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The Double-Edged Sword in Gay Economic Life? Marriage and the Market

M. V. Lee Badgett*

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I. Introduction

Perhaps surprisingly, the economic status of lesbian, gay, and bisexual (LGB) people has been the subject of a hotly contested debate over the last two decades. Generally speaking, one side argues that LGB people are vulnerable to discrimination and lack important economic supports from the state and from private third party actors. Another side contests that claim by citing the results of marketing surveys finding high income levels for LGB people and couples, which are said to imply that LGB people are not in need of statutory protection against discrimination1 or judicial protection

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in the form of heightened scrutiny. Yet another side takes a more market-oriented approach, citing marketing surveys as evidence of an affluent and underappreciated market niche whose purchasing power will help them win attention and equality.

As both an observer and participant in this national debate, my impression is that these debates and empirical claims were more hotly contested in the 1990's than in the first eight years of this decade. In this century so far, attention to LGB people as a market seems to have been diluted by a heightened concern about the possibility of allowing same-sex couples to marry. Economic reasoning plays an important role in this issue, as well. Proponents of marriage equality point to the economic benefits of marriage and argue that same-sex couples should have access to those benefits. Opponents of marriage equality minimize the need for the equal application of benefits to same-sex couples, even going so far as to argue that such rights are linked to benefits that employers and governments can ill afford.

does not deserve the same protection as being black or handicapped) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See Romer v. Evans, 517 U.S. 620, 636-54 (1996) (Scalia, J., dissenting) (arguing that a Colorado referendum prohibiting state or local governments from extending civil rights protections to persons on the basis of sexual orientation only denied preferential treatment to homosexuals and did not impinge on substantive rights); see also Jane Schachter, The Gay Civil Rights Debate In The States: Decoding The Discourse Of Equivalents, 29 HARV. C.R.-C.L. L. REV. 283, 317 n.144 (1994) (comparing calling homosexuals affluent to anti-Asian American and anti-Semitic stereotypes).


"Moreover, I urge my colleagues to think of the potential cost involved here. How much is it going to cost the Federal Government if the definition of 'spouse' is changed? It is not a matter of irrelevancy at all. It is not a matter of attacking anyone's personal beliefs or personal activity. That is not my purpose here. What is the added cost in Medicare and Medicaid benefits if a new meaning is suddenly given to these terms?

In this Article, I argue that the two issues are linked by a common trope—the double-edged sword that is often wielded in the course of public policy debates. In one case, the double-edged quality of a seemingly benign or even positive claim—that LGB people are relatively affluent—has been noted in a variety of contexts to caution against using the image or myth of affluence for fear of heightening resentment against the gay community or for inflating the economic and political power of gay people.6 The most persuasive argument against those empirical claims, in my view, is not political utility or disutility but the mounting evidence from a variety of data sources and authors that LGB people are simply not more affluent than heterosexual people.7 In the next Part, I review the existing empirical evidence on the relative incomes of LGB people and heterosexual people.

In the other case, the issue of marriage rights for same-sex couples and the claims that marriage is a double-edged sword have largely emerged from a debate within the LGB community. These debates, based on competing ideological arguments often rooted in feminism on both sides, have warned that LGB people will lose as well as gain from marriage equality.8 For instance, marriage dissidents in the community warn that the movement to win marriage rights will divert resources from more important issues.9 As this argument often goes, marriage also threatens community by creating dangerous hierarchies within the LGB community, with "good" married gay people favored within and outside the community over "bad" unmarried gay people.10 Worse yet, marriage threatens to draw LGB


7. See id. at 14-15 (asserting that major studies showing that homosexuals have more disposable income are unfairly biased).

8. See Katherine M. Franke, The Politics of Same-Sex Marriage Politics, 15 COLUM. J. GENDER & L. 236, 246 ("[Marriage] exacts a dear price. As lesbigay people are herded into a particular form of sociability—a narrow conception of family—we have lost an interest in, if not now disavowed, other forms of sociality that a generation ago we celebrated.").

9. See Wyatt Buchanan, Alternative to Same-Sex Unions, S.F. CHRONICLE, July 27, 2006, at A4 ("[Same sex marriage] is a limited goal, and to see that goal suck up all the resources and money has been very concerning.").

people into the safety of home and hearth, fragmenting the political and cultural possibilities of sexual dissidence.\(^{11}\)

I am personally unconvinced that the dire warnings emerging from this internal ideological battle within the LGB community are likely to occur, although a fuller discussion is beyond the scope of this article. Even if such outcomes should result, I would argue that they are the result of social, political, and cultural forces other than winning the right to marry.\(^{12}\) However, the marriage dissidents also push us to consider carefully the potential disadvantages of marriage seen in recent history, such as the potential for domestic violence or the economically harmful specialization in home work by women. I would argue, though, that such potential disadvantages are already in the cultural and familial vocabularies of same-sex couples who have grappled with the challenges of making ends meet and raising children without the legal recognition of their same-sex relationship.

Further, I would argue that the heat of the LGB community debate has perhaps prevented shedding light on some of the actual potential disadvantages of marriage for some couples in a material sense. After a brief analysis of the double-edged economic sword in Part II, I turn to marriage. Marriage, after all, is a status that comes with responsibilities as well as rights, obligations as well as benefits. In Parts III through V of this essay, I lay out the edgier side of marriage related to divorce (Part II), public welfare benefits (Part IV), and income taxation (Part V).

**II. Latest Evidence on the Economic Status of LGB People**

On one level, being thought to have relatively high incomes might seem like a positive characteristic, signifying workplace success and a social position worthy of esteem, not stigma. Of course, stereotypes of high incomes for Jewish families are a staple of anti-Semitism, demonstrating that seemingly positive characteristics can trigger resentment and bigotry rather than respect for accomplishment.\(^{13}\)

Regardless of whether high incomes are or should be a mark of productive and virtuous citizenship for LGB people, more than a decade of

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11. See *id.* (noting that same-sex marriage is seen as a disservice to those same-sex couples who choose to not marry).
13. See, *e.g.*, *supra* note 2 and accompanying text.
published research in economics demonstrates that the claim of gay affluence is more properly termed a myth. In my recent review of twelve peer-reviewed studies of income differences between LGB people and heterosexual people, I found no evidence of an extraordinary income advantage for LGB people.14

To the contrary, these studies showed that gay men earn significantly less than do heterosexual men who have similar characteristics. The wage gap is sizable in some studies and ranges from 13% to 32% lower earnings for gay men after controlling for other influences on wages.15 For instance, men in gay couples earn $43,117 on average, or 13% less than married men’s average earnings of $49,777 in Census 2000.16

The picture is less clear-cut for lesbians, though. Lesbian and bisexual women earn more than heterosexual women in the studies reviewed, with the difference reaching as high as a 31% income advantage for lesbians.17 Some, but not all, of that difference results from higher hours and weeks worked by lesbians.18 The other reasons for the higher earnings remain unclear,19 but could result from lesbians’ greater attachment to and experience in the paid labor force.20 But that apparent advantage disappears


15. See id. at 169–71 (reviewing twelve peer-reviewed studies on earnings differences based on sexual orientation). This range is based on ten of the reviewed studies that used data from the United States. Id. Only two of these studies reported a negative earnings gap for gay men that equaled less than 13%. Id. One study found that gay men earned 2.4% less than unmarried, partnered heterosexual men. Id. at 170. The same study, though, found that gay men earned 14.4% less than married heterosexual men. Id.


17. See Badgett, supra note 14, at 170–71, 174–75 (discussing nine studies using data from the United States). Only one of the reviewed studies showed a negative correlation between being a lesbian and earnings. Id. at 174. Two other studies showed no difference between the earnings of lesbian and heterosexual women. Id. The rest of the studies showed that lesbians earn more than heterosexual women, with differences in the estimates varying on the behavioral timeframe used to classify sexual orientation. Id.

18. Id. at 177.

19. See id. (explaining that most hypotheses for lesbians’ higher earnings cannot be tested with existing data).

20. See M. V. LEE BADGETT ET AL., THE WILLIAMS INST., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION 14 (2007) (positing that lesbians may make different career choices based on their lower likelihood of marrying men—who on average have higher wages—or of delaying their careers to have children, thereby investing more in training or experience), available at
when comparing a lesbian couple to a heterosexual couple.\textsuperscript{21} Two women’s incomes are significantly less than the incomes of heterosexual couples (and gay male couples, for that matter).\textsuperscript{22} Taken as a whole, the evidence suggests that lesbians’ economic resources appear to be shaped more directly by their gender than their sexual orientation.\textsuperscript{23}

Other evidence adds to the case for seeing LGB people as subject to economic disadvantage overall. A recent review of studies of discrimination found that many LGB people report having experienced discrimination.\textsuperscript{24} A survey of a random sample of LGB Americans in 2006 found that 7\% of LGB people overall, approximately 9\% of gay men, and approximately 13\% of lesbians said their sexual orientation had led to their being fired or denied a job.\textsuperscript{25} This vulnerability might well be reflected in the lower earnings for gay men as well as the more direct reports of discrimination.\textsuperscript{26}

Taking compensation as including both wages and fringe benefits reveals another realm of discrimination. Most firms that offer health care benefits to employees and to spouses of employees do not similarly cover the same-sex domestic partners of employees.\textsuperscript{27} Indeed, less than a quarter

\textsuperscript{21} See BAJDGETT, supra note 3, at 119 (summarizing findings based on the 1990 Census data that gay male couples earn $58,366, lesbian couples earn $45,166 per year, and heterosexual married couples earn $47,193).

\textsuperscript{22} Id.

\textsuperscript{23} See BAJDGETT, supra note 20, at 12–13 (explaining that it seems "that gender discrimination has a greater impact on lesbians’ wages than sexual orientation discrimination").

\textsuperscript{24} See id. at 2–6 (summarizing five academic reviews of studies on sexual orientation discrimination, three recent surveys based on national probability samples, two other national studies based on non-random samples, eight studies of sexual orientation discrimination in particular geographic areas, and several studies of such discrimination in particular occupations).


\textsuperscript{26} See BAJDGETT, supra note 3, at 36–37 (discussing reasons why gay and bisexual men appear to face sexual orientation discrimination to a greater extent than lesbian and bisexual women). Some employers may discriminate against gay men as a proxy for discrimination based on HIV status, as cases of HIV among lesbians are much rarer. Id. at 37. The income difference between gay and bisexual men and women may stem from heterosexual men’s more negative attitudes toward gay men than toward lesbians. Id. Or discrimination against women might not be detectable because of the lack of data to assess the actual level of labor market experience for lesbians versus heterosexual women.

\textsuperscript{27} See THE KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYEE
of employers provide such benefits, which can be worth $3000 to $4000 in employer payments. And, to add insult to injury, even when employers offer domestic partner benefits, the IRS considers those benefits to be taxable income, adding over $1000 to the tax bill of the average employee with a covered domestic partner.

Given this context, it would seem that there is little to be gained by denying the economic realities of gay and lesbian life, realities that could be addressed by legislation outlawing employment and compensation discrimination. Nevertheless, some marketers insist on promoting unsupportable claims about the high incomes earned and spent by the typical gay man or lesbian as a way to attract corporate advertising dollars. That tension will undoubtedly persist as long as gay people—and especially well-off gay people—become increasingly visible.

The new wave of policy attention is now more focused on issues of relationship recognition, where issues of gay economic status have shifted

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28. Id.


30. See, e.g., I.R.S. Priv. Ltr. Rul. 118113-99 (Nov. 17, 2000), available at http://www.irs.gov/pub/irs-wd/0108010.pdf (explaining the Internal Revenue Service’s position on the taxation of domestic partners’ health care benefits). The letter explains the Internal Revenue Service’s position that health coverage provided to a domestic partner counts as taxable income. Id. at 11. However, the letter notes the Internal Revenue Service’s position that health coverage provided to non-dependent domestic partner is not taxable. Id.


32. See Badgett, supra note 3, at 46 (explaining that discrimination makes little economic sense from the perspective of an employer, given that gay people’s lower earnings and economic vulnerability are not due to differences in ability or performance).

33. See id. at 127 (noting that "some marketers are more defensive and even secretive about their use of statistics" and carelessly promote "an unsupportable stereotype about the entire population of lesbians and gay men").

34. See id. at 126 (reasoning that advertisers will maintain their interest in the gay consumer market as its attractiveness "appears to be tied to identifying the usual source of marketing success for leisure products: consumers who have the right education, race, sex, and household structure to accumulate buying power for the kind of products that rely on high levels of discretionary income").
away from the incomes of gay individuals to concerns about the economic disadvantages faced by gay couples when they cannot marry. But even there, a double-edged sword returns.

III. Divorce

When I talk to heterosexual friends about the issue of gay marriage, occasionally one will add a cautionary tale of the "be careful what you wish for" variety, pointing out the very real likelihood that many gay marriages will end in divorce. Divorce is the counterbalancing edge of marriage, not because marriages by same-sex couples will end, but because there are often economic winners and losers in the process of divorce. Although I will return to the issue of winners and losers shortly, I first want to argue that the ability to divorce is one of the benefits of marriage, at least from a Rawlsian sort of perspective in which one would not know in advance whether one would be the winner or the loser.

The fact is that every marriage ends. The two possible endings to marriages—death and divorce—are about equally likely in the United States. Because marriages end, someone needs to decide how assets, income, and debts will be distributed. Since people entering marriages

35. See id. at 133 (explaining that the thought of gay people making choices in raising children and in entering committed relationships rarely entered the minds of heterosexual Americans until in the 1990s, when "family concerns surged to the top of the list of hotly debated political issues related to lesbian and gay Americans").


37. See Lloyd Cohen, Marriage, Divorce, and Quasi Rents: Or, "I Gave Him the Best Years of My Life," 16 J. LEGAL STUD. 267, 285–87, 289 (1987) (proffering an example of the winner or loser scenario). Cohen argues that as a woman's value to her husband—measured by the value of her housework relative to her husband's increasing income and by her physical attractiveness—declines over time, her husband has an increasing incentive to exit the marriage in order to capture for himself the pecuniary and non-pecuniary benefits that he otherwise would have conferred on her had he stayed in the marriage. Id.


40. See Glendon, supra note 38, at 110 (explaining that the "law governing family support obligations and family property has, for the most part, been developed for situations of crisis, such as death, divorce, separation, or insolvency").
may not want to think about or plan for that ending, the state in essence does the planning for them through the legal institution of marriage.\footnote{See Badgett, supra note 3, at 208 (quoting William N. Eskridge Jr., The Case for Same-Sex Marriage 69 (1996)) (asserting that "[o]ne key function of marriage is to give couples . . . 'off-the-rack rules' for situations that families might not anticipate, as when a relationship ends from the death of one party or by divorce").} Marriage itself comes with a default set of rules for crises in relationships, including division of property and the possibility of alimony, should the relationship end in divorce.\footnote{See Glendon, supra note 38, at 110 (describing default legal consequences of divorce).} For most couples, the marriage contract only needs legal enforcement when it ends.\footnote{See Badgett, supra note 3, at 198 (concluding that, based on the development of law governing family support obligations and property, "obligations [like marriage contracts] are commonly subject to direct state regulation only in case of a family crisis, such as death, separation, divorce, or insolvency").}

The rules for divorce will have important implications for the economic well-being of the spouses during and after a marriage. Because heterosexual married women sometimes give up or reduce their own wage-earning and the possibility of investments in training that would increase their earning capacity over time, women would need some kind of legal claim on the family's assets and the husband's income to avoid destitution should the relationship end in divorce.\footnote{See Badgett, supra note 3, at 198 (concluding that, based on the development of law governing family support obligations and property, "obligations [like marriage contracts] are commonly subject to direct state regulation only in case of a family crisis, such as death, separation, divorce, or insolvency").} Without such a claim, specializing in household work, including child care, would be too risky;\footnote{See Glendon, supra note 38, at 233-34 (explaining the current economic presumptions of individuals involved in marriage and divorce). Glendon notes that: support law, like modern divorce law, now presupposes a partnership of two equal individuals who may have been economically interdependent in marriage, but who are at least potentially independent upon divorce . . . [but i]f one of the spouses is not in a position to provide for her own needs immediately, the role of support law is increasingly seen as that of temporarily aiding in the transition to self-sufficiency. \textit{Id.} However, the trend in "rules governing post-divorce spousal maintenance insist on treating as exceptional the cases which are in fact the most common—those where a spouse's potential for economic independence has been or is currently being compromised by the time he or she has devoted to child care." \textit{Id.} at 233. Spousal support after divorce is relatively infrequent everywhere. \textit{Id.}}

\textit{Id.} at 208. Without such a claim, specializing in household work, including child care, would be too risky;\footnote{See Badgett, supra note 3, at 160 (explaining that the promises in marriage to deliver spousal services protect a man or a woman who gives up opportunities to develop skills useful in other kinds of work in order to focus his or her skill development in the home). Marriage promotes specialization in home production that otherwise would have been "too risky for someone who might later in life have to take on both home production responsibilities and a wage-paying job in the labor market." \textit{Id.} When marriage ends, instruments "like alimony, property division, and child support offer compensation to someone who has given up opportunities in other economically necessary roles." \textit{Id.}} even with
that claim, women are at economic risk in a divorce. In fact, some economists have pointed out that men might have a very explicit incentive to divorce their wives as the wives age and are less productive in the home once children have grown up. Spousal support (alimony) and equitable property division are wives' (and sometimes husbands') claims on the accumulation of family goods and the husband's earning capacity that the wife contributed to in the economic partnership of marriage. In theories of family bargaining, these divorce rules also shape and potentially enhance the relative bargaining power of women within functioning marriages.

Although the organization of families and their division of labor appear to differ on average for same-sex couples when compared with heterosexual couples, the value of divorce is likely to be similar for same-sex partners. Consider the difference between a divorce settlement when a marriage ends and the division of property when a non-recognized and non-formalized relationship ends. In good times, an intact couple that buys a nice house, enjoys a healthy combined income, sits on a comfortable savings account or pension, and drives two late model cars looks pretty much the same economically whether married or unmarried. If the couple is married and the marriage ends, the division of property acquired during the marriage may be overseen by a judge who will apply the law to divide the property equally or equitably, and the judge could impose alimony on the higher earning partner.

46. See BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 217 (1986) (asserting that the advent of no-fault divorce has led judges to increasingly deny long-term continuing support to divorced women based on the rationale that society has entered an era where women have chosen independence); see also Rand W. Ressler & Melissa S. Waters, Female Earnings and the Divorce Rate, 32 APPLIED ECON. 1889, 1892–96 (2000) (finding an empirical relationship between women's divorce probability and wages, in which the probability of divorce increases earnings and higher earnings increases the likelihood of divorce).

47. See supra note 37 and accompanying text.

48. See BADGETT, supra note 3, at 160 (observing that alimony, property division, and child compensation offer at least partial compensation to a person who has contributed to the household instead of pursuing other economic opportunities).


50. See BADGETT, supra note 3, at 133–70 (comparing gay and heterosexual family structures).

51. See GLENDON, supra note 38, at 199–233 (surveying the divorce laws of England, France, West Germany, Sweden, and the United States). Obviously the rules for division will vary from country to country and, in the United States, from state to state. Id. But
If the relationship with no legal status ends, however, a judge might only divide up the property based on an explicit agreement between the two partners or based on who legally owns the property—e.g. she who pays for the sofa, keeps the sofa.\textsuperscript{52} It seems quite likely that a poorer spouse will do better than a poorer unmarried partner in claiming a portion of the property that the couple acquired and shared while together, unless the poorer partner had signed a cohabitation contract that specified a divorce-like division of assets (or unless the poorer spouse had signed a prenuptial agreement that favored the richer spouse).\textsuperscript{53}

Since the division of family assets in a divorce is a zero-sum game, the double-edged sword emerges for at least one member of a married same-sex couple (or a couple with a legal status that requires the equivalent of a divorce to dissolve the relationship).\textsuperscript{54} One member of the same-sex couple might walk away with more after the end of a marriage than from the end of an unmarried relationship, but the other partner would necessarily do worse.

While no systematic studies have been conducted to measure the relative individual gains from ending a legally recognized relationship rather than an unrecognized one, anecdotal evidence suggests the impact is more than simply hypothetical. One friend of mine is convinced (and grateful) that the settlement she got when divorcing her higher earning female partner was much higher simply because their relationship was legally recognized and subject to the state law of divorce. In contrast, another friend recently complained to me about the possibility of his needing to pay alimony to his younger, lower-earning male former partner as a result of the same law that had benefited my other friend.

\footnote{52. See BADGETT, supra note 3, at 199 (explaining that courts have ruled on the division of property of cohabiting, unmarried opposite-sex couples, basing their decisions on explicit and implicit agreements by the members of the couple).

53. See IRVING J. SLOAN, LIVING TOGETHER: UNMARRIEDS AND THE LAW 4–5 (1980) (stating that a nonmarital partner does not have an interest in the property accumulated during the relationship, thus denied of such reasonable and equitable consideration where no agreement to share is present).

54. See Lee Romney, Though They Can’t Wed, Gays May Now Divorce, L.A. TIMES, Jan. 1, 2005, at A1 (explaining that under the rights and obligations of marriage, a partner is liable for the other’s debt, while earned income of both partners is community property that will be equally divided upon dissolution).}
Intriguingly, we also have other evidence that is consistent with the hypothesis that some same-sex couples are conscious of the rules of divorce and, perhaps, of the potential personal downside. California adopted a "domestic partnership" status in 1999 that gave partners about 16 rights, including hospital visitation rights and the right for public employers to offer partner benefits. The benefits were later expanded somewhat, and then in 2003, the state legislature passed a second expansion that applied almost all of the state rights and responsibilities of marriage—including the principle of community property and the laws of divorce—to domestic partners as of January 1, 2005. Recognizing that couples registering under the old rules would not necessarily want a more comprehensive status, the state sent letters notifying existing partners of the changes to give them a chance to use the old, easier dissolution process that involved sending in a simple form. Dissolutions of partnerships went from roughly 10 to 30 per month to 100 to 200 per month until December 2004. In the last month before the new law took effect, almost 1200 couples dissolved their legal domestic partnerships. The rate of dissolution went from 1-2% of existing partnerships in 2000-2002 to 3% in 2003 and almost 9% in 2004.

55. See Grace Blumberg, UCLA School of Public Affairs, Five: California's Adoption of Strong Domestic Partnership Legislation for Same-Sex Couples 5 (2006), available at http://repositories.cdlib.org/uclaspa/cpo/5 (suggesting the desire for an easy exit as a possible explanation for a relatively small percentage of same-sex couples registering for domestic partnership when made available, while those unregistered couples claimed the rights and benefits of marriage without assuming the reciprocal obligation).


58. See Press Release, California Department of Child Support Services, The California Domestic Partner Rights and Responsibilities Act (Aug. 10, 2006), available at http://www.childsup.cahwnet.gov/Portals/0/resources/docs/policy/css/2006/css06-29.pdf (stating that new extended rights and responsibilities will be automatically applied to all registered domestic partners, therefore the California Secretary of State is required to notify and allow an opportunity for the registered domestic partners to dissolve the partnership if they did not wish to accept the extended rights and responsibilities).


60. Id.

61. See id. at 16, fig. 10 (illustrating the annual percentage rate of dissolution for
What does this spike in dissolutions tell us? It seems unlikely that thousands of unhappy couples did not get around to ending their legal relationships until just before the law changed, since dissolutions were quite easy to accomplish until January 1, 2005. In fact, some anecdotal evidence reported in the news media suggests that the dissolved domestic partner relationships continued to exist and only the legal status was dispensed with. Some couples might have dissolved domestic partnerships out of the fear that their tax situations would have been burdened or complicated if they remained domestic partners. Equally likely is the possibility that couples did not want to share property, earnings, or debt. I would hypothesize that wealthy gay men and lesbians, in particular, were reluctant to give their partners an equal share of assets and income as community property or to allow for the possibility of alimony for their partners. Anecdotal evidence related to me by Sacramento insiders suggests that some wealthy gay people did, in fact, oppose this part of the new law.

How much will the prospect of divorce matter to LGB people, and will it influence their marriage decisions and economic well-being? Given the potential economic advantages of marriage, along with widespread over-confidence that one's own marriage will not end in divorce, the possible downside for one partner might be thought to make little difference. Certainly, in the United States, alimony is relatively rare and not particularly generous, reducing a richer partner's risk (but also raising the poorer partner's risk). Couples might also choose to contract out of some

same-sex couples in California from 2000 to 2006).


63. See Romney, supra note 54, at A1 (stating that, although an increased number of same-sex couples got off the domestic partnership registry as their burdens were increased by the new California law, at least some of those couples maintained their relationship).


65. See Blumberg, supra note 55, at 134 (indicating that while unregistered same-sex couples claim the rights and benefits of marriage, they in effect decline to assume the reciprocal obligation).

66. See Yoram Weiss & Robert Willis, Transfers Among Divorced Couples: Evidence
of the divorce obligations in prenuptial agreements. Like many of the issues raised in this Part, the size and prevalence of the negative economic effects of divorce for some individuals is an empirical question awaiting researchers' attention. Either way, though, the gains and losses come in a zero-sum game, with one partner winning and one losing. Marriage matters more in determining which one is the winner or loser, not whether one loses or wins.

IV. Public Welfare Benefits and Poverty

A second possible downside of marriage comes when assessing the responsibilities of marriage in addition to the rights and benefits. In most states, marriage involves an obligation of mutual support between couples, creating a private economic bond that undergirds the remaining economic supports of public programs for income assistance and health care. Nancy Polikoff points out that Maryland, Michigan, and Florida no longer have such a requirement, but clearly those states are in the minority.

One direct impact of this obligation on families comes in the eligibility criteria for many public assistance programs. Federally supported programs such as Temporary Aid to Needy Families, Supplemental Security Income, State Children’s Health Insurance Program (SCHIP), and Medicaid involve calculations of family income that usually only include the income of the applicant and his or her spouse. As a result of these eligibility criteria, women are often much worse off than men after heterosexual divorces.

67. See Nancy Polikoff, Beyond (Straight and Gay) Marriage 126-28 (2008) (demonstrating the relationship between being married and obligations and rights, including health care, medical services, Social Security retirement benefits, and family expenses extending to the support of children and spouse).

68. Id. at 127 (“Maryland, Michigan, and Florida have abolished the necessaries doctrine.”).

allowing same-sex couples to marry would mean that a lesbian or gay applicant’s new spouse’s income and assets would become part of an eligibility calculation, but a same-sex unmarried partner’s income and assets would not. (Marriage might also mean that a family would be less likely to need or seek public assistance, for instance if a partner’s employer provided spousal and family health insurance coverage that meant Medicaid or SCHIP would no longer be necessary.) Thus marriage could mean that some individuals in same-sex couples would lose out on benefits that they now receive.

My colleagues and I have assessed this effect in a series of studies on the fiscal impact of marriage equality for gay couples in several states. In each of those states, we found that state spending on public assistance would drop considerably if same-sex couples were allowed to marry or to enter civil unions.

Another study using Census 2000 provides further support for this claim that unmarried same-sex couples are currently more likely to qualify for welfare benefits and SSI than are married couples. In that ongoing study of poverty in the gay community, my co-authors and I are finding that people in same-sex couples whose incomes place them below the poverty level are more likely to be receiving income from public assistance than are

(illustrating that in a few cases, states have opted to include the income of a cohabiting unmarried partner, though no states treat people with same-sex partners in that way). According to the Administration for Children and Families, United States Department of Health and Human Services, the States of California, Kansas, Oklahoma, South Dakota, West Virginia, and Wyoming will take a cohabiting boyfriend’s household contributions into account when assessing a woman’s eligibility and benefit levels. Id.

comparable, married, different-sex couples below the poverty level. Marriage—and full federal recognition of those marriages—would mean that same-sex couples would lose that advantage.

V. Income Taxation: the Marriage Penalty

Having access to income tax advantages given to married couples is one reason that some same-sex couples might wish to marry.\(^7\) To be sure, there are several important income tax advantages that come with marriage. As noted earlier, the value of employer-provided health insurance benefits is not subject to income taxation, while imputed income based on the value of domestic partner benefits is taxable.\(^7\) The differential tax treatment of health care benefits for married couples would be worth more than $1000 per year in federal income taxes for a typical unmarried couple, and usually even more when state income taxes are taken into account.\(^7\) In addition, married couples can more easily list each other as a dependent on tax forms.\(^7\) Married filers may receive preferential treatment with respect to deductions or exemptions that are higher than for single filers or can be shared in ways that benefit the couple.\(^7\)

Same-sex couples might even pay less in taxes if they were allowed to marry.\(^7\) A couple in which one partner has very low or no income and the other has a much higher income might well pay less in federal taxes. This marriage benefit results because of "income splitting."\(^7\) In a sense, each

\(^{71}\) See I.R.S. Publication 501, 5 (2007), available at http://www.irs.gov/pub/irs-pdf/p501.pdf ("[B]y fil[ing] a joint return, your tax may be lower than your combined tax for the other filing statuses. Also, your standard deduction may be higher, and you may qualify for tax benefits that do not apply to other filing statuses.").

\(^{72}\) See Badgett, supra note 29, at 1, 3–5 (indicating that, while spousal health benefits are exempt from taxation, health benefits provided to all domestic partners are taxed as income to the employee).

\(^{73}\) See id. at 6–8 (stating that the health coverage taxed as income to domestic partners creates an extra tax averaging $1,069 per year).

\(^{74}\) See id. at 9 (stating that "to qualify as a dependent of a taxpayer, a domestic partner would have to live all year in the taxpayer's household, receive more than half of his or her support from the taxpayer, and meet the IRS citizenship/residency test").

\(^{75}\) See James Alm et al., Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage, 2 Nat. Tax J. 201, 204 n.9 (2000) (noting that the Congressional Budget Office has found that 51% of marriages enjoy a tax subsidy).

\(^{76}\) See id. at 203–04 (explaining that "income splitting" provides an opportunity to save money when one partner earns less than the other).

\(^{77}\) See id. at 203 (explaining that "[m]arried couples effectively split their income on tax returns. If two people marry and one of them has zero income, income splitting means
spouse is paying taxes on the average income for the couple, which means that the income might be taxed at a lower marginal rate when tax rates are progressive.\textsuperscript{78} In other words, a couple earning $80,000 a year in taxable income will pay less in taxes than the combined taxes of one person earning $75,000 per year and one person earning $5,000 per year.

What about the other married couples? They constitute the other edge of the tax sword, paying more in taxes as married couples than they would if both were single.\textsuperscript{79} The paradigmatic case is when two earners have fairly similar earnings.\textsuperscript{80} For instance, two single people earning $75,000 per year in taxable income would each pay taxes of 10% on income up to $8,025, 15% on the next $24,525 in income (that is, up to $32,550), and 25% on the next $42,450 in income. If married, however, their $150,000 in combined taxable income would push them into the 28% tax bracket, increasing their taxes as a married couple when compared with two single individuals.

This well-known marriage penalty in the federal tax laws is likely to be a particular concern for same-sex couples if they were allowed to marry and to be treated as married by the tax code.\textsuperscript{81} (Same-sex couples in Massachusetts and Connecticut can marry but are not treated as married under federal tax law because of the Defense of Marriage Act.)\textsuperscript{82} The incomes of same-sex couples are closer together than those of different-sex unmarried couples, suggesting that more same-sex couples would be subject to the marriage penalty, although the difference in incomes within couples is fairly large for both groups.\textsuperscript{83} In Census 2000, the income gap

\footnotesize{that the individual with some income moves into a lower marginal tax bracket as a result of the marriage, so that the marriage reduces the combined tax burdens of the two partners").}

\textsuperscript{78} See id. at 203–04 (explaining that the lower tax is not written into the tax code, rather it "emerges because of the combination of progressive marginal tax rates and the family as the unit of taxation").

\textsuperscript{79} See Alm et al., supra note 75, at 204 (stating that though a subsidy for some married couples exists, the Tax Reform Act of 1969 also created a widespread marriage penalty as well).

\textsuperscript{80} See id. (stating that "when people with similar earnings marry, their combined income pushes the couple into higher tax brackets than they face as singles, and they pay correspondingly higher taxes with marriage").

\textsuperscript{81} See id. at 213 (concluding that if same-sex couples were allowed to marry, it would generate between $300 million and $1.3 billion in additional federal income tax revenue).

\textsuperscript{82} See Defense of Marriage Act 1 U.S.C § 7 (2000) (defining marriage between one man and one woman for any Act passed by Congress regardless of what individual states decide on the matter).

\textsuperscript{83} See Romero et al., supra note 16, at tbl. 3 (showing that the income gap between
between partners was $26,131 for same-sex couples compared with $29,626 for married different-sex couples.84 Same-sex couples with children might also see their income taxes rise because one parent filing as head of household would have paid lower taxes than for a single individual, reducing the couple’s total taxes in the unmarried state.85 Marriage would create the need to file as married, increasing the likelihood that the couple would pay higher tax rates on some income.86

The net effect of the double-edged tax sword could easily be that marriage would raise income taxes paid by people in same-sex couples. Indeed, two studies at the federal level have concluded that same-sex couples would, as a group, pay more in taxes if married than single, thus raising income tax revenue by somewhere between $400 million and $1 billion.87

Some states also have significant tax penalties resulting from a combination of progressive tax rates, favorable head-of-household filing statuses, and sharing of spousal exemptions and credits. In the series of state-level studies mentioned earlier, my colleagues and I have simulated the impact of filing as married for same-sex couples using simulations with Census 2000 data. We found that net state income taxes would rise for as many as three-quarters of same-sex couples if they married. (See Table 1, below).

Clearly for families in this situation, as for those who will lose eligibility for public assistance as outlined in the previous Part, there are financial disincentives to marry. The research on marriage and welfare provision for different-sex couples has found only a relatively small impact of these disincentives on the actual decisions about marriage, however.88

84. Id. at 3.
85. See Alm et al., supra note 75, at 212 (explaining that when single, an individual who claims a child as head-of-household retains a "preferential tax schedule and standard deduction relative to those for single individuals").
86. See id. at 212 (indicating that the tax deductions single parents receive from their children will be minimized if that parent marries).
87. See id. at 212 (stating that legalizing same-sex marriage in the most likely statistical scenario will lead to an annual federal income tax increase of $1 billion); see also CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 2 (2004), available at http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf (stating that from the years 2005–10, legalizing same-sex marriage would have a federal revenue increase of $400 million). The CBO study’s difference in findings likely reflects changes in the tax code designed to reduce the marriage penalty.
88. See James Alm & Leslie A. Whittington, For Love or Money? The Impact of
Perhaps that small disincentive effect is the result of other financial advantages from marriage. Furthermore, anthropologists and other social scientists have found that the decision to marry or enter a committed relationship has symbolic value that may not be outweighed by economic disadvantages.\footnote{89}

<table>
<thead>
<tr>
<th>State</th>
<th>% whose taxes increase</th>
<th>% whose taxes decrease</th>
<th>% whose taxes don’t change</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>11%</td>
<td>54%</td>
<td>35%</td>
</tr>
<tr>
<td>Connecticut</td>
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<td>39%</td>
<td>12%</td>
</tr>
<tr>
<td>Maryland</td>
<td>22%</td>
<td>75%</td>
<td>3%</td>
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<tr>
<td>Massachusetts</td>
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<td>13%</td>
<td>43%</td>
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<td>36%</td>
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<td>46%</td>
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</tr>
<tr>
<td>Oregon</td>
<td>75%</td>
<td>23%</td>
<td>2%</td>
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</tbody>
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| VI. Concluding Thoughts |

In using the same rhetorical trope of the double-edged sword to refer to common concerns about the economic status of LGB people and to less common concerns about marriage, I do not mean to argue that the two situations are precisely parallel. Nor do I mean to argue that we should both avoid blanket assertions that the gay community is wealthy and avoid pushing for the right of same-sex couples to marry.

\footnotesize{Income Taxes on Marriage, 66 ECONOMICA 297, 309–10 (1999) (stating that though the marriage penalty tends to effect women’s decisions to marry more than men, there tends not to be a statistical relationship between tax rates and the decision to marry); see also Robert Moffitt, Incentive Effects in the U.S. Welfare System, 30 J. ECON. LIT. 1, 57 (1992) ("The econometric studies show that labor supply is reduced by the AFDC and Food Stamp programs, that higher potential benefits induce greater participation in these programs, and that the programs affect family structure though usually weakly."); Rebecca M. Blank, Evaluating Welfare Reform in the United States, 40 J. ECON. LIT. 1105, 1158 (2002) (indicating that study results regarding the role of state welfare systems in an individual's decision to marry are inconclusive, though single mothers participating in the Minnesota Family Investment Program married at much higher rates).}

\footnote{89. See ELLEN LEWIN, RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT 250 (1998) (considering the symbolic nature of marriage and concluding that the choice to marry is really about the couple’s relationship to its families); SUZANNE SHERMAN, LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 101 (Suzanne Sherman ed., 1992) (quoting one couple’s reason for marrying as "creating our family").}
The two double-edged swords for the gay, lesbian, and bisexual community outlined in this paper—the stereotype of gay affluence and the possibility of marriage equality—are quite different in one important way.90 The actual existence of affluent LGB individuals would be the situation most analogous to the real potential economic disadvantage of marriage for some LGB people or couples. However, my argument is that the undeniable fact of affluence for some LGB people is not the issue. My concern is the widespread application of the image of affluence to the whole LGB community when the credible data suggests that LGB people are spread out along the income distribution just as heterosexual people are spread out economically.91 The stereotype used to characterize an entire group is the problem, both empirically and politically, not the reality that some LGB individuals happen to be wealthy.

In the case of marriage, the economic double-edged sword is really more like a scalpel, picking out certain individuals or couples for some disadvantage related to divorce, taxation, or public assistance.92 Rather than having a community-wide effect, the potential disadvantages are more personal and customized when they exist. The value of thinking about marriage in this way is also probably most obvious at a more personal level. Most gay people marrying in Massachusetts, for instance, have not been married before and might not realize the full implications of their choice to marry.93 Rather than be surprised at tax time, same-sex couples would be better off understanding any financial trade-offs they might be making before they walk down the aisle.

90. See Badgett, supra note 3, at 2 (explaining that the stereotype of affluent LGB people has been pervasive throughout society, going back to Roman times and reinforced by the visibility of affluent and elite gay individuals such as Oscar Wilde and Gertrude Stein).

91. See Badgett, supra note 3, at 118 (stating that "overall the more reliable household figures suggest that gay households are not more affluent than heterosexual households").

92. See Ressler & Waters, supra note 46, at 32 (stating that women tend to be the financial losers in a divorce); Alm et al., supra note 75, at 204 (stating that, though the subsidy for some married couples existed, the Tax Reform Act of 1969 created a widespread marriage penalty as well, affecting those couples with similar income more than those with one high income earner and one low income earner). Federally supported programs such as Temporary Aid to Needy Families, Supplemental Security Income, SCHIP, and Medicaid involve calculations of family income that usually only includes the income of the applicant and his or her spouse.

93. See Badgett et al., supra note 59, at 10, available at http://www.law.ucla.edu/williamsinstitute/publications/Couples%20Marr%20Regis%20Diss.pdf (stating only 11% of males and 18% of females have been previously married).