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Articles

Same-Sex Couples and the Federal Tax Laws

Patricia A. Cain*

The Internal Revenue Code is premised on the notion that we are all independent persons, individually responsible to the government for paying our "fair share" of the tax burden. Professor Cain asserts that this premise is false, because it ignores real relationships between persons. Although Congress has made some adjustments to this individualistic premise in the case of married couples, no similar adjustments have been made for lesbian and gay couples. Professor Cain, focusing on the income and gift tax treatment of "support payments," argues that lesbian and gay relationships ought to be accorded the same degree of respect under the Internal Revenue Code as marital relationships.

I. INTRODUCTION

Should lesbian and gay couples be allowed to marry? This question has recently received much press coverage.¹ Although many same-sex couples live in committed relationships that are very similar to those of married

* Professor of Law, University of Iowa. I am indebted to my colleagues Joseph Dodge, Calvin Johnson, Larry Ward, and Jean Love for their comments on an earlier draft of this article. Margaret Menicucci, J.D., University of Texas, provided excellent research assistance.

1. A recent issue of the American Bar Association Journal included a debate about whether homosexual marriages should be recognized legally. 76 A.B.A. J. 42 (January 1990). In 1989, the Bar Association of San Francisco passed a resolution favoring same-sex marriages. The San Francisco Recorder carried stories about the ensuing debate. See Recorder, Mar. 1, 1989, at 1, col. 2; Recorder, Mar. 6, at 6, col. 2; Recorder, Mar. 10, 1989, at 6, cols. 1 & 3; Recorder, Mar. 13, 1989, at 6, col. 2. See generally Walter Isaacson, *Should Gays Have Marriage Rights? On Two Coasts, the Growing Debate Produces Two Different Answers*, TIME, Nov. 20, 1989, at 101; Philip S. Gutis, *Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. Times, Nov. 5, 1989, at E-24, col. 1; *Gay Marriage: A Must or a Bust?*, Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, & Paula L. Ettelbrick, *Since When Was Marriage a Path to Liberation?* 6 OUT/LOOK, NAT'L LESBIAN & GAY Q. 8 (1989) (companion articles); Thomas B. Stoddard, *Gay Marriages: Make Them Legal*, N.Y. Times, Mar. 4, 1989, at 27, col. 5 (guest editorial in favor of legalizing lesbian and gay marriages).

couples,² some of them even sanctioned by the church,³ no state in this country has ever recognized the legality of a same-sex marriage.⁴

One of the arguments put forth by advocates of lesbian and gay marriage⁵ is that same-sex couples should be entitled to the same tax benefits enjoyed by married couples. Often, however, advocates of this position overlook the fact that the federal tax laws do not always bestow benefits on married couples. Two-earner married couples, for example, generally pay higher income taxes than they would pay if they could file as single taxpayers. This is true whether or not they file jointly or separately.⁶ The amount of this "marriage penalty" has varied over the years. Taxpayers⁷ and tax scholars⁸ alike have levied attacks against the penalty. In addition to the "marriage penalty," other tax detriments that married couples experience are: (1) joint and several tax liability on a joint return;⁹ (2) the

2. "'Couplehood,' either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals." PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 45 (1983). This book is based on an empirical study of various types of American couples, including married couples, unmarried heterosexual couples, and lesbian and gay couples.

3. See Guitis, *Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. Times, Nov. 5, 1989, at E-24, col. 1.

4. The exclusion of lesbian and gay couples from the legal institution of marriage has been tested in the courts of several states. The courts have uniformly rejected all challenges. See, e.g., Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

5. Advocates include members of the straight community as well as members of the lesbian and gay community. Furthermore, not all members of the lesbian and gay community are advocates of same-sex marriage. In particular, some lesbian feminists raise objections to marriage, because of its historical role in the subordination of women. See, e.g., Ettelbrick, *supra* note 1.

6. Married persons who choose to file separately must usually compute their taxes under the rate schedule provided in I.R.C. § 1(d) (1991). This rate schedule is set so that the combined tax bill for spouses with equal incomes will be the same whether they file jointly or separately. For spouses with unequal incomes, filing separately may actually produce a higher tax bill. On the other hand, if one spouse qualifies for head-of-household status under I.R.C. § 1(b) (1991) (which, for a married spouse, includes a requirement that the couple not live together for the last six months of the tax year), then the combined tax bill of the spouses, at certain income levels, will be lower than the tax that would have been due on a joint return. Nonetheless, the combined tax would be even less if the non-head-of-household spouse could use the single rates.

7. See, e.g., *Druker v. Comm'r*, 697 F.2d 46 (2d Cir. 1982) (upholding the rate schedules against a constitutional challenge that they produced a penalty on marriage), *cert. denied*, 461 U.S. 937 (1983); *Boyter v. Comm'r*, 668 F.2d 1382 (4th Cir. 1981) (approving application of sham transaction doctrine against taxpayers who divorced at year end and then subsequently remarried solely to avoid paying the marriage penalty tax); *Mapes v. United States*, 576 F.2d 896 (Ct. Cl. 1978) (upholding constitutionality of marriage penalty), *cert. denied*, 439 U.S. 1046 (1986); *Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) (upholding constitutionality of marriage penalty), *cert. denied*, 434 U.S. 1012 (1978).

8. See Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Wendy C. Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27 (1978); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1416-44 (1975).

9. Couples who file jointly often pay a lower combined tax than they would pay if they filed separately. Signing a joint return, however, can produce a tax detriment for spouses who later find themselves liable for tax underpayments attributable to the other spouse. The innocent spouse provisions of I.R.C. § 6013(e) (1991) provide some relief from this detriment in extreme cases. See generally Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should be Repealed*, 13 LAW & SEXUALITY: A JOURNAL OF LESBIAN & GAY LEGAL ISSUES 98 (1991).

inability to recognize losses on sales between spouses;¹⁰ and (3) numerous tax attribution rules that treat spouses as a unitary taxpayer.¹¹

Nonetheless, married couples do receive considerable tax benefits. Husband and wife can transfer wealth to each other free of income, estate, and gift taxes.¹² Employers often provide important fringe benefits to the spouses of their employees. For example, the nonemployee spouse may be included in the employer's medical benefit plan. The federal tax law exempts the receipt of these benefits from income taxation.¹³ When married couples divorce, income tax rules are structured to allow the couple to unwind their property entanglements tax-free. In addition, if support payments are to be made subsequent to divorce, the spouses can effectively bargain in advance as to who will bear the income tax burden of such payments.¹⁴ Finally, for some married couples, the availability of the joint return does produce a tax savings.¹⁵

None of these specially enacted tax benefits is available to lesbian and gay couples. The applicable statutes explicitly apply only to spouses. Marital status is determined under relevant state law.¹⁶ Were states to change their marriage laws and permit same-sex marriage, then same-sex couples could no longer argue that the tax law discriminated against them. Upon marriage, they would become subject to all the benefits and burdens of the tax law as opposite-sex married couples currently experience. An

10. I.R.C. §§ 267, 1041 (1991).

11. For example, I.R.C. § 318 (1991) requires that husbands and wives (as well as other related parties) be treated as owning each other's stock. *See also* I.R.C. § 453(e) (1991) (special rules for an installment sale to related party followed by a second disposition).

12. I.R.C. § 1041(a),(b) (1991) provides that transfers of property between spouses will be treated as gifts for purposes of the income tax. Gifts are excluded from income under I.R.C. § 102 (1991). I.R.C. § 2056 (1991) provides for a 100% marital deduction for transfers of wealth to a spouse at death, and I.R.C. § 2523 (1991) provides for a similar marital deduction for lifetime gifts between spouses.

13. *See* I.R.C. §§ 105, 106 (1991).

14. *See* I.R.C. §§ 71, 215 (1991). For a good history of the evolution of divorce taxation rules, see Beverly I. Moran, *Welcome to the Funhouse: The Incredible Maze of Modern Divorce Taxation*, 26 HARV. J. ON LEGIS. 117 (1989).

15. For couples in which only one spouse earns taxable income, the joint return rates produce a lower tax than the rate for single taxpayers would produce. *See* Harvey S. Rosen, *The Marriage Tax is Down But Not Out*, 40 NAT'L TAX J. 567, 571 (1987). Rosen compares the marriage penalty and subsidy for pre-1986 tax rates with those created by the 1986 tax rates. Under rates in effect for 1988, he shows a \$2,748 tax saving for a childless married couple filing a joint return provided one spouse earns \$50,000 and the other spouse earns zero and a \$705 tax saving for the same couple if the secondary earner's wages are \$10,000. By the time the secondary earner's wages reach \$20,000, however, the couple will be paying a marriage penalty tax of \$595. (Note: These figures assume that if the \$50,000 single earner were to file as single, he or she would claim only one personal exemption. If the earner is supporting a nonwage-earning partner, however, the wage-earner may be able to claim that partner as a dependent. *See* discussion *infra* note 117.)

The marriage subsidy under the new 1991 rates for the couple earning \$50,000 and zero, unadjusted for inflation, will be slightly higher than the 1988 subsidy shown by Rosen. Based on his assumptions and calculation method, the subsidy for such a couple will be \$2,810.

16. *See* Rev. Rul. 58-66, 1958-1 C.B. 60 (common law marriages are recognized for federal tax purposes provided such marriages are recognized under the applicable state law). *See also* Joseph Amaro v. Comm'r, T.C. Memo 1970-208 (1970) (" . . . only a couple legally married can avail themselves of the benefits of [the joint return]").

alternative means to achieve the same result would be for Congress to amend the tax laws so that "tax marriages"¹⁷ between same-sex couples would stand on an equal footing with state-recognized marriages.¹⁸

So long as Congress refrains from adopting a uniform federal definition of "spouse," state marriage law will continue to determine important federal tax questions such as who can receive fringe benefits tax-free, make tax-free transfers of wealth, and split income on the joint return. In effect, Congress has delegated to the states the power to allocate certain federal tax burdens. Whether this delegation makes sense, especially in light of current trends in personal living arrangements,¹⁹ raises an intricate question of tax policy: Who should be the taxable unit under an ideal income tax?

It would be impossible to discuss the federal taxation of same-sex couples without acknowledging this underlying policy question. For purposes of this article, I begin with the historical observation that our early tax laws were drafted by a Congress that did not explicitly address the question of the appropriate tax unit, but rather appeared to assume that the taxpaying unit would be the individual.²⁰ As a starting point, individ-

17. I use the term "tax marriage" to mean whatever status Congress might choose to define as "being married" for tax purposes. For example, Congress might define "married for tax purposes" as including any two persons not otherwise married under state law who have signed an affidavit of intent to support each other and to have the tax laws apply to them as though they were married under state law. The definition might include additional requirements such as: (1) the existence of a legally enforceable contract for support; (2) no previous "tax marriage" within a certain time period; and (3) cohabitation for a minimum period of time. Obviously, the more detailed the requirements, the more difficult the provision would be to enforce. Additionally, there would need to be special provisions for an effective dissolution of a "tax marriage."

See generally Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240, 1265-75 (1980) (recommending recognition of "domestic partnerships" for purposes of the tax law).

18. Indeed, Congress could recognize "tax marriages" for opposite-sex couples who are not married under state law.

19. Census reports show that married-couple households as a percentage of total households are on the decline. In 1989, they accounted for 56% of all households, whereas they accounted for 71% in 1970. Bureau of the Census, *Current Population Reports*, Series P-20, No. 441 at 1 (1989). In addition, the increase in two-career married couples has changed the structure of the married couple's household. For example, there are an increasing number of married couples who commute and maintain two households.

20. Although husband and wife, living together, were required to share the personal exemption in the early Revenue Acts, they were otherwise considered individual taxpayers, liable for taxes on their individual incomes. See, e.g., § II of An Act to Reduce Tariff Duties and to Provide Revenue for the Government, and for Other Purposes, 38 Stat. 114, 168 (1913), which provided a \$3,000 personal exemption for each taxpayer and an additional exemption of \$1,000 if the taxpayer was living with a spouse. However, if husband and wife were both taxpayers (i.e., if they both had income), they could not each claim a \$3,000 exemption, but instead were limited to a total of \$4,000 between them. By 1917, these exemptions were reduced to \$1,000 for individuals and \$2,000 for a married couple. See War Revenue Act, Pub. L. No. 65-50, ch. 63, § 3, 40 Stat. 300, 301 (1917).

Scholars have varied in their descriptions of the tax unit of the early days. See, e.g., ERWIN N. GRISWOLD & MICHAEL J. GRAETZ, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 818 (1976) ("Prior to 1948, the tax unit was the individual taxpayer . . ."); June O'Neill, *Family Issues in Taxation* in *TAXING THE FAMILY* 1 (Rudolph G. Penner ed. 1983) ("Before 1948, the U.S. personal income tax focused on the individual . . ."). But see GEORGE EDWIN HOLMES, *FEDERAL INCOME TAX* 50 (1923) (claiming that "[i]n so far as possible the family is treated as a unit for purposes of the income tax.")

ual responsibility in the world of taxes is a good thing. Individual responsibility to one's government, both as to reporting and paying taxes, is a principle that reflects the liberal premises upon which this country was founded.²¹ I disagree, however, with the way in which tax law has been influenced by this focus on the individual. In particular, I am critical of tax doctrines that ignore the reality of personal relationships. For example, judicial analysis of husband-wife transactions are sometimes analyzed as though they had occurred between freely bargaining unrelated taxpayers.²² I call this the "fallacy of individualism" in tax analysis. The fallacy is also evident in legislative choices regarding the appropriate tax unit, at least to the extent such choices deny important connections between individuals.

Congress has made adjustments over the years that have reduced the fallacy's impact on husband and wife.²³ In this article, I argue that the tax law ought to counter the fallacy of individualism further by recognizing the reality of personal relationships in the case of same-sex couples. I begin in Part II with an elaboration of the meaning of the fallacy of individualism. In Part III, I discuss briefly the interdependence of state property law and federal tax law, especially as it affects married and unmarried couples. In the remainder of the article, I focus on two areas in which the tax treatment of married couples is significantly different from the tax treatment of unmarried same-sex couples. These areas are: (1) the income tax treatment of household income under the joint return and the assignment of income doctrine, and (2) gift tax treatment of wealth transfers.

My particular concern is with the tax treatment of support transfers from one partner to another. Under the income tax, the law accounts for support transfers between married couples by providing for income splitting under the joint return.²⁴ Existing law does not allow for similar in-

21. Individual freedom, equality, and personal acquisition of property were important themes in the philosophy of John Locke. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1967). These themes support a tax law based on individual (and equal) responsibility. For two interesting discussions of Locke's political philosophy, especially as to the extent of his "individualism," see CRAWFORD BROUGH MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (Oxford 1962) and ANDRZEJ RAPACZYNSKI, NATURE AND POLITICS 113-217 (1987). Whether Locke or any other early liberal theorist meant to include women (especially wives) in the class of free and equal individuals is questionable. See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 821-22 (1990).

22. See, e.g., *United States v. Davis*, 370 U.S. 65 (1962); *Farid-Es-Sultaneh v. Comm'r*, 160 F.2d 812 (2d Cir. 1947).

23. One example is the joint return provisions, introduced into our tax law in 1948. See Revenue Act of 1948, Pub. L. No. 80-471, ch. 168, §§ 301-305, 62 Stat. 110, 114-16. See also I.R.C. § 1041 (1991) (added to the Code in 1984) and the increase to 100% in the marital deduction for gift and estate tax purposes. See I.R.C. §§ 2523, 2056 (1991).

24. Income splitting is built into the tax rate schedule applicable to married couples filing a joint return. See I.R.C. § 1(a) (1991). When the joint return provisions were enacted in 1948, there was only one progressive rate schedule. Each single taxpayer computed tax liability according to this rate schedule. Total joint return income would be taxed as though the income were earned half by each of two single taxpayers, thereby allowing spouses literally to split their income 50/50 for tax purposes. See Revenue Act of 1948, Pub. L. No. 80-471, ch. 168, § 301, 62 Stat. 110, 114. Under the current

come-splitting between same-sex unmarried couples. I discuss and critique this existing law as it is applied to same-sex couples in Part IV. In Part V, I consider how the current gift tax laws affect support transfers. Although support payments to spouses are generally not subject to the gift tax,²⁵ the status of such payments for same-sex couples is not clear. If the payments are gifts for purposes of the gift tax, then the transferor may incur gift tax liability.²⁶ I argue that, under existing law, support transfers should not be viewed as "taxable gifts."

My narrow focus in this article should not be interpreted as a lack of enthusiasm for broader reform. In an ideal world the tax law would not discriminate in any way against same-sex couples who are similarly situated to married couples. The arguments in this article are addressed to only part of a much larger problem. Although I support partial reform, my preference would be to redraft the entire Internal Revenue Code so that it recognized the existence of lesbian and gay families and treated them with dignity.

II. THE FALLACY OF INDIVIDUALISM

The "fallacy of individualism" refers to the fact that judicial and scholarly analysis of tax issues often assumes that individuals are always rational market actors, attempting to maximize their individual utility. The fallacy of individualism derives from a narrow view of human nature that is decidedly selfish. The fallacy of individualism presumes that decisions by individuals regarding their income or wealth are primarily motivated by a concern for self.

The rhetoric of some tax scholars in the debate over the proper taxation of intrafamily gifts is one example of the fallacy of individualism. Henry Simons, for example, in elaborating on his definition of income as the sum of a person's consumption and accumulation,²⁷ took the position that gifts were income to both the recipient and the transferor. Because it is "more pleasant to give than to receive," the rational, utility maximizing donor can be viewed as engaging in personal consumption.²⁸ Professor Joseph

rate structure, joint return income is "split" between the spouses, but not at the same 50/50 rate (compared to single taxpayers).

25. Transfers to a spouse in fulfillment of the spousal support obligation are not considered taxable gifts. Rev. Rul. 68-379, 1968-2 C.B. 414 (discussed *infra* note 146). Even if a spousal transfer failed to qualify for this "support exclusion," no gift tax would be due, because spouses are entitled to a 100% marital deduction under the gift tax. I.R.C. § 2523 (1991).

26. No gift tax liability will occur if the transfers qualify for the \$10,000 annual exclusion. Nor will payments of medical expenses or tuition produce gift tax liability, provided payments are made directly to the provider of the services. See I.R.C. § 2503(e) (1991). Of course, no gift tax is due and payable until the transferor has made taxable gift transfers in excess of the \$600,000 exemption equivalent amount. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 935-38 (4th ed. 1990) for a brief overview of the mechanics of the unified estate and gift tax system.

27. HENRY SIMONS, PERSONAL INCOME TAXATION 49 (1938).

28. *Id.* at 57.

Dodge has similarly observed that, although gifts may not seem like consumption to the donor in the literal sense of the word, they are more "analogous to consumption than to investment," and they represent "the voluntary exercise of the donor's economic power."²⁹ These views assume that the individual is always the appropriate unit at which to measure income and that individuals make choices primarily to benefit themselves.

Another example of the fallacy of individualism can be seen in the Supreme Court's opinion in *United States v. Davis*,³⁰ decided in 1962. Mr. and Mrs. Davis had entered into a property settlement incident to their divorce under which Mr. Davis agreed to transfer certain appreciated stock to Mrs. Davis. Mrs. Davis agreed to accept the property "in full settlement and satisfaction of any and all claims and rights against the husband"³¹ The Court characterized this as a taxable exchange and taxed Mr. Davis on the gain realized, calculated as the difference between his basis in the stock transferred and its fair market value at the time of the exchange.

Technically, Mr. Davis's gain should have been computed as the difference between his basis and the fair market value of what he received from Mrs. Davis, namely, the release of her marital rights.³² Because there is no established "market" for marital rights, their fair market value could not be established. To remedy this problem, the Court assumed an arm's length bargain between Mr. and Mrs. Davis and was thus able to assume that her marital rights were equal in value to his stock.³³

Although the Court briefly acknowledged the possible "emotion, tension and practical necessities involved in divorce negotiations,"³⁴ it did so only with respect to the valuation question and not with respect to the initial characterization of the transaction as a taxable exchange. In effect, the Court reasoned that, despite the possible presence of strong emotions, it was more accurate to characterize the property settlement as a rational market exchange.

29. Joseph Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177, 1186 (1978). See also Michael McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C.L. REV. 469, 475 (1980) (" . . . a market analysis of marital behavior suggests that a husband . . . who shares his earnings with his wife reaps an economic benefit from that sharing.") But see William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 348-51 (1972) (arguing in favor of the current single tax on income that is subsequently gifted to a family member in that it reflects the reality of the household as an income-sharing entity).

30. 370 U.S. 65 (1962).

31. 370 U.S. at 67.

32. Gain is defined as "amount realized" minus basis. I.R.C. § 1001(a) (1991). "Amount realized" is defined as cash plus the fair market value of any property received. I.R.C. § 1001(b) (1991).

33. "It must be assumed, we think, that the parties acted at arm's length and that they judged the marital rights to be equal in value to the property for which they were exchanged." *United States v. Davis*, 370 U.S. at 72.

34. 370 U.S. at 72.

Any possibility of gift characterization was similarly dismissed in an abrupt footnote, which stated:

Any suggestion that the transaction in question was a gift is completely unrealistic. Property transferred pursuant to a negotiated settlement in return for the release of admittedly valuable rights is not a gift in any sense of the term.³⁵

Thus, the possibility that concern for the wife or that personal feelings of moral commitment might have motivated Mr. Davis were also ignored.

It seems that there were only two possible tax characterizations in *Davis*: a bargained-for exchange or a gift. While it is true that Mr. Davis's transfer of stock does not fit the *Duberstein*³⁶ definition of gift (namely, a transfer stemming from "detached and disinterested generosity"), the transaction is not a typical bargained-for exchange either. The problem in *Davis* was the Court's reluctance to look beyond the dichotomy it had set up: taxable exchange or gift.

Although Congress finally reversed the result in *Davis*,³⁷ the underlying analysis still haunts us. Under this analysis, a transfer of property between family members, lovers, and other intimates will be viewed as though it had occurred in a commercial context. The transfer is either a gift, stemming from detached and disinterested generosity, or a quid pro quo.³⁸ If it is the former, then it will trigger no income tax gain to either party. Gifts do not constitute income to the recipient.³⁹ Nor does a gift of property trigger gain to the transferor.⁴⁰ But if the transfer is a quid pro quo, there is the possibility of tax liability on both sides of the exchange.⁴¹ The person transferring the "quid" is viewed as a seller. To the extent the "quo" received for the "quid" exceeds the basis in the "quid," the transferor of the "quid" will have taxable gain. Similarly, the person transferring the "quo" can be viewed as a seller, who will be taxed to the extent

35. 370 U.S. at 69 n.6.

36. *Comm'r v. Duberstein*, 363 U.S. 278 (1960).

37. See I.R.C. § 1041 (1991), providing that transfers of property between spouses or ex-spouses, if incident to divorce, will be taxed as though they were gifts. Thus, there will be no gain recognized on the transfer and the transferee will take the transferor's basis in the property.

38. One possible alternative available to the *Davis* court would have been to call the transfer a part gift/part sale, thereby triggering partial gain. Another possibility would have been to reverse the rule of *Taft v. Bowers*, 278 U.S. 470 (1929) (see discussion *infra* note 40), as applied to divorce transfers.

39. I.R.C. § 102 (1991).

40. A gift has never been viewed as a realization event for purposes of taxing the donor's appreciation gain. See *Taft v. Bowers*, 278 U.S. 470 (1929).

41. At least one commentator, Professor Bruce Wolk, has focused on the *Duberstein* language to show that lovers who sign a relationship contract might be viewed as parties negotiating for a gain, rather than as persons motivated by affection. See Wolk, *supra* note 17, at 1245-46.

Although Wolk ultimately dismisses this characterization as absurd, it is a natural consequence of applying "marketplace notions to quasi-familial transactions for which such notions are often singularly inappropriate." *Id.* at 1247.

that the fair market value of the "quid" received exceeds the basis of the "quo" transferred.⁴²

These two examples of the fallacy of individualism are relevant to the discussion of tax issues affecting same-sex couples that follows. One issue is whether transfers motivated by personal concerns in an intimate relationship ought to be taxed as income to the transferor, the transferee, or both. Another issue is whether the gift tax ought to reach such transfers when they are made for purposes of supporting the recipient.

III. MARRIAGE CONTRACTS, RELATIONSHIP CONTRACTS, AND THE ROLE OF STATE LAW IN FEDERAL TAXATION

When a man and a woman marry, they generally adopt the "relationship contract" that has been drafted for them by the state.⁴³ Traditionally, the state's contract has contained a provision regarding support obligations between spouses. Other provisions in the state-drafted contract center on property rights. In community property states, for example, both spouses are given concurrent beneficial rights in most property acquired during the marriage.⁴⁴ Another typical provision in the state contract concerns the property rights of a surviving spouse upon the death of one spouse.⁴⁵ The modern state-drafted contract also contains provisions defining spousal property rights in the event of divorce.

Lesbian and gay couples, in contrast to married couples, must draft their own relationship contracts. These relationship contracts typically cover many of the same issues that are resolved for spouses by the state-drafted contract. Relationship contracts include provisions that deal with the following: (1) Whether earned income will be pooled or kept separate; (2) ownership of property acquired during the relationship; (3) allocation of rights in the home; and (4) property division upon termination of the

42. Under this analysis, Mrs. Davis, the recipient of the "quid," should have been taxed. However, the Service has never attempted to include in income receipts by the wife in exchange for her inchoate marital rights. This longstanding administrative practice was finally made public in Rev. Rul. 67-221, 1967-2 C.B. 63. The ruling gives no justification for its holding.

43. Spouses can alter some of the terms of the state-drafted contract by signing a premarital agreement. For example, spouses might contract for different property rights upon divorce than the rights granted by the state. Or, a spouse might contract for different support rights. Whether these contracts "electing out" of the state-drafted marriage contract are valid or not is a question that often raises complex issues of state law and public policy. See generally Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R.4th 22 (1987). For a thoughtful argument in favor of a married couple's right to draft their own marriage contract, see Marjorie Maquire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982).

44. Although state law varies, community property usually includes property acquired during marriage from the earnings of the spouse and not property acquired through gift and inheritance.

45. Such rights include common law curtesy and dower, the right to claim an elective share against a deceased spouse's estate, and homestead rights. For a general discussion of these rights, see J. DUKEMINIER & S.M. JOHANSON, *supra* note 26, at 373-78.

relationship. Sometimes these contracts include provisions regarding property distribution at death.⁴⁶

The specific provisions of particular relationship contracts will vary with the wishes of the couple. Some agreements provide for the sharing of income in a manner similar to community property rules.⁴⁷ Some agreements create an obligation of support.⁴⁸ Other agreements may ignore income and concentrate on the sharing of expenses. If income levels are uneven, the agreement may provide that household expenses will be shared in proportion to relative incomes.⁴⁹ In the case of couples whose income barely covers expenses, such an agreement has the same net result as an agreement to split income evenly and then split expenses evenly.

The main difference between married couples and unmarried couples who have drafted their own relationship contracts is that the marital contract is imposed by the state,⁵⁰ whereas the relationship contract is merely recognized by the state.⁵¹ This distinction can make a difference in at least

46. It is, of course, bordering on malpractice for a lawyer to draft such a contract for a couple without also drafting a pair of wills for the couple. *Inter-vivos* contracts are not normally effective to pass property at death. Effective testamentary dispositions must be accomplished via will, in accordance with the formalities of the state's Wills Act. Nonetheless, form books for relationship contracts often include a provision about the passage of property at death. See BARBARA B. HIRSCH, *LIVING TOGETHER* 111 (1976). Item 35 of this model contract provides that each party will make a will leaving property to the other and that the will is revoked on termination of the relationship. If the wills are never drafted, a surviving partner might argue she is entitled to a share of the decedent's estate under the contract, but there is no assurance such a claim will be successful. A contract cannot take the place of a will. Furthermore, if the will is made, its revocation is generally controlled by state statute. See, e.g., Tex. Prob. Code Ann. § 63 (Vernon 1990) (will can be revoked by physical act or by subsequent will, codicil, or declaration in writing executed with "Wills Act" formalities). It is unlikely that a contract provision can revoke the will effectively under state law. If the will is not in fact revoked (e.g., by physical act or by subsequent will), heirs who wish to rely on the contract provision will be limited to a claim for breach of contract. Since it is at best unclear who is the intended beneficiary of the contract provision, their claim would be difficult to prove. Furthermore, providing for an automatic revocation of the will upon termination of the relationship is not good estate planning. Even if the revocation were effective (e.g., if the condition revoking the will were made express in the will itself), the estate would pass via intestacy. Alternative dispositions in a new will would be preferable to intestacy.

See also *SEXUAL ORIENTATION AND THE LAW* 2-48 (Roberta Achtenberg ed. 1987) [hereinafter *SEXUAL ORIENTATION*] (item 9.00 covers rights of succession and contracts to make wills). There is nothing wrong with including the parties' understanding regarding inheritance in the contract. But if the understanding includes the drafting of wills, then wills should be drafted. The contract cannot stand as a replacement for the wills.

47. See, e.g., HAYDEN CURRY & DENIS CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (Ralph E. Warner ed. 4th ed. 1986) (Agreement to Share provides that property acquired prior to agreement is separate property as is property acquired by gift or inheritance). Accord TONI LYNNE IHARA & RALPH E. WARNER, *THE LIVING TOGETHER KIT* (6th ed. 1990) (see the form for a "Living Together Contract," which provides for sharing income and property); *SEXUAL ORIENTATION*, *supra* note 46 (model agreement at Appendix 2B).

48. See, e.g., *SEXUAL ORIENTATION*, *supra* note 46 (model agreement at Appendix 2C).

49. See B.B. HIRSCH, *supra* note 46, at 98 (describing the "joint funds system" for managing expenses).

50. Couples can opt out of the state contract by drafting antenuptial agreements that create alternative rights. Nonetheless, the state-imposed contract is the beginning point for drafting an alternative agreement. Furthermore, there are some provisions in the state contract that cannot be altered by private agreement. See discussion *supra* note 43.

51. The argument that contracts for a meretricious relationship should not be recognized by the state since they violate public policy has little force today. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557

one regard: An agreement to share income, whether entered into by spouses or others, is not determinative of tax consequences. By contrast, a state-imposed income-sharing requirement is determinative of tax consequences. This distinction is central to the assignment of income doctrine, which is discussed further in Part IV.

It is a maxim of federal income tax law that although federal law defines income, it must give full regard to state-defined property rights in applying that definition. Thus, for example, if spouses have vested property rights in realty under state law, the income from that property should be attributed to both spouses equally.⁵² Similarly, if lesbian or gay partners are joint property owners, the income from the property will be taxed to both of them. At divorce, a division of vested property rights can be viewed as a nontaxable event, whereas a release of nonvested rights for property can trigger taxable income.⁵³ Although these state-defined property rights of husbands and wives no longer play a major role in determining the federal tax consequences of property transfers between spouses,⁵⁴ the analysis underlying many key husband-wife tax cases can be applied to unmarried couples who engage in similar transfers.

There is a caveat to the maxim that federal tax law must recognize state-defined property rights. The assignment of income doctrine will disregard technical or formal ownership of property, even if such ownership is recognized for purposes of state law, whenever the "form" does not reflect the underlying substantive rights in the property. For example, even though state law might recognize the wife as "title owner" of income-producing property, federal tax law might tax the income to the

P.2d 106, 134 Cal. Rptr. 815 (1976); Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 3 A.L.R.4th 13 (1981). However, if a relationship contract is conditioned upon sexual services, it may be held void on public policy grounds. The general rule is that such contracts will be enforced unless they are expressly and inseparably based upon illicit consideration of sexual services. See *Whorton v. Dillingham*, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988) (holding that sexual component of consideration was separable and enforcing remainder of contract). But see *Jones v. Daly*, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981) (refusing to enforce an agreement between a gay male couple, because the agreement called for plaintiff to act as "lover, companion, homemaker, travelling companion, and cook," which the court viewed as calling for primarily sexual services).

52. See, e.g., *Poe v. Seaborn*, 282 U.S. 101 (1930).

53. Under *United States v. Davis*, income would be triggered to the transferor of the property to the extent of its fair market value in excess of its basis. *Davis*, 370 U.S. 65. Thus, the transaction would only be taxed if the property transferred had appreciated in value. The Internal Revenue Service ruled subsequently that the spouse who released the property rights would not be taxed. Rev. Rul. 67-221, 1967-2 C.B. 63. Although the result in *Davis* has been reversed legislatively (see discussion *infra* note 54) as to most transfers of property at divorce, the Internal Revenue Service has taken the position that a transfer of "assignment of income" property can still trigger income to the transferor. See Rev. Rul. 87-112, 1987-2 C.B. 207; Priv. Ltr. Rul. 88-13-023 (Dec. 29, 1987).

54. In 1984, Congress added § 1041 to the Internal Revenue Code. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494, 793. Section 1041 exempts property transfers between spouses from the income tax, thus reversing the result in *United States v. Davis*. In 1981, Congress amended the estate and gift tax law to provide for an unlimited marital deduction, thereby excluding most spousal transfers from gift and estate tax. See I.R.C. §§ 2523, 2056 (1991).

husband, if he has substantial rights in the property.⁵⁵ The "assignment of income," "substance over form," and "sham transaction" doctrines have all been used by the Commissioner to ignore nominal ownership and tax income from property to the substantive owner. Although these doctrines are usually applied in cases involving spouses or other related parties, they are equally available in cases involving lesbian and gay partners. Thus, the substance of property arrangements between lesbian and gay partners ought to be consistent with the form.⁵⁶

The taxation of spousal support payments provides another area for comparison between married and unmarried couples. Spousal support payments made during marriage have always been exempt from both the income tax⁵⁷ and the gift tax.⁵⁸ Payments to children in satisfaction of the state-imposed legal obligation of support are also exempt from income and gift taxes.⁵⁹ However, payments to others in the nature of support present

55. See *Comm'r v. Tower*, 327 U.S. 280 (1946), in which the Court applied assignment of income principles to ignore a wife's interest in a partnership. Justice Black, writing for the majority said:

Thus, Michigan could and might decide that the stock-transfer here was sufficient under state law to pass title to the wife, so that in the event of her death it would pass to whatever members of her family would be entitled to receive it under Michigan's law of descent and distribution. But Michigan cannot, by its decisions and laws . . . also decide issues of federal tax law

327 U.S. at 287-88. See also *Overton v. Comm'r*, 162 F.2d 155 (2d Cir. 1947) (dividends on class B stock, owned by wife, taxed to husband, owner of class A stock, because class B stock had insufficient substantive rights).

56. A frequent practice of unmarried couples is for one partner to sign a deed conveying by gift an interest in realty (typically the home) to the other partner, but not record the deed. Title to realty passes under state law whether the deed is recorded or not, and the Internal revenue Service should recognize both partners as owners for income tax purposes. A somewhat troubling twist on this practice is for the donor to sign the deed, but not deliver it. For example, the donor sometimes wishes to retain possession of the deed with the intent of tearing it up should the relationship end. In such cases, neither the form nor the substance is sufficient to convey any interest to the donee partner. A deed conveys nothing until it is delivered. Although physical delivery may not be required, delivery has not occurred unless the donor intends a present conveyance. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 609-10 (2d ed. 1988).

57. I know of no cases in which the Commissioner has asserted that payments from one spouse to another in fulfillment of the legal obligation of support constitute taxable income to the recipient during marriage. The question would have presented a meaningful tax question only for pre-1948 tax years when husband and wife were required to report income separately.

The issue has arisen in the context of support payments made incident to divorce. In *Gould v. Gould*, 245 U.S. 151 (1917), the Supreme Court ruled that such support payments were not taxable income to the recipient spouse. The rationale for this holding is not clear. A subsequent opinion suggests that the Court was unlikely to view the payments to the wife as income "when the law had already taxed the husband upon his receipt of the income from which he paid the alimony" *Mahana v. United States*, 88 F. Supp. 285 (Ct. Cl. 1950), *cert. denied*, 339 U.S. 978, *reh'g denied*, 340 U.S. 847 (1950). *Gould* is often cited by commentators for the proposition that support payments to spouses are not income to the recipient. See, e.g., Moran, *supra* note 14.

58. E.T. 19, 1946-2 C.B. 166. Cf. *Rosenthal v. C.I.R.*, 17 T.C. 1047 (1951), *rev'd on other grounds*, 205 F.2d 505 (2d Cir. 1953).

59. For income tax rules regarding post-divorce child support payments, see I.R.C. § 71(c) (1991). For early gift tax cases resolving this issue, see *Rosenthal v. Comm'r*, 205 F.2d 505 (2d Cir. 1953); *Helvering v. McCormack*, 135 F.2d 294 (2d Cir. 1943). But see *Comm'r v. Greene*, 119 F.2d 383 (9th Cir.) (1941) (holding that payments to adult daughters allegedly unable to support themselves were taxable gifts despite California law imposing obligation on parents to provide support to children who are poor persons unable to support themselves), *cert. denied*, 314 U.S. 641 (1941). See also *Rev. Rul.* 54-343, 1954-2 C.B. 318, which characterizes parental support payments to adult son

problems for the tax law, because there are no other state-imposed support obligations.⁶⁰ I will focus on this problem regarding support payments in the following sections of this article.

IV. AGREEMENTS TO SHARE INCOME AND THE ASSIGNMENT OF INCOME DOCTRINE

A. *Historical Background*

In 1930, the Supreme Court decided *Lucas v. Earl*,⁶¹ which quickly became the touchstone for resolving assignment of income questions in the tax law. The case involved a husband and wife who had agreed in 1901, well before the enactment of the modern income tax,⁶² that they would each share equally in all income produced or acquired by either of them during the marriage.⁶³ The issue before the Court was how to allocate the tax burden on the salary and fees earned by Mr. Earl. Admitting that Mrs. Earl had a legally enforceable right to receive half of Mr. Earl's earnings under their contract, Justice Holmes concluded that the fruits must be taxed to the tree that produced them.⁶⁴ Thus, Mr. Earl, as the producer of the fruit, would continue to bear the tax burden on his earned income despite his legally effective assignment of that income to his wife.

and his family as taxable gifts, because state law provided no legal obligation to support. This result seems unreasonably harsh as the facts suggest that the son was temporarily disabled by illness. Payment of the son's hospital bills also constituted a taxable gift. *See also* Rev. Rul. 82-98, 1982-1 C.B. 141. The gift tax characterization of medical care payments has been reversed by statute. *See* I.R.C. § 2503(e) (1991).

60. *But see* San Francisco Domestic Partnership Act § 2(a) (1990) (domestic partners are "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership") (emphasis added). Any couple who registers as a domestic partnership must assume an obligation to support each other. Presumably this obligation will be legally enforceable to the same extent that spousal support obligations are.

61. 281 U.S. 111 (1930).

62. An earlier income tax act had been passed in 1894, but was declared unconstitutional in 1895. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). (In 1988, the Supreme Court held that part of the *Pollock* holding has been overruled by subsequent case law. *See* *South Carolina v. Baker*, 485 U.S. 505, 524 (1988).) Thus, there was no federal income tax law in effect in 1901. The sixteenth amendment, authorizing Congress to pass an income tax law, was not ratified until 1913. An income tax on corporations was passed in 1909, before ratification of the sixteenth amendment.

63. The agreement was quite broad and included much more than the promise to pool income. The specific terms of the agreement were

that any property either of us has now or may hereafter acquire . . . in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship.

Lucas v. Earl, 281 U.S. at 113-14.

64. "[W]e think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." 281 U.S. at 115.

The *Earl* case has been rightly criticized for being heavy on metaphor and light on analysis.⁶⁵ This weakness became immediately apparent when the Supreme Court decided *Poe v. Seaborn*⁶⁶ just eight months later. As in *Earl*, a wife had reported on a separate return half of the earned income of her husband.⁶⁷ The only difference between *Seaborn* and *Earl* was that Mrs. Seaborn's claim of entitlement to her husband's income was grounded in the state's community property laws rather than in the state laws regulating private contracts. In *Seaborn*,⁶⁸ the Court sided with the taxpayer and upheld the splitting of tax liability on the income. It distinguished the assignment of the husband's salary in *Lucas v. Earl* as follows:

The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community.⁶⁹

Seaborn made no reference to the fruit and tree doctrine, which focuses on the person who creates the income. Instead, the Court premised its decision on a property law analysis, asking "who owns the income?"⁷⁰ The Court's property law analysis rejected the government's theory of the case as well. The government in *Seaborn* had argued for control of the income stream as the touchstone of tax liability,⁷¹ stressing the fact that under Washington's community property law, Mr. Seaborn had a great deal of control over the property owned by the community. The Court responded by emphasizing that this control was only held in his capacity as agent for the community. Furthermore, Mr. Seaborn had absolute control over the production of earned income since he could always choose

65. "The opinion in *Lucas v. Earl* is late-vintage Holmes, magisterial in tone, studded with quotable phrases, and devoid of analysis." Bittker, *supra* note 8, at 1401 (footnote omitted).

66. 282 U.S. 101 (1930).

67. The husband's salary was only one item of income that they split. In addition, the couple reported income from interest on bank deposits and on bonds, dividends, and profits on sales of real and personal property. 282 U.S. at 109.

68. *Seaborn* was one of four test cases before the Supreme Court. All four cases involved the question whether the community property laws of Washington, Arizona, Texas, and Louisiana authorized spousal division of income for purposes of federal taxation. Mr. and Mrs. Seaborn were from the state of Washington. 282 U.S. at 103.

69. 282 U.S. at 117.

70. In point of fact, income is not something that is owned. One can own a right to income or one can own the dollars in which income may be paid. The Supreme Court's focus on ownership in *Seaborn* only makes sense as a focus on the dollars or the right. The distinction made seems to be that the dollars vested in Mr. Earl before the contract effected a transfer to his wife, whereas the dollars never vested in Mr. Seaborn, because state law gave Mrs. Seaborn direct ownership rights. The superficiality of this analysis is subject to the same criticisms as those levied against the *Earl* decision.

71. "Where the husband has control over and the right to enjoy the entire community income, he is required to include it in his return for Federal income-tax purposes." *Poe v. Seaborn*, 75 L.Ed. 239, 239 (1930) (brief for the government).

leisure over work, a fact never acknowledged by the Court. Responding to the government's "control theory," the Court said, "[p]ower is not synonymous with right."⁷² This pronouncement may have been factually correct as to income from property, but it hardly seems accurate as to earned income.⁷³

B. The Impact of LUCAS v. EARL on Same-Sex Couples

1. Traditional Tax Analysis: The Applicable Rules

The combination of *Earl* and *Seaborn* establishes the following rule: earned income is always taxed to the earner,⁷⁴ unless the income is community property income. Despite the absence of satisfactory justifications for these results, the judiciary has held firm to this underlying rule for over sixty years now.⁷⁵ Thus, there is no viable argument under current law by which a private agreement to split earned income can serve to split the income tax burden. The earner of the income will remain liable for the tax.

Consider a lesbian couple, Anna and Beth. Assume that Anna earns a salary of \$60,000, which she has agreed to share with Beth. Anna remains taxable on the \$60,000 despite the agreement. That result follows clearly from *Earl*. But does the agreement affect Beth's tax liability? *Earl* does not address that question. Only Mr. Earl was before the court. The only issue the Court addressed was whether he should be taxed on 100 percent or 50 percent of his income. Mrs. Earl's tax liability was not at issue. Most students of tax law assume that since Mr. Earl was taxed, then Mrs. Earl should not be taxed.⁷⁶ But that is not necessarily true. If Mr. Earl actually paid Mrs. Earl half of the income amount each year, then her wealth would be increased by the amount she received. Most increases in wealth constitute gross income to the recipient.⁷⁷ Gifts, however, are specifically excluded from the definition of gross income.⁷⁸ Whether the

72. 282 U.S. 101, 113.

73. Mr. Seaborn's power to elect leisure over a salary is effectively a "right." Mrs. Seaborn cannot force him out into the marketplace to work. She will only own the dollars from his salary if he elects to work, a matter totally within his power.

74. This statement of the rule from *Earl* is somewhat simplified. As stated, the rule is true only because it assumes that the earner has a sufficient right to receive the income. Assignment of the right does not relieve the earner of the tax burden.

75. Early commentators tried to develop a "control theory" to explain *Earl* and other cases involving assignment of earned income. In *Helvering v. Eubank*, 311 U.S. 122 (1940), however, the Court held that the earner was taxed on previously earned income to which he had relinquished all control. Thus, the best explanation for the result in *Eubank* is that income is taxed to the person who earns it. See Lloyd George Soll, *Intra-Family Assignments: Attribution and Realization of Income*, 6 TAX L. REV. 435, 438 (1951).

76. See also Treas. Reg. § 1.102-1(e) (1956), which can be read to support this position.

77. See *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) (holding that the receipt of punitive damages, like any other windfall, was an undeniable accession to wealth and therefore taxable under the income tax).

78. I.R.C. § 102 (1991).

hypothecated transfer from Anna to Beth is a gift (or some other type of excluded amount)⁷⁹ is a separate question.⁸⁰ Thus, to answer the question regarding Beth's tax liability we must ask whether the transfer of wealth can be excluded from her income as a section 102 gift.

2. *Identifying the Wealth Transfer*

To help analyze whether Beth's increase in wealth is income or a gift, we should identify more specifically the wealth transfer from Anna to Beth. Although they may have agreed to "pool income," this language is too vague to establish what Beth's rights under the agreement are. One thing is clear: Even if the agreement to pool income is in writing, the agreement itself does not constitute a wealth transfer.⁸¹ Rather, Beth's increase in wealth will occur whenever Anna makes a transfer pursuant to the agreement. The agreement may be implemented in various ways. Here are the two most common ones:

(1) *Joint accounts.* Anna will deposit her paycheck each month in a joint checking account, out of which they will pay all current expenses. If income exceeds expenses by a sufficient amount, the excess may be deposited in a higher interest-bearing account that is also joint. Their agreement is that all funds in all accounts are owned equally.

(2) *Separate accounts.* Anna will keep all of her funds in a separate account under her separate control and will be responsible for making all necessary expenditures for both partners. Beth will maintain a separate account for her separate needs, which are separately budgeted, and Anna will give her the budgeted amount periodically. This method reflects an underlying agreement that Anna will support Beth, but not necessarily that Beth is entitled to half of Anna's income. Alternatively, they may agree that Anna will transfer half of her discretionary income (that is, the amount in excess of joint living expenses) to Beth's separate account on a regular basis.

The decision to use joint or separate accounts may reflect differing views about money management, rather than differing views about equal sharing. Some people find it extremely difficult to maintain joint accounts with another person, because it is impossible to keep a running balance with two people writing checks on the same account. Some people like to keep accurate balances in their checkbooks and religiously check those balances against bank statements every month. Other people prefer not to

79. Another possibility is that payments from Mr. Earl to Mrs. Earl are "support." Support payments between husband and wife are not taxable. See discussion *supra* note 57.

80. See text accompanying notes 85-96 *infra* for discussion of the exclusion from income question.

81. At this point in time, all Beth has is a contingent right under the agreement. Anna may or may not earn income. Once she does, Beth may have rights in that income. The signing of the agreement provides Beth with nothing more than an inchoate right.

waste time doing simple math, but would rather trust the bank to tell them what their balance is at any given time.

Because people have different desires about the details of money management, it is possible to have very different systems that reflect the same underlying agreement to pool income equally. Because tax consequences follow the shift in property rights between the parties, however, different results can occur depending on whether a joint account or separate account system is used.

Assume, for example, that the Commissioner asserts that transfers from Anna to Beth are taxable as income, rather than excludable as gifts. If Anna deposits her earnings in a joint account, the funds are presently available to Beth.⁸² In this case, the doctrine of constructive receipt will apply to tax Beth at the time the deposits are made. This is the time at which the wealth transfer occurs. Since she can draw on these funds at any time, Beth is in constructive receipt of the amount that Anna intended her to have, that is, one-half of each deposit.⁸³

By contrast, if Anna maintains a separate account for her earnings, the doctrine of constructive receipt will not apply. Even though Anna may view all funds and assets as available to Beth should Beth need them, Beth is not in constructive receipt unless the funds are "credited to [her] account, set apart for [her], or otherwise made available so that [s]he may draw upon [them] at any time. . . ."⁸⁴ Under the separate account approach, Beth will only be taxed on amounts that are actually transferred to her or spent for her benefit.

82. Under a joint account either party to the account has the right to withdraw funds. Ownership of the funds, however, is traced to the depositor. If *A* and *B* have a joint account and *A* makes all the deposits, *A* will be viewed as the owner under state law. *See, e.g.*, Minn. Stat. § 528.04(a) (1984); Tex. Prob. Code Ann. § 438 (Vernon 1990). *B* has the right to withdraw the funds, but unless *A* gives *B* permission to keep the withdrawn funds, the funds still belong to *A*. Some states presume that *A* intended a gift to *B* if the funds are made available to *B* in a joint account. But the presumption can be rebutted by clear and convincing evidence. *See, e.g.*, Estate of Abbot, 157 Ill. App. 3d 289, 510 N.E.2d 619 (Ill. App. Ct. 1987) (funds in joint tenancy account held to belong to estate despite presumption that deceased made a gift to other joint tenant when he opened account; presumption rebutted by proof of intent that account was for convenience purposes only). *Accord* Turner v. Mikell, 195 Ga. App. 766, 395 S.E.2d 20 (Ga. Ct. App. 1990), (No. A90A0467), *cert. denied*, (July 11, 1990); Koontz v. Long, 384 S.E.2d 837 (W. Va. 1989). *See also* Smith v. Minnesota, 389 N.W.2d 543 (Minn. Ct. App. 1986) (holding all funds on deposit belong to depositor rather than to other joint tenant unless there is clear and convincing evidence of a contrary intent on the part of the depositor).

83. A taxpayer is in constructive receipt of income when the right to the income accrues and the income is made available. Treas. Reg. § 1.451-2(a) (as amended in 1979). The right to half of all of Anna's deposits has accrued to Beth under the terms of their relationship contract. The amount is made available once it is deposited. By contrast, the rule for gift tax purposes is that no completed gift is made until Beth withdraws the funds. Treas. Reg. § 25.2511-1(h)(4) (as amended in 1986).

84. Treas. Reg. § 1.451-2(a) (as amended in 1979).

3. *Exclusion from Gross Income*

a. *The Gift Exclusion*

Are the transfers from Anna to Beth gifts under section 102 of the Internal Revenue Code? The starting point for answering this question is *Comm'r v. Duberstein*.⁸⁵ Under *Duberstein*, a transfer is a gift if the transferor's motive in making the transfer is "detached and disinterested generosity,"⁸⁶ stemming from "affection, respect, admiration, charity or like impulses."⁸⁷ A difficulty in applying this test to Anna and Beth arises if the transfers occur pursuant to a relationship contract. The mutual promises in a relationship contract suggest a certain quid pro quo that is inconsistent with the notion of "detached and disinterested generosity." Additionally, if Beth has promised more than love, affection, and companionship—for example, if she has also promised services (e.g., housekeeping or cooking)—then the *Duberstein* test is clearly more difficult to meet.⁸⁸

Other scholars have identified this difficulty in applying the *Duberstein* test to relationship contracts.⁸⁹ One commentator has argued that these contracts are similar to contracts between husband and wife, including antenuptial agreements and property settlements at divorce.⁹⁰ Since transfers pursuant to similar husband/wife agreements have never been taxed to the transferee,⁹¹ one might argue by analogy that the transfer to Beth should escape income taxes as well. The difficulty in making such an analogy is that the Internal Revenue Service has never clarified why transfers pursuant to these husband and wife agreements are not taxed to the transferee.⁹² The justification can hardly be that the transfer constitutes a gift under section 102, because the ruling was issued after the Supreme Court decided in *United States v. Davis* that such transfers should not be considered gifts for income tax purposes.⁹³

85. 363 U.S. 278 (1960).

86. 363 U.S. at 285.

87. 363 U.S. at 285.

88. But note that if Beth is viewed as an employee of Anna who is responsible for taking care of the house, then Anna should pay her "in kind" to the extent possible, by providing her with free meals and lodging. The value to Beth of these items would then be excluded under I.R.C. § 119 (1991).

89. See Wolk, *supra*, note 17; Margot Hagaman, *Federal Taxes in SEXUAL ORIENTATION*, *supra* note 46, at 3-1.

90. See Wolk, *supra*, note 17.

91. The Commissioner does not appear ever to have taken the position that the transferee in such a situation should be taxed. Nontaxation became official with the publication of Rev. Rul. 67-221, 1967-2 C.B. 63, discussed *supra* note 42 and *infra* note 92.

92. See, e.g., Rev. Rul. 67-221, 1967-2 C.B. 63, ruling that when a wife releases her inchoate marital rights (e.g., dower) in exchange for property as part of a property settlement at divorce, she is not taxed on the receipt of the property. No explanation is given in the ruling for this result.

The issue for spouses has now been mooted by the passage of I.R.C. § 1041 (1991), which provides that transfers between spouses and ex-spouses incident to divorce shall be treated as gifts.

93. Although the issue in *Davis* was the taxation of the transferor, the holding that the transfer is not a gift seems equally applicable to the transferee.

Nonetheless, it seems clear that transfers from Anna to Beth constitute gifts under section 102. Despite warnings that traditional tax analysis could tax both Anna and Beth, the correct approach is to focus on the primary motivation of Anna in making the transfer. That is the stated rule in *Duberstein*. Provided the contract itself is motivated primarily by love and affection, then all transfers pursuant to the contract ought to be viewed as stemming from the same motivation. Under this analysis, the transfers would be excludable gifts under section 102. To read *Duberstein* and *Davis* as suggesting that gifts between lovers are not gifts if made pursuant to an agreement and to argue that relationship contracts are bargained-for exchanges is to commit the fallacy of individualism.

b. The Support Exclusion

Although I believe gift characterization is accurate for the transfer from Anna to Beth, another characterization is possible. The agreement to pool income was entered into for the purpose of supporting Beth. Thus, the Commissioner might argue that the payments to Beth resemble support payments rather than purely discretionary gifts. In this case, the payments might be characterized as stemming more from a sense of obligation than from "detached generosity." Characterized in this manner, the payments technically would not meet the *Duberstein* test for gift exclusion.⁹⁴ If the payments are characterized as "support," can they be excluded from Beth's income under some theory other than the "gift exclusion"?

One possibility would be to analogize support payments between Anna and Beth to support payments between spouses. Spousal support payments are not income to the recipient. Although the legal basis for exclusion in the case of spouses has never been fully articulated, the exclusion has been recognized both by the judiciary and by the Internal Revenue Service.⁹⁵ The unspoken assumption appears to be that all intrafamily transfers, unless they are payments for services, are either support pay-

94. A counter-argument that the transfers are nonetheless properly classified as gifts is that even though transfers from Anna to Beth stem from a sense of obligation, the obligation itself arises from love, a motive that qualifies the transfer for gift treatment under the *Duberstein* test. See *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (transfer is a gift if it arises "out of affection, respect, admiration, charity, or like impulses").

95. Judicial recognition of the tax-free nature of support payments occurred as early as 1917. See *Gould v. Gould*, 245 U.S. 151 (1917), discussed *supra* at note 57. The position of the Internal Revenue Service is reflected in Rev. Rul. 67-221, 1967-2 C.B. 63, *supra* note 92, which held that a wife did not recognize gain when she received property at divorce in exchange for her inchoate rights. One explanation for this result is that the wife was receiving the property in exchange for her inchoate support and inheritance rights, rights that she would normally enjoy free of income tax. See Philip Mullock, *Divorce and Taxes: Rev. Rul. 67-221*, 23 U. MIAMI L. REV. 736 (1969) (discussing various possible rationales for Rev. Rul. 67-221 other than the one I have suggested and concluding that none of these other rationales supports nonrecognition of gain).

As of 1984, the exclusion has been recognized by Congress. See I.R.C. § 1041 (1991). Section 1041 does not cover support payments explicitly. Rather it treats all transfers between spouses (other than payments for services) as excluded gifts.

ments or gifts, both of which are excluded from the income of the recipient. Although there may be a number of policy reasons for excluding support payments from income, one of the most obvious reasons is that they are sufficiently similar to gifts (for example, the motives behind the transfers are similar in that they both stem from love and affection) that it would be administratively difficult to determine when a payment was a "pure gift" and when it was in fulfillment of a support obligation. Thus both types of payments should be excluded from income.

If this is a sufficient justification for excluding support payments, then Beth's case for exclusion is quite strong. The only difference between Anna's payment of support to Beth and similar payments from one spouse to another is the absence of a state-imposed legal obligation. If a spouse can exclude from income support payments to which she has a recognized legal right, then Beth, whose claims are merely moral and perhaps contractual,⁹⁶ has an even better claim for exclusion. Beth's claim is "better," because the payments she receives are even closer to *Duberstein* gifts than are legally required spousal payments. In sum, whether the transfer to Beth is technically characterized as a gift or support payment, current law ought to exclude the amount from Beth's income.

C. Planning Around LUCAS v. EARL for Same-Sex Couples: Is It Possible?

The effect of *Earl* and *Seaborn* on married couples has been greatly minimized by the availability of the joint return. In couples where there is only one income earner, the joint return provides an income splitting advantage. Assume, for example, a married couple in which only one spouse has taxable income. At a salary of \$40,000, taxable income would be no more than \$31,000.⁹⁷ The applicable tax rate on the joint return for this amount of taxable income is 15 percent,⁹⁸ producing a total income tax bill of \$4,650. Compare this amount to the tax on a lesbian or gay man who also earns \$40,000 and is supporting a partner who has no taxable income. The tax payable for the same-sex couple, unmarried, but otherwise similarly situated to the couple who filed a joint return, would be \$6,711.50.⁹⁹ The difference in tax burden, \$2,061.50, is considerable at

96. If the provision for support in the relationship contract is supported by consideration, Beth could enforce her right to support under contract law. Otherwise, the contract is merely a written embodiment of the couple's moral obligations to each other.

97. Unless the taxpayer itemizes deductions, taxable income is gross income (\$40,000) minus the standard deduction (\$5,000 on a joint return) and the deduction for personal exemptions (two exemptions in this case at \$2,000 each for a total of \$4,000). Thus, taxable income is no more than \$31,000. See I.R.C. § 63 (1991) (taxable income and standard deduction); I.R.C. § 151 (1991) (personal exemption). (Note: I have not made adjustments for inflation in this computation).

98. I.R.C. § 1(a) (1991).

99. The computation (with no adjustments for inflation) is as follows: Gross income (\$40,000) minus the standard deduction (\$3,000 for a single taxpayer) minus two exemptions (\$4,000 total) equals \$33,000. I.R.C. § 151 (1991) allows an exemption for each dependent whose gross income is

this income level.¹⁰⁰ To produce an even tax burden under current rate schedules, the same-sex couple would have to effectuate a transfer of sufficient income from the earner to the dependent so that all income would be subject to the 15 percent rate. A transfer of \$15,550 would accomplish this objective.¹⁰¹ Can it be done?

Obviously a gratuitous assignment will not accomplish the desired result. *Earl* still controls. Possibilities for a successful arrangement will depend on the type of trade or business in which the earner is engaged and on the related skills of the dependent. Assume, for example, that Anna is the partner earning the \$40,000 and that her partner, Beth, is dependent on Anna. If Anna is a lawyer and the \$40,000 represents her net income from practice, she might consider hiring Beth to perform services that benefit the law practice. Depending on Beth's skills, she could do legal research, collect data for client files, answer the telephone or run errands. The payments to Beth from Anna would be compensation for services rendered, taxable to Beth, and deductible by Anna under section 162 of the Internal Revenue Code.

So long as the payment to Beth is truly for services rendered, the "assignment" should successfully transfer the net income tax burden from Anna to Beth, thereby reducing their combined income tax burden. Before rushing to structure an employment contract between these two, however, consideration must be given to the concomitant increase in Social Security taxes. If Beth is hired as an "independent contractor," the creation of \$15,500 in wages for Beth will subject her to Social Security (OASDI) taxes at a rate of 12.4 percent.¹⁰² Those self-employment wages are also subject to the hospital insurance tax of 2.9 percent.¹⁰³ The combined rate

under \$2,000 (the exemption amount). A dependent can include an unrelated person who lives with the taxpayer so long as that person is supported by the taxpayer. See I.R.C. § 152(a)(9) (1991), discussed further *infra* note 117.

Under I.R.C. § 1(c)(3) (1991), the tax rate is 15% on the first \$19,450 of taxable income (or \$2,917.50) and 28% on the remaining \$13,550 (or \$3,794). The total tax, therefore, equals \$6,711.50.

100. By contrast, the marriage penalty, which increases the tax on a married couple if there are two earners, will never exceed \$1,619.50 (ignoring inflation adjustments and the new exemption phaseout contained in I.R.C. § 151(d)(3) (1991) and that amount only occurs at the upper income levels (e.g., when both spouses are earning over \$52,050)).

101. Assume partner A earns the \$40,000. If she could transfer \$15,550 of that amount to partner B for tax purposes, then A's taxable income would be \$24,450 gross income minus \$5,000 (the \$3,000 standard deduction plus a \$2,000 personal exemption), or \$19,450. This amount will be taxed at 15% for a tax bill for A of \$2,917.50.

B's taxable income would be \$15,550 gross income minus \$5,000 (the standard deduction plus the personal exemption), or \$10,550, also taxed at 15%, for a tax bill of \$1,582.50.

The couple's total tax bill, assuming an effective transfer of the income for tax purpose, would be \$4,500, for an income tax savings of \$2,211.50. Note that \$4,500 is \$150 less than the tax bill for the married couple filing jointly. This \$150 difference stems from the fact that two single taxpayers can claim two standard deductions of \$3,000 each for a total of \$6,000, where a joint return filer can only claim a standard deduction of \$5,000.

102. I.R.C. § 1401(a) (1991).

103. I.R.C. § 1401(b) (1991).

of these taxes for the self-employed individual is 15.3 percent,¹⁰⁴ producing an additional tax cost to Beth of \$2,271.50.¹⁰⁵ Given this additional tax, Anna and Beth are only slightly better off shifting the income tax burden.¹⁰⁶

Under the current tax rate structure, I do not believe it makes sense to plan around *Lucas v. Earl*. The only valid method to transfer current earned income from one partner to the other is through an employment for services arrangement. The maximum income tax savings will be 16 percent.¹⁰⁷ But, the newly created earnings will be wages subject to additional taxes at the rate of 15.3 percent. To avoid the 15.3 percent tax, the income transferred must be investment income rather than earned income. Investment income can be transferred via a valid transfer of the underlying investment property.¹⁰⁸

D. Time to Abandon *LUCAS v. EARL*

In 1975, Professor Boris Bittker asked us to imagine the world that might have been without *Lucas v. Earl*.¹⁰⁹ Confining the case to its facts, that is, a contract between husband and wife to share income, Professor Bittker offers a sound critique of the decision. In spite of arguments that *Earl* was necessary to protect progressivity, the decision really could have gone the other way, in favor of the taxpayer, and we would have been no worse off. Had *Earl* been decided in favor of the taxpayer, spouses would have been allowed to split their income by private contract. Congress would not have been pressured into passing the joint return provisions.¹¹⁰ And same-sex couples would no doubt be arguing today for an extension of the *Earl* income-splitting benefits to them.

But *Earl* went against the taxpayer. And it has been on the books entirely too long to suggest that the time has come for judicial abandonment.

104. If Anna hires Beth as an "employee," the OASDI and hospital tax will also be due. Anna will pay half and Beth will pay the other half. The total rate will still be 15.3%, although Anna will be able to deduct her portion, thereby reducing the after-tax cost. See I.R.C. §§ 3101, 3111 (1991).

105. Beth can deduct half of this amount as a trade or business expense, thereby reducing the after-tax cost to her by \$170.36. See I.R.C. § 162(e) (1991).

106. They save \$2,211.50 on income taxes and pay an extra \$2,101.14 (\$2,271.50 minus \$170.36) in other taxes, for a total benefit of \$110.36. If the \$15,500 transfer to Beth had been out of income taxed to Anna at the 31% top marginal bracket (triggered under the single rate schedule at \$47,050 of taxable income), then the income tax savings would be increased by an additional \$465 (i.e., 3% of \$15,500), still probably not enough of a savings to warrant the arrangement.

107. This savings only occurs if income is transferred from a 31% marginal bracket to person taxed at the 15% rate.

108. For example, if Anna deposits excess cash in a joint interest-bearing bank account, Anna and Beth can split the tax on the interest. Both social security numbers should be given to the bank to evidence the underlying agreement that the funds are jointly owned and not just on joint deposit for convenience.

109. Bittker, *supra* note 8, at 1401-04.

110. Joint returns for the purpose of splitting income would not have been necessary except for those spouses who might want to split the tax burden without actually splitting the income. Joint returns for the sake of convenience might have nonetheless been desired by some spouses.

What I do want to suggest is the possibility of additional legislative adjustments¹¹¹ that will reverse the negative effect of *Earl* on couples like Anna and Beth. My specific proposal is for a limited abandonment of *Lucas v. Earl* so that Beth's support will not be taxed at Anna's marginal tax rate.

Earlier in this article, I argued that support payments were sufficiently akin to gifts that they should be excluded from the income of the transferee. That argument was made for the purpose of avoiding a double tax on income earned by Anna and then transferred to Beth. That argument presumed that the ideal tax result was a single tax on any current income consumed within a single household for the immediate support of that household. The argument did not, however, consider whether the ideal result was to assess that tax at the marginal bracket of the transferor or the transferee.

Tax theorists define income as the sum of an individual's consumption choices and accumulation during the tax period.¹¹² If Anna supports Beth during the tax period, the question becomes whether this support ought to be viewed as Anna's consumption or Beth's. In a literal sense, of course, Beth's support is Beth's consumption. She is the one who eats the meals and wears the clothes. Under this view, we ought to tax the payments to Beth simply because she is the one consuming their value. Her consumption ought to be taxed at her marginal bracket.

Is there any way to view the support payments as consumption to Anna? The fallacy of individualism, which regards all taxpayers as profit-maximizing market actors, suggests that such payments constitute taxable consumption to the payor. As one tax scholar has explained:

[A] market analysis of marital behavior suggests that a husband, for example, who shares his earnings with his wife reaps an economic benefit from that sharing. Under market criteria, the value of that choice is presumed to be the value of the money . . . relinquished. It is the value of this choice, not the actual market consumption . . . by the donee spouse, that would be taxed to the donor spouse¹¹³

Professor Andrews, by contrast, has questioned whether it is appropriate to view the donee's consumption as that of the donor for income tax purposes.¹¹⁴ Although he concluded that taxing the donee's consumption at the donor's marginal rate was often justified, his conclusion assumed that the donor's marginal rate either was approximately the same as the donee (for example, gifts among friends and family members in the same

111. The joint return provisions are one such adjustment.

112. H. SIMONS, *supra* note 27, at 49.

113. McIntyre, *supra* note 29, at 475 (footnote omitted).

114. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 348-51 (1972).

economic class) or that there was some other reason explaining why the donor's rate was the fair one to use. In the case of support transfers to someone in a lower bracket, he argued that the transferor was often subject to a tax rate that had been adjusted to account for the fact of family support payments. This, of course, is only true under the joint return rate, which is set to account for the fact that one spouse may be supporting the other, or under the head-of-household rate, which is set to account for the fact that the taxpayer is supporting a child.

Because Anna's rate is not set to account for the fact that she is supporting Beth, some other adjustment is required. One possibility would be for Congress to reverse *Lucas v. Earl* to the extent the assignment is made out of a taxpayer's current income for the purpose of supporting her life partner. Obvious objections to this proposal would include the administrative difficulty in determining what portion of the transfer was for support.¹¹⁵ But the policy behind the argument is sound. It focuses on the very definition of income. Anna's income should include only her consumption and her accumulation.

In the interest of equity, same-sex couples ought to be allowed to split income when the split enables one partner to support the other at that partner's lower marginal tax bracket. The real consumption is occurring in the activities of the nonearner. When \$20,000 of a \$60,000 salary is used to support another, it should not be taxed the same as \$20,000 personal consumption by other \$60,000 taxpayers. Making the joint return available to same-sex couples would be one way to solve the problem of support payments. But as an alternative to the joint return, Congress could accomplish the same equitable result by enacting rules recognizing income splitting agreements by same-sex couples, at least to the extent of support payments.

Another way to accomplish a reduction in the marginal bracket at which support is taxed would be to increase the dependency exemption deduction.¹¹⁶ The deduction, as it is currently constructed, removes dollars from Anna's marginal bracket without taxing them to Beth. Assume for example that Anna spends \$20,000 a year on Beth's support. Under cur-

115. Identifying the transfer might be difficult too. If Anna provides support in kind (e.g., free room and board) as well as cash payments, it might be difficult to determine whether she has transferred amounts in excess of support. Or, as is discussed *infra* in Part V, it might be difficult to determine whether some payments are primarily for Beth's benefit or for Anna's. In particular, entertainment expenses paid by Anna may benefit Beth, but at the same time such expenses may be viewed as stemming primarily from Anna's choice of leisure activities and also from her choice to have company. For gift tax purposes, it is not necessary to identify such payments as Anna's consumption or Beth's. I would not apply a gift tax to any consumption payments that are reasonable. But the question I am posing for income tax purposes is: At whose marginal bracket should these consumption payments be taxed? In this case, we must determine whether the consumption is properly attributable to Anna or to Beth.

116. The current deduction is \$2,000 per dependent, unadjusted for inflation. I.R.C. § 151(d)(1) (1991).

rent law, the only adjustment to her tax bill that is allowed on account of this support is the \$2,000 deduction under section 151.¹¹⁷ Assuming that she is taxed at a 31 percent marginal bracket, the deduction saves her \$620 in taxes.

If Congress adopted my proposal to tax Beth rather than Anna on this \$20,000 amount, then Anna would save roughly \$6,200 in taxes.¹¹⁸ The \$20,000 income in Beth's hands would produce a tax to her of \$3,000, ignoring any available personal exemption and standard deduction.¹¹⁹ Shifting the tax burden from Anna to Beth, thus saves them approximately \$3,200. If we assume that the current rate schedules produce the ideal tax liability on Beth's \$20,000 of consumption when it is taxed to her, then we ought to be able to compute a dependency exemption for Anna that will produce the same net tax on the \$20,000. That is, we can give Anna a large enough deduction to produce the same amount of tax savings that the \$20,000 shift from her 31 percent bracket to Beth's 15 percent bracket produced. If we do this, the burden of the tax will be on Anna rather than Beth. However, since we are considering them a household for tax purposes, it should not matter whether the tax is paid by Anna or Beth.

If Anna were allowed a dependency deduction of \$10,322.58, it would produce the same amount of tax savings as the shift of \$20,000 to Beth did.¹²⁰ Such a deduction could be made available by statute to all single taxpayers who are "supporting" another adult in their households.¹²¹ The

117. I.R.C. § 151(c) (1991) gives Anna a deduction for all dependents. I.R.C. § 152(a)(9) (1991) defines dependents to include a member of her household, although unrelated, but only if Anna provides over half the support. Lesbian and gay partners who wish to claim each other as dependents under this provision should be alerted to the special rule of I.R.C. § 152(b)(5) (1991), which provides: "An individual is not 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" (emphasis added).

No state has a law prohibiting same-sex cohabitation. However, some states do have laws prohibiting same-sex sodomy. I know of no case in which the Internal Revenue Service has relied on I.R.C. § 152(b)(5) (1991) to deny a dependency exemption deduction to lesbian or gay taxpayers. If an agent did assert that position, I would make the conduct/status distinction and emphasize that the statute speaks of a relationship in violation of local law, and not of acts in violation of local law.

All cases denying the deduction have involved heterosexual couples who were violating either a cohabitation statute or a state bigamy statute. However, some of these decisions use language that is broad enough to cause concern in the case of a lesbian or gay couple in a state that has a sodomy statute. See *Enslinger v. Comm'r*, 610 F.2d 189 (4th Cir. 1979) (cohabitation), *cert. denied*, 446 U.S. 941 (1980); *Estate of Buckley*, 37 T.C. 664 (1962) (bigamy).

118. This assumes all \$20,000 would have been taxed to Anna at the 31% rate. Anna would no longer be entitled to a \$2,000 dependency deduction for Beth if Beth is to be taxed on the \$20,000. Instead Beth would claim the exemption herself. Thus Anna's actual tax savings on the \$20,000 transfer would be \$620 less than \$6,200. (Note: All calculations are approximate, because I have not included the inflation adjustments authorized by I.R.C. §§ 1(f), 63(b)(4), 151(d)(3) (1991)).

119. Under current law, Beth would be entitled to the \$3,000 standard deduction in addition to the \$2,000 personal exemption. Thus, her actual taxable income would be \$15,000, taxed at the 15% rate, which would produce an actual tax of \$2,250.

120. A deduction of \$10,322.58 at the 31% marginal bracket saves \$3,200 in taxes.

121. Under an ideal tax, an expanded deduction might be appropriate for all actual "support payments" made to another individual, whether that individual is a household member or not and

amount of the deduction could be expressed as a percentage of the amount of support actually paid.¹²² For the sake of administrative ease, a constant percentage could be used that would produce savings roughly equivalent to the tax savings produced by an actual shift from Anna's bracket to Beth's bracket. Based on current rates, that percentage ought to be 50 percent. The tax savings of a shift from the 31 percent bracket to the 15 percent bracket is 16 percent. The tax savings of a shift from the 28 percent bracket to the 15 percent bracket is 13 percent. Allowing Anna a deduction equal to 50 percent of any support payment actually made effectively saves her 15.5 percent if she is in the 31 percent bracket and 14 percent if she is in the 28 percent bracket. For the sake of simplicity over equity, which would require more accurate measurements, the proposed 50 percent deduction makes sense.

There are a number of administrative issues to consider. For example, I would only count support payments made in cash.¹²³ And I would include a maximum deduction. The amount of the maximum deduction depends upon whether one views the current joint return rates or the single return rates as correctly reflecting the amount of household consumption that ought to be taxed at the 15 percent bracket. If the single rate schedule, which taxes the first \$19,450 of taxable income at a 15 percent rate, is "correct," then the maximum deduction should be 50 percent of \$19,450. If the joint return rate schedule is "correct," then the maximum deduction should be limited to 50 percent of \$13,000.¹²⁴

The 50 percent deduction should only be allowed if the dependent provided none of her own support. The validity of the deduction would be easy to monitor in the case of dependents who had no taxable income, because their tax filing (for example, no return) evidences their dependent status. If the dependent provides some of her own support, but less than

whether that individual is an adult or a child. Of course, to the extent a "support payment" is made to another via a qualified charitable organization (*e.g.*, the Red Cross), the payment is fully deductible as a charitable contribution under § 170 of the Internal Revenue Code. By restricting my proposal to "support payments" made to one adult member of the taxpayer's household, I am explicitly adopting the "couple" as the appropriate tax unit. I leave open for now the more difficult question of whether the appropriate tax unit should include minor children or more than one adult. This question is more difficult for a number of reasons. For example, the size of the household unit can affect the dollar amount necessary to support each person because of the cost savings that result from economies of scale. In addition, if each member of the household unit contributes to the standard of living by performing services that are not normally taxed (*e.g.*, the imputed income from cooking one's own meals or painting one's own home), then a multiperson household will have more value from imputed income than a two-person household.

122. In this case, the percentage would be 51.6%. \$10,322.58 is 51.6% of \$20,000.

123. Cash payments would include indirect cash payments made for the benefit of the dependent, such as rent paid to the landlord and grocery bills paid to the store. I would not include mortgage payments with respect to a home owned by the payor, nor would I include the fair rental value of the home that is provided to the dependent. See Temp. Treas. Reg. § 1.71-1T (1986), explaining which payments meet the "in cash" requirements for alimony.

124. The single rate schedule taxes Anna's first \$19,450 of taxable income at 15%. The joint return rate taxes the first \$32,450 at 15%. Basing the deduction on \$13,000 would produce an effective tax of 15% on the first \$32,450 of Anna's taxable income (\$19,450 plus \$13,000 equals \$32,450).

half, the gross limit (\$19,450 or \$13,000) ought to be reduced accordingly.¹²⁵ For computational ease, "support" contributions of the dependent might be equated with her taxable income.¹²⁶ In addition, a minimum deduction of \$2,000 should be retained for low-income taxpayers who meet the support requirements of section 152, but who do not transfer as much as \$4,000 total support.

In sum, support payments should be exempted from the reach of *Lucas v. Earl*, because they represent consumption of the transferee and ought to be taxed at her marginal bracket. Married taxpayers and heads of household pay taxes according to a rate schedule that reflects their support transfers. Because same-sex couples who support each other cannot avail themselves of the joint return,¹²⁷ some other adjustment is needed to reduce the tax burden on the support payments. One possible approach would be to tax all support payments to the transferee. Administrative problems with this approach, however, suggest that an increased dependency deduction expressed as a percentage of the support actually paid to the dependent would be preferable.

V. THE GIFT TAX

Under current law, gift and estate taxes are often described as the concern of the wealthy and not of the general population. Every person can make \$600,000 worth of cumulative gratuitous transfers before any tax will be triggered.¹²⁸ This \$600,000 "exemption" amount can be transferred in the form of inter vivos gifts at death, or through some combination of lifetime and deathtime transfers. The tax will be triggered on the first \$1 that is gratuitously transferred in excess of \$600,000. The marginal rate applicable to that first \$1 is 37 percent, increasing to a top bracket of 50 percent.¹²⁹ Conceived as a tax on the wealthy, the tax steps in at a comparably hefty rate.¹³⁰ The availability of a \$10,000 annual exclusion from taxable gifts,¹³¹ calculated on a per donee basis, is also thought to mitigate the effect of the gift tax on the less wealthy.

125. For example, if Beth provides \$6,000 of her own support and Anna provides another \$20,000, Anna's gross support amount will be reduced by \$6,000. Assuming a \$13,000 gross limit, her deduction would then be \$3,500.

126. Under current law, adjustments would have to be made, however, for certain nontaxable receipts that Beth might enjoy, e.g., tax-exempt interest or nontaxable alimony.

127. Same-sex couples in which each partner supports herself would not want to file a joint return, because it would subject them to the "marriage penalty." Whether a "marriage penalty" is ever justified under an ideal income tax is a separate question from the ideal tax treatment of support payments. For discussions of the marriage penalty, see the articles cited *supra* note 8.

128. Each person has a \$192,800 credit against gift and estate taxes due. This amount is the tax due on \$600,000 worth of transfers.

129. The 50% top rate becomes effective after 1992 on all transfers in excess of \$2,500,000. I.R.C. § 2001(c) (1991).

130. Compare the top income tax rate of 31% with the 37% to 50% marginal rates applicable to gratuitous transfers of wealth.

131. I.R.C. § 2503(b) (1991).

Although \$600,000 may seem a high enough figure to some, there are likely to be regional differences of opinion on the matter. California real estate prices, for example, are steep enough to push some middle-income couples into the 37 percent tax bracket on the basis of home ownership alone. In addition, vested pension plans, together with employer-provided life insurance, can easily produce taxable estates in excess of \$600,000 for persons who spend all their available income on support rather than making investments in estate assets. In such cases, it is unlikely that any tax will be due until death, but the amount of that tax at death will be increased if the decedent has made any taxable gifts during her lifetime.¹³²

Spouses can make gift transfers to each other free of the gift tax.¹³³ For all other taxpayers, including Anna and Beth, gift transfers are taxable to the extent they exceed \$10,000 per donee per year.¹³⁴ The gift tax is assessed against the transferor when the gift transfer is complete. If Anna keeps her funds in a separate account, no gift transfer is completed until she actually transfers funds to Beth or uses them for Beth's benefit.¹³⁵ If Anna deposits funds into a joint account, there is no completed gift for gift tax purposes until Anna withdraws the funds.¹³⁶

Technically the definition of "gift" is different for income and gift tax purposes.¹³⁷ Thus, it is logically possible for a transfer to be considered a gift under the gift tax definition, but not a gift under the income tax definition. In this case, the transfer would be subject to both the gift tax and

132. The gift and estate taxes have been unified since 1976. The final estate tax due at death is computed on the total amount of property in the estate plus lifetime taxable gifts, technically called "adjusted taxable gifts" in I.R.C. § 2001 (1991). The \$192,800 credit ensures that no tax will be payable until this unified "tax base" exceeds \$600,000. In addition, if any gift taxes are paid before death (e.g., if lifetime transfers exceeded \$600,000), they can be credited against the final tax due. Thus, the main effect of lifetime taxable gifts is to push the final taxable estate into a higher tax bracket.

133. I.R.C. § 2523 (1991) provides for a marital deduction of 100%, provided the gift is not a "terminable interest."

134. The \$10,000 annual exclusion is available only for gifts of a "present interest." I.R.C. § 2503(b). If Anna makes tuition and medical payments on behalf of Beth, those payments will not be taxed as gifts, provided payment is made directly to the provider. I.R.C. § 2503(e) (1991).

135. This assumes that the agreement is to pool income. An agreement to pool is similar to an agreement to make gift transfers in the future. A promise to make a gift in the future is subject to gift taxes whenever the promise becomes enforceable and its value can be determined. Because there is no way to know in advance how much income will actually be made available to Beth, there can be no argument that a gift occurs at the time Beth's rights vest under the contract. The rights cannot be valued at that time. If Anna had promised instead to make annual payments of \$x so long as the relationship lasted, an argument could be made that the gift tax is triggered at the time the contract is signed. See Rev. Rul. 69-347, 1969-1 C.B. 227 (taxable gift occurred upon marriage because antenuptial agreement became enforceable at that time and provided for set annual payments for 20 years).

136. Treas. Reg. § 25.2511-1(h)(4) (as amended in 1986).

137. The gift tax definition asks whether there was "adequate and full consideration in money or money's worth" for the transfer. I.R.C. § 2512(b) (1991). The income tax definition looks to the transferor's motive. Duberstein, 363 U.S. 278 (1960). Recognizing these different definitions, Judge Frank once suggested that Congress consider using different symbols in the different definitions, "calling it a 'gift' in the gift tax law, a 'gift' in the income tax law, and a 'gift' in the estate tax law." *Comm'r v. Beck's Estate*, 129 F.2d 243, 246 (2d Cir. 1942).

the income tax.¹³⁸ Similarly, it ought to be logically possible to argue for gift treatment under the income tax, while maintaining that a transfer is not a taxable gift under the gift tax.

Having taken the position for income tax purposes that payments made to Beth pursuant to the relationship contract stem primarily from love and affection, however, consistency would seem to require that any such payments be characterized as taxable gifts. This is because the gift tax provisions define "gift" as any transfer "for less than an adequate and full consideration in money or money's worth."¹³⁹ "Love and affection" is not adequate consideration in money or money's worth.

Is there any way that Anna and Beth can achieve the same tax result under their relationship contract as a married couple achieves under a marriage contract? In other words, is there any theory under which we might argue that the transfers from Anna to Beth are neither taxable income nor taxable gifts? While it is clear that Anna cannot utilize the gift tax marital deduction, there are several arguments that can be made against gift taxation.

First, we must consider the purpose of the gift tax: to protect against depletion of the taxable estate.¹⁴⁰ The question becomes whether the wealth transfers from Anna to Beth are the sort of transfers that threaten estate depletion. One accumulates wealth out of disposable income. If Anna's taxable income is \$60,000 for the year, she will have approximately \$41,500 in after-tax income.¹⁴¹ Assuming no other deductions from her payroll check,¹⁴² this is the amount available for income pooling with Beth. If Anna were to write Beth a year-end check in the amount of \$20,000, which Beth could spend as she pleased, the transfer would look like a \$20,000 gift, \$10,000 of which would be taxable.¹⁴³ But does this amount really constitute "disposable income" to either Anna or Beth? The relationship agreement calls for the sharing of expenses as well as income. Even if Anna writes a check to Beth for \$20,000, Beth is obligated to use those funds to cover her half of the joint expenses. The joint

138. See Priv. Ltr. Rul. 7921017 (Feb. 16, 1979) (holding that a transfer that did not qualify as a gift under I.R.C. § 102 nonetheless was a gift for gift tax purposes). See also *Comm'r v. Beck's Estate*, 129 F.2d 243 (2d Cir. 1942) (cited in the ruling as supporting its holding). But see *Dunn v. United States*, 86 F. Supp. 861 (E.D. Pa. 1949) (arguing that the meaning of gift should be the same for income and gift tax purposes).

139. I.R.C. § 2512(b) (1991).

140. "The first federal gift tax was imposed in 1924 'not only to prevent estate tax, but also to prevent income tax avoidance' It was repealed in 1926, and the present tax dates from 1932." *Federal Estate and Gift Taxation: Recommendations of the American Law Institute and Reporters' Studies* 1969 A.L.I. 71 [hereinafter *Recommendations*].

141. Income tax on \$60,000 is \$15,322. Social security taxes are approximately \$3,500. See discussion *supra* note 100 and accompanying text.

142. Other deductions might include contributions to her health plan, retirement plan, or parking fees.

143. This assumes that Anna has made no other gifts to Beth during the year, an unlikely event because they are likely to have exchanged birthday presents.

expenses include payments for housing (either mortgage payments or rent), for repairs, insurance, utilities, and groceries. If their joint expenses exceed \$20,000, which is likely, then the amount of the unrestricted transfer to Beth is less than \$10,000.

Let us assume for purposes of argument that Anna and Beth live in a three bedroom home, which they rent for \$1,500 a month, and that the cost of repairs, insurance, utilities, and food is on average \$500 a month. In this case, their total joint expenses are \$24,000 for the year. This means that \$12,000 of the \$20,000 transfer to Beth is not a transfer for Beth's sole enjoyment, but is a contribution toward their joint living expenses. Is this \$12,000 amount the sort of wealth transfer that the gift tax was intended to reach? One might argue that it is not because the \$12,000 does not represent truly disposable income. It is not a net wealth transfer from one taxpayer to another that necessarily reduces the transferor's taxable estate. Anna might well live in the same house whether or not she was in a relationship with Beth. The cost of repairs, insurance and utilities might not vary much between sole occupancy and shared occupancy.¹⁴⁴ The grocery bill might be higher for two than for one, but not necessarily. If Anna and Beth were not living together, Anna might spend more money in restaurants and on entertaining friends.

If Anna pays all living expenses out of her separate account,¹⁴⁵ she will be paying Beth's share of the expenses. Under their agreement to share everything, Beth's share is \$12,000. But the situation can also be described as one in which Anna is paying \$24,000 for living expenses and allowing Beth to live with her at no cost. Although I believe the gift tax question is the same regardless of the mechanics, this latter approach isolates the issue nicely. The issue is: Does the provision of room and board cost-free constitute a gift to the recipient in the absence of proof that the transferor would not have made these payments for self consumption anyway? Since payments of this type cannot possibly reduce the transferor's taxable estate (they are consumption expenses), they should not be viewed as taxable gifts.

Support for this position can be found in Revenue Ruling 68-379,¹⁴⁶ which held that transfers from a husband to a wife in satisfaction of his obligation to support her are not taxable gifts, because "[t]he satisfaction of this legal obligation does not have the effect of diminishing the husband's estate any more than the satisfaction of any other legal obligation." In addition, the ruling raises another possibility: that payments in the na-

144. Insurance costs will sometimes be higher for unmarried couples, because they must each insure their own property separately. To avoid this result, some lesbian and gay couples agree that all furniture and household items are owned by one party and that is the party who takes out insurance.

145. Even if Anna and Beth shared a joint account, the money in the account would not really be available to Beth if it must be used to pay joint living expenses.

146. See Rev. Rul. 68-379, 1968-2 C.B. 414.

ture of support are not taxable gifts. The payments in the ruling were made pursuant to an agreement entered into incident to a legal separation. Nonetheless, it assumes that payments that satisfy a legal obligation of support are not taxable gifts. Anna's payments to Beth are similar to the husband's payments to support his wife and they do not have the effect of diminishing her estate. If the analogy holds, Anna's payment of Beth's support should not constitute a taxable gift.

There are, however, arguments against this "legal obligation to support" analogy. First of all, Anna undertook her support obligation voluntarily. The husband's obligation arose under state law.¹⁴⁷ Also, "legal support" is often limited to payments for bare necessities under state law.¹⁴⁸ Thus, the amount of support exempted from gift tax may not include all of the consumption items purchased by Anna for the benefit of Beth.

In the 1960s, the American Law Institute (ALI) began a study of the federal estate and gift tax system.¹⁴⁹ At its May 1968 annual meeting, the ALI adopted a number of recommendations, including the unification of the gift and estate tax and the 100 percent marital deduction, which have been adopted by Congress. At this same May 1968 meeting, the ALI addressed the transfer for consumption problem and adopted the following resolution:

An expenditure should be excluded from transfer taxation as a lifetime transfer, under either a dual tax system or a unified tax, if the expenditure is for:

(a) the benefit of any person residing in the transferor's household or the benefit of a child of the transferor under 21 years of age, whether or not he resides in the transferor's household, provided that such expenditure does not result in such person or child acquiring property which will retain significant value after the passage of one year from date of such expenditure; or

(b) current educational, medical or dental costs of any person; or

(c) current costs of food, clothing and maintenance of living accommodations of any person in fact dependent on the transferor, in

147. Although, presumably, he chose freely to incur the obligation by choosing to marry in the first place.

148. Under Virginia law, for example, parents who are living with their children are legally obligated to provide only the child's basic needs. Any provisions beyond that must come from the parents' generosity. In cases of divorce, however, the courts may award child support that covers basic needs and provides for a measure of assumed parental generosity. See *Conway v. Conway*, 10 Va. App. 653, 395 S.E.2d 464 (1990). Under North Carolina law, a parent's legal obligation to support a minor child includes, but is not limited to provision of necessities. The measure of the obligation depends on "the child's needs in relation to the father's station in life, his pecuniary resources, and his earning ability honestly exercised." *Williams v. Williams*, 261 N.C. 48, 56, 134 S.E.2d 227, 233 (1964). The Internal Revenue Service generally looks to state law to determine the extent of a taxpayer's legal obligation to support another. See, e.g., Rev. Rul. 56-484, 1956-2 C.B. 23 (parent will be taxed to extent income from minor's property is used to support minor, but only to extent of parent's obligation under state law).

149. See, e.g., *Federal Estate and Gift Tax Project, Study Draft Number 1* 1965 A.L.I. 1.

- HeinOnline -- 1 Law & Sexuality: Rev. Lesbian & Gay Legal Issues 127 1991

whole or in part, for support, provided such expenditure is reasonable in amount.¹⁵⁰

Note that this proposal offered tax rules that could be applied consistently to lesbian and gay families as well as to traditional families. No special relationship between the transferor and transferee was required. The purpose of the proposal was to clear up what was perceived as a "common misunderstanding about the gift tax consequences of responding to the needs of various persons for help."¹⁵¹ Furthermore, since the Internal Revenue Service had taken the position that support transfers were taxable gifts unless they were made pursuant to a legally binding support obligation and since the state laws were quite varied in their support requirements, geographical location was often determinative of the gift tax question. The ALI proposal would have eliminated this geographical discrimination. But most important, the proposal would have extended this nongift status to support payments that occurred within lesbian and gay couples.

In 1981, Congress adopted part of the ALI proposal. Payments of medical expenses and tuition are now explicitly excluded from the definition of gift, regardless of whether those payments are made on behalf of traditional family members, nontraditional family members, or even good friends.¹⁵² This provision is a major benefit for lesbian and gay families, but it is not enough. Under an ideal tax system, no support payments would be subject to the gift tax.

Although the failure of Congress to codify the rule regarding support payments generally is troubling, it is difficult to believe that Congress intended tuition payments to escape gift characterization, but not payments for basics such as food and clothing. It is just as likely that Congress thought no specific laws were required, given the existence of prior authority on the question with respect to intrafamily support transfers. In addition, the annual exclusion was raised from \$3,000 to \$10,000, which no doubt was viewed as sufficient to cover support payments that might exceed the minimum support required under some state laws.

The difficulty is that no state imposes support obligations in lesbian and gay families. The partners can, of course, take on such obligations voluntarily by contract.¹⁵³ Whether the Internal Revenue Service would equate such contract obligations with state imposed ones is an open question. If it does not, then under existing authority, support payments could be taxed as gifts. Whereas, the \$10,000 annual exclusion may be sufficient

150. *Recommendations*, *supra* note 140, at 20-21.

151. *Id.* at 19.

152. I.R.C. § 2503(e) (1991).

153. And, in San Francisco, if the couple registers as a domestic partnership, support obligations are imposed under local law. See discussion *supra* note 60.

to cover support payments to children that exceed any legally imposed obligations, it is not sufficient to cover all support payments in lesbian and gay families where no state-imposed support obligations exist.

In sum, support transfers ought not to be treated as taxable gifts, because they are not transfers that serve to deplete the transferor's taxable estate. One argument that such payments are not taxable gifts when they occur within a lesbian or gay household is that the payments are primarily for the consumption of the transferor. When Anna satisfies her own consumption needs, she is not depleting her estate and thus not making a taxable gift to Beth. Another argument is that to the extent the lesbian or gay partners have legally obligated themselves to support each other, their support payments are not gifts. There is adequate authority to support nongift characterization in the case of legally imposed support payments by spouses and by parents. There is no reason not to extend this rule to lesbian and gay couples.

VI. CONCLUSION

Our income tax laws are based on the notion that the individual is the appropriate tax unit. Congress recognized that this notion was unworkable for husbands and wives who shared a household and supported each other. The joint return provides a partial legislative solution to the "individual as tax unit" problem. Congress has made similar adjustments for husbands and wives over the years, which, in effect, allow spouses to share income, and make wealth transfers at no tax cost. These adjustments have established the husband and wife (and in some cases, their dependent children) as the tax unit.

The tax laws ignore other real households in which couples share income and property. In particular, lesbian and gay couples, who are prevented by state law from marrying, are harmed by tax laws that limit tax benefits to married couples. Full parity between married couples and same-sex couples could be obtained if Congress would recognize some form of "tax marriage." In this article, however, I have made arguments for lesser reforms. In particular, I have argued that support payments from one lesbian or gay partner to another ought to be taxed at the marginal bracket of the transferee. In addition, such support payments ought not be viewed as taxable gifts.

At one level, the arguments I have made appear somewhat contradictory. I have argued that income transferred to a lower bracket partner for purposes of supporting her ought to be taxed at the lower rate of the transferee because the amounts really are her consumption. In addition, I have argued that the same amounts ought to be considered, at least in part, as the transferor's consumption for purposes of the gift tax. The apparent contradiction is, I think, related to the fallacy of individualism

and the fact that my arguments are made in the context of existing law and tax policy, both of which focus too narrowly on the individual taxpayer. The fallacy of individualism encourages us to look at a single household expenditure as the consumption of either *A* or *B*. By contrast, the arguments I have made reflect the reality that many such expenditures are for the joint consumption of *A* and *B*.

Support payments within a lesbian or gay household are payments for joint consumption. And yet the tax rates applicable to lesbian and gay couples ignore this joint consumption and instead focus on individual consumption. I have argued for a shift in the tax from the transferor's rate to the transferee's rate as a means to adjust for the existing law's refusal to acknowledge the reality of this joint consumption by lesbian and gay couples. I realize that this remedy is one that preserves the concept of the individual taxpayer. At the same time, it is a remedy that recognizes the individual taxpayer's relationship with another and honors their support commitments by not overtaxing them.

Similarly, I have argued for an adjustment in the way current tax law views gift transfers. To counter the rule that only payments pursuant to state-imposed legal obligations escape the gift tax, I have suggested that we look at such payments as the consumption of the transferor. The theories behind both the existing rule and my counter view presume a selfish, atomistic human nature. The current rule, for example, assumes that transfers for no consideration are either required by statute or made for the purpose of depleting one's estate and thereby avoiding taxes. My theory presumes another selfish motive: consumption for self-benefit. And yet the tax treatment I suggest (that is, no gift taxes) could also be explained by acknowledging the reality of relationships in which moral commitments and obligations are the driving motives behind "support transfers." Such an explanation would not require an identification of the person most benefitted by the consumption. Transfers pursuant to moral commitments are not made for the purpose of estate depletion. Thus, they should not be subject to the gift tax.¹⁵⁴

As I stated at the outset, the arguments I have made in this article are but part of a larger reform that must occur before full tax parity between same-sex couples and married couples will be attained. In an ideal world the tax law would not discriminate against same-sex couples who are similarly situated to married couples. If joint returns are the appropriate reporting device for husband and wife, then I believe joint returns should be available for same-sex couples who consider themselves just as committed

154. Congress might decide it wanted to tax such transfers for other reasons. It might, for example, decide, that our moral commitments were causing us to make inefficient transfers and thus such transfers ought to be subject to tax as a means of discouraging the transfers. But if they are to be subject to the gift tax, it ought to be because taxing such payments carries out the purpose of the gift tax.

as married couples and whose household is just as much a single economic unit. If husbands and wives can acquire joint wealth without paying gift and estate taxes, then I believe lesbian and gay couples are entitled to that same tax treatment. Full tax equity between married couples and same-sex couples who are similarly situated, but for the legal barrier to marriage presented by state law, seems so correct a principle that it hardly needs defending. What I have tried to do in this article is to suggest different ways of looking at one type of transaction, the payment of support to a lover, which is currently subjected to discriminatory treatment under existing tax laws.