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Patricia A. Cain
University of Iowa

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DEATH TAXES: A CRITIQUE FROM THE MARGIN

PATRICIA A. CAIN[1]

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[1]Aliber Family Chair in Law, University of Iowa. This article is based on a paper delivered at *The Death of the "Death Tax"?* conference at the Cleveland-Marshall College of Law on October 6, 2000, well before George W. Gush became president and before Congress voted to repeal the estate tax. I am thankful to Professor Deborah Geier and Cleveland-Marshall for hosting this conference and to the many participants who commented on my paper at the time of the conference, especially Joel Dobris, Joseph Dodge, Carolyn Jones, and James Wilson. I dedicate this article to the memory of tax colleague and friend, Rebecca S. Rudnick, whose presence at that October conference made it all the more delightful for me. Rebecca, always engaged in the moment, delighted by everything around her, added a creative spark to my life every time I ran into her. She met an untimely death at sea, off the coast of Papua New Guinea, on June 2, 2001. Rebecca, I'll miss you.

While it is true that Congress has voted to repeal the estate tax as of 2010, the repeal bill also provides for the tax to be reinstated on January 1, 2011. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) [hereinafter EGTRRA]. Many commentators predict that the repeal will never take effect. *See*, *e.g.*, Brooks J. Holcomb, *Death Tax Eulogy May be Premature*, 38 ARIZ. ATTY. 16 (2001). I include myself in this group of skeptics. Thus, the critique I provide in this article is just as relevant as it was when I first drafted it in October of 2000.

I. INTRODUCTION

Feminist theorist bell hooks wrote many years ago that if movements were to succeed in making the world better, they ought to pay attention to the plight of the most marginalized.[2] Thus, in the interest of justice, and in keeping with the advice of bell hooks, my critique of the death tax is from the perspective of the marginalized taxpayer, the taxpayer whose position is almost never considered by Congress in the writing of tax legislation, nor by the IRS in the interpretation of tax legislation. My marginalized taxpayer is a gay or lesbian partner in a long term committed relationship.

I critique from this perspective not to show that gay and lesbian couples are treated less favorably than married couples by the tax law. I assume that most people will agree with me that whenever a tax rule favors traditional families, it consequentially disfavors nontraditional families, who cannot meet the necessary definitional requirements to have the rule applied to them. When a rule, such as the marital deduction, favors only married couples, the inability to marry prevents nontraditional families from the benefits of the rule. For those of us who agree that equality is a good principle and that justice requires treating all families alike, we might critique the estate and gift tax laws against our notion of equality. We might, for example take the position that nontraditional families should be treated the same as traditional families. That is, we might adopt the principle of formal equality.

But achievement of formal equality is not the goal of my critique. In part, formal equality is not my goal because I do not begin with the conclusion that the current treatment of traditional families is necessarily just. Rather, I begin with a normative question: how *should* the estate tax system treat families generally? Thus, my project is one of substantive justice and not mere formal equality.

II. SOME HISTORY

The proper taxation of the family under both the income tax and the estate tax has been debated for ages. It is an old issue. My purpose, however, is to consider the

[2] *See* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 14-15 (1984).

issue from a perspective somewhat different from that of those who have debated the issue over the years. My perspective is the perspective of the marginalized taxpayer. I critique from this perspective to see if it can tell us anything new about the old debate and to ensure that the ultimate tax treatment is just as to all taxpayers.

I have made similar critiques before, primarily focusing on the income tax.[3] In those critiques, one of my primary concerns has been how the tax law recognizes or fails to recognize personal relationships. For example, I have criticized the Supreme Court's view of divorce in *United States v. Davis*,[4] where the Court viewed property division at divorce comparable to a negotiated taxable exchange between strangers.[5] I have criticized the Tax Code for embodying a "fallacy of individualism."[6]

Throughout our tax history, taxpayers have been viewed as individuals for income tax purposes. The enactment of the joint return in 1948 did not change that view.[7] As every student of tax history knows, the joint return was not enacted because Congress viewed husband and wife as a single unit.[8] Rather, Congress adopted the joint return in order to extend the tax benefit of income splitting that had been enjoyed by community property spouses ever since *Poe v. Seaborn*[9] to spouses in common law states, who were denied that benefit under the doctrine of *Lucas v. Earl*.[10]

The original marital deduction for estate and gift tax purposes was a result of the same concern over formal equality. That is, Congress justified the marital deduction on grounds that, under the estate tax regime, common law spouses should experience

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[3]*See* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991) (but pages 123-29 do discuss some gift tax issues) [hereinafter Cain, *Same-Sex Couples*]; Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000) (some discussion of estate and gift tax issues, but more attention to income tax issues).

[4]370 U.S. 65 (1962).

[5]Cain, *Same-Sex Couples*, *supra* note 3, at 103-05.

[6]*Id.*

[7]Husband and wife may file a joint return or not. Even if they do file a joint return, they report their individual incomes separately. Boris Bittker, in his classic article, *Federal Income Taxation and the Family*, described the post-1948 treatment of spouses as retaining "many 'individualisitic' elements of the tax law." 27 STAN. L. REV. 1389, 1414 (1975). He gives several examples such as the $100 dividend exclusion of section 116, available to each spouse provided each spouse has sufficient dividend income. *Id.* at 1414-15. Bittker also provides examples of tax provisions that seem to treat husband and wife as one merged individual and concludes that "Congress has not been much concerned with tidying up the conceptual loose ends…." *Id.* at 1416.

[8]*See* especially Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HISTORY REV. 259 (1988). Professor Jones explains that the choice of the joint return as the solution to the community property versus common law debate was supported by legislators who held very traditional views of gender roles. The joint return option gave a tax benefit to the spousal unit without having to give the wife any control or vested interest in the marital property or income.

[9]282 U.S. 101 (1930).

[10]281 U.S. 111 (1930).

the same tax benefits that community spouses experienced. The original marital deduction created a form of estate splitting at the time of the death of the first spouse because it gave a 50% deduction that resulted in the taxing of only half of that spouse's estate provided he (or she) actually transferred the other half (or more) to the surviving spouse.

Thus, neither the original income splitting rules nor the estate splitting rules, initially enacted in 1948, were based on a view of the marital unit as a single economic unit for tax purposes. The concept that husband and wife constitute a single unit for tax purposes did not arrive until the 1980s.

In 1981, Congress enacted the unlimited marital deduction making all gratuitous transfers between spouses exempt from the estate and gift tax. Three years later Congress enacted section 1041 of the Internal Revenue Code exempting from the income tax all transfers between spouses and certain transfers between ex-spouses provided the transfer occurred incident to divorce. The legislative histories of both provisions cite to a normative view of husband and wife as a single entity such that property transfers should not be taxed until the property leaves the marital unit. [11] These statutory changes of the 1980s extended the principle of marital unity to the dissolution of the unit in the event of either death or divorce. Thus, no income or estate and gift tax would be imposed on interspousal transfers during the marriage. And similarly, in the case of death or divorce, those taxes would be deferred until the property left the control of the surviving or divorced spouse and passed to someone outside the marital unit.

Although Congress did not enact these marital unit tax rules until the 1980s, proposals for such changes were proposed throughout the 1960s. On the income tax front, criticisms of the 1962 decision in *Davis* arose shortly after the decision was handed down.[12] The criticisms, however, were not about normative views of the tax unit, but instead were focused on the differences in tax treatment between spouses divorcing in common-law and community-property states.[13] The enactment of section 1041 is viewed by many as a response to these criticisms. Thus, despite Congressional statements acknowledging marital unity, section 1041 is primarily a product of formal equality rather than substantive justice.

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[11]For evidence that section 1041 is in part based on a view that husband and wife are a single unit, *see* H.R. REP. NO. 98-432, 191 (1983). "This policy is already reflected in the Code rule that exempts marital gifts from the gift tax, and reflects the fact that a husband and wife are a single economic unit." For a discussion of the legislative history of the unlimited marital deduction as an extension of the marital unit rule, *see* Shelfer v. Commissioner, 86 F.3d 1045 (11th Cir. 1996).

[12]In 1966, just four years after the decision was handed down, the American Bar Association recommended that Congress overrule *Davis*. *See Bulletin*, A.B.A. SEC. TAX'N NO. 4, 62 (1966).

[13]*See* DuCanto, *Federal Tax Law: Where You Divorce Does Make a Difference*, 9 LOY. U. CHI. L.J. 397 (1978); Alan Gunn, *The Federal Income Tax Effects of the Missouri Version of the Uniform Divorce Act*, 1974 WASH. U. L.Q. 227 (1974); Schwartz, *Divorce and Taxes: New Aspects of the Davis Denouement*, 15 UCLA L. REV. 176 (1967); Weinstock & Walzer, *Tax Aspects of Divorce in Community Property and Noncommunity Property States*, 42 TAXES 386 (1964); Orlie L. Curtis, Note, *Should Federal Income Tax Consequences of Divorce Depend on State Property Law*?, 49 S. CAL. L. REV. 1401 (1976).

The unlimited marital deduction was first proposed by Treasury in 1969.[14] In its explanation for why the deduction should be expanded, the Treasury observed that most husbands and wives view property accumulated during the marriage as belonging to both of them. However, the report never stated that that view was normatively correct. That is, the Treasury never concluded that transfers between husband and wife should not be subject to the gift and estate tax *because* such transfers are not real transfers of ownership. Rather, the Treasury stressed the fact that in community property states, the estates were split 50/50 and under the 50% limited marital deduction, common law spouses could not split ownership equally without paying some gift tax.[15] Thus, as with section 1041, formal equality, focusing on the plight of spouses in common law property states, was the primary driving force behind the unlimited marital deduction.

Just as the fallacy of individualism has led to absurd results in the income tax regime (e.g., the *Davis* decision), it has also led to absurd results in the estate tax world. Too narrowly focused on the individual ownership of property, the estate tax provisions have refused to recognize certain forms of joint ownership of property as valid for estate tax purposes. For example, a joint tenancy is presumed to be owned by the person who dies first and not the survivor unless the surviving tenant can prove original contribution to the property.[16] Before 1976, this joint tenancy rule applied to spouses in common-law states as well as to non-spouses. A husband and wife who worked side by side for forty years on the family farm, titled to them as joint tenants, would not be considered true joint owners at the time of the husband's death if the husband had been the sole original purchaser of the farm or had inherited it from his family. Farm wives complained bitterly when they were asked to pay estate taxes on 100% of the value of the farm they thought they had owned equally with their husbands.[17] The focus on the individual who contributed capital as the important and thus "true" owner caused this absurd result. This focus also privileged capital over services.

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[14] *See* U.S. TREASURY DEPT., TAX REFORM STUDIES AND PROPOSALS, 91st Cong., pt. 3, at 357-381 (1969). For academic discussion of the proposals, *See* Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986 (1970); Kurtz & Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1381-84 (1970).

[15] Under the pre-ERTA law, a husband who owned all the marital property in his own name and wanted to transfer half of it to his wife in order to split ownership, would have to report a taxable gift of half the value of the gift because the marital deduction was limited to half the value of the transferred property. *See* I.R.C. § 2523 (West 1976).

[16] § I.R.C. § 2040 (West 2001). While this presumption that the first to die provided full consideration may be appropriate in cases involving parent and child joint tenancies, it is not clear why this presumption should apply to couples in the same generation. Furthermore, the rule applies even if the person who provided full consideration files a gift tax return at the time the joint tenancy is created. Thus, section 2040 operates to prohibit using a joint tenancy to avoid probate because it forces donors to make gifts in the form of tenancies in common in order to avoid being taxed on any appreciation that occurs between the time of the gift and death. Now that the gift and estate taxes are unified, section 2040 seems even less necessary.

[17] *See* Mary Moers Wenig, *Taxing Marriage*, 6 U.S.C. REV. OF LAW & WOMEN'S STUDIES 561, 571-72 (1997).

While the unlimited marital deduction solves the problem of the farm wife,[18] as well as that of other spouses who with good reason view the marital property as belonging to both spouses, the 1981 law that created the unlimited marital deduction went even further and authorized the deduction when the surviving spouse (typically the wife) was given a mere life estate. As several critics have observed,[19] if the estate tax rules are really based on the idea that husband and wife own property equally, the current rules imply a strange concept of equal ownership. Husband's ownership[20] includes the power of ultimate disposition of the property and wife's ownership is limited to a life estate.

It is not my purpose to add my voice to the critique of the QTIP provisions. I merely point out that the existing estate and gift tax rules applicable to spouses did not result from a sustained study of how family units ought to be treated under the tax laws. Instead the rules have been changed bit by bit over the years, primarily in response to allegations of unequal treatment of spouses in common-law states as compared with spouses in community-property states. In addition, if one attempts to justify the current rules by arguing that spouses should be treated as equal owners of property for tax purposes, whether or not they are so treated under the property rules of their particular states, then the argument fails because the tax rules themselves contemplate an inequality in control of the property.

III. NEED FOR REFORM, NOT REPEAL

For these reasons, the current estate tax regime is suspect, even as it applies to spouses. From the perspective of the marginalized lesbian or gay taxpayer who is part of a long-term committed couple, the estate tax regime is even more problematic. For both gay and nongay critics of the tax, of course, one possible solution is to repeal the tax altogether. That is certainly the easiest solution to the myriad problems posed by the tax in its current form. Repeal would in the short run bring greatest benefit to the lesbian and gay taxpayers currently subject to the tax since the tax falls more heavily on them than on their married counterparts. As much as I am tempted by the image that a central campaign promise of the current Bush administration (repeal of the estate tax) is in reality pro-gay legislation,[21] I align

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[18]The specific problem arising from spousal joint tenancies was resolved in 1976 when the rules for spousal joint tenancies were changed to provide that the property would be deemed to be owned equally by the spouses. Thus from 1976 to the time of the enactment of the unlimited marital deduction in 1981, surviving spouses were taxed on only half of the joint tenancy property rather than 100%.

[19]*See* Mary Moers Wenig, *Taxing Marriage*, 6 U.S.C. REV. OF LAW & WOMEN'S STUDIES 561 (1997); Wendy Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers*," 10 LAW & INEQUALITY 137 (1991).

[20]The QTIP provisions are gender neutral. But since women live longer than men and men tend to marry younger women, the first spouse to die will most likely be the husband and thus it will be the husband who takes advantage of the QTIP provision. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 31 (1994) (discussing the fact that wives generally outlive their husbands).

[21]A conservative group, Americans for Tax Reform, has discussed the possibility of building an alliance with the Log Cabin Republicans, a gay organization, directed toward repeal of the estate tax. Both groups understand that the repeal would be a major benefit to

myself with those who oppose repeal. The periodic imposition of a tax on accumulated wealth seems a basic prerequisite for a nation that purports to embrace notions of equality and fairness. While we might consider abandoning the current estate tax for an alternative tax on wealth, the costs of completely changing our tax system seem immense to me. We know the estate tax. We understand its basic concepts. Numerous estate plans have been developed on the assumption that it will remain with us in something close to its current form. In addition, fifty states finance a portion of their budget from the pick-up estate tax that currently depends on the continued application of the tax at the federal level. Better to reform the estate tax than to praise it or bury it.[22]

Those who defend the tax often do so based on Rawlsian notions of justice.[23] That is, although unequal inheritance of wealth is not in itself unjust, "fair equality of opportunity" requires the raising of revenue to support or create equal opportunity. The Rawlsian "difference principle" supports progressive taxation of inheritance.[24] But, as numerous commentators[25] and even Rawls himself point out,[26] questions of justness in the specific allocation of any tax continue to arise even once the abstract question of which sort of tax is more fair has been answered. To suggest reforms to the current estate tax that are fair to all, I now turn to my critique from the margin.

IV. THE PERSPECTIVE OF THE MARGINALIZED TAXPAYER

To understand the perspective of the marginalized gay or lesbian taxpayer who is concerned about the estate tax, one must know something of how same-sex couples live their lives. Narrative method, or the sharing of specific stories, is one way to create this knowledge.

Feminist scholars in many disciplines have embraced consciousness-raising and narrative as methods that inform their scholarship. One key feature of feminist

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wealthy gay men and lesbians. *See* Michael Triplett, *Repealing the Estate Tax: An Unintended Gift from Bush?*, *at* http://www.gfn.com/archives/story. phtml?sid=8375 (last visited Dec. 5, 2001).

[22]*See*, *e.g.*, Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 275-76 (1983).

[23]*See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[24]*See*, *e.g.*, Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX. L. REV. 363 (1996) ("Traditionally, Rawls and other liberal egalitarians have considered an estate tax and, under some conditions, a progressive income tax, to be central to a liberal regime. In Rawls' theory, the estate tax is an important means of correcting disparities in the distribution of wealth and power that tend to undermine important principles of justice--the fair value of political liberty and fair equality of opportunity."). By contrast, Professor Edward McCaffery relies on Rawls to argue against the estate tax. *See* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); Edward J. McCaffery, *The Political Liberal Case Against the Estate Tax*, 23 PHIL. & PUB. AFF. 281 (1994).

[25]*E.g.*, Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 284 (2000).

[26]*Id*. at 284 n.42 ("Rawls emphasizes, however, that exactly what form taxes should assume, and how steeply marginal rates should rise with receipts or expenditures, are 'a matter of political judgment guided by theory, good sense, and plain hunch, at least within a wide range.'" quoting from A Theory of Justice at 278).

thought is that abstract theory ought to be based on concrete experience. Much early feminist scholarship, both in law and in other disciplines, focused on deconstructing abstract rules and revealing their hidden biases by showing that such rules were not crafted with women's experience in mind.

The use of personal narrative, of fictional stories, and of real stories of real lives can help make visible experiences that in the past have been ignored.[27] In addition to feminist legal scholars,[28] critical race theorists have embraced the use of narrative. Indeed, narrative has become the prime method of many prominent critical race legal theorists.[29] Telling stories of discrimination in rich and concrete detail helps to teach the listener about different perspectives.

Gay and lesbian scholars have also embraced narrative.[30] Because discrimination against gay men and lesbians has been so dominant throughout our legal history, many gay people have lived closeted lives. Even some of us who have been out for years have felt compelled to be silent at times. Our stories, like other stories "from the bottom,"[31] have only recently begun to be told in the legal journals, courtrooms, and legislatures.

V. SOME STORIES

In a 1992 book focusing on the question of lesbian and gay marriage, Suzanne Sherman provides us with the personal narratives of twenty-four same-sex committed couples.[32] Some of them have celebrated their relationships in public ceremonies, others in private ones. Some believe that marriage is the best political solution for lesbian and gay couples who want their commitments to be publicly recognized. Some couples have registered as domestic partners in localities that offer such registrations. Others argue that for gay men and lesbians to register publicly with the government in a world that is so homophobic and hostile to them is dangerous or risky. Whatever their political beliefs about the role of marriage and public acknowledgement of their relationships, they all used surprisingly similar

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[27]*See*, *e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 7 (1991) (narratives of survivors of domestic violence). *But see* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (arguing that much narrative scholarship lacks legal analysis and is thus not particularly useful to lawyers).

[28]*See*, *e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

[29]*See* Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, The Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 564 (1995); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990); Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

[30]*See*, *e.g.*, William N. Eskridge, *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Marc Fajer, *Can Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

[31]Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987).

[32]LESBIAN AND GAY MARRIAGE (Suzanne Sherman ed., 1992).

words to describe their commitment to each other. They also spoke about finances and property ownership.

Says Kathie, who had been with Pat for seventeen years at the time of the interview: "Our goal is to stay together as long as we possibly can. We own the house together, we've owned another house together. We have some joint investments, we have wills that give each other everything unless we die within thirty days of each other, we have a durable power of attorney for health matters. We keep our everyday finances mostly separate. We both contribute to our joint account for household expenses, both pay half the mortgage."[33]

Kelvin, partnered with Dennis for twenty-two years, talks about his view of the importance of coupledom: "Part of me is very traditional, into the world of couples and lace curtains, picket fences and happy-ever-after. I'm very emotional, very romantic, very sentimental. I'm not so sure you can have that kind of life in a threesome. For the longest time, I thought that couples weren't a necessary way of being, but now I believe that if you're not coupled , if you don't have that love or that marriage, you're missing something."[34]

His partner, Dennis, describes their living situation as follows: "We share ownership of just about everything. We don't have joint accounts, but if Kelvin pays for lunch one day, I don't owe him money, for example, I pay the house and car, and Kelvin pays the bills."[35]

Kelvin adds: "Everything has always been both of ours. Maybe that's partly what keeps us together, wondering who would get what if we were to break up."[36]

Phyllis Lyon and Del Martin met in 1949 and set up a joint household in 1953.[37] They have been together ever since. They are well known for their active participation in both the women's movement and the lesbian and gay rights movement.[38] They co-authored a book called Lesbian Woman in 1972, which discusses some of the early fear of lesbianism in the women's movement. Phyllis describes their early years together as follows: "We didn't have much when we moved into this house. I had a bunch of books and records and she had a bunch of books and records. I had a car. I had a radio phonograph. We had a couch that pulled out into a three-quarter bed, the refrigerator, the stove, and the cabinets in the kitchen. We had absolutely no money left after buying the house. But it worked out. And it just kept on working out. It seems that if you're going to plan to stay together, it really makes some sense to act as if that's what you mean to do."[39]

They merged their finances after moving in together and the classification of property as "mine" and "yours" ceased.[40] Everything became "ours." Del adds:

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[33] *Id.* at 32.

[34] *Id.* at 39.

[35] *Id.*

[36] *Id.*

[37] LESBIAN AND GAY MARRIAGE, *supra* note 32, at 42.

[38] *See* Marvin S. Snow, *Phylles Lyon and Del Martin*, *in* OUTSTANDING LIVES: PROFILES OF LESBIANS AND GAY MEN 259-65 (Christa Brelin & Michael J. Tyrkus eds., 1997).

[39] LESBIAN AND GAY MARRIAGE, *supra* note 32, at 44-45.

[40] *Id*. at 45.

"Although we've been together almost forty years and own our home jointly, we've been told that legally, we are strangers."[41]

Chuck and Tede, together since 1984, try to share everything "pretty much fifty-fifty."[42] They don't have written agreements because it works well for them without having to spell out the details.[43] Chuck pays "a little bit more for rent, because I earn a bit more than Tede, and I feel it's only fair for me to do that."[44] When they go out to eat or to a movie, they "trade off treating each other. It's never really verbalized much because it just works out."[45] Chuck is a lawyer who believes in having a will so he has reduced to writing his concern for Tede's well-being after Chuck's death.[46] Tede, by contrast, describes himself as more anarchist, and hasn't yet written a will.[47]

Reid is a pastor of the Metropolitan Community Church.[48] He says of his seventeen year relationship with John: "I felt that God had sent John to me to be my life mate; therefore it was already sanctioned and ordained by God."[49] They have both supported each other in various ways during their relationship. For example, Reid explains: "We both sense the importance of being individuals and helping the other toward self-actualization.[50] Before we left Quincy, I asked John if he would consider staying in school there another two years and, in return, I would go with him wherever he needed to go to get his Ph.D. and for his first job.[51] If he'd stay those next two years, then I'd follow him the next two moves.[52] Its' worked wonderfully. There is some give and take all the time."[53]

Reid says: "I don't know how many times the primary breadwinner has reversed. But John's got his Ph.D now and I'm in the ministry so I'll never catch up anymore."[54]

Margrete, together with Robin eight years, says: "Everything we have is shared. We did have separate savings and checking accounts before we got into the house-buying process, but now we don't."[55]

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[41] *Id.* at 47.

[42] *Id*. at 50-51.

[43] *Id*. at 51.

[44] LESBIAN AND GAY MARRIAGE, *supra* note 32, at 51.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 52.

[48] *Id.* at 59.

[49] LESBIAN AND GAY MARRIAGE, *supra* note 32, at 59

[50] *Id.* at 60.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] LESBIAN AND GAY MARRIAGE, *supra* note 32, at 60.

[55] *Id.* at 82.

Robin says: "We haven't kept track of who spent money on what since our relationship started. There were times when I was a student and didn't have any money."[56]

They share everything, even clothes.[57] Robin explains: "I learned that style from my parents, They're very, very close. There's no separation of things. When you're a couple, you're a couple for life, and so everything is shared."[58]

Similarly, John and Harry, together twenty-nine years, share everything. "Any money that comes to us goes immediately into a shared pot."[59] The same is true for Michael and Thomas, together since 1980.[60] "As far as finances go, we share everything. Our whole household, our whole life together is one. It's all ours."[61]

Terry and Don, together since 1970 also "share everything."[62] "We never put names on anything. We own the business, we own our home, our cars."[63]

Ruth and Nina Jo, together since 1979, keep their accounts more separate.[64] Although they appear as fully committed as those couples who pool their assets, they recognize that they have different attitudes toward money that stem from their different backgrounds.[65] So the house account is joint, but they keep other money separate so that each is responsible for accounting for her own money.[66]

Frances and Gayle meet once a month to calendar and go over the bills.[67] They take turns paying them.[68] They also discuss how they'll split other housekeeping chores.[69] As Frances explains it: "For money, we have a three-pot system. We both have an individual account and we have a household account. We contribute to our household account based on a percentage of our income."[70]

Mollie and Morgan pool all their income into a joint account and pay the bills from that.[71] "Our household is put together much the same as other married couples," says Morgan.[72]

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[56]*Id.*

[57]*Id.* at 83.

[58]*Id.*

[59]LESBIAN AND GAY MARRIAGE, *supra* note 32, at 92.

[60]*Id.* at 120.

[61]*Id.* at 127.

[62]*Id.* at 147, 153.

[63]*Id.* at 153.

[64]LESBIAN AND GAY MARRIAGE, *supra* note 32, at 174.

[65]*Id.* at 179.

[66]*Id.*

[67]*Id.* at 199.

[68]*Id.*

[69]LESBIAN AND GAY MARRIAGE, *supra* note 32, at 199.

[70]*Id.*

[71]*Id.* at 143.

Eric Marcus, in his book on committed lesbian and gay couples, called *Together Forever*,[73] devotes an entire chapter to money matters. Based on his own personal experience, he said that he knew money would be an issue for the couples he interviewed. He surmises that how to handle money often is more of an open question for same-sex couples because, for them, there are no "long-standing rules." The basic long-standing rule for opposite-sex couples has been that the man earns and controls the money although the woman can spend sums for household expenses. Those rules do not work well for many married men and women today, but they do provide a framework against which the couple can discuss what their particular rules will be. Marcus found more diversity regarding money management methods than appears in the Sherman book, but he does report that four-fifths of the forty-one couples he interviewed had chosen to merge their finances.[74] Many of the couples he interviewed talked of merging their finances as emblematic of their commitment to each other.[75] Some couples kept finances separate at the beginning and merged them later into the relationship. For example, Nate and Danny kept their finances separate for the first eight years of their relationship, but merged finances for the next ten.[76] Nate was a spender and Danny was a saver so merging early on would have presented a problem for them.[77] They talk about the influence their families had on their attitude toward money.[78] Nate's father "was into spending money on entertainment, on clothes."[79] Nate learned the joy of spending from him and often bought things for Danny.[80] Danny, who grew up in a poor family and was extremely frugal, reacted negatively to such gifts, often returning them because he thought they cost too much.[81] By the time they merged finances, Danny had taught Nate how to save, and Nate had taught Danny how to enjoy spending money on clothes and entertainment.[82]

Stanley and Stewart also merge their finances.[83] They don't share equally, but it is important to them that they each contribute what they can.[84] Stanley says: "I'm sorry to say that I'm not the big breadwinner in the family. What I make in a year wouldn't keep us in spaghetti. But in any relationship you have to somehow hold

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[72] *Id.*

[73] ERIC MARCUS, TOGETHER FOREVER: GAY AND LESBIAN MARRIAGE (1998).

[74] *Id.* at 180.

[75] *Id.*

[76] *Id.* at 181.

[77] *Id.* at 181-82.

[78] MARCUS, *supra* note 73, at 181-82.

[79] *Id.* at 181.

[80] *Id.* at 182.

[81] *Id.*

[82] *Id.*

[83] MARCUS, *supra* note 73, at 186.

[84] *Id.* at 187.

some weight financially."[85] At the time of the interview Stanley had recently lost his job as a result of downsizing and was living on unemployment.[86] He contributed the full amount of his unemployment check to their joint account.[87] Stewart never complained or charged him with contributing too little.[88] As Stewart explained: "So we've had to cut back. My salary is not the highest in the world, but it's a decent salary and I've done some extra work. It's no problem maintaining all the bills when I've had to. He wants to feel like he's doing something. He doesn't want to sit home and do nothing."[89]

VI. OBSERVATIONS

For many same-sex couples, the merging of finances and the joint ownership of property are a public symbol of the strength of their commitment to each other.[90] Some couples also express their commitment in public ceremonies.[91] And some couples express their commitment by taking the same last name.[92]

Based on a recent scholarly survey of unmarried couples, it is fair to conclude that same-sex couples share ownership of assets at a much higher rate than opposite-sex unmarried couples.[93] The result is not surprising. Married couples are more

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] MARCUS, *supra* note 73, 187.

[89] *Id.* at 187-88.

[90] *See* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 54 (1998), showing that 37.6% of the same-sex committed couples in her survey viewed financial interdependence as evidence of their commitment. By contrast, only 30% of the unmarried opposite sex couples in the survey viewed financial interdependence as symbolic of commitment.

[91] *See* ELLEN LEWIN, RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT (1998).

[92] *See*, *e.g.*, Pat Norman & Karen Norman's story, *in* LESBIAN AND GAY MARRIAGE, *supra* note 32, at 211. *See also* LEWIN, *supra* note 91, at 72-73 (Bob and Mark registered as domesitc partners, changed both of their last names to a new shared last name, and publicly celebrated their commitment in a ceremony).

[93] Fellows et al., *supra* note 90. *See also* PHILIP BLUMENSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 95 (1983), reporting on a study of couples' attitudes toward money, work, and sex. The study was based on information gleaned from 12,000 surveys returned by each partner in married and cohabiting couples (including opposite and same-sex couples). The date shows that after ten years together 68% of gay males and 59% of lesbians favor pooling income and assets. These percentages approach the percentages for married couples that have been together that long, 77% for husbands and 74% for wives. Very few unmarried opposite-sex couples had been together over ten years so there is no reliable data on them for comparison. However, in couples that have been together between two and ten years, 32% of heterosexual male cohabitants favor pooling compared with 44% of gay men and 27% of heterosexual female cohabitants favor pooling compared with 40% of lesbians.

likely to share ownership of assets than any other group.[94] Since same-sex couples cannot marry even though they may want to, that group is likely to include couples who are more committed than unmarried opposite-sex couples, all of whom have elected against marriage. Thus the joint ownership habits amongst couples who want to get married, but cannot, should be closer demographically to the joint ownership experiences and desires of married couples.

The stories I have presented in this section reveal themes of commitment, financial interdependence, joint ownership, and sharing of responsibilities, both personal and financial. They are consistent with the surveys that show a significant number of gay and lesbian couples favor the pooling of both income and assets.[95] The stories also show that attitudes about money may affect how individual partners manage their financial affairs or contribute to joint ownership. But, in the end, the stories support the concept that lesbian and gay couples are economic units that function to improve the lives of the individual partners through a system based on tacit understanding, trust, and financial interdependence.

VII. DIVISION OF LABOR

In a recently-published book, sociologist Christopher Carrington describes his decade-long study of the "details of everyday life in the households of lesbigay families."[96] The families he studies consist of same-sex couples who "engage in a consistent and relatively reciprocal pattern of loving and caring" for each other.[97]

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[94]In community property states, the default rule is that married couples own property acquired during the marriage (other than property acquired by gift or bequest) as community property. In addition, since property owned during the marriage is presumed to be community, the default rule often includes all property of the couple. *See generally* WILLIAM A. REPPY & CYNTHIA A. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES (1994). For married couples in other states, title to property may be held by one spouse alone, but often the spouses pool resources in joint bank accounts and hold real property as joint tenants with right of survivorship. *See generally* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 96 (1993) ("married couples prefer to pool their money more than other kinds of couples do."); *See also* N. William Hines, *Real Property, Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582 (1966) (reporting on empirical data showing incidence of joint tenancy titles and also what percentage of such titles are held by husband and wife); *But see* Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 86 (1993) reporting on two surveys conducted by the author, as well as two additional surveys by other investigators. On the pooling question, the married couples in these surveys reported "yes" only 48% of the time (Hertz study), 56% of the time (Pahl study), and 70% of the time (Kornhauser random survey). Kornhauser's article showed that married couples vary significantly both in their attitudes toward pooling and in their habits.

[95]*See* BLUMSTEIN & SCHWARTZ, *supra* note 93. Their study is about attitudes and does not necessarily stand for the proposition that all of those who favor pooling engage in pooling. But the Fellows et al. survey does show high percentage of actual joint ownership of assets in same-sex couples. E.g., 73% of homeowning couples own the home jointly. Fellows et al., *supra* note 90, at 55.

[96]CHRISTOPHER CARRINGTON, NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN 5 (1999).

[97]*Id.*

While much variety exists amongst the couples in his study, especially on the basis of gender, class, race, and wealth, the couples share some commonalties. Carrington's prime focus is on domesticity or housework. A home must be maintained by someone. If two people share a home, one of them is more likely to do the domestic tasks than the other. Shopping, cleaning, meeting repair and other service personnel, planning meals, keeping up with extended family members and friends are all important tasks that benefit both members of the couple when done by only one partner. And unlike married couples, these tasks do not tend to be assigned on the basis of gender. Rather, it is the person with the most flexible work schedule or the shortest commute to work who does more domesticity. Here, time is the central factor. Often, however, it is the status and pay of the outside employment that determines which partner does more domesticity. Economic efficiency suggests that the most highly paid partner in a couple spend more time on paid employment.

When both partners are highly paid, much of the housework is done by hired help. But there are certain parts of domesticity that can't be done by hired help. Maintaining relationships with family and friends is a prime example. Often the division of labor between same-sex partners reflects the fact that one partner is simply better at certain domestic tasks than the other. Over time, a mutual dependency is created in which the couple's quality of life will be maintained only so long as each partner carries his or her share of the domestic work.

VIII. DEATH AND TAXES

Death of a partner brings the couple's relationship to an end. If the death is a premature one, the surviving partner will not only experience the traumatic emotional loss of an intimate partner, but will also invariably suffer a dramatic decrease in standard of living.

While more work has been done on the decreased standard of living that follows the termination of a marriage through divorce,[98] there is empirical evidence that standards of living decrease after a spouse's death as well.[99] Most of these studies focus on widows who are either at the poverty line at the time of the deaths of their spouses or are forced into poverty shortly thereafter. Such studies prove very little about standards of living of wealthier families when one of the spouses dies unexpectedly. But common sense tells us that loss of a significant wage-earner in the prime of his or her career is likely to produce negative financial consequences on the survivors, regardless of what the overall family situation is. A wealthy survivor may not be forced into poverty, but her standard of living may well decrease.

As grief experts explain, there is also a period after the death of a close family member during which the survivor must grieve.[100] For some, this grief period, which some call a period of mourning, may last for years. During this period of time,

[98] *See*, *e.g.*, LENORE WEITZMAN, THE DIVORCE REVOLUTION (1985).

[99] *See* NATIONAL ECONOMIC COUNCIL INTERAGENCY WORKING GROUP ON SOCIAL SECURITY, WOMEN AND RETIREMENT SECURITY (1998); Lynne Marie Kohm & Britney N. Brigner, *Women and Assisted Suicide: Exposing the Gender Vulnerability to Acquiescent Death*, 4 CARDOZO WOMEN'S L.J. 241, 256-57 (1998) (describing the plight of widowhood).

[100] *See*, *e.g.*, ELISABETH KUBLER-ROSS, ON DEATH AND DYING (1969); JOHN D. MARTIN & FRANK FERRIS, I CAN'T STOP CRYING (1992).

friends offer support and the survivor often works through grief in the privacy of the home.[101]

It is our understanding of the grief and the sense of loss that follow the death of an intimate partner that supports the political case against the estate tax. Politicians rail against the tax calling it a "death tax," suggesting that the tax is imposed on the loss of life and that there is something unseemly about that.[102] I certainly agree with the politicians who oppose the tax to the extent it increases the loss I have just described. To help explain the problem with the current tax from the perspective of the marginalized gay or lesbian taxpayer, I now turn to a discussion of the way in which the tax does in fact contribute to the loss of long-term same sex couples.

IX. HOW THE CURRENT TAX ON GRATUITOUS TRANSFERS BURDENS UNMARRIED COUPLES.

Because most students of the estate and gift tax are used to thinking about the tax as it applies to traditional families, I will first describe some of the negative impacts of the tax as it is applied to same-sex couples.

A. No Marital Deduction.

The absence of a marital deduction poses a gift and estate tax problem whenever a same-sex partner makes a transfer to the other partner. As to the gift tax, the question arises whenever a transfer in excess of $10,000 occurs. Under the current regime, when one partner supports another, the support payment may constitute a taxable gift. And yet, couples often take care of each other, with the understanding that there is a reciprocal obligation of support. It is not clear whether a couple's understanding that each will support the other as circumstances might require affects the characterization of transfers between the partners. For example, if Sam pays all the household and related bills this year for a total of $100,000 because Tede is temporarily disabled, is the transfer really a gift since Sam is assuming that Tede will do the same for Sam's benefit should their individual positions be reversed in a future year? Should it matter whether Tede is ever called upon to support Same or is it sufficient that he has promised to do so?

Recall the stories of couples from the earlier section. Chuck and Tede feel that they contribute equally to current expenses. Yet, in reality Chuck pays more because he makes more money.[103] What is equal in their eyes is not necessarily equal in the

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[101]For an interesting presentation of the social history of our attitudes toward death spanning a period from the middle ages to the 20th century, *See* PHILIPPE ARIESE, WESTERN ATTITUDES TOWARD DEATH (1974). The author presents a picture of death as a more public event in the earlier periods moving to a more private event in modern times. In addition, he suggests that in earlier times we were more accepting of death than we are now. *Id.*

[102]Representative Crane (Illinois) made the following comments before the House of Representatives on June 7, 2000:

> Mr. Speaker, I rise today to address the tax that is one of the most obscene, unfair, and immoral of all taxes. The estate tax, or what is commonly referred to as the death tax, since it is generally triggered only by one's removal from productive life, has outlived its usefulness. Later this week, this body will be voting on legislation to eliminate the death tax, and I think it is past time to bury the death tax once and for all.

[103]Chuck and Tede are described *supra* notes 42-47 and accompanying text.

eyes of the IRS. Reid and John present the same problem. They have taken turns supporting each other as each one of them has decided to go back to school for a higher degree.[104] Since the IRS pays attention to gift taxes based on an annual accounting period, an agent might well view Reid's support of John as a taxable gift and John's support of Reid in a different year as a taxable gift.

Similarly, Stanley and Stewart pay living expenses according to their ability.[105] They recognize that the contributions are unequal, especially since Stanley has lost his job. Their concern is that the arrangement needs to feel fair to them. Since they each contribute the most they can, the arrangement does seem fair. It is unlikely that they view the arrangement as one in which Stewart is making taxable gifts to Stanley. And yet, in the view of the IRS, he is.[106]

Spouses do not worry about these sorts of support arrangements for two reasons. First, the IRS views any inter-spousal transfer in satisfaction of the legal obligation of support as exempt from the gift tax.[107] Second, even if the transfer were a taxable gift, the transferor would be entitled to a 100% marital deduction.[108]

B. No Right to Split Gifts.

Unmarried partners who want to make gifts to third parties must determine from whose separate funds the gift will be made. This can cause some difficulty if the two partners view all the property as jointly owned. Margrete and Robin, for example, have never kept records of who paid for what even though Robin had no income during the time that she was a student.[109] They view everything as belonging to both of them. Assume that in their later years, after they've accumulated sufficient wealth, they give $20,000 a year to their four favorite nieces. They never file a gift return, assuming that each of them can rely on the $10,000 annual exclusion. But how might the IRS view these gifts if it knows that their "nest egg" began with contributions that came primarily from Margrete? The IRS might determine that

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[104] Reid and John are described *supra* notes 48-54 and accompanying text.

[105] Stanley and Stewart are described *supra* notes 83-89 and accompanying text.

[106] *See*, *e.g.*, Rev. Rul. 82-98, 1982-1 C.B. 141 (1982) (ruling that a parent's payment to help support an incapacitated adult child for whom he owed no legal obligation of support is a taxable gift, unless it qualifies for the medical or tuition exception in I.R.C. section 2503(e). *But see* Cain, *Same-Sex Couples*, *supra* note 3, at 129 setting forth arguments for why support payments for the benefit of intimate cohabitants ought not be considered taxable gifts.

[107] "…the proposition that one does not incur a gift tax liability by supporting a spouse and children in an amicable family setting was thought so obvious as not to require an explicit statement." BORIS I. BITTKER & ELIAS CLARK, FEDERAL ESTATE AND GIFT TAXATION 73 (1990). However, Treasury did issue a proposed regulation, never finalized, under the Internal Revenue Code of 1954 that provided that "current expenditures by an individual on behalf of his spouse or minor child in satisfaction of his legal obligation to provide for their support are not taxable gifts." Treas. Reg. § 25.2511-1(f)(1) (proposed 1957). For a thorough discussion of the question of whether support payments should be treated as gifts, *see* Jeffrey S. Kinsler, *A Comparative Proposal to Reform the United States Gift Tax Annual Exclusion*, 30 VAND. J. TRANSNAT'L L. 949 (1997); Robert G. Popovich, *Support Your Family But Leave Out Uncle Sam: A Call for Federal Gift Tax Reform*, 55 MD. L. REV. 343 (1996).

[108] I.R.C. § 2523 (West 2001).

[109] Margrete and Robin are described *supra* notes 55-58 and accompanying text.

Robin was never really the owner and that the only donor was Margrete, thereby creating $40,000 in adjusted taxable gifts each year.[110]

C. Section 2040 and Joint Tenancy Property

First of all, based on anecdotal evidence from lawyers and CPA's who represent gay couples, it appears that the IRS will audit any return that includes a non-spousal joint tenancy reported at less than 100% of value.[111] The burden is then on the survivor to prove original contributions. This burden of proof is almost impossible when property has been held for a long period of time, unless the IRS is willing to accept estimates and partial proofs.[112] A major problem is that the IRS has never provided any guidelines for what would be an acceptable level of proof when two partners have owned property jointly for many years.[113]

Consider, for example, the stories of Phyllis Lyon and Del Martin, together since 1953.[114] They describe all their property as belonging to both of them. But when the first partner dies, if the form of ownership is joint tenancy,[115] the IRS will take the position that 100% of the property is included in the taxable estate. Absent sufficient proof to rebut the presumption, the survivor could wind up paying taxes on property that she purchased herself.

Thus, responsible estate planning experts always advise clients to sever their joint tenancies and create revocable trusts. While I view this as sound advice, which cures

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[110]Nor would I advise Margrete's estate to argue that even if Margrete was the original owner of the funds transferred, she effectively transferred $10,000 tax-free to Robin each year and then Robin transferred that $10,000 to the nieces. The IRS will claim that the wealthy partner is the true donor and the less wealthy partner was merely being used as a conduit. *See* Heyen v. U.S., 945 F.2d 359 (10th Cir. 1991) (twenty-nine gifts of 10K followed by twenty-seven retransfers to donor's family members taxed as though donor was transferor of all gifts to family members). *See also* Schultz v. U.S., 493 F.2d 1225 (4th Cir. 1974) (brothers gave to each other's kids and reciprocal gift analysis applied). Of course, in any case, the remaining $30,000 plus any actual gifts to Robin during those years would be treated as adjusted taxable gifts by the IRS view of the matter even if Margrete's estate could successfully argue as to the first $10,000 that the transfer was to Robin and then to a niece.

[111]The tax planners who have shared this information with me, come primarily from California.

[112]*See* Estate of Fratini v. Commissioner, 76 T.C.M. (CCH) 342, T.C.M. (RIA) 98, 308 (1998) (allowing taxpayer to approximate contributions when records were inadequate to compute the amount definitively).

[113]Furthermore, the IRS appears to be giving less guidance generally on all topics, which is of concern to planners who need to know the IRS position on as yet unsettled areas of law. *See* Christopher Bergin et al., *The Changing Landscape of IRS Guidance: A Downward Slope*, 90 TAX NOTES 5 (2001).

[114]*See* Terry and Don's story *supra* notes 62-63 and accompanying text. They own everything together, including the business they run.

[115]Even if the form of ownership is tenancy in common, the IRS could require substantiation of original contribution to prove that no gift occurred upon formation of the tenancy. If one partner pays the purchase price and the couple takes title as tenants in common, the purchasing partner will have made a taxable gift, included in the estate as an adjusted taxable gift.

not only the section 2040 problem but also problems that might arise if the partners die close in time to each other,[116] the effect of the tax rule is to deny same-sex partners the right to hold property as joint tenants. Given the strong preference for joint tenancy by many gay and lesbian clients, even when the tax burden is removed, the burden of constrained choice still exists.

D. No IRA Rollover

There is an IRA rollover for spouses but not for same-sex partners.[117] When two partners have planned retirement together[118] and one dies early, the survivor will be disadvantaged by having to pay an immediate income tax on the retirement benefits of the partner rather than being able to roll them over into his or her own retirement plan and have all funds continue to grow at a tax-free rate.

E. The Generation Skipping Tax (GST) is Based on Traditional Family Relationships

Imagine two lifetime partners who plan to make all assets available to the survivor and, at the survivor's death, the remaining assets are to be divided equally among their ten nieces and nephews. Unlike spouses, these partners can encounter generation skipping problems when the property all passes to the nieces, seemingly a single generation away. If partner A dies first and at Partner B's death a portion of the assets are distributed to A's two nieces, who happen to be forty years younger than B, B's estate will have to pay a generation skipping tax at the rate of 55% on top of the estate tax.[119] The same is true if one of the partners has a child that both partners want to benefit and that child is more than 37.5 years younger than the non-parent partner.[120]

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[116]Under joint tenancy rules, the survivor will take full ownership. If the tenants die within weeks of each other, the property may never benefit the survivor. But the survivor heirs or beneficiaries will inherit 100% of the property to the exclusion of the other partners heirs or beneficiaries. This problem can be cured by careful drafting of will terms, e.g., a provision in each partner's will that provides for an equal distribution of any jointly held property to the families or beneficiaries of both tenants.

[117]I.R.C. §§ 408(d), 402(c) (West 2001).

[118]All couples who have been together a long time, whether they use joint account and joint ownership of property or keep things separate, expect the joint contribution to living expenses to continue. If one partner dies and cannot make her contribution to the joint mortgage, then that money has to come from somewhere. Life insurance and retirement funds are both possibilities. For couples who are relying on retirement funds from both partners to maintain them in their old age, a premature death will cause the retirement funds of the deceased partner to be taxed immediately thereby reducing the amount that can be accumulated tax free until the survivor needs the funds. While some survivors might need the funds immediately, others would prefer to defer the tax until the funds are needed, e.g., upon the survivor's retirement.

[119]Of course there is a 1.0 million exemption so the tax won't apply if the final transfer does not exceed the available exemption.

[120]I.R.C. § 2651(d) (West 2001). Of course if the other partner adopts the child in a state that allows second-parent adoption, then the GST tax would not apply.

Note also that the GST tax rule about predeceased parents does not apply to non-traditional families. For example, assume Partner A, who has no lineal descendants, wants to

X. STORIES OF DEATH AND TAXES

I turn again to narrative to demonstrate further the problem that the current tax poses for same-sex couples. Whereas my earlier stories elaborated on the ways in which long-term committed gay and lesbian couples view themselves as couples rather than two individuals, these current stories will deal with situations in which the coupledom is ended through death of a partner. These narratives come from lawyers and accountants who have represented gay and lesbian clients in estate tax audits. Confidentiality is maintained because although the stories are based on real people, I have either elaborated on or amalgamated the specific facts from individual cases.

Alice and Barb are a lesbian couple in Ohio. They had lived together for over forty years when Alice died. The auditing agent took the position that since Alice was the wealthy partner, everything she paid for over the forty years that benefited Barb was an adjustable taxable gift. Thus, Alice's ownership of the couple's residence which was used by Barb created an adjusted taxable gift. Vacation trips for the two of them paid out of Alice's funds created an adjusted taxable gift. Entertainment expenses and meals at fancy restaurants – all items of joint consumption – were proposed as adjusted taxable gifts. Although the case was finally settled, the audit lasted over two years.

Carl and Dan are a gay male couple in California. They owned all their property as joint tenants and considered it "community property." The property included real estate and joint checking accounts and a joint CD. They purchased some of the property twenty years ago. Carl was earning slightly more than Dan at the time of Carl's death. The agent asked for proof of Dan's original contribution to every piece of joint property. Dan had not retained cancelled checks for twenty years, but he did have tax returns. He was able to show that he made enough money to enable him to cover half the down the payment for the property purchased twenty years ago. On the more recent purchases, Dan was eventually able to produce cancelled checks to account for 40% of the funds needed for the down payment. Data on the bank accounts varied. The agent asked for proof of equal contribution to the mortgage payments. Dan had no cancelled checks to the mortgage company, but was able to show some cancelled checks to Carl which appeared to be partial reimbursements. They had split the interest deduction and property tax deduction equally on their tax returns over the years. Again the case was ultimately settled, but the taxpayer's representative who shared this story with me says she will never allow a gay or lesbian client to own property jointly. Even if they can substantiate contributions, the emotional toll is not worth the benefit of avoiding probate or reaping the benefits of Proposition 13,[121] which is also an issue for nonspousal property owners in California.

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benefit her deceased sister's lineal descendants. She can distribute to her grandniece, the daughter of her deceased niece and avoid the GST. But A's Partner B, who might want to benefit the same family member, the grandniece, cannot do so without incurring a GST. I.R.C. § 2651(e) (West 2001).

[121]Proposition 13 added a provision to the California Constitution that protects the property owner from increases in property tax valuations. *See* CAL. CONST. art. XIII, A. However, upon a "change in ownership," the value of property can be increased to current fair market value. If partners take title as joint tenants, then upon death of the first partner, there is no "change in ownership." But if partners take title as tenants in common, then when the first

Elliot and Frank are a gay male couple in Texas who lived together for 25 years. When they planned their retirement, they decided to sell all their Texas assets and move to Santa Fe. Their estate planner severed all their joint tenancies into 50/50 tenancies in common and filed the necessary gift tax returns since Elliot had made all original contributions to the joint tenancies. Frank complained because he felt he was the true owner of some of the properties since he had managed them for years and had puttered around the residence making minor improvement here and there. The planner, after twenty billable hours of additional research, agreed that on the basis of *Otte v. Commissioner*,[122] Frank could claim some original contribution to the joint property, but less than 50%. Gift tax returns were still necessary. The planner then transferred all property into two separate revocable trusts in which each partner named the other as the primary beneficiary in the event of death. They moved to Santa Fe, hired an accountant to keep track of the assets in their individual trusts, and lived a life of intermediate luxury on the income produced by their assets. Five years later, much to everyone's surprise, Frank, eleven years younger that Elliot, died. After paying thousands of dollars in planning and transaction costs and a small sum in gift taxes in order to split their estate between them, all the property that had originally belonged to Elliot came back to Elliot under the terms of Frank's trust.

Gertrude and Holly lived together for over fifty years. They spent much of their time entertaining friends who were artists. Over the years, these friends made gifts to Gertrude, also an artist. At Gertrude's death, the art work was valued at $5 million. Neither Gertrude nor Holly owned other property. In order to pay the estate tax, Holly will have to sell almost $2 million worth of the artwork. She resists selling anything because the art reminds her so much of her life with Gertrude. Finally, she sells two Picassos, and removes them from the place on the wall that they have occupied for the past twenty years. The wall is slightly discolored, indicating where the painting has hung for so many years. When friends visit and ask how she can stand to look at the blank space, she replies stoically, "Oh those walls aren't blank. I can see the Picassos as clearly as ever."[123]

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partner dies, his half changes ownership when distributed to the survivor pursuant to the deceased partner's will. *See* CAL. REV. & TAX CODE §§ 60-62 (West 1998).

[122] 31 T.C.M. (CCH) 301, T.C.M. (P-H) P 72,076 (1972).

[123] This story is derived from an incident in the life of Alice B. Toklas, the lifetime companion of Gertrude Stein. In the real story, the villain was not the taxing authority, but rather Gertrude's nephew, Allan, or, more accurately his widow, Roubina. In her will, Gertrude had named Allan and his children as the ultimate beneficiaries of her estate after Alice's death. After Allan's death, his widow, Roubina, kept an eye out for the inheritance due her children and became concerned that Alice was not taking proper security precautions to protect the valuable art work housed in her apartment. Finally, fifteen years after Gertrude's untimely death from cancer, Roubina Stein asked the law to intervene and place the art work in a safe place so that the remainder interest would not be defeated. For the rest of Alice's life, the art was concealed and protected in a bank vault. A friend visiting Alice after the removal of the art reported that "the apartment had not been repainted for more than fifteen years with the result that where each painting had hung a discolored area of its exact size now remained." *See* LINDA SIMON, THE BIOGRAPHY OF ALICE B. TOKLAS 250 (1977). *See also* JAMES R. MELLOW, CHARMED CIRCLE: GERTRUDE STEIN AND COMPANY 475-76 (1974).

XI. ANOTHER STORY: A PURELY HYPOTHETICAL FACT SITUATION THAT DEMONSTRATES THE BURDEN OF THE DEATH TAX

Some couples view their assets as completely merged. Some view them as separate. The longer a couple lives together, the more their property becomes merged. Even when ownership does not become joint, there are expectations by each partner that certain assets (e.g., the Picasso paintings) will be available to both of them during their joint lives. When one partner dies, the availability of the assets may cease if the assets are required to pay an unexpected estate tax.

Consider for example, the situation of Anna and Beth, a hypothetical couple, whose income and wealth mirrors that of many lawyers and similar professionals. Anna earns over $150,000 per year. That salary is not in the realm of the very rich, but it certainly means that Anna is well-off. Beth, by contrast, is a dedicated and talented pianist, who pulls down around $25,000 a year from teaching students and performing. They are committed to each other and support each other's career choices. They jointly own a home purchased fifteen years ago for $200,000, which is now worth $600,000.[124] They took title as joint tenants with right of survivorship and financed the purchase with a fifteen year mortgage, which has been recently paid off. Anna made the mortgage payments and claimed all the interest deductions and property tax deductions on her income tax return. They agreed that, in return, Beth would pay for the groceries, do the shopping and prepare the meals.

Some years ago, Anna inherited from her father a cabin in Maine. Anna and Beth have used the cabin over the years as their special retreat. It is located on a 40 acre tract and it is the one place in the world that has brought them peace and spiritual happiness. In the early years of their relationship, when they decided to have a holy union ceremony, celebrating their lifelong commitment to each other, they chose this acreage as the site for the celebration.

The first year they were together, they purchased their first piece of art. Both women had appreciated art, but seemed to differ in their tastes. On a visit to New York, they walked into a gallery and instantly fell in love with a painting by a young French artist they had never heard of before. Anna paid most of the $15,000 purchase price, but Beth contributed $500 from her own savings so that the decision to purchase would feel more truly shared.

For Beth's 40th birthday, Anna purchased a $40,000 Steinway piano to replace the piano that Beth had been using at home. The piano was intended as a gift to Beth, although Anna secretly felt as though she has gotten the major benefit from the gift because she loves to listen to Beth play.

Both Anna and Beth are now in their late forties. Neither expects death to occur. They have done no estate planning other than to write wills leaving all their property to each other. Consider the possible estate tax cost to Beth should Anna suddenly die in a freak accident.

The home, the cabin in Maine, the piece of art, and the piano are all items of property that Beth identifies as key parts of her life with Anna. These assets alone will trigger an estate tax. The residence is worth $600,000 and the Maine property has appreciated to $600,000 as well. The artist of the $15,000 painting has been

[124]Housing costs vary greatly from city to city. The median cost of a four bedroom home in Palo Alto, for example, is in excess of $800,000. In Iowa City, no home of any sort has sold for more than $600,000. Yet, the estate tax makes no distinction based on housing costs.

"discovered" and the value of his paintings have skyrocketed. The painting they own is now worth $100,000. The Steinway has similarly appreciated in value to $60,000[125]. Add to these items Anna's retirement plan assets ($300,000) and the group term life insurance provided by her employer (twice her salary, $300,000), as well as Anna's bank accounts, car, and other personal property (assume a total value of $40,000), and the total estate has reached the value of $2,000,000.

An estate of two million may sound like a lot of wealth, but in Anna and Beth's case, it is not enough to continue supporting Beth in her current life style, or in fact, anything close to it. If Anna were to die in 2001, the estate tax payable would be around $560,000. The life insurance and retirement plan assets produce just enough cash to cover this tax. If Anna and Beth had lived in a state like Iowa that has a state inheritance tax, Beth would have to come up with another $200,000 to $300,000 to pay the state tax bill.[126]

Obviously Anna should have done some estate planning to avoid this tax problem. She surely should have taken out more insurance than the amount provided by her employer. She probably should have created an irrevocable life insurance trust. However, I use the example, not to prove that couples that resemble Anna and Beth should hire an estate planner. Rather I use the example to question whether it is fair to place such a large tax burden on Beth or other taxpayers like her.

There are some specific facts in their situation that cause the tax problem. First of all, Anna, who is supporting Beth, dies early and thus Beth loses her source of support. The $600,000 in liquid assets is probably enough to support Beth if she can invest all of it rather than pay it to the tax collector. Had Anna done sufficient planning, the problem would not have occurred. This fact demonstrates that often the tax falls more heavily on the unwary, or those who die young before completing their estate plans.

Another fact concerns the type of property in the estate. The personal residence, the cabin in Maine, the painting, and the piano can all be described as constitutive property.[127] If Beth has to pay inheritance taxes on top of the estate taxes, she will surely have to sell some of these items. And yet, all of these items represent important connections to her life with Anna. Do we really want to force living people to give up property of this sort in order to pay death taxes?

The home, because it is owned in joint tenancy, is subject to Section 2040. While Beth feels she made valuable contributions to the purchase of the home, she

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[125]Query whether the piano should be included in Anna's estate. If Beth can prove the piano was a gift, then it may not be included. But Anna did not file a gift tax return for the piano, so the IRS may take the position that it still belonged to Anna. If Beth can prove that it was a gift, the value of the piano at the time of the gift must be included in the estate as an adjusted taxable gift. Since Anna is probably paying most of the bills and may be making other gifts to Beth, the $10,000 annual exclusion may not be available to reduce the gift amount attributable to the piano.

[126]There is no $675,000 exemption under the state inheritance tax. In Iowa, there is no exemption at all for taxable transfers at death. The Iowa tax is levied on transfers between unrelated parties at the rate of 15%.

[127]Carolyn C. Jones, *The Moral Hazard of the Estate Tax*, 48 CLEV. ST. L. REV. 729 (2000). *See also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX. REV. 759 (1998).

has no records that will prove a financial contribution. In the nine months following Anna's death,[128] as Beth is grieving, she will be asked to go through records to prove what she has paid for and will be made to feel as though her contributions to their joint estate don't really count.

Should Anna and Beth face this tax burden? Is the burden a *just* one? I have used variations of this basic hypothetical in presentations before various audiences. Some people think it is outrageous for Anna and Beth to face this burden because married couples do not face it. Others feel that the burden is of their own making through lack of planning. Still others begin to realize that the estate tax is not a tax on only the very wealthy.

My own normative conclusion is that Anna and Beth should not bear a tax burden on these particular facts. Even though tax law might view Anna as the sole owner of most of their joint assets, Beth's ownership rights ought to be recognized. She should not have her property taken away from her solely because her co-owner has died. The estate tax is conceptualized as a tax on the privilege of transferring property. But, from Beth's perspective, it is a tax on her continued ownership of property.

Early supporters of an inheritance or estate tax, going back to Jeremy Bentham, argued that the tax was proper because it was a way to raise needed revenue without depriving anyone of property.[129] Numerous scholars have viewed the estate tax as particularly appealing because it is a tax on the dead, who cannot experience the burden of the tax.[130] And yet it is difficult to view the tax on Anna's estate as one on Anna, rather than on her surviving partner, Beth.

XII. PROPOSALS FOR CHANGE

To return to my early theme, the problem presented by the case of Anna and Beth seems to me to be one of the fallacy of individualism. Just as the tax law originally viewed spouses as two totally separate individuals for tax purposes, the tax law today views all non-spouses as individuals for tax purposes. To correct the problem in the case of spouses, the tax law adopted a new view of spouses in the 1940s and strengthened that view in the 1980s. The current law has merged spouses into a single taxpayer. That position goes too far in the other direction, in my view, and should be dubbed the fallacy of merged identities.

The degree to which any couple or family is in fact merged in identity, in the sharing of property ownership, or in their views and expectations about use of property varies greatly from family to family. Some traditional and some nontraditional couples are completely merged. Others are not. The tax law should reflect the reality of each couple's life together. To accomplish this would require a substantive law that does not make marriage the bright line it currently is in estate taxation.

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[128]The estate tax return is due within nine months of the decedent's death. I.R.C. § 6075 (West 2001).

[129]*See* Jeremy Bentham, *Supply Without Burthen or Escheat Vice Taxation*, *reprinted in* 2 THE WORKS OF JEREMY BENTHAM 585 (J. Bowring ed., 1962) (1795).

[130]In addition to Bentham, *id.*; *See* John Stuart Mill, *Principles of Political Economy*, *reprinted in* 3 COLLECTED WORKS OF JOHN STUART MILL 811-12 (J.M. Robson ed., 1965) (1848); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990).

At the same time, as I have argued elsewhere,[131] bright lines can be useful. For one thing, if the IRS were required to make decisions about tax on a case by case basis, depending on the degree to which each couple was in fact merged in identity and property ownership, accurate collection of taxes would be come very costly. Secondly, if the IRS were charged with making the determination of whether two individuals were in fact a merged couple for tax purposes, the government would be forced to invade the private sphere of intimate relationships to make that determination. Neither of these consequences are attractive.

There are, in my view, seven possible options that could resolve the tax problems faced by couples like Anna and Beth. The ideal resolution would find the right balance between individualism and merger. It would also empower couples to make their joint choices, should they wish to do so, about how their particular situation should be viewed. Further, the ideal resolution would preserve the core purpose of the estate tax by taxing wealth that belongs more to the dead than to the living.

A. Option Number One: Repeal the Estate Tax.

This option is the easiest, but it is not ideal. The estate tax may not raise much revenue, but the amount it raises is not insignificant. Further, in addition to the points I made earlier in support of the estate tax,[132] with the state-by-state repeal of the rule against perpetuities, the estate tax is the most effective tool we have to prevent the amalgamation of wealth into family dynasties.

B. Option Number Two: Treat Same-Sex Couples the Same as Married Couples

To accomplish this, either states would have to recognize relationships between same sex couples,[133] or the Congress would have to establish a federal standard for tax purposes.[134] This option is also far from ideal. The marital deduction in its current form is flawed in at least two ways. First of all, the QTIP allows the titled partner to invoke too much control when the reality is that the property was acquired by both partners over the term of the relationship. Second, the unlimited marital deduction seems unwarranted in the case of spouses who are not at all merged or who have been together a very short time and who have large amounts of wealth.

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[131] *See* Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

[132] *See supra* notes 21-26 and accompanying text.

[133] The status would not have to be marriage. It could be a form of domestic partnership or civil union akin to the status recognized by Vermont. Congress would then have to amend the estate tax laws to treat same-sex domestic partners recognized by their state law the same as married couples recognized by state law.

[134] Congress could enact a federal domestic partner registry for tax purposes. Of course the likelihood of such legislation by a Congress that so recently enacted the Defense of Marriage Act (DOMA), which provides for the nonrecognition of same-sex marriages for federal purposes is nil. While EGTRRA does increase the exemption to 3.5 million before the estate tax is scheduled for repeal in 2010, the exemption for the gift tax is increased only to 1.0 million and the gift tax is not repealed. Nor is the annual exclusion increased. Retaining the gift tax with only a 1.0 million exemption does not resolve the problem faced by those committed same-sex couples in which one partner contributes more to the joint support of the couple. So long as payment of support is treated as a taxable gift and the annual exclusion remains at $10,000, the wealthier partner will be required to file gift tax returns.

Thus, to extend a flawed provision to unmarried couples might create formal equality; but it would not further substantive justice.

C. Option Number Three: Increase the Exemption

In the case of Anna and Beth, the tax burden would have been avoided had the exemption equivalent been a mere $2,000,000. The tax has always been conceived as a tax on the very wealthy. And yet, notions of wealth have changed significantly in recent years with the increase in the stock market and the number of people who have become millionaires as a result of being paid in the form of stock options. Assuming recent financial trends continue, $675,000 (even growing to $1,000,000 in 2006) does not seem like a lot of wealth. Middle class professionals such as Anna, who work hard all their lives, have no trouble accumulating assets in the millions by the time of death. The current exemption needs to be increased significantly for the tax burden to fall more directly on the truly wealthy.[135]

The strongest argument in favor of this option is that it is simple. A primary argument against this option as the ideal solution is that it fails to take into account the specific situation of a couple and their property holdings. While the case might be rare, consider a couple that has one single piece of constitutive property (e.g., a Cezanne worth $10 million). They bought it early in their relationship (or inherited it) and they have enjoyed it for their thirty years together, sharing their thoughts about it and the new things they see in it every evening as they share special time together after dinner. When one partner dies, the survivor will have to sell the Cezanne to pay the taxes – even if they in fact own it and paid for it equally. You simply cannot cut the Cezanne in half or partition it between the survivor and the government. To enjoy the Cezanne you must have the whole thing.[136] Thus, the option of increasing the exemption, while simple, will afford only rough justice.

D. Option Number Four: Impose the Tax Only Once Each Generation.

If the aim of the estate tax is to break up family dynasties and to impose the tax on the dead owner of the property, then imposing the tax once each generation seems consistent with those aims. One argument in favor of such an approach is that it means that siblings as well as spouses and life partners would be spared the tax burden. When two sisters live together for the last years of their lives (if not longer), they share a standard of living in much the same way that spouses do.[137] Depending on who dies first and who owns more wealth than the other, a surviving sibling could find herself in the same position as Beth. Although taxing wealth once each generation seems more in keeping with the purpose of an estate tax, designing such a

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[135]Where to draw the line is a matter for empiricists and economists. Joel Dobris, in his remarks at the Death of Death Taxes conference, suggested an exemption of $10 million. My hunch is that an increase to 3 or 4 million would significantly reduce, or perhaps eliminate, the burden on most professional, middle-class lesbian and gay couples.

[136]One solution to this problem might be to sell the remainder interest in the painting to anyone willing to wait for delivery until the death of the survivor. The sales proceeds might produce enough to pay the taxes, especially if only half of the painting was subject to the tax.

[137]Estate of Davenport v. Commissioner, 74 T.C.M. (CCH) 405, T.C.M. (RIA) 97,390 (1997) (two sisters lived together most of their adult lives and agreed to commingle all earnings and assets).

tax creates numerous problems. The central problem would be the determination of generation. The current generation skipping tax assigns persons to particular generations and in so doing, it adopts and privileges traditional family relationships. One solution to this would be to ignore family relationships and use difference in ages. The attraction of this approach, from the government's point of view, would be that the tax is not deferred for too long. If generations are presumed to shift every twenty years for example, a person who marries someone twenty-five years younger would not cause his wealth to go untaxed until her death, as the current scheme would allow. At the same time, it seems unfair to tax the wealth at the death of the spouse and burden the survivor simply because she happens to be five years too young. A possible solution to this problem would be to adopt a rule that imposes the tax at the death of the older spouse, but defers its payment for twenty years. A plausible justification for this approach is that a younger person has the opportunity to accumulate new wealth and thus need not be solely dependent on the wealth of the deceased spouse for retirement purposes. Nonetheless, as this short exploration of how such a tax might be constructed shows, complexities would invariably abound.

A second problem would be the planning possibilities that provide tax avoidance schemes to creative decedents. For example, a parent who wishes to defer the tax on an inheritance intended for his child, might well make an arrangement to leave the property to a trusted younger and healthy sibling who would be expected to use the funds for the benefit of the child. Thus, while a proposal to tax wealth once each generation is attractive in the abstract, its implementation is likely to create insurmountable practical difficulties.

E. Option Number Five: Exemptions for Constitutive Property

Since one of the problems raised by my example is the undue burden placed on a survivor who has an emotional if not legal interest in retaining certain constitutive property, perhaps we could resolve a large part of the problem by simply allowing an exemption for such property. Homesteads, the family farm, aesthetic objects including paintings, musical instruments, and similar items might be exempted from the tax. Such a concept is not unfamiliar. We currently exempt from the claims of creditors other than the government property of this sort.[138]

Professor Ray Madoff has written about the problem of applying the estate tax to constitutive property of this sort.[139] He charges the estate tax with embracing the myth of fungibility. The estate tax, in its current form, bluntly taxes all property owned at death, making no distinctions between cash and family heirlooms to which sentimental attachments have been made. The bluntness of the tax requires taxing all property at its fair market value with no adjustments for personal attachments. Madoff suggests exempting from the tax certain rights in personality (e.g., a name, private letters) if the owner/decedent has made it clear that he or she does not want

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[138]*See*, *e.g.*, Section 522(d) of the Bankruptcy Code exempting certain personal property such as wearing apparel, household goods, and musical instruments from creditor's claims. State statutes similarly exempt such property. *See*, *e.g.*, IOWA CODE § 627.6 (2001) (exempting from creditors claims clothing, family bibles, portraits, and similar personal property).

[139]Ray D. Madoff, *Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity*, 17 VA. TAX REV. 759 (1998).

the items marketed. I am suggesting a similar proposal. However, my proposal would ascribe ownership and control over the constitutive property to the survivor who views the property as rightfully constitutive of his or her personality or, alternatively, of his or her coupledom with the decedent.

While appealing at an abstract level, this option raises difficulties in enforcement. First of all, how does one determine whether a $10 million Cezanne is constitutive or merely purchased with a view to avoiding the taxing authorities? We might, of course, give the government a tax lien on all such items of constitutive property such that if they were sold, thereby evidencing their ceasing to provide important personal connections for the owner, they'd be taxed at that time. The complexities and transaction costs of enforcing such an exemption might easily outweigh the justness of this proposal.

F. Option Number Six: Deferral of Tax When a Survivor has a Claim to Constitutive Property

Rather than exempting constitutive property completely, an arrangement for deferral of the tax might accomplish the necessary fairness for a surviving nonmarital partner. Indeed, one scholar has described a deferral system that would apply to all estate property upon the death of the first partner in an unmarried cohabitant relationship.[140] Dubbed the Trust for an Unmarried Survivor (TUMS), and based on the concept of the Qualified Domestic Trust (QDT)[141] for alien spouses, this arrangement would allow a survivor to place shared property into a trust and defer the estate tax until the death of the survivor. The estate tax would be calculated at the death of the first partner to die, but would not be paid until property was pulled out of the TUMS, either during the survivor's lifetime or at death. While the proposal poses a number of complications as applied to all property, it does so in an attempt to balance concerns of fairness to the survivor with protection of the estate tax. The arrangement would work wonderfully well with constitutive property such as the $10 million Cezanne which could remain in the trust free from tax so long as the survivor wanted to continue enjoying the personal consumption value of the painting.

G. Option Number Seven: Personal Tax Partnerships

I have complained that tax law has suffered from a fallacy of individualism and that more recently it also suffers from a fallacy of merged identities. In an ideal world, tax law ought to strike the correct balance between individualism and the merged couple. One way to strike this balance would be to recognize each individual and allow the individual partners in a couple to decide how coupled or merged they want to be for tax purposes.

The Internal Revenue Code allows individuals to form business partnerships in which they allocate capital ownership, share income and losses, and provide for services. Tax law will recognize the allocations provided they have "substantial economic effect."[142] The partnership is not a separate taxable entity for income tax

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[140]*See* Joan B. Ellsworth, *Prescribing TUMS: An Alternative to the Marital Deduction for Unmarried Cohabitants*, 11 VA. TAX REV. 137 (1991)[hereinafter *Prescribing TUMS*].

[141]*See* I.R.C. § 2056(d)(2) (West 2001).

[142]*See* I.R.C. § 704(b) (West 2001).

purposes. The tax burden of the profits and losses and the tax consequences of dispositions of property are allocated out to the individual partners in accord with their agreement. When the partnership is dissolved, there need be no tax triggered provided the partners can receive their shares of property with positive bases for tax purposes.

Suppose Anna and Beth could form a similar partnership. They could decide in advance what property would be jointly shared by the partners. They could decide in advance how net income would be shared.[143] They could decide in advance how the property would be distributed in the event the partnership was terminated, either by mutual agreement or by death of one of the partners. Termination of the partnership should not be a taxable event. Rather, property should be distributed according to the joint agreement of the partners and the recipient of the property should take historical cost basis. Any property at death that passes to someone other than the tax partner would be subject to the estate tax, provided the estate were large enough to trigger a tax.[144]

There are numerous pros and cons to this option. A primary initial issue is how to limit the use of such arrangements. For example, who should be permitted to create such tax partnerships and should they be limited to two persons? Should we, for example, only allow intimate committed partners? Or, should we allow siblings or other family members to form such partnerships? If the driving principle is shared property, why limit the partnership to two persons? My version of this option would permit only two person partnerships and would limit each taxpayer to one partnership. While the limitation might be hard to justify in terms of the principle that partnerships ought to reflect the real-life agreements of sharing,[145] some limitations are necessary to make the proposal workable.[146]

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[143]For the IRS to recognize their chosen allocation, Congress would have to reverse the rule set forth in Lucas v. Earl. While most tax theorists think we need to maintain Lucas v. Earl to avoid wholesale assignment of income amongst family members and to protect against erosion of the income tax base, I would prefer to allow such arrangements and repeal joint income tax returns. Such an arrangement would solve the marriage tax penalty problem, would give effect to real income sharing between spouses and life partners, and would make each individual taxpayer directly accountable to the government for his or her share of the partnership income. While I do not propose to develop the income tax side of this proposal in any detail in this article, which after all focuses on the estate tax, I do want to go on record in support of recognition of such tax partnerships for income as well as estate tax purposes.

[144]This option should be compared to the proposal made ten years ago by Joan Ellsworth. Whereas my proposal would exempt all partnership property from tax until the death of the survivor, Ellsworth's proposal would merely defer the tax, computed at the death of the first partner, until the death of the survivor. *See Prescribing TUMS*, *supra* note 140, at 169; *See also id.* at 186-89 (proposing a new section 2056B of the Internal Revenue Code, which would defer the tax until the death of the survivor, but in no event longer than fifteen years after the death of the first cohabitant). *See also* Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 101-09 (2001) (arguing more broadly in favor of a partnership model to replace the traditional family model for property distribution issues as well as for taxation).

[145]Small family businesses and family farms are examples of multi-person sharing arrangements. Of course, to the extent the activity is a business for profit, the family members can structure a partnership or other business entity to vest ownership in all participants. The hidden problem is the assignment of income doctrine. When a child works for years in the

Some have suggested cohabitation as the limiting principle.[147] But, even with cohabitation as a limiting principle, it might be possible for persons in different generations to form such partnerships. If they could, then the partnership arrangement would serve to exempt the partnership property from estate taxes when it passes to the next generation. If such arrangements were permissible, then why not simply repeal the estate tax? If everyone planned carefully enough, they could form partnerships with beneficiaries in lower generations and avoid the tax completely. In that case, the tax would only fall on those persons who neglected to do the necessary paper work. Imposing a tax on only unplanned estates violates the principle of fairness I meant to suggest in the hypothetical case of Anna and Beth. Thus, some limiting rule would have to be constructed.

One possibility would be to limit the partnerships to two people in the same generation, with generation defined in terms of years rather than family relationships. For couples who are in spousal or similar relationships but who fall outside the generation limits, we might exempt a certain amount of property or reduce the tax rate based on the number of years the couple has been together or shared the property via the partnership agreement. The concept here is that ownership rights do vest over time when people agree to share property ownership.[148] Alternatively, we might simply bar such arrangements between parents and children or other related parties of different generations who are barred from the marriage relationship because of the family relationship.[149]

While my immediate focus is on same-sex couples, my critique of the estate tax has in part been based on the notion that, despite the form in which legal title may be held, property is often owned in other senses by partners or family members who share in the upkeep and the use of the property. Just as Anna and Beth's sharing of

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parent's business expecting to receive an ownership interest, how should we treat the child's participation efforts? If she receives a property interest in exchange for services, then under standard tax theory, she ought to have income and the parent ought to have a deduction. By contrast, a spouse who works in the home in exchange for a property transfer does not have income. My "personal tax partnership," in effect, extends this ability to earn property rights via services free from the income tax to unmarried couples. We may not want to extend that ability further to parent/children households or relationships. But in all honesty, I have trouble identifying a principle that would draw a line excluding such households.

[146]Other scholars have wrestled with this problem of how to structure a tax alternative to marriage such that it resists tax avoidance, but also reaches the right couples. Joan Ellsworth, for example, would limit her TUMS proposal to cohabitating couples. *See Prescribing TUMS supra* note 141, at 169. While there is some superficial appeal to such a limiting rule, I worry about those long term comitted partners who because of competing job opportunities may not be living together. Or perhaps they would qualify so long as they cohabited in both homes. The fact of cohabitation suggests greater opportunity for real sharing. But how many years should be required? What happens when one partner moves to a nursing home or intensive care facility at the end of life? How will the IRS determine whether or not a couple is in fact cohabiting? Ellsworth suggests a five year minimum before allowing the establishment of a TUMS. *Id.* at 173.

[147]*Id.*

[148]*See* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 93 (1990) (proposing that the tax rate on spouses might vary with the length of the relationship).

[149]*E.g.*, Uncles and nieces or aunts and nieces.

life and property supports the notion that they should both be viewed as owners for estate tax purposes, a parent and a child might share a home or a business in much the same way and for just as many years. In such cases, I see no reason to ignore the non-legal title ownership of the child.[150]

Just as marriage has been an inaccurate bright line for determining who shares what, who owns what, and who ought to be exempt from the estate tax, alternatives to marriage appear to suffer from some of the same problems. Tax partnerships of the sort I have suggested are likely to be either overinclusive (i.e., include tax avoiders who don't really share) or underinclusive (i.e., not include true sharers who simply fail to sign the legal papers). While this option, the personal tax partnership, is in some ways the most attractive of the seven because it can accord tax significance to sharers who *ought* to be treated as co-owners of property, it may also be the most difficult option to develop.

XIII. Conclusion

The estate tax is supposed to be a tax on the property of a decedent. As such, it has been defended as a good and just tax because it taxes the dead rather than the living. However, the current estate tax is unfair because it in fact places a burden on survivors whose interests in the decedent's property ought to be enjoyed by the survivor free from tax. The plight of long-term committed lesbian and gay partners demonstrates the unfairness of this burden. I have suggested seven possible ways to either erase or reduce the burden. All of the options have strengths and weaknesses. If the estate tax is to be maintained, as I think it should be, the simplest solution would be to reduce the burden by increasing the exemption significantly, perhaps to $5 million. The most complex solution, and perhaps the fairest, if the details could be worked out, would be to allow taxpayers to form tax-free personal partnerships with significant others in which they could share intimacy and property free from tax.

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[150]*But see* the concerns I raised in *supra* note 145.