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THE INCOME TAX AND THE STATE OF A UNION IN AMERICA

by Cindy Lou Beale*

I. INTRODUCTION

One of the hottest topics in American social and legal policy today is that of the legal recognition of the relationship between same-sex partners, whether it is a same-sex marriage, a civil union, or some variation on the theme. A host of legal issues now swirl around these couples, including:

a. which states will recognize their relationships,
b. how portable are their new-found legal relationships to other states given how many states have declared these unions illegal, and
c. perhaps, most importantly, how secure are their relationships if one partner can simply move to a non-recognizing state, thus effectively ending the relationship?

As with any new legal status, the legal ramifications of same-sex unions are legion. Considering the nation’s political climate, the split among the states regarding the validity of same-sex unions, and the federal government’s anti-same-sex marriage position as codified in the Defense of Marriage Act since 1996, the waters will probably remain murky for quite some time.

The purpose of this paper is to examine the legal and demographic changes that have occurred since 1948 when the joint return was created as well as the assumptions and other motivating factors behind its creation and to determine if the continued existence of that filing status in our federal tax system is appropriate.

II. MASSACHUSETTS SAME-SEX COUPLES’ TAX-FILING PROBLEMS

Like most Americans, every year same-sex couples will file their income tax returns, federal and state (where applicable). Something as banal as this annual rite has the potential of throwing many same-sex couples into an ethical dilemma of the first order. For those same-sex couples fortunate enough to reside in Massachusetts and who have been legally married there, the situation on first glance seems to be pretty clear: the Massachusetts Department of Revenue issued a Technical Information Release, which provides that same-sex spouses (married on or after May 16, 2004) should file as married persons, jointly or separately, for Massachusetts state income tax purposes.

However, since Congress passed DOMA in 1996, each partner is legally required to use the filing status of “single” when he or she files his or her federal income tax return. In Massachusetts, same-sex partners then face a risk of committing perjury when he or she signs his or her federal income tax return.

There is no clear answer to this particular ethical dilemma. The situation, however, does pose at least one other issue: how relevant is the filing status of married filing jointly today? To be sure a taxpayer’s federal marital status affects his or her tax liability in a variety of ways, but not always consistently or favorably. Not only is the present treatment of the marital

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unit inconsistent and inaccurate, but it is based on outdated, unexamined premises.16

III. DEMOGRAPHIC CHANGES SINCE 1948

In 1948 when the joint return was established, certain assumptions prompted its creation as a response to perceived inadequacies in the system.17 One of those assumptions was that the married couple had a “traditional” family in which there was only one earner in each family.18 This assumption was not true in 1948 when the joint return was enacted because 23.1% of all married women participated in the labor force.19 It is even less true today because in 2003, 61% of all married women worked.20

The 203% increase in the proportion of working married women working since 1948 is consistent with the fact that traditional families consisting of breadwinner dads and stay-at-home moms now account for a mere one-tenth of all households.21 Furthermore, a record number of children—33%—are born to single parents, many of them to underemployed, uninsured mothers.22 Moreover, married couples with children, which made up nearly every residence a mere century ago, now total just 25%—with that number projected to drop to 20% by 2010, says the Census Bureau23, when nearly 30% of homes will be inhabited by someone who lives alone.24

Fueling this demographic change is the fact that more people are setting up same-sex households. From 1990 to 2000, the percentage of gay male couples with children increased from 5% to 22% and the percentage of lesbian couples with children increased from 22% to 34%.25

Also, unmarried heterosexual couples households have increased nearly 50% from 1996 through 2002.26 Heterosexuals are marrying later. From 1950 through 2002, the average age for first-time marriage for males increased from 23 to 27 years old and, for women, from 20 years old to nearly 26.27 Couples are also splitting up in greater numbers. From 1950 through 2002, the percentage of divorced men increased from 2% to 8% and the percentage of divorced women, from 2% to 11%, and more adults will remain unmarried.28

Finally, more Americans, on average, are living longer, which will make for an expanding population of widows and widowers as Baby Boomers age.29 Meanwhile, more seniors are divorcing so they can qualify for Medicaid, while others are living together instead of remarrying to avoid losing their survivor pension or health-care benefits.30

Given this vast demographic shift and the very remote possibility of full federal and state legal recognition of same-sex unions in the near future, time and energy would be better spent in changing our federal income tax system to one that is based on the individual as the more appropriate unit of taxation.

IV. DEVELOPMENT OF THE FILING STATUS CATEGORIES

Before implementing fundamental changes in the system, it is important to examine some of the complexities involved in its creation. Prior to the enactment of the joint return, Congress examined alternative methods of correcting discrimination which arose in the treatment of family income under Federal income tax law.31
From 1913 to 1948 the individual taxpayer was the only filing category. The language of the first income tax statute based on the Sixteenth Amendment imposed a tax "upon the entire net income arising or accruing from all sources...to every citizen of the United States...and to every person residing in the United States, though not a citizen thereof". The Revenue Act of 1916 explicitly taxed "the entire net income received...by every individual".

In 1918, Congress gave married taxpayers the option of filing their federal income taxes jointly, but since there was only one rate schedule for all taxpayers and the rates were progressive, combining the spouses' incomes on one jointly filed tax return was disadvantageous. Accordingly, most married taxpayers who had two taxable incomes filed separately to take advantage of the progressive rate schedule.

One such couple were Guy C. Earl and his wife, Ella, who had signed a contract in 1901 in Oakland, California, in which they agreed to split all of their earned income equally. Because there was no income tax in 1901, Mr. and Mrs. Earl were innocent of any tax avoidance motive when they filed separate tax returns in 1920 and 1921. Yet in March 1930 the Supreme Court held in Lucas v. Earl that Guy Earl was taxable on the full amount of his personal service income (salary and attorney's fees) and could not assign it for tax purposes to his wife, Ella, even though their 1901 contract was valid under California law, because Guy had earned the salary and fees.

In upholding Mr. Earl's employment contract over his marital contract, the Supreme Court in Lucas v. Earl accomplished several things. First, it enunciated the assignment of income doctrine, which makes it virtually impossible for a taxpayer with income from wages, salaries, or professional fees to shift volitionally these items to other taxpayers, such as a spouse or a child, to "split" taxpayer's earned income and take advantage of the progressive rate schedule. Second, the Court clearly upheld Mr. Earl's employment contract over his marital contract, thus reinforcing the traditional common-law concept that legal ownership followed title. Without such ownership, Mr. Earl would not have had any income to assign. So, ownership and the concomitant dominion and control of the earned income that accrued to the owner at the moment he or she earned the income would ultimately determine the appropriate taxpayer in the marital unit.

The holding in Earl was put to the test a mere seven months later in Poe v. Seaborn. A husband and wife resided in the State of Washington, a community property state, and their taxable income consisted of Mr. Seaborn's salary, and investment income and profits on sales of real and personal property. All of the Seaborns' property constituted community property as neither spouse had any separate property or income. Each spouse filed a separate individual federal income tax return on one-half of the community income, which the IRS opposed, arguing that all of the income should have been reported on the husband's return.

The Supreme Court held for the Seaborns, rejecting the government's theory that the husband's power to manage community property warranted taxing all the community income to him. Instead, the Court held that one-half of the community income was taxable to each spouse. Lucas v. Earl was distinguished as involving an assignment (under an agreement made by a married couple domiciled in a common-law state) of earnings that would have belonged to the husband in the absence of the assignment, while in Poe v. Seaborn "by
law, the earnings are never the property of the husband, but that of the community.54 (emphasis added).

Following the Poe case, the tax status of a married couple in a community property state differed from that of a married couple in a common-law state in two fundamental ways.55 First, each community property spouse paid the same tax as an unmarried person with one-half the aggregate community income because there was one, progressive tax rate structure.56 That result obtained in common-law states only in the unusual case of a married couple whose income was generated one half by each spouse and whose investment income, if any, was also equally divided between them.57 Second, the federal income tax burden for equal-income married couples was identical in community property states, whether the income was attributable to one spouse or to both.58 This concept came to be known as “couples’ neutrality”, meaning that couples with the same taxable income have the same income tax liability. In common-law states, since there was no couples’ neutrality, the tax liability of equal-income married couples could vary widely, since it depended on the amount attributable to each spouse.59

The income tax advantages of living in a community property state for married couples soon became apparent, and there was a stampede among the states to change from common-law to community property states.60 Oklahoma and Oregon passed do-it-yourself community property laws, which permitted married couples to elect to be governed by the newly enacted community property systems of these two states.61 In the 1944 decision of Commissioner v. Harmon62, the Supreme Court ruled that these “opt-in” community property systems were substantially the same as the income-splitting contract between husband and wife that was held ineffective for federal tax purposes in Lucas v. Earl.63 The Court went on to announce that only a non-elective system of community property, “made an incident of marriage by the inveterate policy of the State,” could qualify for income-splitting under Poe v. Seaborn.54

The result of the Harmon case was that the community property system was effective for federal income tax purposes if under local law the couple could “opt out” (as permitted in most traditional community property states), but not if they had to “opt in”.65 Oklahoma and Oregon promptly replaced their optional community property systems with mandatory ones, which were accepted as effective by the IRS.66 Hawaii, Nebraska, Michigan, and Pennsylvania also joined the community property parade, and by 1948 similar action was under discussion in states as far removed from the influence of Spanish law as Massachusetts and New York.67

Congress responded to the community property epidemic in 1948 by deciding to authorize all married couples to aggregate their income and deductions on a joint return and to pay a tax equal to twice what a single person would pay on one-half their consolidated taxable income.68 This device was virtually the same in its effect on federal revenue as standing idly by while the whole country adopted the community property system. Enactment of the income-splitting joint return meant that the political credit for reducing taxes was concentrated in Congress rather than dispersed among the state legislatures.69 Unlike an across-the-board cut in tax rates, the joint return could be supported as a way of terminating both the historic federal income tax disparity between community property and common-law states and the special opportunities for intrasposual income splitting that were available to married couples with income-producing property.60
While the enactment of the joint return produced couples' neutrality nationwide, it was not marriage neutral. Under the new regime, a married couple paid a tax equal to twice what a single person would pay on one-half their consolidated taxable income; however, if a single person had a taxable income equal to that of a married couple, the single person would pay the same amount of income tax as the couple.

For example, consider Adam and Anna, a married couple with $50,000 of taxable income earned solely by Adam; Betty and Bob, also a married couple, who have $50,000 of taxable income, with $25,000 earned by each; and Debbie, an unmarried woman who lives alone and also has a taxable income of $50,000. If the tax rate is 0% on the first $10,000 of taxable income, 15% on the next $20,000 and 30% on the next $30,000, Adam and Anna, and Betty and Bob can effectively split their respective incomes as each couple is one taxable unit. Thus, each couple’s total tax liability would be $4,500: ($10,000 X 0%) + ($15,000 X 15%) X 2, regardless of whether the couple had a one income-earner or a two income-earner marriage.

Debbie cannot split her income as the two married couples can. Instead, she is subject to the "brutality" of the progressive rate schedule and must pay federal tax of $9,000: ($10,000 X 0%) + ($20,000 X 15%) + ($20,000 X 30%), or $4,500 more than her married friends who had the identical amounts of income—double their tax liability. This amount became known as the “single’s penalty”, and in the case of Adam and Anna, a “marriage bonus.”

The singles’ penalty was attacked on the grounds that:
  a. taxes should be independent of marital status,
  b. the disparity between the joint rate structure and the singles rate structure, even if partially justified by

the increased cost of supporting the breadwinner’s marital partner, was excessive, particularly if account was taken of the economic value of the second spouse’s untaxed household services, and c. similar benefits should be granted to other persons, such as widows and widowers with dependents, whose incomes also had to support two persons rather than one.\(^{73}\)

In 1969, Congress responded to the continuing complaints about the onerous singles’ penalty by creating a new rate schedule for unmarried taxpayers, under which their liability could not exceed a married couple’s tax by more than 20% at any taxable income level.\(^{74}\) As a result of this change, in addition to the singles’ penalty, a “marriage penalty”\(^{75}\) was created, which still exists until today, although it has been eliminated in the standard deduction and in the 15 percent bracket through December 31, 2010 as a result of the Working Families Tax Relief Act of 2004.\(^{76}\)

Since 1969, if two single people, each with the same amounts of taxable income, get married and continue to have relatively the same amounts of taxable income, the couple will pay more than twice the tax than what each single person paid in taxes prior to his or her marriage.\(^{77}\) There is, therefore, a penalty on the act of marrying itself. Couples more likely to incur a marriage penalty are those with two earners with similar incomes, and those with higher combined incomes.\(^{78}\) Couples are more likely to incur a marriage bonus where there is only one wage earner.\(^{79}\)

Under 2005’s rate schedules\(^{80}\), if two single cohabiting taxpayers each had a taxable income of $100,000, each taxpayer would have an individual tax liability of $22,506.50 for a total liability for the unmarried couple of $45,013. If the
two single persons decided to and were legally able to marry, on their joint tax return they would instead owe $46,591.50, or an additional $1,578.50, the “marriage penalty/singles’ bonus.”81

While the singles’ penalty did not disappear in 1969, it was somewhat alleviated by the adoption of the new rate schedule for single or unmarried taxpayers. So, if a single taxpayer had $200,000 in taxable income in 2005, his or her tax liability would be $52,999 versus $46,591.50 for a married couple filing jointly, resulting in a “singles’ penalty/marriage bonus” of $6,407.50—a considerable sum and much more punitive than the marriage penalty in the prior example.82 As Scott Houser, a tax-code expert and economics professor at California State University in Fresno put it, “[f]ixing the marriage penalty is just going to make the singles penalty worse.”83

The same tax liability would obtain for this particular single or unmarried taxpayer if he or she were (a) truly single (never married, divorced, or widowed and not a surviving spouse or qualifying widow or widower), (b) a partner in an unmarried relationship, heterosexual or homosexual, (c) merely sharing living quarters and arrangements as roommates often do, or (d) part of a nontraditional extended family that does not fit the definition of “head of household” under the Internal Revenue Code.

Currently, the only legally available way for a particular single taxpayer to “avoid” the harsh single’s penalty would be to marry an individual with no taxable income. So, if this particular unmarried taxpayer desired to and was legally able to, and did marry such a person, his or her tax liability would drop from $52,999 to $46,591.50, resulting in a marriage bonus of $6,407.50 to the married couple (the same amount as the singles’ penalty when the taxpayer remained unmarried).

V. CONFLICTS BETWEEN NEW TYPES OF FAMILIES AND THE JOINT RETURN

In light of the growing numbers of never married taxpayers, unmarried heterosexual couples, unmarried (at least for federal tax purposes) homosexual couples, the increasing number of divorced persons and widows and widowers (all of whom may have dependents)84, the joint return and its rate structure and their underlying theories are no longer appropriate.85

There have been numerous unsuccessful constitutional challenges to the filing status categories on the grounds that the classifications discriminate unfairly against unmarried persons.86 The most recent challenge to the filing status categories as unconstitutionally discriminating against homosexuals unable to marry legally at the time came in Mueller v. Commissioner.87 Mueller failed to file a tax return from 1986 through 1995 as a protest to his being limited to filing a tax return as “single” no matter what his actual relationship status.88 He challenged the marital classifications in the Internal Revenue Code as discriminatory on equal protection grounds because he and his gay partner were legally denied the sanctions of marriage. The judge advised Mueller that Congress was the more proper forum for determining whether policy considerations warranted narrowing the gap between the tax treatment of married taxpayers and homosexual and other unmarried partners.89 The Seventh Circuit Court of Appeals affirmed, reiterating its decision in previous cases that the marital classifications in the Code do not violate the Constitution.90
In 1996, Mueller did file a tax return that he had completed jointly with his partner, Todd Bates. On the return, Mueller listed his name first and Bates’ name second, striking out the word “spouse” where it appeared in the label block of the return. Mueller marked “Married Filing Jointly” as their filing status, but struck out the word “Married.” Mueller claimed an exemption for a “spouse” on line 6b of the return, and claimed a standard deduction “based upon his claimed filing status of ‘filing joint return.’” Mueller also used the married filing jointly tax rate schedule. He had Bates sign the return on the line below his name, but again struck out the word “spouse” in the signature block. If Mueller had been allowed to file a joint return with Bates, they would have benefited from a “marriage bonus” of $1,897 in federal taxes because although Mueller was employed in 1996, Bates was not.

As DOMA had become law in 1996, in 2001, Mueller directly challenged the definition of “marriage” in 1 U.S.C. § 7 as 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 wife, for purposes of federal law, including the income tax filing categories, as unconstitutional on a variety of grounds, including equal protection, due process, separation of church and state, and the prohibition on cruel and unusual punishment.

Mueller met the same fate in Mueller II as in Mueller I. The judge in Mueller II held that DOMA was irrelevant to Mueller’s case because no state recognized same-sex marriage or unions of any sort at that time, and consequently, Mueller and Bates were not and could not have been married. Accordingly, DOMA’s existence and definition of marriage did not change the law applicable to Mueller’s case. Mueller’s marital status was “single” as determined by state law and the court held that the marital classifications in the Code did not violate the Constitution. While more sympathetic to Mueller’s arguments than the judge in the first case, the second judge gave Mueller the same advice he had received previously; namely, that Mueller was in the wrong forum and Congress was the more appropriate body to consider Mueller’s constitutional claims. Mueller II was affirmed on appeal.

Notwithstanding Mueller I and II, the current focus among couples in same-sex unions is not on income-tax reform per se, but rather on continuing legal recognition of their marriages (or unions) both in their own states, as in Vermont, Massachusetts and Connecticut, and possibly in other states. Also, gay advocacy groups are focused on the defeat of DOMA based on constitutional grounds, but not by way of an income tax issue involving constitutional challenges.

VI. INTERNATIONAL PERSPECTIVES

A somewhat novel approach has been suggested by the Supreme Court albeit not in an income tax situation. In several recent cases involving human rights as well as sexual orientation, the Supreme Court’s majority opinion has looked to international law in making its decisions.

In *Roper v. Simmons*, Justice Kennedy, held that the Eighth Amendment’s prohibition against cruel and unusual punishment categorically bars capital punishment for crimes committed before the age of 18. Part of his analysis rested on the fact that prior to *Roper*, the United States was the only country that still permitted the juvenile death penalty.

In *Lawrence v. Evans*, the U.S. Supreme Court struck down Texas’ sodomy law on the ground that it violated the
right to liberty guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution. In rendering this opinion, the Court specifically referred to the European Court of Human Rights ("ECHR")\textsuperscript{111}; and, for the first time, some of the cases the ECHR had previously decided.\textsuperscript{112}

In the wake of \textit{Roper} there has been a very public debate about the appropriateness of looking to the logic of foreign courts to help untangle domestic legal questions. While Justice Ruth Bader Ginsburg embraces this practice, stating that the United States judiciary should consider international law more often\textsuperscript{113}, Justice Scalia (among others) lambastes it, saying that foreigners should not be given a role in helping interpret the Constitution.\textsuperscript{114}

Given the increasing rate of globalization\textsuperscript{115}, and the recent forays by the majority of the Supreme Court in some cases into international law in deciding constitutional issues\textsuperscript{116}, it might be instructive to examine what other countries have done with their tax filing units and rate structures.

Among the 32 OECD countries (for 2002), the dominant unit of taxation is the individual and not the family.\textsuperscript{117} Joint filing is required in seven countries, and is allowed in six.\textsuperscript{118} The individual is the required unit in the remaining countries.\textsuperscript{119} And, finally, since 1970, seven countries have moved from joint taxation to individual taxation.\textsuperscript{120}

As of 2005, Great Britain provides for same-sex civil partnerships and extends tax benefits to these new unions\textsuperscript{121}; the Netherlands provides for same-sex marriages for couples and registered partnerships for either same-sex or opposite-sex couples and also extends tax benefits to these new unions; Denmark also provides a registered partnership for same-sex couples as well as tax benefits; Portugal provides for partnership rights for same- and opposite-sex couples with the extension of tax benefits; France provides a civil solidarity pact for same- and opposite-sex couples with the extension of tax benefits; and Germany provides for registered partnerships for same-sex couples without an extension of tax benefits.\textsuperscript{122}

\textbf{VII. CONCLUSION}

Sweeping demographic shifts have occurred during the last fifty years in the United States, especially the decline of the traditional family and the escalation in the number of single persons and nontraditional families. While Vermont, Massachusetts and Connecticut and an ever-increasing number of foreign countries have afforded some form of legal recognition for same-sex unions, including in most cases changes to the tax laws consistent with these legal changes, the federal government has refused to do so since 1996. This inconsistency between some states and the federal government at the very least creates conflicts and risks for same-sex couples in filing their federal income tax returns.

The confluence of these domestic facts alone makes the continued use of the joint return and its rate structure and their underlying theories inappropriate. Combined with the changes abroad and the extremely remote chance of null federal and state recognition of same-sex unions domestically, Congress should eliminate the unfairness of using the marriage unit as the filing unit for our federal income tax system so the United States can remain a competitive force economically in an increasingly global world. The individual unit better comports with the current realities of the American way of life and that of much of the rest of the world.
ENDNOTES

1Goodridge v. Dept. of Public Health, 440 Mass. 309 (2003). Except where specificity is required, the term "same-sex union(s)" will be used throughout this paper to refer to all same-sex marriages, civil unions, and any other legal recognition of a same-sex relationship.

2 In the landmark ruling of Baker v. State, 170 Vt. 194 (1999) the court ruled simply: "[T]he state is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law" - adding that to do so is, "when all is said and done, a recognition of our common humanity." Id. at 226. As justification for this decision, the court relied on the state Constitution's Common Benefits Clause - specifically citing this passage: "[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular enrolment or advantage of any single person, family, or set of persons, who are a part only of that community." Id. at 228. Lawmakers concluded that they would not open marriage to gay and lesbian couples but, rather, establish a parallel system of protections and responsibilities through the Vermont civil union law, which would become effective July 1, 2000. (codified as amended in scattered statutes throughout the Vermont Statutes Annotated).

The Connecticut bill authorizing civil unions between same-sex partners, 2005 Connecticut Senate Bill No. 963, was signed into law April 20, 2005, and became effective on October 1, 2005.

http://www.cga.ct.gov/asp/sgabillstatus/sgabillstatus.asp?
setBillType=Bill&bill_num=963&which_year=2005&Submit.x=11&Submit.y=11.

A bill that would have allowed gay couples in Oregon to form civil unions and that also would have given them many of the rights available to married couples, died in Oregon’s Legislature on August 5, 2003 as the Legislative session ended without a joint vote on the bill. Associated Press, Ore. Governor Pushing for Civil Unions Law, NY TIMES, April 13, 2005.

http://www.hrc.org/Template.cfm?Section=Oregon1&CONTENTID=28279
&TEMPLATE=/ContentManagement/ContentDisplay.cfm

3 On March 14, 2005, Judge Richard A. Kramer of San Francisco County Superior Court, ruling on Judicial Council Coordination Proceeding No.

4365 (which consisted of six coordinated cases sharing a common issue: whether a marriage in California is a union between a man and a woman even though California Family Code section 308.5 states that only a marriage between a man and a woman is valid or recognized in California) ruled that California’s Ban on same-sex marriage was unconstitutional. See also, Dean E. Murphy, Judge in California Voids Ban on Same-Sex Marriage, NY TIMES, March 15, 2005 § A at 16.

California became the first state ever to pass a bill to extend the freedom to marry to same-sex couples in 2005. Unfortunately Republican Gov. Arnold Schwarzenegger vetoed this important legislation.

http://www.hrc.org/Template.cfm?Section=California&CONTENTID=30358
&TEMPLATE=/ContentManagement/ContentDisplay.cfm


4 E.g., See Wilson v. Ake, 354 F. Supp. 1298 (M.D. Fla. 2005) where a lesbian couple, who had been legally married in Massachusetts, sued the United States Attorney General and a Florida court clerk, asserting that Florida was required to recognize their marriage, and seeking declaration that the Defense of Marriage Act and a Florida statute withholding recognition for same-sex marriages entered into in Florida or elsewhere were unconstitutional. The district court held that Defense of Marriage Act (see note 8 infra and accompanying text) did not violate the Full Faith and Credit Clause nor the equal protection or due process guarantees, the right to marry a person of the same sex is not a fundamental right guaranteed by the Due Process Clause, and the Florida statute was constitutional. Id at 11, 13, and 14. See generally, Robin, Cheryl Miller and Jason Binnion, Annotation, Marriage Between Persons of Same Sex—United States and Canadian Cases, 1 A.L.R. Fed. 2d 1 (March 2005) (discussing the case law in the U.S. and Canada on same-sex unions, as well as the Defense of Marriage Act)
Professor Grossman argues that regardless of how the Supreme Judicial Court rules, it's time for Massachusetts to get rid of the marriage evasion law, by legislative repeal if necessary. *Id.* She states that for marriage to be meaningful, it must be portable to promote the stability of same-sex marriages. *Id.* For example, if the marriage evasion law is strictly enforced and (a) the Massachusetts courted same-sex couple cross state lines, they lose the benefits and protections that their marital status had provided; or (b) one spouse in a Massachusetts same-sex marriage wants to abandon the other (and any children of the relationship) without cost, the departing spouse need only move to any one of the forty states whose laws expressly prohibit same-sex marriages, in order to be relatively confident that the union will not be recognized and that the obligations created by marriage cannot be enforced. *Id.*

5 Id.; Joanna Grossman, *Will Non-Resident Same-Sex Couples Be Able to Marry in Massachusetts? The State's Highest Court Considers the Marriage Evasion Law*, FindLaw's Legal Commentary: Legal Write, Mar. 01, 2005. Professor Grossman discusses the Massachusetts marriage evasion statute, enacted in 1913, that Governor Mitt Romney had announced his intention to enforce one month before the first same-sex marriage was performed in Massachusetts (which was May 16, 2004). *Id.* The marriage evasion law requires, among other things, that city and town clerks cannot issue a marriage license unless and until they have seen proof, and are satisfied, that an out-of-state applicant is not prohibited from marrying in his home state. *Id.* Eventually, the clerks statewide agreed to comply with the marriage evasion law. *Id.* Subsequently, eight same-sex couples sued for a preliminary injunction against enforcement of the marriage evasion law, which was denied, *Cote-Whitacre v. Department of Public Health*, 18 Mass. L. Rptr 190, 2004 WL 2075557 (Mass. Sup. Ct. 2004). Plaintiffs then requested a direct appellate review by Massachusetts' highest court, the Supreme Judicial Court, which request was granted. Final briefs are due in May 2005 and the case will be set for argument sometime thereafter. *Id.*

6 Id.

7 See notes 4-6 supra and accompanying text.

file their Vermont income tax return as either Civil Union Filing Jointly or Civil Union filing separately. However because of the need for federal income tax information on the Vermont income tax return, just as in Massachusetts, the civil union partners must complete a Married Filing Jointly or Married Filing Separately tax return to use for that purpose. Finally, each partner must then complete and file an actual federal return, which under current law, can only be filed as single.

http://www.state.vt.us/tax/pdf/word_excel/individual/civilunions.pdf

Connecticut's law does not yet speak of the filing technicalities for civil union partners. It does, however, seem to indicate that at least partners in a civil union will be treated the same as if they were legally married for withholding tax purposes.


For purposes of this paper, tax returns filed as either married filing jointly or single will be the only ones discussed. All other filing status categories are beyond the scope of this paper.

See note 12 infra and accompanying text for the IRS' definition of "married". See part IV infra for the historical development of the jointly filed return category.

The terms "single" and "unmarried" are used interchangeably throughout this paper. A single or unmarried taxpayer includes a taxpayer who is (a) truly single (never married, divorced, or widowed and not a surviving spouse or qualifying widow or widower), (b) a partner in an unmarried relationship, heterosexual or homosexual, (c) merely sharing living quarters and arrangements as roommates often do, or (d) part of a nontraditional extended family that does not fit the definition of "head of household" under the Internal Revenue Code [hereinafter cited as IRC]. All references to IRC are to the Internal Revenue Code of 1986, as amended.

11 Supra note 8.

12 See 1 U.S.C. §7 supra note 8. See also. Letter from the Internal Revenue Service to Eugene A. Delgadillo, President, Public Advocate of the United States, Inc. (June 14, 2004), ["The law is clear on this issue, and we point out the federal definition of marriage when explaining 'filing status' in IRS Publications 17, 'Your Federal Income Tax,' and 501, 'Exemptions, Standard Deduction, and Filing Information.' In both publications, we introduce the subject of marital status with this paragraph: 'In general, your filing status on whether you are considered unmarried or married. A marriage means only a legal union between a man and a woman as husband and wife.'] available at http://www.publicadvocateusa.org/news/article.php?article=121 (last visited April 9, 2005). For reporting on the letter, see Allen Kenny, IRS: Joint Filing Not Allowed for Same-Sex Married Couples, 103 TAX NOTES 1466 (2004) all cited in Infanti, Tax Protest at 24 note 2 and accompanying text.

13 IRC §§6001-6003, 6065; Boris J. Bittker, Martin J. McMahon, & Lawrence A. Zelenak, Federal Income Taxation Of Individuals at §44.01(6) (Warren Gorham & Lamont Third Edition 2002) [hereinafter cited Bittker, Federal Income Taxation]. See also, E.J. Graff, Marrying Outside the Box: What happens when same-sex spouses face the I.R.S., N.Y. TIMES, April 10, 2005 §6 (Magazine) at 22 [hereinafter cited as Marrying Outside the Box].

14 The IRS seems relatively nonplussed by this issue: in Marrying Outside the Box, supra note 13 at 24, Eric Smith, an I.R.S. spokesman, stated: "Historically, filing status has not been a primary focus of our compliance efforts. The largest focus we have has on tax abuse, abusive tax shelters, that sort of thing." It should be noted that there is no place on the 1040 form to declare whether you are male or female since that's irrelevant to how much you owe. Id.

15 Some of the most obvious are as follows: (1) the joint return rate schedule IRC § 1(f)(8)(B) provides that from January 1, 2004 through December 31, 2010 the upper limit of the 15 percent rate bracket for married couples filing joint returns is 200 percent of the upper limit of the 15 percent rate bracket for unmarried taxpayers; (2) an exemption for taxpayer and for his or her spouse on a joint return IRC § 151(b); (3) the standard deduction on a joint return is twice that of a single taxpayer IRC § 63(c)(2) again from January 1, 2004 through December 31, 2010; (4) IRC § 1041's tax-free transfers between spouses; (5) IRC §121's $500,000 exclusion of gain from the sale of a principal residence from the gross income of a married couple filing a joint return (other taxpayers are entitled to only a $250,000 exclusion). Married taxpayers, however, are not always treated so favorably nor so consistently throughout the Code. For example, the capital loss limitation of $3,000 per tax year is the same for married taxpayers and individuals, IRC §1211. See Philip J. Harmelink, Marital
property and spouses entitled to income benefits given. The text does not specify the benefits given single persons, married couples, or married couples greater than single persons, but less than twice the benefits given single persons. There are miscellaneous provisions and biasing factors. See also supra note 122.

Professor Kornhauser cites a 1947 Treasury Department report entitled The Tax Treatment of Family Income, which made no recommendations as to how to respond to certain perceived inadequacies in the federal tax system. It stated that it would merely "examine alternative methods of correcting discriminations which arise in the treatment of family income under present Federal income tax law." See also supra note 122. Professor Robinson & Mary Mears Wenig, Marry in Haste, Report at Tax Time: Marital Status as a Tax Determinant, 8 VA. TAX REP. 773, 773-79 (1989) who stated that income splitting was adopted out of ability-to-pay considerations, but out of necessity to stem the flight to community property law. But Professors Robinson and Wenig did recognize that the 1948 change was "tax reform," to the extent that it reduced taxes for middle and upper class couples in common-law-states. Kornhauser, Love, Money & the IRS at 101-102 note 122. See part II infra.

Kornhauser, Love, Money & the IRS at 101-102.

Id. at 103.

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 578 (2004-2005). It should be noted that data for 1994 and subsequent years are not strictly comparable to prior years because of a major redesign of the survey questionnaire and collection methodology. Id. at tbl 569 note 2. Hereinafter cited as Stat. Abstract. The comparable 1993 data is that 59.4% of married women participated in the workforce.


22 Conlin, UnMarried America at 109.

23 Id. at 108.

24 Id.

25 Conlin, UnMarried America at 109. One can only assume that with the legalization of same-sex unions in Vermont, Massachusetts, and Connecticut (as well as possible legalization in other states see notes 2-3 supra and accompanying text) these numbers may accelerate.

26 Id. at 108 and 110.

27 Id.

28 Id. at 109.

29 Id. at 110. This phenomenon is consistent with the finding that a record number of children are born to single parents, text accompanying note 22 supra.

30 Id.

31 Id. at 110 and 114.

32 See note 17 supra and accompanying text.

If each spouse had $60,000 of taxable income and the tax rate was 10% on the first $30,000 and 20% on the next $30,000, and 30% on the next $120,000, each spouse’s tax liability would be $9,000 for a total tax liability of $18,000 for the married couple who filed separately. ([$30,000 X 10%] + [$30,000 X 20%]) X 2. If each spouse’s taxable income were combined on one jointly filed tax return, the couple’s federal tax liability income would be $240,000 ([$30,000 X 10%] + [$60,000 X 20%] + [$30,000 X 30%]) or $6,000 more in federal tax liability because the couple was not able to take advantage of the “income-splitting” effects of each spouse filing individually and the benefits of the progressive rate schedule.

<table>
<thead>
<tr>
<th>Each Spouse Filed Own Return</th>
<th>Spouses Filed Joint Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse 1 $30,000 X 10% = $3,000</td>
<td>Spouse 1 $30,000 X 10% = $3,000</td>
</tr>
<tr>
<td>30,000 X 20% = 6,000</td>
<td>30,000 X 20% = 6,000</td>
</tr>
<tr>
<td>Spouse 2 30,000 X 10% = 3,000</td>
<td>Spouse 2 30,000 X 20% = 6,000</td>
</tr>
<tr>
<td>30,000 X 20% = 6,000</td>
<td>30,000 X 30% = 9,000</td>
</tr>
<tr>
<td>Total T1 120,000 Total Tax 18,000 Total T1 120,000 Total Tax 24,000</td>
<td></td>
</tr>
<tr>
<td>Additional Tax = 6,000</td>
<td></td>
</tr>
</tbody>
</table>

The benefits of each spouse filing his or her own tax return were obvious: a $6,000 tax savings, due to the ability of each spouse to compute his or her tax starting at the lowest tax rate whereas if the married couple elected to file jointly and combine both incomes on one jointly filed tax return, the second spouse’s $60,000 of taxable income begins to be taxed at 20% (the first $30,000 of it) and not at 10% as for the separately filing spouses, for an additional tax of $3,000. And, the last $30,000 of taxable income of the second spouse in the couple filing the joint return is taxed at 30%, not 20% as for the separately filing couple, for an additional tax of $3,000 on that layer of income; a total additional tax of $6,000 for the jointly filing couple.

See note 37 infra and accompanying text for a discussion of the mandatory effect of the progressive tax rate structure on the second earner’s taxable income for the married filing jointly category under current federal tax law.

40 Bittker, Federal Income Taxation and the Family at 1400.

41 Lucas v. Earl, 281 U.S. 111 at 113 (March 1930).

42 281 U.S. 111 (1930).

43 Id. at 114.

And the famous fruit and tree metaphor: "...we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." Id.

45 Bittker, Taxation and the Family at 1401. There is disagreement in the literature as to whether the Supreme Court in Lucas v. Earl was trying to protect the progressive rate schedule. Compare Bittker, Federal Income Taxation and the Family at 1402-03 ("the common notion that the principle of Lucas v. Earl, as applied to married couples was an essential buttress to the progressive rate schedule is fallacious.") with Cain, The Story of Earl at 279 ("[the government's] concern in Earl, never explicitly mentioned by Holmes, was protection of the progressive rate structure. If an agreement to shift income results in the undermining of progressivity, that agreement should be ignored by the tax collector regardless of the taxpayer's innocent non-tax avoidance motives"). See note 37 supra and accompanying example for the benefits of splitting income, filing separately and the concomitant advantages of the progressive rate schedule.

46 Kornhauser, Love, Marriage, & the IRS at 73.

47 Poe v. Seaborn, 282 U.S. 101 at 117 (November 1930). In Poe, the Court explained that although California also had a community property regime, a California wife's interest in community property amounts to a mere expectancy contingent on her husband's death and does not rise to level of a present interest. This was also the position of the Attorney General and the Treasury Department in denying husbands and wives the privilege of making separate returns of one-half of the community income in California, but according to that privilege to residents of other community property states.
This ownership marital income provision, resulting in each spouse separately paying half of all community income, resulting in each spouse reporting and paying tax separately on his or her half share, were Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Bittker, Taxation and the Family at 1406.

Kornhauser, Love, Marriage, & the IRS at 80-91 (based on empirical studies, Professor Kornhauser found that control of the money generally still resides with the earner, thus she argues that the owner should be the taxable unit, not the married couple); but see Cain, The Story of Earl 276-79 (the earner may not be entitled to the income, for various reasons, e.g., junior associate in a law firm brings in earnings far in excess of his or her salary) and Professor Cain states that we do not tax the earner in those instances.

It is interesting to pause here for a moment and reflect upon what the Earls tried to accomplish with their marital contract in 1901: they established a marital regime of equal ownership and equal control of their joint income such that their contract equalized each spouse’s financial position within the marital unit. Bittker, Taxation and the Family at 1402. If the Earl’s marital contract had been upheld by the Supreme Court, it would have not only provided for income splitting of the Mr. Earl’s earned income, but it would have done so in a way that would have required the Earls to equalize their ownership of the income inter se (and for subsequent taxpayers as well). Id. This is a far cry better than what Congress achieved in 1948 when it enacted the married filing jointly rate structure and pure income splitting between married taxpayers. Id.

282 U.S. 101 (November 1930).

Id. at 109.

Id.

Id.

Id.

282 U.S. 101 (November 1930).

Id.

Id.

Id.

Bittker, Federal Income Taxation ¶ 35.01; Bittker, Federal Income Taxation and the Family at 1407.


Id. See e.g. of Adam and Anna and Betty and Bob part IV infra. So, in community property states, marriage usually reduced, and divorce increased, a couple’s federal income taxes: marriage was not a tax-neutral event.

Bittker, Federal Income Taxation ¶ 35.01.

Id.

Id.

Id.

323 U.S. 44 (1944).

Id. at 46 (1944); Bittker, Federal Income Taxation ¶ 35.02


Bittker, Federal Income Taxation ¶ 35.02.

Id.

Id.

Bittker, Federal Income Taxation and the Family at 1412-13. With the tax disparity between community property and common-law property largely eliminated, the new community property states lost their taste for Spanish law and repealed their statutes. Bittker, Federal Income Taxation at ¶ 35.02. Thus, each spouse was presumed to earn one-half of the couple’s taxable income and tax was computed as if each spouse filed individually.
Accordingly, each couple was given the advantages of income-splitting and the progressive rate schedule. See note 37 supra and accompanying text.

69 Id. at 1413.

70 Id. In 1940, the Supreme Court, in Heiner v. Horst, 311 U.S. 112 (1940) extended the assignment of income doctrine to income from property. Taxpayers with investment income could shift the tax liability for that income to their spouses or children as long as they were willing to give up ownership of the underlying income-producing property (securities, bank account, rental real estate, etc.). Bittker, Federal Income Taxation and the Family at 1401. Consequently there was a distinction between the taxation of earned income and investment income from 1940 until 1948 when Congress established the joint filing structure and allowed for income splitting between spouses. Id. Professor Bittker notes that even though most income and deduction items were aggregated as a result of the enactment of the 1948 joint return, many tax provisions continued to treat husband and wife as separate individuals even if they filed a joint return. Id. at 1414-1416. See note 15 supra and accompanying text.

71

<table>
<thead>
<tr>
<th>Debbie's Tax</th>
<th>Spouses' Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income</td>
<td>Tax</td>
</tr>
<tr>
<td>$10,000 X 0% = $0</td>
<td>Spouse 1</td>
</tr>
<tr>
<td>20,000 X 15% = $3,000</td>
<td>15,000 X 15% = 2,250</td>
</tr>
<tr>
<td>50,000</td>
<td>9,000</td>
</tr>
</tbody>
</table>

Additional Tax: Singles' Penalty/Marriage Bonus: $4,500

72 For Adam and Anna, who had $50,000 of taxable income all earned by Adam, there would have been a marriage bonus as well because under the 1948 scheme, Adam would have had a $9,000 tax liability if he had been single like Debbie. Adam's marriage to Anna gave Adam the opportunity of splitting his income with her under the joint return regime and having the same tax liability, $4,500, as Betty and Bob, who each actually had $25,000 of taxable income.

As explained by Dorothy Brown: A marriage bonus occurs whenever a couple pays lower federal income taxes as a result of marriage than they would pay if they remained single and filed individual returns. Marriage bonuses are the greatest where there is only one wage earner. Dorothy A. Brown, The Marriage Bonus/Penalty in Black and White, 65 U. Cin. L. Rev. 787, 787 (1997).

73 Bittker, Federal Income Taxation at ¶ 44.02[5]. Congress responded to the third of these complaints in 1951 and 1954 by enacting the special rate schedule for heads of households and allowing surviving spouses to use the joint return rates for two years following the deceased spouse's death. Id. For a further discussion of the validity of the economic justifications for the disparity in taxation between married couples and single persons, see Bittker, Federal Income Taxation and the Family at 1420-26; Kornhauser, Love, Money, & the IRS at 96-100.

74 Bittker, Federal Income Taxation at ¶ 44.02[5]. Although in intervening years, the ceiling has changed on the percentage by which a single taxpayer's tax liability on a particular amount of taxable income may exceed the tax liability of a married couple filing jointly with the same taxable income, the principles of the 1969 relationship of the rate schedules are still manifest in IRC § 1. Id.

75 Again, as explained by Dorothy Brown: A marriage penalty occurs whenever a couple pays higher federal income taxes as a result of their marriage than they would pay if they remained single and filed individual returns. Marriage penalties are the greatest where there are two wage earners. Dorothy A. Brown, The Marriage Bonus/Penalty in Black and White, 65 U. Cin. L. Rev. 787, 787 (1997).

76 Id. Pub. L. 108-311, 118 Stat. 1144 (2004), Working Families Tax Relief Act of 2004 [hereinafter cited as WFTRA 2004] eliminated the marriage penalties in the standard deduction and in the 15 percent bracket for tax years beginning after December 31, 2003 for taxpayers filing joint returns. Thus, for tax years beginning on January 1, 2004 and through December 31, 2010, the joint return standard deduction is 200 percent of the standard deduction for unmarried taxpayers, IRC § 63(c)(2) and the upper limit of the 15 percent rate bracket for married couples filing joint returns is 200 percent of the upper limit of the 15 percent rate bracket for unmarried taxpayers, IRC § 1(f)(8)(B).

77 (Except for 2004 through 2010 for the 15 percent bracket as explained in note 76 supra). Bittker, Federal Income Taxation at ¶ 44.02[5]. And because Congress recognized that these married taxpayers would probably
notice this phenomenon, it barred married taxpayers from filing separate returns using the new singles rate structure. Instead, married taxpayers who wish to file separate tax returns are subject to a special married filing separately rate schedule, IRC § 1(d). Id.

74 See notes 72 and 75 supra and accompanying text. The penalty results from pursuing three policies: (1) equal taxes for all equal-income married couples; (2) a smaller differential between single and married persons than was provided by "pure" income splitting from 1948 to 1969; and (3) a progressive rate structure. Bittker, Federal Income Taxation at ¶ 44.02[5]. It should be noted that these objectives cannot be achieved simultaneously. Id.

75 Id. 51 percent of married couples received a marriage bonus of $1,300 and 42 percent paid a marriage penalty of $1,400, and 6 percent were unaffected. Under the basic measure of the marriage penalty, couples paid a total of about $4 billion less in taxes than they would have if they were required to file as individuals. Congressional Budget Office, For Better or Worse: Marriage and the Federal Income Tax at 29-30 (1997) [hereinafter cited as CBO Study].


81 In this particular example, the "second earner's" taxable income does not have the advantage he or she had when single of having the first dollar of taxable income taxed at 10%; instead the first dollar of the second earner's taxable income is taxed at the marginal rate that applied to the last dollar of the first earner's income. In this case, on the joint rate schedule, $100,000 of taxable income begins to be taxed at 25%. In addition, once total taxable income exceeds $182,800 on the joint return (as it does here), the marginal tax rate increases to 33%.

82 But, if this particular unmarried taxpayer desired to and was legally able to marry, and did so, his or her tax liability would drop from $52,999 to $46,591.50, resulting in a marriage bonus of $6,407.50, to the married couple (the same amount as the singles' penalty when the taxpayer remained unmarried).

83 Conlin, UnMarried America at 108. For slightly more than half of all spouses, marriage actually slashes their tax liability, CBO Study at 29-30. Conlin, UnMarried America at 108. That means, for example, that highly-salaried executives with stay-at-home wives get subsidies that single working mothers do not. Id.; Kornhauser, Love, Marriage & the IRS note 143 and accompanying text. In effect, there is a bonus to high-salaried executives with stay-at-home wives and over time, a wealth shift to high-income, one-earner married taxpayers. Id.

84 See text accompanying notes 21-31 supra.

85 One of the problems with reform with respect to the income tax treatment of marriage is that some group of taxpayers will have a plausible complaint of unfair treatment, regardless of which approach Congress chooses. Bittker, Federal Income Taxation at ¶ 44.02[5].

86 See also, Estate of Armstrong v. Commissioner, 119 T.C. 220 at 37-38 for citations to multiple cases regarding the constitutionality of the marital classifications.


88 Infanti, Tax Protest at 10.


91 Id.

92 Id.

93 Id.

94 Id.

95 Id.
Norms

112 Crime

109

107 See, supra.

105 See, e.g., Wilson v. Ake, note 4 supra. The right injustice might be a widowed mom denied her dead spouse's Social Security benefits or a widower refused the federal benefits set aside for public-safety officers' families. Marrying Outside the Box at 22.

106 Id.

104 See notes 1-3 supra and accompanying text.


101 Id.

100 See notes 1-3 supra and accompanying text.

99 Infanti, Tax Protest at 14.

98 82 T.C.M. (CCH) 764 (hereinafter Mueller II) cited in Infanti, Tax Protest at 13-16.

97 Infanti, Tax Protest at 14 and note 72 supra and accompanying text.

96 Id.

95 Infanti, Tax Protest at 14.


92 Id.

91 Infanti, Tax Protest at 24.

90 Id.

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114 Id.

113 Thomas L. Friedman, It’s a Flat World, After All, NY Times, § 5 (Magazine) 33-37 (April 3, 2005).

116 And the fact as Justice Ginsburg also stated that “[e]ven more so today, the United States is subject to the scrutiny of a candid world...[w]hat the United States does, for good or for ill, continues to be watched by the international community, in particular by organizations concerned with the advancement of the rule of law and respect for human dignity.” Anne. E. Kornblut, Justice Ginsburg Backs Value of Foreign Law, NY Times, § A at 10, April 2, 2005.


118 Id.

119 Id.

120 Id.

121 Julian Knight, Same-sex couples enjoy tax boost, BBC News, December 2, 2005 at http://news.bbc.co.uk/1/hi/business/4491620.stm

122 Sarah Lyall, In Europe, Lovers Now Propose: Marry Me, a Little: Legal Alternatives to Wedding Vows, NY Times, § A at 3 February 15, 2004. See also Gay Marriage Around the Globe, BBC News, December 22, 2005 at http://news.bbc.co.uk/1/hi/world/americas/4081999.stm which states that in addition to the countries already mentioned herein Canada, Spain, Norway, Sweden, Iceland, Finland, Belgium, Luxembourg, Argentina, and New Zealand provide some form of legal recognition of same-sex unions—ranging from the full benefits of legalized marriage to the status of a registered partnership.