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LGBT Families, Tax Nothings

Anthony C. Infanti¹

I. Introduction

According to the proverb, “the eyes are the windows of the soul.”² One might say that, like the eyes, the law—particularly an area of public law such as tax law—is a window on our collective American soul. The tax law provides a view of both who we are as a society and what we aspire to be.³ Less proverbially (and more accurately), one might say that the tax law serves an expressive function by showcasing what the dominant group(s) in American society purport to value and how they value it.⁴ In this regard, the tax law provides insights regarding the value, if any, that the dominant group(s) in American society place on our many lesbian, gay, bisexual, and transgender (LGBT) families.⁵ To get a sense of these insights, this essay will peer into the window created by federal tax law.

¹ Associate Dean for Academic Affairs and Professor of Law, University of Pittsburgh School of Law. Thanks to the staff at the *Journal of Gender, Race & Justice* for all of their hard work in putting together a well organized conference and to the participants for an intellectually stimulating time together.

² THE YALE BOOK OF QUOTATIONS 611 (Fred R. Shapiro ed., 2006).

³ See Anthony C. Infanti, *The Ethics of Tax Cloning*, 6 FLA. TAX REV. 251, 319–20 & n.354 (2003) (discussing the view held, to differing degrees, by many comparativists and legal historians that law is a mirror of society); David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in COMPARATIVE LAW IN THE 21ST CENTURY 19, 20–29 (Andrew Harding & Esin Örüçü eds., 2002) (discussing the controversy among comparativists, legal historians, and sociologists regarding the relationship between law and society); see generally Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 441 (Mathias Reimann & Reinhard Zimmermann eds., 2006); David Nelken, *Defining and Using the Concept of Legal Culture*, in COMPARATIVE LAW: A HANDBOOK 109 (Esin Örüçü & David Nelken eds., 2007).

⁴ Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1243–49 (2008) (summarizing the Gramscian concept of “hegemony”).

⁵ According to the 2010 American Community Survey, there were approximately 594,000 same-sex households in the United States in that year. Daphne Lofquist, *Same-Sex Couple Households: American Community Survey Briefs*, U.S. CENSUS BUREAU 1 (Sept. 2011), <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>. Of these, 115,000

Before providing the obligatory roadmap of this essay's discussion of what can be seen through this window, a few words about this essay's scope are in order. Elsewhere, I have argued at length for making the federal income tax relationship neutral by allowing individuals to choose their own families for tax purposes—rather than forcing them to fit within preconceived notions of what a family ought to look like, as we do now.⁶ This essay does not directly repeat that call for reform, but it does help to fill in the background against which that call was made. Though there are many different forms of LGBT families (as there are of so-called traditional families), this essay focuses on the differential tax treatment of one subset of LGBT families; namely, those composed of a same-sex couple with children, where one spouse stays at home to care for the other spouse and their children. These families, despite their close resemblance to the prototypical nuclear family, are placed at a distinct disadvantage as compared with their traditional counterparts. Other families that depart from the traditional model of the nuclear family—whether gay or straight—are also valued less for tax purposes; however, fuller treatment of their legal predicament is beyond the scope of this essay.

With a better understanding of the scope of the instant endeavor, I will now set forth the roadmap of the discussion. In Part II, we will look through the window created by the federal tax law to observe which families it sees and values. Unsurprisingly, we will find that the federal tax law sees one basic type of family: the traditional family constructed around a different-sex married couple and their children. Although the federal tax law takes

households (or nearly 20%) “reported having children.” *Id.* at 2. (For a discussion of the problems with the data regarding same-sex couples compiled as part of the 2010 Census, see generally Martin O’Connell & Sarah Feliz, *Same-sex Couple Household Statistics from the 2010 Census* (Soc., Econ. & Hous. Statistics Div., U.S. Bureau of the Census, Working Paper No. 2011-26, 2011), available at <http://www.census.gov/hhes/samesex/files/ss-report.doc>.) More recently, the Williams Institute released a report analyzing trends in data from the American Community Survey between 2005 and 2011. Gary J. Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005–2011*, WILLIAMS INST. (Feb. 2013), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/ss-and-ds-couples-in-acs-2005-2011/>. This report also indicates that, in 2011, nearly 20% of same-sex couples were raising children under the age of eighteen. *Id.* at 5.

Naturally, these numbers reflect only one form of LGBT family, namely, one patterned after the traditional family by being constructed around a conjugal couple.

⁶ See generally Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605.

account of recognized variants of the traditional family (e.g., a widow/er with children, single parents, and children caring for aged parents or young siblings), the more closely a family conforms to the model of the prototypical traditional family, the more the federal tax law values it. Despite being closely patterned after the traditional family form, LGBT families headed by same-sex couples are left in the federal tax law's blind spots and thus go partly or wholly unseen. Like many wholly owned business entities, LGBT families are thus treated as tax "nothings"; that is, they are disregarded for federal tax purposes.⁷

In Part III, we will explore how these LGBT families can, like disregarded business entities, sometimes make themselves visible for federal tax purposes.⁸ Unlike disregarded entities, however, LGBT families headed by same-sex couples must "misrepresent and 'carve up' their families"⁹ in order to mimic family arrangements that *are* seen by the federal tax laws—all in order to obtain a fraction of the tax benefits afforded to traditional families. It is deeply troubling to ask same-sex couples to deny lived reality by misrepresenting themselves and the composition of their families on a form signed under penalty of perjury.¹⁰ Yet, the focus of this essay is not on the tax disadvantages that these LGBT families experience because of the need either to rearrange their families on a single return or to split their

⁷ *E.g.*, David S. Miller, *The Tax Nothing*, 74 TAX NOTES 619 (1997).

⁸ *See* Treas. Reg. § 301.7701-2(c)(iv)(B) (as amended in 2012) (treating disregarded entities as entities separate from their owners for employment tax purposes); Notice 99-6, 1999-1 C.B. 321 (indicating that some taxpayers urged the Internal Revenue Service to treat disregarded entities as separate entities for employment tax purposes, notwithstanding that this was contrary to Treasury Regulations then in effect); T.D. 9356, 2007-2 C.B. 675 (siding with those who urged separate treatment and promulgating the regulation cited at the beginning of this footnote on the ground that it would ease administration of the tax laws by the Internal Revenue Service and compliance by taxpayers).

⁹ MOVEMENT ADVANCEMENT PROJECT ET AL., UNEQUAL TAXATION AND UNDUE BURDENS FOR LGBT FAMILIES 5 (2012), *available at* <http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf>.

¹⁰ *See id.* at 9 (discussing how LGBT families must split themselves up in order to be seen by the tax laws); *Tax Considerations for Same-Sex Couples*, LAMBDA LEGAL (Jan. 18, 2012), <http://www.lambdalegal.org/publications/tax-considerations> (discussing the conundrum faced by married same-sex couples who must claim "single" filing status on their federal income tax returns, and providing them with a document that they can attach to their returns explaining that they are actually married but are filing "single" because of the federal Defense of Marriage Act).

families up among different tax returns; those disadvantages are well known.¹¹ Instead, the focus here is on the specific manner in which these LGBT families are encouraged to rearrange or carve themselves up in order to be seen and obtain federal tax benefits.

The contribution of this essay to the symposium *Modern Families: Changing Families, Challenging Laws* is to explore the rhetorical and psychological price that LGBT families must pay in order to be seen by the federal tax laws. To obtain maximum tax advantages, LGBT families with a stay-at-home spouse must reorder themselves so that one spouse is the “taxpayer” who files a return claiming the other spouse and the couple’s children as “dependents.”¹² In Part IV, this essay discusses how, in a society that prizes autonomy and self-reliance,¹³ this reordering requires same-sex couples to participate in their own stigmatization merely to gain access to a fraction of the tax benefits afforded to traditional families. Although a case currently pending before the U.S. Supreme Court appears to hold the promise of ending the need for this self-stigmatization,¹⁴ Part V explains why this promise may not turn out to be a reality. Part VI contains brief concluding remarks.

II. Tax Families

The federal income, gift, and estate tax laws see only one type of family: the traditional family. Through different lenses, the tax laws see the traditional family either at its core (i.e., the married different-sex couple), as the nuclear family (i.e., the core plus children), or as the extended family (i.e., the nuclear family plus other blood or adoptive/adopted relatives, at varying degrees of inclusivity). For all of the different permutations of the traditional

¹¹ See generally MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 9.

¹² *Claiming an Unmarried Partner as a Dependent on Your Tax Return*, NOLO (last visited Mar. 27, 2013), www.nolo.com/legal-encyclopedia/claiming-unmarried-partner-dependent-tax-29735.html; Alden Wicker, *Your Taxes: If You’re a Same-Sex Married Couple...*, LEARNVEST (Mar. 8, 2012), <http://www.learnvest.com/knowledge-center/your-taxes-if-youre-a-same-sex-married-couple/>; see Richard M. Horwood et al., *Estate Planning for the Unmarried Adult*, Tax Mgm’t Portfolio (BNA) No. 813, § III(C)(1)(a) (2013) (discussing how one domestic partner can qualify as the “dependent” of the other); Jeffrey A. Zaluda, *A “Spouse” by Any Other Name Is Not Necessarily a “Spouse,”* 34 TAX MGMT EST., GIFTS & TR. J. 178 (2009) (same).

¹³ See generally MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005).

¹⁴ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 2012 U.S. LEXIS 9413 (Dec. 7, 2012).

family that it sees, the federal tax laws turn a blind eye to LGBT families—especially those that are most closely patterned after the prototypical traditional family. In this Part, I provide a brief survey of the different ways that the federal tax laws see the traditional family before addressing their failure to see LGBT families.

A. Seeing the “Core”¹⁵

For federal income tax purposes, the only collective, personal¹⁶ taxable unit is the married different-sex couple.¹⁷ All other individual taxpayers file

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[P]rivacy has not been awarded to just any group considering itself a family. The contour of the family entitled to protection through privacy has historically been defined as the reproductive unit of husband and wife, giving primacy to the marital tie. It was anticipated that this basic pairing would eventually be complemented by the addition of children. ... Extended-family members, such as elderly parents or unmarried siblings, may also have been incorporated into the family once its basic tie was forged. The legitimate family—the one entitled to privacy protection—however, was defined in the first instance through marriage.

FINEMAN, *supra* note 13, at 110.

¹⁶ As opposed to business. For example, partnerships and corporations can be tax(able) units. I.R.C. §§ 11 (imposing tax on corporations), 702(b) (determining the character of partnership items at the partnership level), 703 (requiring taxable income to be computed at the partnership level and requiring many elections to be made at the partnership level), 6031 (requiring partnerships to file tax returns), 6221–6234 (auditing partnership items at the partnership level), 7704 (treating publicly traded partnerships as corporations for federal tax purposes) (LEXIS through Jan. 15, 2013).

¹⁷ *Id.* § 6013. For this purpose, the Internal Revenue Service has indicated that a different-sex couple that has entered into a civil union or domestic partnership that is legally equivalent to marriage may also file jointly. Amy S. Elliott, *IRS Memo Indicates Civil Unions Are Marriages for Tax Purposes*, 133 TAX NOTES 794 (2011). For the sake of simplicity, in this essay all different-sex couples who are treated as “married” for federal tax purposes will be referred to as “married different-sex couples” regardless of the label applied to their relationship.

The filing of a joint return is elective; however, the vast majority of married different-sex couples choose to file jointly. See I.R.S. Pub. No. 1304, *Individual Income Tax Returns 2010*, at 39–40 tbl.1.2 (2012), available at <http://www.irs.gov/pub/irs-soi/10inalcr.pdf> (indicating that, for taxable year

their own, separate income tax returns. The federal gift and estate taxes do not permit the filing of joint returns by any taxpayer.¹⁸ Nonetheless, both treat the married different-sex couple as a unit by refraining from taxing transfers of property until the property leaves the marital unit.¹⁹ In addition, for gift tax purposes, married different-sex couples are permitted to split their gifts to third parties between them.²⁰ A report from the Committee on Ways and Means of the U.S. House of Representatives articulates the policy underlying this treatment, stating that, “[i]n general, it is inappropriate to tax transfers between spouses. This policy ... reflects the fact that *a husband and wife are a single economic unit*.”²¹ This policy is so deeply entrenched that the federal income, gift, and estate taxes all continue to see the married different-sex couple as a unit even after the marriage has ended due to divorce.²²

Even though the tax laws see all married different-sex couples, they value certain of these couples more than others. For couples who adhere to the model of the working husband and stay-at-home wife, the federal income

2010, the number of married filing jointly returns was 53,526,090 while the number of married filing separately returns was 2,532,292). As of this writing, all same-sex couples (whether married or in an equivalent relationship) are prohibited from filing a joint federal income tax return, whether they wish to or not. 1 U.S.C. § 7 (LEXIS through Jan. 15, 2013). For a discussion of the possibility that this provision may be struck down on constitutional grounds, see *infra* Part V.

¹⁸ I.R.C. §§ 6018, 6019.

¹⁹ *Id.* §§ 2056, 2523 (permitting the tax-free transfer of property between different-sex spouses). The income tax similarly permits the tax-free transfer of property between different-sex spouses—and, in some cases, former different-sex spouses—regardless of whether the couple files their tax return together or separately (indeed, once divorced a formerly married different-sex couple ceases to be eligible to file a joint federal income tax return). *Id.* § 1041; Treas. Reg. § 1.6013-4(a) (as amended in 2002) (flush language).

²⁰ I.R.C. § 2513 (permitting married different-sex spouses to split gifts).

²¹ H.R. REP. NO. 98-432, pt. 2, at 1491 (1984) (emphasis added).

²² I.R.C. §§ 71, 215 (dealing with the taxation of alimony payments and together continuing the income-splitting privilege associated with the joint federal income tax return after divorce); 1041(a)(2) (no recognition of gain or loss on the transfer of property to a former spouse incident to divorce); 2516 (likewise exempting property settlements incident to divorce from gift tax); 2043(b)(2) (importing the rules of § 2516 into the estate tax); see Temp. Treas. Reg. § 1.1041-1T, Q&A (6) (as amended in 2003) (flush language) (“a transfer of property occurring not more than one year after the date on which the marriage ceases need not be related to the cessation of the marriage to qualify for section 1041 treatment”).

tax rewards them with a “marriage bonus.” In other words, the husband will pay less tax on his income than if he had remained single because the federal tax laws allow him to split his income with his wife (for tax purposes only—actual sharing is not required).²³ In contrast, the federal income tax imposes a “marriage penalty” on those couples who depart from this model by having both spouses out in the work force earning relatively equal amounts. Splitting income does not help these dual-earner couples, and the husband and wife often end up paying more tax than if they had remained single.²⁴ In this way, the federal income tax not only sees different-sex married couples, but also actively encourages one type of marital arrangement over all others (i.e., the working husband with a stay-at-home wife).

B. Seeing the Nuclear Family

The federal tax laws also see the children of different-sex married couples as an inextricable part of the family unit. For example, to prevent abuse, the federal income tax will, under some circumstances, aggregate the income of children with that of their parents. The purpose of this “kiddie” tax is to prevent parents from dividing their investment income among their minor children in order to lower their own tax bills by obtaining access to the lower rate brackets multiple times (i.e., as many times as the number of children that they have).²⁵ The kiddie tax combats this abuse by either taxing the child’s investment income at the parent’s marginal tax rate or by having the parents report the child’s investment income on their own tax return.²⁶ In either case, this provision creates a quasi-collective taxable unit that can include the entire nuclear family.²⁷

At the same time, the federal income tax provides numerous tax benefits to the nuclear family, including additional personal exemptions for dependent children, the child tax credit, the dependent care assistance credit, an exclusion for employer-provided dependent care assistance programs, an expanded earned income credit for families with children, a credit for

²³ BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 111.3.2(1), *available at* 1997 WL 440072.

²⁴ *Id.*

²⁵ I.R.C. § 1(g); *see* BITTKER & LOKKEN, *supra* note 23, ¶ 111.3.8, *available at* 1997 WL 440072.

²⁶ I.R.C. § 1(g)(1), (3), (4), (7).

²⁷ *Cf. id.* § 1(g)(5) (providing rules for determining the taxation of the child’s investment income if the child’s parents are unmarried or file separate returns).

adoption expenses, and tax benefits for educational expenses.²⁸ Furthermore, the federal income tax allows employers to provide a number of tax-free fringe benefits to the spouses and dependents of their employees. Chief among these benefits is tax-free health insurance coverage.²⁹ In addition, employers can provide to employees, their spouses (including widows and widowers), and their dependent children the following benefits free of income tax: (1) no-additional-cost services (e.g., an airline can provide standby flights on its planes), (2) qualified employee discounts (e.g., a clothing retailer can provide clothing at a discount), and (3) use of on-premises athletic facilities.³⁰ (And, foreshadowing the discussion in the next section of this Part, the federal income tax allows airlines to provide standby flights to their employees' parents free of income tax as well.³¹) Naturally, this listing of tax-free fringe benefits is not exhaustive.³²

²⁸ *Id.* §§ 21, 23, 24, 32, 129, 151. For a discussion of how LGBT families often experience these provisions differently (or benefit from them not at all), see generally MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 9.

The credit for adoption expenses is one example of a provision where nontraditional (i.e., legally unseen) families have an advantage over traditional families. Normally, expenses incurred in connection with stepparent adoptions are ineligible for this credit. I.R.C. § 23(d)(1)(C). But because the federal tax laws do not see LGBT families, one same-sex spouse's adoption of the other's children through a second-parent adoption should escape this prohibition because of the lack of a federally recognized spousal relationship. To the contrary, gay couples who use a surrogate to aid them in family formation will find that they are completely denied this credit. *Id.* § 23(d)(1)(B). Infertile married different-sex couples are likewise denied the adoption credit; however, that denial is premised on the assumption that these couples will be able to deduct surrogacy-related expenses as medical expenses. Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1159–60 (2004).

²⁹ I.R.C. §§ 105, 106; see Treas. Reg. §§ 1.106-1 (1960) (indicating that spouses and dependents are also covered by the § 106 exclusion); Notice 2004-79, 2004-49 I.R.B. 898 (indicating that the Internal Revenue Service intends to conform the definition of dependent in Treas. Reg. § 1.106-1 with that in § 105(b) and permitting taxpayers to rely on the notice pending the issuance of those regulations).

³⁰ I.R.C. § 132(a)(1), (2), (h)(1), (2), (j)(4); see Treas. Reg. § 1.132-1(b)(1), (3) (as amended in 1993) (explaining inclusion of family members in coverage of this exclusion for certain fringe benefits), -2 (1989) (explaining no-additional-cost services), -3 (1989) (explaining qualified employee discounts).

³¹ I.R.C. § 132(h)(3).

³² See, e.g., *id.* §§ 117(d), 119, 132(g).

The federal income tax also continues to see the entire nuclear family in other ways after one of the different-sex spouses passes away. For example, a surviving spouse with a dependent child will still use the rate schedule for married taxpayers filing jointly during the two taxable years following the year in which the decedent spouse passed away.³³ During the same two-year period, a surviving spouse likewise receives the same standard deduction as a married couple filing jointly, the same exclusion for gain on the sale of a principal residence, and the same increased threshold for the application of the overall limitation on itemized deductions.³⁴

Following this two-year period, a surviving spouse with dependent children will normally qualify for head of household status.³⁵ The rate schedule for heads of household was enacted in 1951 to recognize that unmarried persons with dependents—particularly widows and widowers—have family responsibilities similar to those of married different-sex couples.³⁶ Although less beneficial than the married filing jointly rate schedule, the head of household rate schedule was originally designed to “produce[] a tax liability for a given amount that was midway between the liability of a single person and that of a married couple filing a joint return.”³⁷ Head of household status continues to provide significantly better rates than those afforded to “single” taxpayers. Just to pick a random example from the 2012 tax tables, a taxpayer with \$50,000 of taxable income who files as single owes \$8,536 of tax while a taxpayer with the same taxable income who files as head of household owes \$7,151 of tax, for a reduction in the tax due of more than 16%.³⁸ Even this example may understate the benefit because head of household status also comes with a larger standard deduction, meaning that the difference in tax rate is likely even larger than it seems.³⁹ The more advantageous rate schedule and standard deduction are not limited

³³ *Id.* §§ 1(a)(2), 2(a).

³⁴ *Id.* §§ 63(c)(2)(A)(ii), 68(b)(1)(A), 121(b)(4).

³⁵ *Id.* § 2(b).

³⁶ S. REP. NO. 82-871, at 10 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1968, 1978–79 (“The hardship appears particularly severe in the case of the individual with children to raise who, upon the death of his spouse, finds himself in the position not only of being denied the spouse’s aid in raising the children, but under present law also may find his tax load much heavier.”); H.R. REP. NO. 82-586, at 11 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1781, 1790–91 (same); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1417–18 (1975); Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 273–74 (2002).

³⁷ Bittker, *supra* note 36, at 1417.

³⁸ I.R.S. Instructions for 2012 Form 1040, at 85 (2013), *available at* <http://www.irs.gov/pub/irs-pdf/i1040gi.pdf>.

³⁹ I.R.C. § 63(c)(2). For an illustration, see *infra* Tables 1–3.

to surviving spouses or formerly married persons; however, as we will see in Part III, it fails to apply to many LGBT families.

C. Seeing the Extended Family

Expanding the traditional family beyond its nuclear core, the federal income tax laws often recognize that other relatives (e.g., brothers and sisters, parents, grandparents, and grandchildren),⁴⁰ even though not constituting an economic unit, will act together to advance each other's interests for tax purposes in ways that unrelated persons would not. For example, family members might sell each other assets in order to recognize losses and reduce taxes without losing control of the assets.⁴¹ Or they might acquire each other's debts at a discount (and become each other's creditors) to avoid the recognition of discharge of indebtedness income.⁴² Or they might engage in like-kind exchanges of property to defer the taxation of gain on property that they wish to sell (and, in some cases, to simultaneously accelerate the recognition of loss on the other property involved in the exchange).⁴³

The federal estate and gift tax laws likewise recognize that taxpayers will often aggressively attempt to reduce their transfer tax burden in order to maximize the amount of wealth transferred to their relatives. For example, there are special valuation rules that disregard attempts at "freezing" the transfer tax value of an interest in a corporation or partnership. Such "freezes" occur when a taxpayer transfers an interest (e.g., common stock) by gift to a family member while retaining an interest (e.g., preferred stock) whose value is exaggerated simply to reduce the amount of the taxable portion of the transfer—the same portion of the transfer that is later insulated from estate tax upon the eventual death of the taxpayer (hence, the notion of a "freeze").⁴⁴ The federal estate tax also aggregates family ownership of a corporation (borrowing rules from the income tax) for purposes of determining whether the retention of voting rights upon the transfer of stock is tantamount to the retention of the enjoyment of the property, triggering the property's inclusion in the transferor's gross estate.⁴⁵

⁴⁰ I.R.C. §§ 267(c)(4), 318(a)(1).

⁴¹ *Id.* § 267(a).

⁴² *Id.* § 108(e)(4).

⁴³ *Id.* § 1031(f).

⁴⁴ *Id.* § 2701; *see also id.* §§ 2702–2704 (applying to transfers in trust, buy-sell agreements, and the lapse of voting or liquidation rights involving family members).

⁴⁵ *Id.* § 2036(a)(1), (b). As applied by the Internal Revenue Service, § 2036, again borrowing rules from the income tax, also takes family relationships into account in determining whether a power to remove and replace a trustee will be deemed "a reservation of the trustee's discretionary powers of

In other situations, Congress singles out the extended traditional family for tax benefits. For example, for federal estate tax purposes, certain property used in a farming or other business qualifies for advantageous valuation rules—but only if the property passes to a member of the decedent’s extended family (i.e., the taxpayer’s spouse, the taxpayer’s ancestors, the taxpayer’s lineal descendants (and their spouses), the lineal descendants of the taxpayer’s spouse (and their spouses), or the lineal descendants (and spouses) of the taxpayer’s parents).⁴⁶ Congress has also been concerned with ensuring that tax benefits are afforded to taxpayers even if they diffuse ownership of property within their families. For example, for federal income tax purposes, the 100-shareholder limit that applies to small business corporations wishing to be taxed on a pass-through basis (i.e., only at the shareholder level, rather than at both the corporate and shareholder levels) treats all members of a family—six generations worth, to boot—as a single shareholder.⁴⁷

III. Tax “Dependents”

As the discussion in Part II suggests, many tax provisions do expand the range of families who are seen to include less traditional family forms. For instance, single parent families, a child caring for elderly parents, an adult sibling caring for minor siblings, and others are accounted for through provisions that see a taxpayer and her “dependents.” Most provisions that see these other family forms afford taxpayers beneficial deductions, credits, and exclusions from gross income.⁴⁸ Less often, these provisions deny benefits to taxpayers unless a payment is made to someone who is *not* a dependent (i.e., someone who is not a recognized member of the taxpayer’s family), typically to prevent abuse.⁴⁹

As we will explore in this Part, LGBT families—particularly, those composed of a same-sex couple with children—do not easily fall within the ambit of even this expanded vision of the family. Nonetheless, LGBT families

distribution over the property transferred by the decedent-grantor to the trust.” Rev. Rul. 95-58, 1995-2 C.B. 191. For a discussion of both of these provisions and how they define family, see Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 7–15, 28–29, 30–32 (2005).

⁴⁶ I.R.C. § 2032A(e)(2). For a discussion of this rules, see Crawford, *supra* note 45, at 16–23.

⁴⁷ I.R.C. § 1361(c)(1).

⁴⁸ For a catalog of these provisions, see Anthony C. Infanti, *Inequitable Administration: Documenting Family for Tax Purposes*, 22 COLUM. J. GENDER & L. 329, 354–64, 367–70 (2011).

⁴⁹ *Id.* at 365–70.

are often advised to realign their families in ways that allow one member of the family to claim other family members as dependents. Through such realignment, part (or sometimes all) of an LGBT family can make itself visible for tax purposes and become eligible for some (though not all) of the tax benefits afforded to traditional families.⁵⁰

Although it is not entirely confined to traditional family relationships, the federal income tax definition of a “dependent” is permeated by the idea of the traditional family. For federal income tax purposes, two categories of individuals can qualify as “dependents”: a taxpayer’s “qualifying child” or a taxpayer’s “qualifying relative.”⁵¹ In the following paragraphs, I provide a brief description of each of these categories of dependents.

A. Qualifying Child

A “qualifying child” includes a taxpayer’s son, daughter, stepson, stepdaughter, adopted son, adopted daughter, or foster child, as well as any of their descendants.⁵² A qualifying child also includes the taxpayer’s brother, sister, stepbrother, stepsister, half-brother, half-sister, adopted brother, or adopted sister, as well as any of their descendants.⁵³ In addition to having the correct type of familial relationship with the taxpayer, the qualifying child must (1) share the same principal place of abode as the taxpayer for more than one-half of the taxable year; (2) be younger than the taxpayer; (3) be under the age of nineteen (or, if a student, under the age of twenty-four), unless permanently and totally disabled; (4) not have provided more than one-half of his/her own support during the year; and (5) not have filed a joint return with his/her spouse.⁵⁴ Other parent–child (or quasi-parent–child) relationships simply are not recognized for this purpose.⁵⁵

In many states, LGBT families with children may be surprised to learn that their children are not “qualifying children” of both parents due to the absence of a legally recognized relationship between the children and one of the parents. Take, for example, Helen and Mary, a hypothetical lesbian couple with children biologically related to Mary. The couple, who periodically throughout this essay will help to illustrate the concrete impact of tax provisions affecting LGBT families, live in a state where their

⁵⁰ See *supra* note 12.

⁵¹ I.R.C. § 152(a).

⁵² *Id.* § 152(c)(2)(A) & (f)(1).

⁵³ *Id.* § 152(c)(2)(B) & (f)(1), (4).

⁵⁴ *Id.* § 152(c)(1)(B)–(E).

⁵⁵ See *Begay v. Comm’r*, 105 T.C.M. (CCH) 1114 (2013) (rejecting a constitutional challenge to the definition of “qualifying child” brought by a Navajo elder with clan-based obligations to a child who did not fit squarely within the relationship requirements of § 152(c)).

relationship is not legally recognized and second-parent adoption is not permitted. Consequently, Helen has been left without any legal ties to the couple's children. Helen and Mary may (or may not) be surprised to learn that their children are *only* qualifying children of Mary and *not* of Helen.⁵⁶ This is important because, notwithstanding the suspicion with which the courts view classifications based on a child's legitimacy,⁵⁷ some federal tax provisions cover *only* qualifying children and *not* dependent children who are merely "qualifying relatives" (if that).⁵⁸ In this way, we once again observe the federal tax laws favoring certain types of families—those that hew most closely to the traditional family model—over all others.

Among the important tax benefits that are affected by this distinction between "qualifying" and "other" children are the child credit, the earned income credit, the dependent care assistance credit, and the exclusion from

⁵⁶ See *Smith v. Comm'r*, No. 10405-07, T.C. Summ. Op. 2008-125 (Sept. 18, 2008) (holding that a taxpayer who had married in a religious ceremony but who had not obtained a marriage license in a state that does not recognize common law marriage could not claim an additional personal exemption or the child tax credit with respect to her spouse's children because they were his qualifying children and not her own); Cain, *supra* note 36, at 268 ("Non-traditional families include unmarried heterosexual parents, sometimes living together, as well as same sex partners who co-parent children that are sometimes legally recognized as the children of both parents. In all of these non-traditional families, the children are classified as nonmarital—historically known as illegitimate or bastard."); Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387, 389–90 (2002) (indicating that the federal tax laws rely upon state law for making determinations of marital and family status); *Parenting Laws: Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN (Dec. 14, 2012), http://www.hrc.org/files/assets/resources/parenting_laws_2nd.pdf (indicating that only eighteen states and the District of Columbia permit second-parent adoptions statewide; notably, all but two of these states legally recognize same-sex marriages or same-sex civil unions or domestic partnerships that are the legal equivalent of a marriage, see *Marriage Equality and Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN (Dec. 10, 2012), http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map.pdf).

⁵⁷ Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 322–25 (2010); Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2379–85 (2007).

⁵⁸ See *infra* text accompanying note 75.

gross income for employer-provided dependent care assistance—all of which turn on whether a taxpayer has one or more qualifying children.⁵⁹ For instance, in *Leonard v. Commissioner*,⁶⁰ a taxpayer supported a disabled “friend” of the same sex (who had lived with her for more than a decade) and the friend’s grandchildren. The grandchildren qualified as the taxpayer’s dependents because they met the definition of a “qualifying relative” (described below).⁶¹ Nonetheless, the taxpayer was ineligible to claim the dependent care assistance credit, the child credit, and the earned income credit—all because the grandchildren were not her “qualifying children,” as defined above.⁶² Returning to our example, if Mary remains in the home to care for the children and has no income, the ability to claim the dependent care assistance credit, to participate in an employer-provided dependent care assistance program, to claim the child tax credit, and to claim (in whole or in part) the earned income credit will simply be lost. For purposes of these provisions, the federal tax laws turn this intact LGBT family into a tax nothing—it is as if this family did not exist at all.

If Mary and Helen live in a state that either (1) recognizes their relationship with each other and with their children (e.g., through a presumption of parenthood) or (2) refuses to recognize their relationship but allows both parents to establish a legal relationship with the children (e.g., through second-parent adoption), then the children should be qualifying

⁵⁹ I.R.C. §§ 21, 24, 32, 129; I.R.S. Chief Couns. Advice 2008-12-024 (Mar. 21, 2008); see Treas. Reg. § 1.21-1(b)(1)(i) (2007) (explaining the reference to § 152(a)(1) in § 21(b)(1)(A) as referring specifically to the definition of “qualifying child”); see *generally* MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 9, at 6–7. The dependent care assistance credit is nonrefundable (meaning that someone with no income tax liability will have no use for the credit) and employer-provided dependent care assistance programs necessarily apply only to those who are employed. I.R.C. § 26. In addition, a taxpayer must have earned income to claim the refundable portion of the child tax credit and to claim the earned income credit at all. *Id.* §§ 24(d), 32(a), (c)(2).

Certain individuals without qualifying children can claim the earned income credit; however, the credit for these individuals is much smaller and is phased out at very low levels of income. I.R.C. § 32(b), (c)(1)(A)(ii). For example, in 2012, taxpayers without a qualifying child became ineligible for the earned income credit when their adjusted gross income reached \$13,980 (or \$19,190 for married different-sex couples filing a joint return). I.R.S. Instructions for 2012 Form 1040, *supra* note 38, at 49.

⁶⁰ No. 12719-07S, 2008 Tax Ct. Summary LEXIS 141 (Nov. 4, 2008).

⁶¹ *Id.* at *6–9.

⁶² *Id.* at *10–13.

children of both women.⁶³ Nevertheless, only one of them will be able to claim the children as dependents.⁶⁴ Given that this is an intact LGBT family, Helen will claim the children as dependents because she has the higher adjusted gross income.⁶⁵ Moreover, because the children are Helen's qualifying children, she will be able to file using head of household status.⁶⁶ In this situation, even though Helen and Mary's state sees an intact family, the federal tax laws would refuse to see this reality and instead would insist that they reconfigure their family. Precisely how their family would be reconfigured will have to await the discussion in Part IV, regarding whether the federal tax laws will see any connection at all between Helen and Mary or will instead treat them as legal strangers.

B. Qualifying Relative

1. The Rules

⁶³ See *Answers to Frequently Asked Questions for Same-Sex Couples*, INTERNAL REVENUE SERV., at Q&A-8 (Aug. 4, 2012), <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Couples> (indicating that the Internal Revenue Service will treat a member of a same-sex couple as a stepparent of a child if that individual is treated as a stepparent of the child under state law).

⁶⁴ *Id.* at Q&A-3.

Certain provisions allow a child to be treated as the dependent of both parents. I.R.C. §§ 105(b), 132(h)(2)(B), 213(d)(5); see *id.* § 152(f)(7). However, these provisions apply only to children who fall within the special rule in § 152(e) for children of divorced or separated parents. *Id.* § 152(e)(1)(A). For an intact LGBT family such as Helen and Mary's, these provisions are of no help because their children will not fall within § 152(e).

⁶⁵ I.R.C. § 152(c)(4)(B). If Helen and Mary live in a community property state that legally recognizes their relationship, then the federal tax laws will respect the application of the state's community property laws and each of them will report one-half of the total community income. I.R.S. Chief Couns. Advice 2010-21-050 (May 5, 2010); I.R.S. Priv. Ltr. Rul. 2010-21-048 (May 5, 2010). If neither has a higher adjusted gross income because all of their income is community income, then it appears that either (but not both) of them can claim the child as a dependent. *Answers to Frequently Asked Questions for Same-Sex Couples*, *supra* note 63, at Q&A-3. Though this informal guidance appears to always afford same-sex couples the ability to choose which of them will claim their children as dependents, this position contravenes the plain language of § 152. See I.R.C. § 152(c)(4)(B), (e). The application of community property laws might, however, adversely affect Helen's ability to claim head of household status. See *infra* note 66 and accompanying text and note 81.

⁶⁶ I.R.C. § 2(b).

A “qualifying relative” includes most of the same relationships covered under the definition of qualifying child.⁶⁷ Other qualifying relatives include the taxpayer’s father and mother, as well as their ancestors and their brothers and sisters.⁶⁸ The term further includes the taxpayer’s stepfather or stepmother and the taxpayer’s in-laws (i.e., father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, and daughter-in-law).⁶⁹ But all of the foregoing categories of relatives will be qualifying relatives only if their income is below the exemption amount (\$3,800 in 2012) and if the taxpayer provides more than half of their support.⁷⁰

There is one final category of persons included within the group of qualifying relatives, even though these persons bear no obvious (however attenuated) family relationship to the taxpayer. The class of individuals falling within this category is much broader than the others because it is not confined to familial relationships recognized under the law; however, the requirements that apply in order for this class of individuals to fall within the definition of “qualifying relative” are stricter than those that apply to more conventional familial relationships. This category includes any individual (other than the taxpayer’s different-sex spouse) who meets the income and support requirements mentioned above *and* who (1) has the same principal place of abode as the taxpayer and (2) is a member of the taxpayer’s household for the entire year.⁷¹ The taxpayer must both maintain and occupy this household.⁷² A taxpayer is considered to maintain a household only if the taxpayer furnishes over half the cost of maintaining the household.⁷³

⁶⁷ Compare *id.* § 152(c)(2) with *id.* § 152(d)(2)(A)–(B), (E). The definition of a “qualifying relative” includes the son or daughter of a brother or sister, but, unlike the definition of “qualifying child,” it does not include more distant descendants. *Id.* § 152(d)(2)(E).

⁶⁸ *Id.* § 152(d)(2)(C), (F).

⁶⁹ *Id.* § 152(d)(2)(D), (G).

⁷⁰ *Id.* § 152(d)(1)(B)–(C); Rev. Proc. 2011-52, § 3.19, 2011-2 C.B. 701.

⁷¹ I.R.C. § 152(d)(1)(B)–(C), (2)(H). The prohibition against claiming spouses as dependents applies without regard to the general convention of testing marital status at the close of the taxable year. *Id.* § 152(d)(2)(H) (specifically disregarding the rules of § 7703). Thus, if the individual is the taxpayer’s spouse “at any time during the taxable year,” then the taxpayer cannot claim the individual as a dependent. *Id.*

⁷² Treas. Reg. § 1.152-1(b) (as amended in 1971).

⁷³ I.R.C. § 2(b)(1) (flush language); Rev. Rul. 64-41, 1964-1 C.B. 84; see *Leonard v. Comm’r*, No. 12719–07S, 2008 Tax Ct. Summary LEXIS 141, at *7 (Nov. 4, 2008) (relying upon these authorities when interpreting § 152(d)(2)(H)).

There is an exception to the definition of “qualifying relative” that is designed to ensure that a child is claimed as the dependent of only one taxpayer. Under this exception, a child who is one taxpayer’s qualifying child is specifically prohibited from being another taxpayer’s qualifying relative.⁷⁴ The Internal Revenue Service has, however, indicated that if the taxpayer with respect to whom a child is a qualifying child is not required to—and does not—file a federal income tax return, then another taxpayer may claim that child as a qualifying relative.⁷⁵

2. The Repercussions

These rules compound the problems that many LGBT families encounter when applying the definition of “qualifying child.” To return to our hypothetical lesbian couple, we observed in the previous section that, absent a legally recognized relationship, Mary and Helen’s children are not qualifying children of Helen (and, therefore, cannot be claimed as her dependents under that rubric). These children will be Helen’s qualifying relatives (and, therefore, can be claimed as her dependents) only if: (1) they have income below the exemption amount, (2) have the same principal place of abode as Helen, (3) are members of Helen’s household for the entire taxable year (and Helen must furnish over half the cost of maintaining that household), and (4) receive more than half of their support from Helen. Furthermore, for Helen to claim the children as her dependents, Mary must earn so little income as not to be required to file a federal income tax return; otherwise, the rule prohibiting the children from being claimed as dependents by both Helen and Mary (because the children are Mary’s qualifying children) would prohibit Helen from claiming the children as her dependents (and effectively permit only Mary to claim them as dependents).

If this panoply of conditions is satisfied, then Helen will be able to claim the children as her dependents. Yet, while this LGBT family will gain some of the tax benefits afforded to traditional families, we must not lose sight of the fact that this LGBT family will, in the process, lose the tax benefits described in the previous section that are limited to taxpayers with qualifying children (i.e., the child credit, the earned income credit, the dependent care assistance credit, and the exclusion from gross income for employer-provided dependent care assistance programs). Moreover, because the children will qualify as Helen’s dependents only under the final, broad

⁷⁴ I.R.C. § 152(d)(1)(D).

⁷⁵ Notice 2008-5, 2008-1 C.B. 256 (indicating that the mere fact that the other taxpayer files a return to obtain a refund of withheld income taxes will not count as filing a return for this purpose, but claiming the earned income credit on that return will void this exception); see *Leonard*, 2008 Tax Ct. Summary LEXIS 141, at *9 (approving of this position).

category for nonrelatives, Helen will be prohibited from using the more generous head of household rate schedule and standard deduction and will instead be relegated to the less generous rate schedule and standard deduction for “single” taxpayers.⁷⁶

In contrast, if Mary were to earn sufficient income to be required to file a tax return but not be the family’s primary breadwinner, then the children could be claimed as her dependents (and *only* her dependents).⁷⁷ Accordingly, the parent who provides the majority of the child’s support (i.e., Helen) would be denied tax benefits that would normally accompany the ability to claim the child as a dependent. This could result in erosion in the value of (or even the loss of⁷⁸) the various tax deductions and exclusions from gross income that can be claimed with respect to dependents. The potential erosion in value stems from the fact that the value of a deduction (as well as the value of an exclusion from gross income, which is the equivalent of a deduction) is a function of the taxpayer’s marginal tax rate. The higher the taxpayer’s marginal tax rate, the more value a deduction or exclusion holds for the taxpayer. For example, a \$100 deduction is worth \$35 to a taxpayer with a 35% marginal tax rate but is only worth \$15 to a taxpayer with a 15% marginal tax rate. Allocating the deduction away from the higher-earning spouse to the lower-earning spouse may thus result in a reduction in the value of the tax benefit to the family. (To the contrary, if Mary’s earned income is sufficiently low, then the fact that the couple’s relationship is not legally recognized may permit her to—in the view of some, inappropriately—

⁷⁶ I.R.C. § 2(b)(3)(B)(i); *see supra* text accompanying notes 37–38. For some inexplicable reason, the Internal Revenue Service conceded in *Leonard v. Commissioner*, 2008 Tax Ct. Summary LEXIS 141, at *1–2 n.2, that the taxpayer was entitled to head of household status even though the grandchildren in that case were the taxpayer’s dependents only by reason of § 152(d)(2)(H). *Contra* I.R.S. Chief Couns. Advice 2008-12-024 (Mar. 21, 2008).

⁷⁷ *See* Patricia A. Cain, *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F. L. REV. 481, 495 (2010) (“because the partner’s child is the qualifying child of the partner, the child will no longer qualify as any sort of dependent for the taxpayer who is supporting that child”).

⁷⁸ For example, if the payment of a deductible expense is made by Helen rather than by Mary. Shifting income from Helen to Mary to pay these expenses has its own tax consequences that may make this a far less than attractive solution, even putting aside the possibility that the Internal Revenue Service might try to recast this series of steps as a direct payment by Helen of the expenses. For a discussion of the tax complexities faced by same-sex couples who pool their income and assets, *see generally* Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004).

claim the earned income credit where she and Helen would be ineligible to do so based on their combined incomes.⁷⁹)

It is little wonder then that LGBT rights and other progressive organizations have expressed dismay at the ways in which these rules turn a blind eye to intact LGBT families. In order to be seen at all, these families must break themselves apart and distort their true composition—merely to gain some of the benefits afforded to traditional (and, as we have seen, even somewhat less traditional) families:

LGBT families must misrepresent and “carve up” their families. Parents are forced to decide which parent “claims” their children for exemptions. To gain tax relief, some families must split their children between different tax returns. Other LGBT parents can only claim their children as “qualifying relatives” or cannot claim them at all. Heterosexual married families can simply file jointly, account for all children on one form, and check the exemption boxes.⁸⁰

With the stage now set, we can turn in the next Part to determine what connection (if any) the federal tax laws might see between Helen and Mary themselves. As we will explore, if the federal tax laws do see a connection between them, it will result in an even more pernicious reordering of their LGBT family—one that not only requires misrepresentation and carving up of the family but also exacts a dear psychological price by requiring the same-sex couple to be active participants in their own stigmatization.

IV. Dependency, Same-Sex Spouses, and Stigma

As described in the previous Part, the definition of “qualifying relative” is purely geographical and financial; that is, it relates to places of abode, households, amounts of income, and levels of financial support. It is entirely untethered from marital and familial bonds. This creates an opportunity for children who lack a legal relationship to one of their same-sex parents to be claimed as a dependent by that parent. As we will explore in this Part, this broad view of a “qualifying relative” likewise creates the possibility that one same-sex spouse might be able to claim the other as a dependent.⁸¹ Where

⁷⁹ Cain, *supra* note 36, at 284 n.114.

⁸⁰ MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 9, at 5.

⁸¹ The couple’s conjugal relationship will not prevent Helen from claiming Mary as a dependent because, regardless of whether Mary and Helen’s relationship is recognized for purposes of state law, they will not be considered spouses for federal tax purposes. 1 U.S.C. § 7 (LEXIS through Jan. 15, 2013); *cf.* I.R.C. § 152(d)(2)(H). There is a caveat here for same-sex couples who live in community property states and who have entered into

one same-sex spouse can claim all of the other members of the household (i.e., both her spouse and the couple's children) as dependents, LGBT families are not "carved up" for federal tax purposes, but instead are permitted to remain "intact." The question that we will explore now is the price that same-sex couples must pay to have their families seen as an intact unit for federal income tax purposes.

A. Some Numbers (Just a Few!)

Returning to our hypothetical lesbian couple, if Mary works in the home to care for Helen and the couple's children, she will likely qualify as Helen's dependent. In other words, Mary would likely have income below the exemption amount because she is not working outside the home, Helen would provide more than half of Mary's support, and, like the children, Mary would have the same principal place of abode as Helen and be a member of Helen's household for the entire taxable year.⁸² For Helen, this would open the

legally recognized relationships that bring them under the umbrella of the state's community property laws. *See Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States*, INTERNAL REVENUE SERV., at Q&A-3 (Aug. 4, 2012), <http://www.irs.gov/uac/Questions-and-Answers-for-Registered-Domestic-Partners-and-Same-Sex-Spouses-in-Community-Property-States>. In that situation, the federal tax laws will respect the application of the community property laws and each spouse will report one-half of the total community income. I.R.S. Chief Couns. Advice 2010-21-050 (May 5, 2010); I.R.S. Priv. Ltr. Rul. 2010-21-048 (May 5, 2010). In effect, this may make it impossible for the "dependent" same-sex spouse to meet the income and support tests for being a qualifying relative because he/she will be attributed half of the earnings and other community income of the same-sex spouse who is in the paid labor market. *Cf. Cain, supra* note 77, at 496 (making a similar point with regard to the ability of one same-sex spouse to claim the other as a dependent for purposes of the federal income tax provisions dealing with employer-provided health insurance). In many cases, it will also make it impossible for either of the same-sex spouses to claim head of household status, because neither will provide more than half the cost of maintaining the household. I.R.C. § 2(b)(1) (flush language); *Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States, supra*, at Q&A-2.

⁸² For this purpose, an individual cannot be treated as a member of the taxpayer's household "if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law." I.R.C. § 152(f)(3). Prior to the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), commentators expressed concern about the ability of one same-sex spouse in a state with a sodomy law to claim the other spouse as a dependent because of this exception. *E.g.*, Adam

possibility of claiming an additional personal exemption for Mary as well as the many other tax benefits associated with dependents (though, again, not head of household status unless Helen has a legal relationship with the children that makes them her qualifying children).⁸³ One important benefit of being able to claim Mary as a dependent is that Helen will be able to add Mary to her employer-provided health insurance (assuming that this option is available to her at her place of employment) without the prohibitive tax cost that would normally apply to this decision.⁸⁴ Assuming that Helen would also be able to claim the couple's children as dependents, the entire family would, in effect, appear on a single tax return, just as a nuclear family does when a married different-sex couple files a joint federal income tax return.

Or would it? The federal tax laws see different families—or no families at all—depending on the sexual orientation of the conjugal couple that is at the family's core. For instance, for an LGBT family with a stay-at-home spouse where there is no legal relationship between the breadwinner and the children, the tax return will include the entire family but be filed using “single” status. In other words, the tax laws would see no family in the traditional sense, just a single person supporting ostensible strangers. Where there is a legal relationship between the breadwinner and the children, the tax return will again include the entire LGBT family but be filed using “head of household” status—as if there were no couple at the core of the family. A similarly situated different-sex married couple would also file a tax return

Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 329, 377 (1995). Following *Lawrence*, which struck down the remaining state sodomy laws on constitutional grounds, this provision should no longer prevent one same-sex spouse from claiming the other as a dependent.

⁸³ See *supra* note 48.

⁸⁴ Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3, 8–10 (2009); see Gates, *supra* note 5, at 5 (indicating that different-sex couples are more likely to have both spouses covered by health insurance and that “same-sex couples are twice as likely as their different-sex counterparts to have only one spouse or partner insured”).

It is worth noting that the income limitation in § 152(d)(1)(B) does not apply in determining whether Mary is a dependent for purposes of the provisions relating to employer-provided health insurance. See *supra* note 29. However, same-sex couples in community property states may not qualify for this benefit because the splitting of income between them under community property law may prevent them from satisfying the support test (e.g., if all of one spouse's support is provided by the other out of community property funds). *Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States*, *supra* note 81, at Q&A-4.

that includes the entire family, but it would be filed using “married filing jointly” status—recognizing both spouses and the children for what they are.

Tables 1 through 3 provide some very simple illustrations of the effect on these families’ tax liabilities resulting from this difference in treatment. The calculations in each table are based on the following set of assumptions: Each family is composed of a conjugal couple (same-sex if filing as single or head of household and different-sex if married filing jointly) with two children (who are both qualifying children for the different-sex couple and for the same-sex couple filing using head of household status, but are not qualifying children of the taxpayer filing using single status). For the same-sex couple, the spouse working in the paid labor force can (and does) claim the stay-at-home spouse as a dependent. The different-sex couple is entitled to two personal exemptions (i.e., one for each spouse). The couple has no above-the-line-deductions or itemized deductions, the couple is filing for 2012 at the specified levels of gross income in the tables, and all income consists of wages.

Table 1

Same-Sex Couple Filing as “Single”

Gross Income	Standard Deduction	Personal Exemptions	Taxable Income	Tentative Tax	Earned Income Credit	Tax Due
\$25,000	\$5,950	\$15,200	\$3,850	\$388	\$0	\$388
\$50,000	\$5,950	\$15,200	\$28,850	\$3,896	\$0	\$3,896
\$75,000	\$5,950	\$15,200	\$53,850	\$9,499	\$0	\$9,499

Table 2

Same-Sex Couple Filing as “Head of Household”

Gross Income	Standard Deduction	Personal Exemptions	Taxable Income	Tentative Tax	Earned Income Credit	Tax Due
\$25,000	\$8,700	\$15,200	\$1,100	\$111	\$3,565	(\$3,454)
\$50,000	\$8,700	\$15,200	\$26,100	\$3,299	\$0	\$3,299
\$75,000	\$8,700	\$15,200	\$51,100	\$7,426	\$0	\$7,426

Table 3

Different-Sex Couple Filing as “Married Filing Jointly”

Gross Income	Standard Deduction	Personal Exemptions	Taxable Income	Tentative Tax	Earned Income Credit	Tax Due
\$25,000	\$11,900	\$15,200	(\$2,100)	\$0	\$4,662	(\$4,662)
\$50,000	\$11,900	\$15,200	\$22,900	\$2,569	\$0	\$2,569
\$75,000	\$11,900	\$15,200	\$47,900	\$6,319	\$0	\$6,319

The differences here are stark and relate inversely to the level of legal recognition afforded to the family. In each case, the LGBT family left wholly unrecognized by the law (i.e., the family relegated to single filing status) is taxed significantly more than the LGBT family that benefits from the legal recognition of both parents (though not of the parents’ relationship with each other) and much more than the different-sex couple. For the family with \$25,000 of gross income, which is very close to the poverty line,⁸⁵ the same-sex couple filing using single status actually owes a positive tax liability where the family receiving some legal recognition and filing using head of household status receives a refund of \$3,454 due to the availability of the earned income credit. The different-sex couple—with the same family composition—fares even better, receiving a refund nearly 135% of that received by the same-sex couple filing using head of household status.

A similar pattern can be seen at higher levels of income. At the \$50,000 gross income level, the same-sex couple filing their return using single status owes the most in tax, or \$3,896. The family filing their return using head of household status owes approximately 15% less tax than the family filing “single,” and the different-sex couple owes approximately 34% less tax than the family filing “single.” At the \$75,000 gross income level, the same-sex couple filing their return using single status owes the most in tax, or \$9,499. The family filing their return using head of household status owes approximately 12% less tax than the family filing “single,” and the different-sex couple owes nearly 34% less tax than the family filing “single.” Obviously, how highly a family is valued for federal tax purposes relates both to the sexual orientation of the couple that is at its core and, derivatively, to the value placed on that family (in terms of legal recognition) by the state where the family resides. Because they are treated as tax nothings, LGBT families

⁸⁵ Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034, 4035 (Jan. 26, 2012).

pay a clear and ascertainable price for departing from (i.e., directly challenging) the traditional family norm.

B. Differential Treatment Based on Sexual Orientation

As is assumed in the calculations above, when a husband and wife file a joint federal income tax return, they are afforded two personal exemptions. The second exemption is available to this different-sex couple not because the stay-at-home spouse can be claimed as a “dependent” but because, in the words of the Treasury Regulations, “*there are two taxpayers* (although under section 6013 there is only one income for the two taxpayers on such return, i.e., their aggregate income).”⁸⁶ If a husband and wife do not file a joint return, then the husband may claim an additional personal exemption for the wife only in the very limited circumstance where the wife does not file a return, “has no gross income[,] and is not the dependent of another taxpayer.”⁸⁷ Indeed, the definition of a “dependent” is constructed so as to prevent one different-sex spouse from ever claiming the other as a dependent.⁸⁸ Nonetheless, through the addition of separate mention of spouses, “[m]any, though not all, of the exclusions, deductions, and credits that are provided (or denied) to a taxpayer with respect to her dependents apply equally to the taxpayer’s different-sex spouse.”⁸⁹

This is a key distinction between a tax return that purports to reflect an intact LGBT family and one that reflects an intact traditional family. Where one spouse is out in the paid labor force and the other works in the home, the way that the family is viewed for federal tax purposes turns entirely on the sexual orientation of the couple that is at the core of the family. If the couple is same-sex, the federal tax laws see *no* couple at all. Instead the federal tax laws see one individual who is *the* taxpayer earning income out in the workforce and a series of individuals who are “dependent” upon that taxpayer for their support (i.e., the stay-at-home spouse and the couple’s children). In contrast, if the couple is different-sex, the federal tax laws see the couple as two individuals working together to support and

⁸⁶ Treas. Reg. § 1.151-1(b) (as amended in 1972) (emphasis added).

⁸⁷ I.R.C. § 151(b).

⁸⁸ *See id.* § 152(b)(2) (excepting from the definition of “dependent” an individual who has filed a joint federal income tax return with his/her spouse), (d)(2)(H) (specifically excepting spouses from the portion of the definition of “qualifying relative” that does not turn on familial bonds between the taxpayer and the dependent); BITTKER & LOKKEN, *supra* note 23, ¶ 30.3.1, .3.4[2], 1997 WL 439641 (providing examples of situations where one different-sex spouse cannot claim the other as a dependent, even if they are the other spouse’s sole support).

⁸⁹ Infanti, *supra* note 48, at 372–73.

maintain their family. As mentioned above, the Treasury Regulations specifically acknowledge the existence of two separate taxpayers, even though they are treated as an economic unit that reports a single combined income.⁹⁰ The federal tax laws thus recognize the contributions of *both* spouses to the family, seeing two taxpayers even if only one of the spouses is earning income that is subject to tax.⁹¹ This is important because calling someone a “taxpayer” has been characterized as “emphasiz[ing] the civic responsibility of taxpaying and confer[ring] dignity and respect on the taxpayer.”⁹²

By denying taxpayer status to one of the same-sex spouses and instead labeling her a “dependent,” the federal tax laws impose a further and more pernicious cost on LGBT families for their departure from the traditional family norm. As Martha Fineman has noted, “[t]he very language of our politics and politicians is mired in a simplistic rhetoric of individual responsibility and an ideology of individual autonomy.”⁹³ The federal tax laws embody these views of individual responsibility and autonomy when they see traditional families. Even where one spouse remains in the home engaged in caretaking work, the federal tax laws see two taxpayers who are contributing to society and taking responsibility for themselves and their family. But when the federal tax laws see an LGBT family with a stay-at-home spouse,

⁹⁰ See *supra* note 86 and accompanying text; see also *supra* notes 18–21 and accompanying text.

⁹¹ See FINEMAN, *supra* note 13, at 119 (“The common law expressed a structure in which the distinct specialization of the spouses complemented each other—the wage earner and the housewife; the protector and the protected; the independent and the dependent. Each spouse needed his or her complement in order to attain and maintain a whole, complete family entity, an entity that provided for all its members’ needs. This specialization, bringing together the head and heart of the family in the form of husband and wife, allowed the marital family to function in a self-sufficient manner, providing both economic and domestic resources to the unit.”); *id.* at 147 (“Our new legal and aspirational model for marriage is that of ‘partnership,’ an egalitarian concept that recognizes that both spouses make contributions, even if they differ in kind. The contribution of the wife might still be specialized and domestic, but the argument is that such a contribution, while different in form than that made by the wage earner, is nonetheless of presumptively equal value. Wives are not dependent and subservient.”).

⁹² Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599, 638 (2007); see Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 983 (1997) (“society ... accords more respect to taxpayers than nontaxpayers in ... public debates”).

⁹³ FINEMAN, *supra* note 13, at 8–9.

they do not see an individual taking responsibility for himself or herself but rather an individual who is fully dependent upon another for their support.

Despite the fact that “dependency [is] inevitable[and] reliance on governmental largesse and subsidy is universal,”⁹⁴ applying the label “dependent” to an individual is a clear mark of stigmatization in American society:

Dependency is a particularly unappealing and stigmatized term in American political and popular consciousness. The specter of dependency is incompatible with our beliefs and myths. We venerate the autonomous, independent, and self-sufficient individual as our ideal. We assume that anyone can cultivate these characteristics, consistent with our belief in the inherent equality of all members of our society, and we stigmatize those who do not.⁹⁵

This attitude was on full—and, eventually, quite open—display during the 2012 presidential campaign. In fact, Republican presidential candidate Mitt Romney’s now infamous remarks at a private fundraiser illustrate how being a taxpayer intersects with the widely accepted (albeit totally unfounded) stigmatization of dependency:

During a private reception with wealthy donors..., Mitt Romney described almost half of Americans as “people who pay no income tax” and are “dependent upon government.” Those voters, he said, would probably support President Obama because they believe they are “victims” who are “entitled to health care, to food, to housing, to you name it.”

In a brief and hastily called news conference..., Mr. Romney acknowledged having made the blunt political and cultural assessment, saying it was “not elegantly stated,” but he stood by the substance of the remarks, insisting that he had made similar observations in public without generating controversy.

....

⁹⁴ *Id.* at 33; *see id.* at 34–35 (“It is puzzling, as well as paradoxical, that the term dependency should have such negative connotations. Far from being pathological, avoidable, and the result of individual failings, a state of dependency is a natural part of the human condition and is developmental in nature.”).

⁹⁵ *Id.* at 34; *see id.* at 8, 31.

In one clip, Mr. Romney describes how his campaign would not try to appeal to “47 percent of the people” who will vote for Mr. Obama “no matter what.” They are, he says, “dependent upon government, who believe that they are victims, who believe the government has a responsibility to care for them.”

He says those people “pay no income tax,” and “so our message of low taxes doesn’t connect.” Mr. Romney adds: “My job is not to worry about those people. I’ll never convince them they should take personal responsibility and care for their lives.”⁹⁶

Mr. Romney’s running mate, U.S. Representative Paul Ryan, made similar remarks well before his selection as a candidate for Vice President:

“We’re coming close to a tipping point in America where we might have a net majority of takers versus makers in society,” Romney’s running mate, Rep. Paul Ryan (Wis.), said at the Heritage Foundation last year.

But the second part of that message is usually that the “takers” don’t want it that way and instead want to rebuild an independent life.

Ryan described social programs as necessary to “help people who are down on their luck get back onto their feet,” though he warned about the safety net turning into a “hammock that ends up lulling people into lives of dependency.”⁹⁷

In reporting on how Mr. Romney had bungled a conservative talking point in the private remarks quoted above, reporters from the *Washington Post* described the general attitude expressed by both Mr. Romney and Mr. Ryan as being, “[f]or many conservatives, ... as obvious as gravity: Government has divided America into makers, who work hard and pay taxes, and takers, who don’t do enough of either; there are too few of the former and too many of the latter.”⁹⁸

Like the more general stigmatization of dependency, this line between those who pay taxes (i.e., the makers who contribute to society) and those

⁹⁶ Michael D. Shear & Michael Barbaro, *In Video Clip, Romney Calls 47% “Dependent” and Feeling Entitled*, N.Y. TIMES, Sept. 18, 2012, at A1.

⁹⁷ David A. Fahrenthold & Ed O’Keefe, *In Video, Romney Strays from GOP Points*, WASH. POST, Sept. 19, 2012, at A6.

⁹⁸ *Id.*

who do not (i.e., the takers who are dependent on the work of the makers for their support) is entirely unfounded. Indeed, Mr. Romney's remarks came in for sharp criticism among fact checkers after they were made public. The fact checkers noted that, among those who did not pay income tax in 2011, 60% paid payroll taxes (i.e., Social Security and Medicare taxes) and many of those who paid neither income nor payroll taxes were elderly individuals who had likely paid one or both of these taxes during their working years.⁹⁹ Additionally, many of those who pay no income tax are "makers" who are working and contributing to society; however, they are just among the working poor.¹⁰⁰ Others are actually quite wealthy but still manage to pay no income tax at all.¹⁰¹ Furthermore,

those folks who aren't paying federal taxes are almost all paying state and local taxes—state sales taxes, real estate taxes (either on their homes or built into their rents) and possibly state income taxes too, since those taxes tend to exempt fewer poor families than does the federal income tax. If they buy gasoline, liquor or tobacco, or have telephones, they're also feeding the federal purse.¹⁰²

The same lack of factual grounding is present in the stigmatization of same-sex couples. One spouse is the "taxpayer" and the other is labeled a "dependent." But one is *not* a "maker" and the other a "taker." Both are productive members of society making contributions to their family in their own ways—one by working in the paid labor force and the other by working in the home. Yet, by applying these labels, a relationship of equality between adults is turned into one of inequality. Relationships between a caretaker and a dependent are not perceived as relationships of equals—in this case,

⁹⁹ Janet Novack, *Memo to Mitt Romney: The 47% Pay Taxes Too*, FORBES (Sept. 17, 2012, 9:16 PM), <http://www.forbes.com/sites/janetnovack/2012/09/17/memo-to-mitt-romney-the-47-pay-taxes-too/>; see Annie Lowrey, *Behind the "People Who Pay No Income Tax,"* ECONOMIX BLOG, N.Y. TIMES (Sept. 17, 2012, 10:23 PM), <http://economix.blogs.nytimes.com/2012/09/17/the-reasons-behind-the-people-who-pay-no-income-tax/?hp> (making similar points).

¹⁰⁰ *Dependency and Romney's 47 Percenters*, FACTCHECK.ORG (Sept. 18, 2012), <http://www.factcheck.org/2012/09/dependency-and-romneys-47-percenters/>.

¹⁰¹ *Id.*

¹⁰² Novack, *supra* note 99; see *Dependency and Romney's 47 Percenters*, *supra* note 100 (making the same points); Lowrey, *supra* note 99 (same).

referring to one spouse as a dependent effectively places him/her on the same tax plane as the couple's children.¹⁰³

In contrast, when a different-sex couple divides their labor in the same way, they are not stigmatized—one is not a taxpayer and the other a dependent. *Both are taxpayers*. The federal government thus clearly puts its imprimatur on the value of work in the home when it is performed by a different-sex married spouse. Indeed, as we observed in Part II.A above, through the tax laws, the federal government places a higher value on this division of labor between different-sex spouses than it does on a division of labor where each spouse works outside the home and equally contributes to the family's finances. The former couple is rewarded with a marriage bonus for federal income tax purposes while the latter couple suffers a marriage penalty.

Regardless of whether this sexual-orientation-based distinction is tethered to reality, it is a form of stigmatization nonetheless.¹⁰⁴ In fact, it is a curious combination of, on one hand, the structural (and highly public) sexual stigma represented by the federal and state defense of marriage acts (collectively, DOMAs)¹⁰⁵ and, on the other hand, something approaching, but

¹⁰³ See FINEMAN, *supra* note 13, at 304 (describing how parent–child and other relationships between a caretaker and an inevitable dependent are not relationships of equals).

¹⁰⁴ See Gregory M. Herek, *Sexual Stigma and Sexual Prejudice in the United States: A Conceptual Framework*, in CONTEMPORARY PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL IDENTITIES 65, 66 (Debra A. Hope ed., 2009) (“[S]tigma is used here to refer to the negative regard and inferior status that society collectively accords to people who possess a particular characteristic or belong to a particular group or category. Inherent in this definition is the fact that stigma constitutes shared knowledge about which attributes and categories are valued by society, which ones are denigrated, and how these valuations vary across situations.”).

¹⁰⁵ See Gregory M. Herek, *Anti-Equality Marriage Amendments and Sexual Stigma*, 67 J. SOC. ISSUES 413, 413–14 (2011) (“Because they deny lesbian, gay, and bisexual members of same-sex couples the rights and recognition enjoyed by heterosexuals, these statutes and amendments [i.e., the federal and state DOMAs] are stigmatizing. Moreover, the campaigns waged to enact them, during which sexual minority individuals’ basic rights are subjected to public debate and a majority vote, have been (and continue to be) occasions for the expression of sexual stigma.”); *id.* at 415 (explaining structural stigma); *id.* at 415–18 (explaining why the federal and state DOMAs constitute a form of structural stigma); see also Herek, *supra* note 104, at 67 (“*Sexual stigma* ... is the stigma attached to any nonheterosexual behavior, identity, relationship, or community. In other words, it is socially shared

not fully resembling, the internalized (and more private) sexual self-stigma that, “[i]n sexual minority individuals, ... is manifested as negative feelings toward their own same-sex attractions and toward others like themselves.”¹⁰⁶ It is thus a mix of heterosexism and something akin to, but not quite the same as, sexual self-stigma.¹⁰⁷

Requiring same-sex couples to designate one spouse as a dependent of the other in order to obtain tax benefits is an inextricable part of the structural sexual stigma embodied in the federal and state DOMAs. Absent the DOMAs, married same-sex couples would be entitled to file joint federal income tax returns. If married same-sex couples were permitted to file joint returns, then both spouses would be recognized as taxpayers, neither spouse could be classified as a dependent of the other, and no sexual stigma would be applied to the couple. Far from being stigmatized, under current law, the couple would be actively favored over those married couples composed of two spouses who work outside the home because the couple with a stay-at-home spouse would be afforded a marriage bonus (instead of suffering a marriage penalty).

At the same time, however, this tax dimension of structural sexual stigma embodied in the DOMAs is both a part of and apart from the legal architecture of heterosexism. Far from being so publicly visible, only the Internal Revenue Service and the same-sex couple filing a return that designates one spouse as a dependent of the other are actually aware of the stigmatization. No one else is directly privy to the picture painted by a same-sex couple’s tax return, because federal tax returns and tax return information are confidential and the unauthorized disclosure of such information is a federal crime.¹⁰⁸ Some might go even further and argue that this stigma is voluntarily imposed by the same-sex couple on itself; in other words, they might argue that it is akin to “internalized stigma[, which is] an individual’s personal acceptance of stigma as a part of her or his own value system and self-concept.”¹⁰⁹ After all, no legal compulsion forces one of the same-sex spouses to claim the other as a dependent. The couple could always forego the tax benefits to preserve (a modicum of) their dignity.¹¹⁰ Rather

knowledge about homosexuality’s devalued status relative to heterosexuality.”); *id.* (explaining structural stigma).

¹⁰⁶ Herek, *supra* note 105, at 415; Herek, *supra* note 104, at 73 (same).

¹⁰⁷ Herek, *supra* note 105, at 415.

¹⁰⁸ I.R.C. §§ 6103, 7213 (LEXIS through Jan. 15, 2013).

¹⁰⁹ Herek, *supra* note 104, at 73.

¹¹⁰ Foregoing the tax benefits still would not eliminate or alter the “[s]tructural sexual stigma ... embedded in religion, language, the law, and other social institutions.” Herek, *supra* note 105, at 415; *see* Herek, *supra* note 104, at 67 (same).

than voluntarily stigmatize themselves, the same-sex couple could voluntarily pay the additional taxes that they would have saved by having one claim the other as a dependent.

But this argument fails to capture the true nature of this stigmatization. At one level, the idea that this is a chosen stigma misses the mark. This choice is not a meaningful choice at all. Even with the tax benefits associated with the stigma, Tables 1 through 3 demonstrate that same-sex couples with a stay-at-home spouse already pay more tax than similarly situated different-sex couples. For many LGBT families, when the choice is between stigmatizing oneself or providing for one's family, there really is no choice involved at all. At another level, the idea that this is internalized stigma also misses the mark. It may be true that some have accepted this stigma "as a part of [their] value system and self-concept."¹¹¹ But, for many others, the choice (if it can even be called a choice) to label one spouse a dependent may have no relation at all to their value system or self-concept and may merely be the necessary means of obtaining tax benefits that will increase the available resources for supporting their families. So, even though this may appear to be, at least in part, a form of self-stigma, it is actually an overtly coerced stigmatization of the self (as opposed to the usually more covert coercion associated with the stigma of the closet, for example).¹¹²

That this highly visible, public stigmatization is privately enacted does not in any way diminish the impact that it can have on the same-sex couple. "A growing body of literature indicates that ... experiences of stigma subject sexual minority individuals to chronic stress beyond what other members of

¹¹¹ Herek, *supra* note 104, at 73.

¹¹² See David M. Frost & Ilan H. Meyer, *Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals*, 56 J. COUNSELING PSYCHOL. 97, 97–98 (2009) ("It is important to note that despite being internalized and insidious, the minority stress framework locates internalized homophobia in its social origin, stemming from prevailing heterosexism and sexual prejudice, not from internal pathology or a personality trait." (citation omitted)); *id.* at 107 (same); *id.* at 98–99 (discussing situations in which concealing one's sexual orientation is a protective mechanism in an unsafe environment—using the now-repealed Don't Ask, Don't Tell policy in the military as an example—and, therefore, not a form of internalized stigma); *id.* at 106 (discussing results of a study that indicate that "[o]utness had a strong negative relationship with internalized homophobia," but that "they are not synonymous with one another").

society normally experience, and this minority stress can have a significant psychological impact.”¹¹³ As I have noted elsewhere,

researchers have detected ... “minority” stress and its concomitant negative mental health effects among lesbians, gay men, and bisexuals. Ilan Meyer ... has even “proposed a minority stress model that explains the higher prevalence of mental disorders [among lesbians, gay men, and bisexuals] as caused by excess in social stressors related to stigma and prejudice.”¹¹⁴

This stress stemming from the stigmatization of same-sex couples only compounds the more generally increased levels of stress to which same-sex couples are exposed (as compared to married different-sex couples) by reason of being denied the benefits associated with marriage.¹¹⁵ Whatever its source, “experiencing stress increases one’s risk for mental and physical illness.”¹¹⁶

¹¹³ Herek, *supra* note 105, at 418 (citation omitted).

¹¹⁴ Infanti, *supra* note 4, at 1237–38 (footnotes omitted) (citing Robin J. Lewis et al., *Stressors for Gay Men and Lesbians: Life Stress, Gay-Related Stress, Stigma Consciousness, and Depressive Symptoms*, 22 J. SOC. & CLINICAL PSYCHOL. 716, 717–18, 725–26 (2003); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 45–52 (1995); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 679–82 (2003) [hereinafter Meyer, *Prejudice*]; Ilan H. Meyer & Laura Dean, *Internalized Homophobia, Intimacy, and Sexual Behavior Among Gay and Bisexual Men*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 160, 178–83 (Gregory M. Herek ed., 1998)) (quoting Meyer, *Prejudice, supra*, at 691)).

¹¹⁵ David M. Frost, *Similarities and Differences in the Pursuit of Intimacy Among Sexual Minority and Heterosexual Individuals: A Personal Projects Analysis*, 67 J. SOC. ISSUES 282, 294 (2011) (“... LGB [i.e., lesbian, gay, and bisexual] individuals perceived significantly more barriers to and devaluation of their intimacy projects than heterosexuals, and this difference was more pronounced at the macrosocial level (e.g., laws and policies.)”); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 616 (2006) (“As a consequence of these and the many other forms of differential treatment to which they are subjected, same-sex couples are exposed to more stress than married couples, especially when they encounter life’s inevitable difficulties and challenges.”).

¹¹⁶ Herek, *supra* note 115, at 616; see Frost, *supra* note 115, at 295 (“As both

The act of denying LGB [i.e., lesbian, gay, and bisexual] individuals the right to civil marriage and their exclusion from the accompanying benefits conferred on other (heterosexual) citizens establishes same-sex couples as second class citizens and may even diminish LGB individuals' social and psychological well-being. The result is an environment characterized by minority stress.¹¹⁷

Moreover, the effects of this stress are not felt by the same-sex couple alone: "To the extent that government recognition of same-sex relationships facilitates well-being for parents, it will enhance the well-being of their children because children benefit when their parents (regardless of the latter's sexual orientation) are financially secure, physically and psychologically healthy, and not subjected to high levels of stress."¹¹⁸

V. Change on the Horizon?

LGBT families pay a hefty price for their departure from the traditional family norm. Because of the DOMAs, LGBT families are treated as tax nothings. These families are ignored for federal tax purposes unless they can divide or realign themselves in ways that allow them to be seen for federal tax purposes. As we observed in Part IV, LGBT families suffer both monetarily and psychologically in this process of division and realignment of their families merely to gain some (and by no means all) of the tax benefits afforded to similarly situated traditional families.

As I write this essay, the U.S. Supreme Court has a case before it that seems to hold the promise of removing the mark of this stigma (at least in future cases; nothing can undo the effects wrought by past stigmatization). In *Windsor v. United States*,¹¹⁹ the Supreme Court will squarely consider the question whether section three of the federal DOMA, which concerns the federal government's refusal to legally recognize same-sex marriages, violates the guarantee of equal protection of the laws embodied in the Fifth Amendment's Due Process Clause. If the Supreme Court declares section three of the federal DOMA unconstitutional, as it seems inclined to do,¹²⁰ it

social stress and minority stress theory suggest, disadvantaged social status (e.g., sexual minority status) is associated with increased stress exposure, which is, in turn, associated with decreased health and well-being." (citation omitted).

¹¹⁷ Frost, *supra* note 115, at 284.

¹¹⁸ *Id.* (citation omitted).

¹¹⁹ *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 2012 U.S. LEXIS 9413 (Dec. 7, 2012).

¹²⁰ Adam Liptak & Peter Baker, *Justices Cast Doubt on U.S. Law Defining Marriage*, N.Y. TIMES, Mar. 28, 2013, at A1.

might be said that all I will have done in this essay is to record for posterity one of the (many) impacts on same-sex couples of this dark chapter in our legal history.

At first blush, it might appear that, in the absence of section three of DOMA, all married couples—whether different-sex or same-sex—would be placed on the same legal footing for federal tax purposes. The reality, however, is likely to be much more complicated because a Supreme Court decision striking down section three of the federal DOMA will raise more questions than it will answer. As I explain in a forthcoming essay, a favorable decision in *Windsor* will have no effect on section two of the federal DOMA, which permits states to refuse recognition to same-sex marriages celebrated in other states.¹²¹ It would only be a very broad and favorable decision in another Supreme Court case, *Hollingsworth v. Perry*, which concerns the constitutionality of California’s Proposition 8, that could potentially alter the recognition of same-sex marriage at the state level.¹²² At this time, a favorable decision in *Hollingsworth* is no foregone conclusion, and a far-reaching one seems quite far-fetched.¹²³ Assuming that section three of DOMA is found to be unconstitutional (and absent an unexpectedly far-reaching decision in *Hollingsworth*), the federal tax laws will once again revert to relying upon state law to determine whether a same-sex couple is married for federal tax purposes.¹²⁴

But which state’s law would the Internal Revenue Service turn to in order to determine whether a same-sex couple is considered to be married for federal tax purposes? Will the determination be made, as I am sure some will argue, solely by reference to the law of the state of celebration?¹²⁵ Or will the determination be made by reference to the law of the state where the couple resides? In the case of property ownership, financial transactions, and torts, will we rely upon state choice of law rules to determine which state’s law

¹²¹ See generally Anthony C. Infanti, *The Moonscape of Tax Equality* (Apr. 22, 2013) (unpublished manuscript) (on file with author).

¹²² *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, 2012 U.S. LEXIS 9416 (Dec. 7, 2012).

¹²³ Adam Liptak, *Justices Say Time May Be Wrong for Ruling on Gay Marriage*, N.Y. TIMES, Mar. 27, 2013, at A1.

¹²⁴ I.R.C. § 7703; *Boyter v. Comm’r*, 668 F.2d 1382, 1385 (4th Cir. 1981) (“We agree with the government’s argument that under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status.”).

¹²⁵ Cf. Rev. Rul. 58-66, 1958-1 C.B. 60 (recognizing common law marriages validly entered into in one state even after the couple has moved to a state that requires a ceremony as a prerequisite for a valid marriage).

applies to marital status determinations? Or will some combination of rules be cobbled together?

However simple and appealing a uniform federal rule might seem, it is both unlikely and problematic. A uniform federal rule of recognizing same-sex marriages based on the law of the state of celebration is unlikely because it is at odds with the Obama administration's current approach to same-sex marriage.¹²⁶ Last year, President Obama indicated that same-sex marriage is an issue best left to be worked out at the state (as opposed to the federal) level.¹²⁷ Notwithstanding signals of a different approach in President Obama's inaugural address in January 2013, the U.S. Solicitor General filed a highly anticipated *amicus curiae* brief in *Hollingsworth* in late February 2013 that did not act upon these signals.¹²⁸ Despite arguing in favor of heightened scrutiny for sexual-orientation-based classifications (a position that the Obama administration announced in 2011),¹²⁹ the Solicitor General's brief quite narrowly focused on the situation in California and other states where same-sex couples are already afforded all of the benefits and obligations of marriage but are deprived of the label "marriage" for their legal relationship.¹³⁰ The Solicitor General's brief did not speak to the situation in the majority of states, where same-sex couples' relationships are not legally recognized at all.

A uniform federal rule of recognizing same-sex marriages based on the laws of the state of celebration is also problematic for at least two reasons. First, it would perpetuate, in a different form, a problem that exists with the current blanket refusal to recognize same-sex marriages at the federal level.

¹²⁶ The proposed Respect for Marriage Act would achieve the same end by determining marital status by reference to the law of the state of a marriage's celebration. H.R. 1116, 112th Cong. (2011); S. 598, 112th Cong. (2011). But this legislation has little hope of enactment in the near future. See Tara Siegel Bernard, *Same-Sex Marriage Activists Look to Law*, N.Y. TIMES, May 12, 2012, at B1.

¹²⁷ Adam Liptak, *A Predicament on Gay Marriage*, N.Y. TIMES, Feb. 5, 2013, at A13.

¹²⁸ See *id.*; John Schwartz & Adam Liptak, *U.S. Asks Justices to Reject Ban on Gay Marriage*, N.Y. TIMES, Mar. 1, 2013, at A1.

¹²⁹ Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.scribd.com/doc/49404879/Attorney-General-Holder-s-Letter-to-John-Boehner-on-DOMA-Appeal>.

¹³⁰ Brief for the United States as Amicus Curiae Supporting Respondents at 9–12, *Hollingsworth v. Perry*, No. 12-144 (U.S. Dec. 7, 2012), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/02/12-144tsacUnitedStates.pdf>.

At present, same-sex couples whose relationships are legally recognized by their home states are normally required to file two federal income tax returns using single or head of household status, unless one same-sex spouse can claim the other as a dependent.¹³¹ On their state income tax returns, however, these couples usually cannot file using single or head of household status.¹³² Because state income tax laws often piggyback on the federal income tax, this creates a nonconformity of filing status (e.g., single or head of household at the federal level and married filing jointly or married filing separately at the state level). This nonconformity leads to added complexity—and often added compliance burdens—for same-sex couples.¹³³ For example, “this nonconformity will produce higher tax preparation costs, higher state audit risks (when states are confused by differences on the state and federal returns), and more expense in dealing with state inquiries concerning conforming changes after federal audit changes have been made.”¹³⁴ A uniform federal rule would create a mirror image of this problem. With same-sex marriages recognized regardless of the law of the couple’s state of residence, same-sex couples would be required to file as married filing jointly or married filing separately for federal purposes but would, in all likelihood, be prohibited from using those statuses for purposes of most state tax laws. This would give rise to precisely the same complexity and administrative burden that currently exists; it would just be a different group of same-sex couples that would be burdened (i.e., those who are already saddled with state nonrecognition of their relationships).

Second, a uniform federal rule would do nothing to remove the stigma that would persist for those who live in states such as Colorado, Idaho, and South Carolina, which use federal taxable income as the starting point for calculating state income tax liability.¹³⁵ If same-sex couples are permitted to file joint federal income tax returns but continue to be required to file using

¹³¹ Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33 (2012). Colorado’s recently enacted civil union regime is a notable exception to this general rule. Colorado Civil Union Act, § 1, 2013 Colo. SB 11 (LEXIS) (to be codified at COLO. REV. STAT. § 14-15-117); *see infra* note 135 and accompanying text.

¹³² Smith & Stein, *supra* note 135, at 49–50.

¹³³ *Id.* at 49–81.

¹³⁴ *Id.* at 34.

¹³⁵ COLO. REV. STAT. § 39-22-104 (2012); IDAHO CODE ANN. §§ 63-3011B, -3011C, -3024 (2012); S.C. CODE ANN. § 12-6-1110 (2012). In fact, when enacting its civil union regime, Colorado withheld from same-sex couples the right to file joint state income tax returns precisely because they are ineligible to file joint federal income tax returns. Colorado Civil Union Act, § 1, 2013 Colo. SB 11 (LEXIS) (to be codified at COLO. REV. STAT. § 14-15-117).

single or head of household status in these states, then, for purposes of completing their state income tax returns, same-sex couples in these states will be required to recompute their federal income taxes as if they were unmarried, have one same-sex spouse claim the other as a dependent (just as they do now), and use the federal taxable income so calculated as the starting point for computing their state income taxes. For these same-sex couples, the current stigmatization of “dependent” same-sex spouses would continue relatively unabated.

In light of the foregoing discussion, a more likely result of the invalidation of section three of DOMA will be for the Internal Revenue Service to somehow cope with the extant patchwork of state laws when it comes time to answer difficult questions regarding the marital status of same-sex couples. Among the questions that the Internal Revenue Service will have to consider are: Whose relationships will count? Will only same-sex marriages be recognized? Will civil unions and domestic partnerships that are intended to be the legal equivalent of marriage be recognized?¹³⁶ Will relationships that entail a similar legal entanglement of the couple but entail something less than all of the rights and obligations of marriage (e.g., designated beneficiary or reciprocal beneficiary relationships) be recognized? (In other words, will the Internal Revenue Service further entrench the extant privileging of marriage in the federal tax laws?¹³⁷) When will those state laws count? More specifically, which state’s law will govern the taxation of transactions that touch multiple states, some of which legally recognize same-sex relationships and others of which do not?

However the Internal Revenue Service decides to cope with this patchwork of state laws in answering these questions, the only thing that is clear is that one or more (potentially large) subsets of same-sex couples will find that their relationships will continue to be denied legal recognition for federal tax purposes. This will happen because a majority of states still refuse legal recognition to same-sex relationships.¹³⁸ Consequently, what seems like a possibly momentous advance in the fight for LGBT rights—one that would ostensibly place LGBT families on equal legal footing with traditional families for federal tax purposes—may actually leave many LGBT

¹³⁶ See *supra* note 17.

¹³⁷ For a fuller explanation and some more difficult questions that will need to be answered, see Infanti, *supra* note 121.

¹³⁸ *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN (Dec. 10, 2012), http://www.hrc.org/files/assets/resources/US_Marriage_Prohibitions.pdf.

families standing in the same spot,¹³⁹ tarnished with the same stigma that is currently attached to their relationships by the federal tax laws.

VI. Conclusion

This contribution to the Journal's symposium *Modern Families: Changing Families and Challenging Laws* has focused on what might be viewed as the most "conventional" of LGBT families.¹⁴⁰ But, as we have observed while peering through the window that the tax laws open upon our collective American soul, even for these families—and perhaps especially for them—"challenging" hardly begins to describe the tax law landscape that they face. If we valued our families—all of our families—we would take the necessary steps to make our tax laws relationship neutral in order to relieve the tax burdens and stigmas that we currently impose on LGBT and other nontraditional families.

¹³⁹ Or possibly even a worse spot. *See* Infanti, *supra* note 121.

¹⁴⁰ This is not a view that I share:

"Can family caregiving be a form of political resistance or expression?" This provocative question begins a recent article by law professor Laura Kessler. In answering "yes" to this question, Kessler singles out lesbian and gay parenting as an example of what she calls "transgressive caregiving" because the very existence of lesbian and gay families represents a "radical challenge to heterosexual reproduction and family relations." At the same time that it challenges heterosexist norms, lesbian and gay parenting also calls into question a host of negative stereotypes, particularly about gay men. Thus, in the hands of lesbians and gay men, the simple (and, some critics might say, assimilationist) act of parenting becomes a defiant, political act.

ANTHONY C. INFANTI, EVERYDAY LAW FOR GAYS AND LESBIANS (AND THOSE WHO CARE ABOUT THEM) 223–24 (2007) (footnotes omitted) (quoting Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 2, 38 (2005)).