State and local governments, for the most part, no longer attempt to use the criminal law to impose a uniform standard of personal morals concerning intimate behavior. Some states have repealed outright the laws originally enacted to give legal sanction to religion-based standards of sexual conduct. In a substantial number of other states, statute books still include criminal laws prohibiting adultery, cohabitation, fornication, and sodomy; however,

† Assistant Professor of Law, Wayne State University. J.D., 1968, University of Oregon. LL.M., 1986, George Washington University.
1. See MODEL PENAL CODE & COMMENTARIES § 213.6 note on adultery and fornication (1980).
2. See, e.g., CAL. PENAL CODE, tit. 9 (Deering 1993) (none of many sex-related crimes punish consensual activities between adults). Cf. MODEL PENAL CODE & COMMENTARIES §§ 213.0-213.5 (1980). One of the notes to § 213.1 states that "the Model Code does not criminalize consensual sexual conduct between adults." Id. § 213.1 note. The Commentaries to Model Penal Code Art. 213 include a long "Note on Adultery and Fornication" discussing the many rational reasons why those activities are not proscribed in the Model Code, including the fact that lack of prosecution tends to breed disrespect for the law generally. Id.
3. See, e.g., ALA. CODE § 13A-13-2 (1994) (sexual intercourse by married person with one not spouse and "lives in cohabitation" with that person); FLA. STAT. ANN. § 798.01 (Harrison 1991) ("lives in open state of adultery"); R.I. GEN. LAWS § 11-6-2 (1993); UTAH CODE ANN. § 76-7-103 (1994); State v. Thompson, 31 Utah 228, 87 P. 709 (1906) (each act of sexual intercourse a separate offense); W. VA. CODE § 61-8-3 (1994) (includes both adultery and fornication).
4. See, e.g., ARIZ. REV. STAT. ANN. § 13-1409 (1994) ("open and notorious cohabitation or adultery"); CLOD. REV. STAT. ANN. §§ 18-6-201, -203 (West 1994) (crime of "bigamy" includes mere "cohabitation" while still married to another; "cohabitation" means living together "under the representation of being married"); FLA. STAT. ANN. § 798.02 (Harrison 1991) ("lewdly and lasciviously associate and cohabit together"); N.M. STAT. ANN. § 30-10-2 (Michie 1978) ("Unlawful cohabitation consists of persons who are not married to each other cohabiting together as man and wife."); N.D. CENT. CODE § 12.1-20-10 (1993) (living "openly and notoriously... as a married couple without being married..."); VA. CODE ANN. § 18.2-345 (Michie 1994) ("lewdly and lasciviously associate and cohabit together"); W. VA. CODE § 61-8-4 (1994) ("lewdly and lasciviously associate and cohabit together").
5. See, e.g., VA. CODE ANN. § 18.2-344 (Michie 1950) (voluntary sexual intercourse by an unmarried person).
6. See, e.g., ALA. CODE §§ 13A-6-63 to 13A-6-65 (1975); ARK. CODE ANN. § 5-14-101 (Michie 1987) ("deviate sexual activity"); § 5-14-122 ("sodomy"); IDAHO CODE § 18-6605 (1994) ("infamous crime against nature"); State v. Larson, 81 Idaho 90, 337 P.2d 1, cert. denied 361 U.S. 882 (1959) (§ 18-6605 includes sodomy, fellatio), State v. Altswatter, 29 Idaho 107, 157 P. 256 (1916) (same holding as Larson)); IND. CODE ANN. § 35-41-1-9 (Burns 1994) ("deviate sexual conduct" defined broadly to include essentially all sexual acts other than heterosexual genital-to-genital sex); MINN. STAT. ANN. § 609.293 (West 1994) (voluntary, consensual sodomy prohibited); N.Y. PENAL LAW § 130.38 (McKinney 1987) (consensual sodomy prohibited); R.I. GEN. LAWS § 11-10-1 (1994) ("abominable and detestable crime against nature") ("sodomy" was held surplusage when used in conjunction with charge of "abominable and detestable crime against nature," State v. Castore, 435 A.2d 321, 324 (R.I. 1981)); UTAH CODE ANN. § 76-5-403 (1953) (covers both consensual and nonconsensual sodomy); VA. CODE ANN. § 18.2-361 (Michie 1994) ("crimes against nature," sexual acts with mouth or anus, consent not relevant). The District of Columbia’s rather harsh sodomy statute was amended to exclude acts between
prosecutions for private, adult consensual acts violating those prohibitions are essentially nonexistent.7 By adopting antidiscrimination laws that establish rights to equal treatment without regard to private living arrangements,8 many states have in fact taken positive actions that cast doubt on the continued validity of aged “morals” statutes. Though not without atavism9 the courts have not opposed, and have sometimes advanced, the movement away from government involvement in intimate affairs. Nearly ten years ago a New York Supreme Court justice described a retirement-age couple’s living together without formal marriage as an “enlightened and realistic approach to modern day living . . . .”10

Despite its usual nonjudgmental approach, the Internal Revenue Code (I.R.C.) penalizes taxpayers who may not conform to state statutes that criminalize selected sexual activities. Taxpayers living in states where such statutes are still on the books cannot claim a “dependency exemption” for a cohabitant, while a married couple with exactly the same economic circumstances is not similarly limited. There is no reliable way to estimate the number of taxpayers who have been, and are, adversely affected. However, § 152(b)(5) of the Internal Revenue Code11 applies whenever two persons not legally married to each other (or otherwise related) live in one dwelling in contravention of state law and one wishes to claim the other as a dependent for tax purposes.

The reported cases are relatively few to date, but in the past most taxpayers probably settled for economic reasons rather than challenge the regulation. However, the impact of § 152(b)(5) increases as the value of personal exemptions increases. In addition, as medical benefits have become more widely available, both the amounts involved and the number of taxpayers affected has increased, and will continue to do so. Based on 1994 allowances and tax rates, one exemption allowance ($2450) could reduce the tax due by up to $970 per year. The tax effect of including health insurance premiums in gross income could be even greater; $200 per month is not a high health insurance premium in these days of rapidly escalating health care costs.

7. No discovered compilation of national crime statistics includes a category limited to consensual sex crimes. Most compilations that include sex-related crime categories do not expressly include consensual adultery, fornication, illegal cohabitation, or the like, in those categories.
I.R.C. and Victorian Morality

Part I of this Article discusses § 152(b)(5)'s origin and its subsequent application by the courts. The next section discusses how the application and effect of § 152(b)(5) are inconsistent with state policies, a result that is precisely the opposite from what Congress intended. Part III proposes a solution that is politically practicable, that would effectuate Congress's original intent while protecting federalist principles, and that would reduce (if not eliminate) the current disparate treatment of married and unmarried cohabitant.

I. SECTION 152(b)(5) ORIGIN AND APPLICATION

A. Origin

I.R.C. § 151(c) allows a taxpayer to claim an “exemption” for a person who is the taxpayer’s “dependent” as defined in § 152. Section 152(a) provides the “general definition” of “dependent,” while § 152(b) provides further definitions (i.e. limitations) which relate to particular circumstances.

One of the criteria under which a person qualifies as a dependent under § 152 is strictly economic: The taxpayer must provide more than half of the dependent's support. Before 1954, the categories of persons who qualified as “dependents” under § 152 were limited to the taxpayer’s relatives by blood or marriage. Under § 152(a)(9), the 1954 recodification added a new category of “dependent” that required no blood or legal relationship but, instead, depended on physical living arrangements:

An individual who, for the taxable year of the taxpayer, has as his or her principal place of abode the home of the taxpayer and is a member of the taxpayer's household.\(^2\)

The added provision neither has nor implies any requirement concerning the noneconomic aspects of relationships between persons of the household. According to the sparse legislative history, § 152(a)(9) was added to allow a dependency exemption whenever the taxpayer actually supported a person who resided in her or his home. One stated example was a foster child living in the taxpayer’s home. However, the examples were expressly and intentionally noninclusive.\(^3\)

While § 152(a)'s requirements are purely economic and objective, it was qualified four years later by I.R.C. § 152(b)(5), which provides:

An individual is not a member of the taxpayers 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.

That provision denies “member of household” status to persons who otherwise satisfy the requirements of § 152(a), resulting in the loss of “dependent” status.

---

Economic reality, the theoretical touchstone of the I.R.C., is irrelevant to § 152(b)(5)'s operation. Since other I.R.C. provisions also rely on the § 152(a) definitions, the impact of § 152(b)(5) reaches beyond the loss of the dependency exemption to areas that may be of greater financial significance. For example, I.R.C. § 106 excludes employer-paid health insurance premiums from an employee's gross (taxable) income. The regulations limit that exclusion to amounts paid for the benefit of the employee and his or her "dependents" as defined in § 152.14 Similarly, I.R.C. § 213 allows deduction of health care expenses only when paid for the benefit of the taxpayer, his or her spouse, or a dependent as defined in § 152.15

After Congress adopted § 152(a)(9) (and before it adopted § 152(b)(5)), at least one person took Congress at its word. In his 1954 personal tax return, Leon Turnipseed claimed Tina Johnson as a dependent, relying on § 152(a)(9).16 Ms. Johnson lived in Turnipseed's home for the entire year and Turnipseed supported her and her children by a previous marriage. Despite the fact that Turnipseed unquestionably satisfied the statute's express, unambiguous requirements, the I.R.S. denied him an exemption for Ms. Johnson. On appeal, the Tax Court upheld the agency's determination by imposing its own gloss on the language enacted by Congress. The court was clearly motivated by moralistic considerations and took pointed note of the fact that Tina Johnson was "Mrs. David Johnson," "living in sin" with another man (Turnipseed)—and bearing a child while living in the household.17 The court bluntly stated the basis for its decision:

The uncontroverted facts disclose that petitioner in the taxable year in question was living in adulterous cohabitation with Tina Johnson, the undivorced wife of David Johnson.

In our opinion, Congress never intended the specific paragraph in question [I.R.C. § 152(a)(9)] to be construed so literally as to permit a dependency exemption for an individual whom the taxpayer is maintaining in an illicit relationship in conscious violation of the criminal law of the jurisdiction of his abode.

We are of the opinion that to so construe the statute would in effect ascribe to the Congress an intent to countenance, if not aid and encourage, a condition not only universally regarded as against good public morals, but also constituting a continuing, willful, open, and deliberate violation of the laws of the State of Alabama. This we are unable to do.

In so interpreting paragraph [152(a)(9)] we do not intend to hold that its purpose is to be limited to cases falling within the example set forth in the Committee Report, but are here applying the well settled rule that statutes should

17. It is unclear, from the opinion's stated facts, whether Turnipseed was the child's father.
I.R.C. and Victorian Morality

receive a sensible construction, so as to effectuate the legislative intention and, if possible, avoid an absurd conclusion.\textsuperscript{18} The court’s opinion was troubling on several grounds beyond its departure from the clear language of § 152(a)(9). Most noticeably, it cited no authority to support its assertions about congressional intent. It also did not point out any evidence supporting the assertions that Turnipseed actually knew of the Alabama statute, much less any evidence proving that he consciously, willfully, and openly defied it. Similarly, the Tax Court apparently felt it was irrelevant that Ms. Johnson had been separated from, and not supported by, her legal husband for four years before she became a member of Turnipseed’s household.\textsuperscript{19}

Four years after \textit{Turnipseed}, Congress enacted the Technical Amendments Act of 1958, retroactively codifying the results in that case. The legislative history for the amendment is sparse. No economic or fiscal consideration was offered in support of the amendment, as is generally the case for tax provisions. The committee reports explained that the provision “would make it clear that an individual who is a ‘common law wife’ where the applicable state law does not recognize common-law marriages would not qualify as a dependent of the taxpayer.”\textsuperscript{20}

B. Application

Since 1958, there has been a small but steady stream of cases in which § 152(b)(5) played a pivotal role. Because of the small dollar amounts

\begin{itemize}
\item \textsuperscript{18} \textit{Turnipseed}, 27 T.C. at 760-61 (emphasis added) (footnote omitted). The Alabama statute provided:

\begin{quote}
If any man and woman live together in adultery or fornication, each of them shall, on the first conviction of the offense, be fined not less than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; on the second conviction for the offense, with the same person, the offender shall be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months; and, on a third, or any subsequent conviction, with the same person, shall be imprisoned in the penitentiary for two years.
\end{quote}

\textit{Id.} at 761 n.3.

The cases cited as authority cited in \textit{Turnipseed} were Bassett v. Comm’r, 26 T.C. 619 (1956), a decision written by Judge LeMire (\textit{Turnipseed}’s author) concerning the deductibility of prepaid medical expenses), Sorrells v. United States, 287 U.S. 435 (1932), concerning the government’s contention that entrapment was not a defense to a Prohibition violation, despite the egregious nature of the entrapment, and United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868), concerning a criminal charge of delaying the U.S. Mail by arresting the mail carrier on a local murder warrant. The Tax Court did not refer to decisions allowing deduction of fines as business expenses when allowing the deduction would “frustrate sharply defined national or state policy.” See, e.g., Lilly v. Comm’r, 343 U.S. 90, 96-97 (1952); Comm’r v. Heininger, 320 U.S. 467, 473-74 (1943). The Tax Court’s failure to refer to those decisions, which are analogous, is probably explained by the fact that those decisions would not support the conclusion the Tax Court wished to reach.

\textit{Turnipseed}, 27 T.C. at 760-61. In the first of those four years, Mr. Johnson contributed $52 to the support of the wife and two children he deserted. Thereafter, he contributed nothing. \textit{Id.} at 759.


\textsuperscript{20} \textit{Id.} at 759.\end{itemize}
generally involved, many taxpayers probably chose to comply with the provision rather than incur the costs of a challenge. One case illustrates how the amendment works: In *Martin v. Commissioner*, the Tax Court denied the trucker-taxpayer's 1970 dependency claim for Addie Lou Martin (no relation) who had resided with him ("took up housekeeping," as characterized by the court), in three different states, for a little over a year. The court asserted that the taxpayer's relationship violated laws of all three states and held that Martin was barred from claiming Ms. Martin as a dependent. Only assumption supports the court's conclusion that the taxpayer and Ms. Martin actually engaged in state-proscribed activities. Ms. Martin's only child was born long before she met the taxpayer. The I.R.S. initially denied the exemptions for both Ms. Martin and for Nancy Sue, her daughter from a prior relationship. Before the Tax Court, however, the I.R.S. conceded that Mr. Martin could take an exemption for Ms. Martin's daughter, under § 152(a)(9), without regard to the fact that he was not related to the now-allowed dependent.

In most § 152(b)(5) cases, the court assumes that when unmarried persons live in a single dwelling unit, they are violating some state law concerning private interpersonal activities. Sometimes that assumption is challenged. In 1974, Cassius L. Peacock III contended that he was entitled to a dependency exemption because his long-term relationship with Carol Marie Jones did not violate Arizona law, which subjected only "open and notorious cohabitation or adultery" to criminal penalties. Peacock asserted that he and Ms. Jones lived quietly, and the legal status of their relationship was not "open and notorious" since she consistently used his last name. The Tax Court noted that Ms. Jones had given birth to three children while the two were living in the

21. "The lack of litigation may have additional causes. If both parties to a relationship earn income, it may be beneficial for them to each file as single—as some married couples no doubt do because of the "marriage penalty." It is also likely that persons in circumstances similar to Turnipseed's avoided discovery by using the same last name on the tax return. Even at the present time there is no, or very limited, information exchange between the I.R.S. and local authorities who record marriages and divorces.

22. 32 T.C.M. (CCH) 656 (1973).

23. *Id.*, citing ALA. CODE tit. 14, § 16 (1959); FLA. STAT. ANN. § 798.01-.03 (West, repealed 1983); ILL. ANN. STAT. ch. 38, paras. 11.7, 11.8 (Smith-Hurd 1961) (amended 1975).

24. *See* Untermann v. Commissioner, 38 T.C. 93 (1962); Estate of Daniel Buckley v. Commissioner, 37 T.C. 664 (1962); Davis v. Commissioner, 23 T.C.M. (CCH) 1099 (1964). But for the procedural rules applied to tax cases, the I.R.S. would be hard pressed to provide support for denying an exemption, which would mean documenting the occurrence of activities most likely to take place behind closed doors in one's bedroom. The relevant state laws do not prohibit two adult persons, regardless of their respective sexes, from residing in a single dwelling unit. If the I.R.S. had the burden of proof, there is a good argument that § 152(b)(5) would be unconstitutional. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).


26. ARIZ. REV. STAT. ANN. § 13-222 provided: "A person who lives in a state of open and notorious cohabitation or adultery is guilty of a felony punishable by imprisonment in the state prison for not more than three years." The current version of ARIZ. REV. STAT. ANN. § 13-222 is at ARIZ. REV. STAT. ANN. § 13-1409 (West Supp. 1994).
same house. However, the court's held against the taxpayer on the grounds that Peacock had not proven that it was not public knowledge that he and Ms. Jones were not married.\textsuperscript{27}

The court's decision in \textit{Peacock} shows the difficulty of challenging a § 152(b)(5) determination. First, the taxpayer was required to prove a number of negatives regarding the status of his relationship in the community. Second, doing so placed the taxpayer in a "Catch-22" situation: In the process of presenting proof that the relationship's status was not a matter of public knowledge, the taxpayer had to make his relationship public knowledge—or at least a matter of public record.

\textbf{C. Taxpayer's Procedural Handicap}

The procedural setting of taxpayer litigation presents a unique problem for taxpayers challenging an I.R.S. determination based on § 152(b)(5). When the I.R.S. assesses a deficiency, the taxpayer can contest the issue by filing a petition in Tax Court for a redetermination.\textsuperscript{28} As the petitioner, the taxpayer has the burden of proof.\textsuperscript{29} Alternatively, the taxpayer can pay the assessed amount, file a request for refund and, if the refund is denied, commence a refund action in federal district court.\textsuperscript{30} Again, the taxpayer is the plaintiff. Therefore, the taxpayer bears the burden of proving that the I.R.S.'s determination (or assumption) that he or she was violating local law is incorrect.\textsuperscript{31} In effect, in a § 152(b)(5) case there is a presumption that the taxpayer is guilty of a crime. The I.R.S. does not have to prove what the taxpayer's relationship was, what activities took place between the taxpayer and the claimed dependent, or anything concerning the public knowledge of the taxpayer's marital status. In contrast, if the taxpayer was being prosecuted under state law for violating the substantive provision leading to the § 152(b)(5) determination, the state would bear the burden of proving, beyond a reasonable doubt, that the taxpayer committed the prohibited acts with which he or she was charged. Evidence that more than one person lives in a single dwelling unit is not proof that states barring sodomy, adultery, lewd cohabitation and the like have been violated. The state would have to prove actual

\footnotesize{


31. The taxpayer's burden is, perhaps, made more onerous by the fact that the taxpayer's own testimony, when uncorroborated and self-serving, may not be sufficient to overcome the presumption that the I.R.S. determination is correct. \textit{See} Comm'r v. Smith, 285 F.2d 91, 96 (5th Cir. 1960); Schad v. Comm'r, 87 T.C. 609, 620-23 (1986).
}
intimate, sexual activity. In a § 152(b)(5) case, taxpayers have to prove the absence of those activities, leaving them with a possibly insurmountable evidentiary burden.

D. **Constitutional Considerations**

Many of the statutes underlying § 152(b)(5) determinations raise troubling constitutional issues, and may be subject to constitutional challenge if enforced against the taxpayer. Therefore, one would expect a similar opportunity when a taxpayer is subject to an adverse § 152(b)(5) determination based on such a statute. Nevertheless, the most authoritative case taking on this issue found that taxpayers are unable to challenge either the underlying substantive state statute or § 152(b)(5) on such grounds.

In 1978, the U.S. Court of Appeals for the Fourth Circuit considered constitutional challenges to § 152(b)(5). In *Ensminger v. Commissioner*, the taxpayer challenged the constitutionality of the North Carolina anticohabitation statute, contending that it violated his right to privacy. The Tax Court declined to rule on that contention, and the Fourth Circuit confirmed that ruling on the grounds that neither the Commissioner nor the Tax Court had the authority to determine the constitutionality of state laws. The court found no authority in the legislative history or elsewhere to support a conclusion that Congress intended any inquiry into the validity of the state law when applying § 152(b)(5). In addition, the Fourth Circuit did find that the North Carolina courts had held the anticohabitation statute constitutional. The Fourth Circuit was very careful not to hold that the North Carolina statute was constitutional; instead, it held only that a frontal attack on constitutionality was not maintainable in a federal tax proceeding.

The result in *Ensminger* places the taxpayer in a position where no relief is practicably possible. The state statute cannot be attacked in a federal tax proceeding, where it is presumptively valid. The taxpayer does not have standing to attack the state statute in state court unless he or she is being prosecuted, which is unlikely. The taxpayer might be able to challenge the state statute in a state tax proceeding, but only if state tax statutes adopt the federal definitions and state procedural rules permit challenges to the constitutionality of a criminal-code statute in a tax proceeding.

*Ensminger* also challenged the constitutionality of § 152(b)(5) as applied to him. As to that, the Fourth Circuit held that the federal statute's impact on a taxpayer's right to privacy was so indirect that it could not be questioned on

---

32. 610 F.2d 189 (4th Cir. 1979), aff'g 36 T.C.M. (CCH) 934 (1977).
33. Id. at 191-92.
34. Id. (citing State v. Robinson, 176 S.E.2d 253 (N.C. Ct. App. 1970)).
35. Id. at 192, 194.
I.R.C. and Victorian Morality

that ground, nor was it subject to strict scrutiny. After reviewing a number of prior decisions relating to indirect (therefore not unconstitutional) effects of federal statutes, the court concluded that the state law was the source of the taxpayer’s grievance. Congress did not, according to the court, intend to deter any particular conduct. Instead, the court opined that Congress merely wanted to insure that it was “not treading upon an area of the law exclusively within the realm of the individual states”—the legality of marriages and other interpersonal relationships. The negative impact of §152(b)(5), therefore, was caused by state law, not federal law.

The end result of Ensminger is that taxpayers cannot indirectly challenge state statutes in a federal tax proceeding, nor can they successfully challenge the federal rule because it is not the law that effectively causes the result. Standing alone, neither of those conclusions are particularly remarkable. Both are supported by substantial authority. Taken together, however, they prevent taxpayers from challenging legal rules that may be based on constitutionally impermissible considerations.

II. THE FEDERALIST COERCION: ENFORCING STATE LAW CONTRARY TO STATE PRACTICES

A. Inconsistent State Statutes

Ensminger highlights a real problem with §152(b)(5). Imposing a federal penalty on unmarried couples may be consistent with what appears in one portion of a state’s statute books, but it is inconsistent with state law as enforced. State prosecutions for private consensual acts between adults are virtually nonexistent, especially where heterosexual couples are concerned. The result is that the I.R.S. holds taxpayers to norms and standards that the states themselves long ago abandoned. The result can be unintentionally ironic, as the holding from Eichbauer v. Commissioner demonstrates:

Although the petitioner has assumed the responsibility of supporting Mrs. Gonzales [who was divorced before the relationship started], although the officials of the State of Washington have not undertaken to prosecute them, and although the community in which they reside accepts them as husband and wife, we are required . . . to sustain the respondent’s [denial of a dependency deduction].

36. Id. at 192 (relying on Braunfeld v. Brown, 366 U.S. 599 (1961) (which sustained state Sunday “blue law” against challenge by Jewish merchants)). The Fourth Circuit acknowledged that §152(b)(5) caused similarly situated taxpayers to be treated differently, depending on the state in which they resided. Had the taxpayer lived in California, the relationship would not have violated local law and therefore the exemption would not have been denied. Id. at 191. In 1975, California repealed criminal sanctions for sexual activity between consenting adults. 1975 CAL. STAT. chap. 71, §§ 5-12.
37. Ensminger, 610 F.2d at 193-94.
38. 30 T.C.M. (CCH) 581 (1971).
39. Id. at 583 (emphasis added). The Tax Court found that the petitioner’s relationship violated WASH. REV. CODE § 9.79.120 (1970), which provides: “Every person who shall lewdly and viciously
Apparently *Turnipseed’s* situation “universally regarded as against good public morals” contemplated a rather small universe.

This state of affairs is all the more distressing when one realizes that in addition to not enforcing their anachronistic statutes, states have adopted laws that are directly inconsistent with such statutes. In 1991 the Tax Court relied on § 152(b)(5) to deny a dependency claim, and in the process ignored the inconsistency in Utah law thereby created. By 1987, Nicholas (the taxpayer) and Debbie L. Fox had lived together as an unmarried couple for at least six years. For that tax year, the I.R.S. denied Nicholas’s claimed dependency exemption for Ms. Fox (but not his dependency exemption for Ms. Fox’s child by a prior marriage). The denial was based on a Utah statute criminalizing fornication. In support of his position that the Commissioner’s determination was incorrect, Nicholas contended that the parties’ relationship satisfied the requirements of the Utah statute (effective in 1987) which legalizes marriages “not solemnized.” Under that statute, a relationship is treated as a de facto marriage if the parties, pursuant to a contract (not excluding implied contracts), undertook marital rights and duties, “have cohabited,” and generally hold themselves out as married.

The Tax Court’s interpretation of Utah’s fornication statute leads to a paradoxical, and troubling, result. If all cohabitation is illegal, the marriage statute requires the parties to engage in criminal acts in order to legitimize their cohabit with another not his or her husband or wife is guilty of a misdemeanor. *Eichbauer*, 30 T.C.M. at 583. Interestingly, the Tax Court relied on encyclopedic sources to find the taxpayer’s relationship violated that section. *Id.* Apparently the I.R.S. was unable to find relevant Washington state court decisions. A Lexis search of Washington cases using “9.79.120” as the search term revealed no reported decision concerning a prosecution for violating that statute by cohabitation.

41. *Id.* at 468. The I.R.S. apparently concedes that the child of a cohabitant can qualify under § 152(a)(9), without regard to the cohabitant-taxpayer relationship. However, when the cohabitant’s child reaches 19, the exemption is lost, even if the child is a student. Section 151(c)(1)(B) allows a taxpayer to claim an exemption for his or her “child” aged 19 through 23, when the child is a student. For § 151(c)(1)(B) purposes, “child” includes only natural children and stepchildren, not a cohabitant’s child. I.R.C. § 151(c)(3). 42. *Id.* (citing UTAH CODE ANN. § 76-7-104 (1990)).
43. UTAH CODE ANN. § 30-1-4.5 (1989). That section provides:

(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:
   (a) are capable of giving consent;
   (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
   (c) have cohabited;
   (d) mutually assume marital rights, duties, and obligations; and
   (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

Utah courts can recognize a marriage that satisfies § 30-1-4.5 as legal and valid, even if no order has been entered. *See State v. Johnson*, 856 P.2d 1064, 1068-69 (Utah 1993). The fact that these marriages can be “established” after the relationship has terminated makes one suspect that the Utah legislature intended to establish rules for palimony cases.

124
I.R.C. and Victorian Morality

nonsolemnized marriage. Most laws, at least by implication, do not reward criminal acts. As interpreted by the Tax Court either the Utah marriage statute is invalid on its face or it will never be voluntarily used. A person wishing to claim the benefit of the marriage statute would have to admit participation in illegal acts. However, few would perceive a jail term, or whatever sanction the law normally permits, as being a reasonable exchange for the marriage statute’s benefits.

That absurd result could be avoided by construing the Utah fornication statute as not proscribing activities that take place in a relationship that satisfies the marriage statute. The Tax Court’s application of § 152(b)(5) in Nicholas is inconsistent with this construction, and with state law concerning cohabitant. It is also, therefore, inconsistent with the presumed congressional intent behind § 152(b)(5), i.e. harmonizing the federal tax code with state law.

B. Contemporary Community Standards

Taking other state statutes into consideration is one way to more rationally apply § 152(b)(5). Another rational application is to interpret state law based on contemporary community standards. In In re Shackelford, the U.S. District Court for the Western District of Missouri considered the I.R.S.’s contention that the bankruptcy-petitioner-taxpayer had improperly claimed a dependency exemption. On her 1976 return, Mary M. Shackelford claimed her three minor children and Mr. Francis Simons (who was unemployed) as dependents. Both Ms. Shackelford and Mr. Simons were single and, as the court noted, “their bedside activities were completely private.” The I.R.S. denied the dependency exemption based on § 152(b)(5) and a Missouri statute that stated, in relevant part:

Every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor.

The district court, in reversing the determination of the I.R.S., held that “merely living together” did not violate that statute:

In this day and age, can it be said that merely living together is open, gross lewdness or lascivious behavior? Does this conduct openly outrage decency? Is it injurious to public morals? Would the language in State v. Bess, 20 Mo. 420 (1855) “What act can be more grossly lewd or lascivious than for a man and woman, not married to each other, to be publicly living together and cohabiting with each other”, still be applicable today? I think not.

The district court’s construction of the Missouri statute is not unreasonable.

44. 3 Bankr. Rep. 42 (W.D. Mo. 1980).
45. Id. at 43. It was probably helpful that Ms. Shackelford and Mr. Simon did not have any children together, unlike many of the other taxpayers involved in § 152(b)(5) cases.
46. Id. at 44 (quoting Rev. Stat. Mo. § 563.150).
47. Shackelford, 3 Bankr. Rep. at 44.
After all, the essence of such statutes is to enforce community standards, and there is no reason why the standards to be applied should be those of the nineteenth century rather than the present. However, *Shackelford* has not been cited in any subsequent reported decisions, although it may have influenced lower court decisions.

When a state statute does contain value-based terms—such as the Arizona statute in *Peacock* criminalizing "open and notorious cohabitation or adultery"48 and the Washington statute in *Eichbauer* proscribing "lewdly and viciously cohabit[ing]"49—there is no compelling reason why contemporary values should not be used in the manner of *Shackelford*. Quite the opposite, in fact: The courts originally supplied the rationale that § 152(b)(5) was intended to conform the Code with state law. Based on the lack of prosecution, states are arguably interpreting their sex-offense laws as not criminalizing consensual adult cohabitation. Applying contemporary standards to value-laden sex offense statutes would conform § 152(b)(5) to state law, as applied by the state, which is more consistent with inferred congressional intent than the Tax Court's mechanistic, literal approach. In addition, interpreting statutes of this sort50 based on current community standards would place cohabiting couples in the same position vis-à-vis the I.R.S. as they are vis-à-vis their friends, neighbors, and state law as enforced.

However, state statutes that do not include value-laden terms51 would not be amenable to the *Shackelford* solution. For example, the Utah criminal statute involved in *Nicholas* labelled all sexual intercourse between persons not married to each other as "fornication";52 there is no requirement that "public decency" be "outraged" or other such terms. When there are no value-laden terms, it is difficult to interpret the statute based on contemporary values.

52. Nicholas v. Comm'r, 62 T.C.M. (CCH) 467 (1991) (construing Utah Code Ann. § 76-7-104 (1990)). It would be interesting to see how the I.R.S. would support its position if the cohabitant had no children. Unfortunately the burden of proof placement precludes the I.R.S. from having to prove its case.

126
I.R.C. and Victorian Morality

C. Conflict With State Antidiscrimination Laws

As indicated, to date there have not been a large number of reported decisions involving § 152(b)(5). However, many states have statutes that prohibit employment or other discrimination by private persons based on marital status, sexual preference, or sexual orientation. These laws, as well as voluntary antidiscrimination actions by unions and employers, will no doubt increase § 152(b)(5)’s significance.

One area likely to be particularly affected is medical coverage. Under I.R.C. § 106, employer contributions for health and accident insurance are excluded from the employee’s gross income. However, the exclusion is limited to amounts paid for insurance coverage, or medical expenses, of the taxpayer and his or her “dependents” as defined in § 152.53

The I.R.S. has issued several private-letter rulings in response to inquiries from state, county and city officials concerning tax treatment of employee benefits; there is no reason to believe the rules do not apply to private employers. In these rulings, the I.R.S. has taken the position that employer-paid health insurance coverage for an unmarried cohabitant is taxable income to the employee if her or his cohabitant cannot be claimed as a dependent because of § 152(b)(5).55 In each instance, the interested government entity was prohibited from, or chose not to practice, employment discrimination based on marital status. As a result, an employee could obtain coverage for his or her unmarried cohabitant in his or her employer-provided medical insurance benefit program, or receive reimbursement for the cohabitant’s medical

---


54. Reg. § 1.106-1 (1992); see also I.R.C. § 105(b).


A private letter ruling is the I.R.S.’s response to a detailed taxpayer inquiry concerning contemplated actions. The official effect is limited to the inquiring taxpayer and the facts stated in the inquiry, i.e., it has no precedential value. See Rev. Proc. 93-1, 1993-1 I.R.B. 9. Since they are not whimsical, unreviewed correspondence, private letter rulings do reveal the position the I.R.S. will probably take in similar circumstances.
expenses through a similar program.\textsuperscript{56}

The effect of the rulings is that the value of the benefit attributable to the cohabitant's inclusion is included in the employee's gross income. The employer must report the value of those benefits in the same manner, and subject to the same payroll deductions, as employee wages. The tax impact may be significant, particularly from the viewpoint of the affected taxpayer. The amount withheld from each paycheck for tax payment increases, based on the assumption that the monthly insurance premium is part of the taxpayer's pay, with no corresponding increase in the taxpayer's pay check. Assuming that the premium attributable to the cohabitant is $200 per month (probably conservative), the annual tax effect will vary from $728 to $1921, depending on the taxpayer's bracket and based on the 1994 exemption allowance.

The I.R.S.'s conclusions concerning the amount to be included in the employee's wages have been inconsistent. The earliest letter ruling concludes: The amount of compensation includible in the employee's gross income will be the fair market value of such coverage determined, under the principles set forth in section 1.62-21(b)(2) of the regulations, on the basis of the amount that an individual would have to pay for the particular coverage in an arm's-length transaction (i.e., at individual policy rates).\textsuperscript{57} That conclusion presents difficulties beyond the additional tax burden. It requires the employer to determine what the nonmarried cohabitant would have to pay for individual coverage, which requires individual inquiry into the cohabitant's age, medical history, and present physical condition. Later letters suggest a change of heart by the I.R.S.: Where the particular coverage provided to the individual is group medical plan coverage, the amount includible in the employee's gross income is \textit{the fair market value of the group medical coverage}, notwithstanding that the fair market value of the group coverage may be substantially less or more than the fair market value of individual coverage or the subjective value of the coverage to the employee.\textsuperscript{58} The more recent I.R.S. position is, obviously, much less onerous on the employer (the amount can be determined by simple subtraction) and the employee (group coverage is usually much less expensive than individual coverage). However, the result remains unreasonable and may arguably constitute a federally forced violation of state antidiscrimination laws. That is inconsistent with the alleged congressional intent behind § 152(b)(5), and directly contrary to current efforts to eliminate discrimination.

\footnotesize{56. In one instance, the subject city had adopted a "Domestic Partnership" statute that required an unmarried couple to execute an enforceable declaration of domestic partnership before the employee's cohabitant could be covered. Priv. Ltr. Rul. 92-31-062 (May 7, 1992). The additional formality did not change the result.


I.R.C. and Victorian Morality

III. A PROPOSED SOLUTION

The alleged rationale for disallowing a dependency deduction for nonmarried cohabitant is that Congress would otherwise appear to be condoning “immoral” activities condemned by the state. That rationale is extremely hollow when the state, through inaction or more recent legislation, condones those activities. The end result is that the Internal Revenue Service is placed in the position of acting as the “morals police” for local police and prosecutors. In theory, at least, the income tax portion of the Internal Revenue Code is not intended to be a weapon for combatting crime. And those areas where it is used as such a weapon are markedly distinguishable: To take one example, while the social and legal problems associated with the so-called “war on drugs” may justify denying business expense deductions for the expenses of illegal drug traffickers, no similar public outcry exists to limit private consensual activities.

If not infringing on state prerogatives is a legitimate concern, it may be difficult to obtain an outright repeal of § 152(b)(5). However, as the Tax Court decisions demonstrate, enforcing § 152(b)(5) amounts to federal enforcement of state laws that the state chooses to not enforce itself. There is another way to satisfy Congress’s assumed intent—in a much more realistic manner. I.R.C. § 162(c) precludes deduction of illegal bribes as a business expense. Section 162(c)(2) provides in part:

No deduction shall be allowed . . . for any payment . . . made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment . . . under any law of a State (but only if such State law is generally enforced), which subjects the payor to a criminal penalty or

59. Some excise taxes are probably intended to discourage illegal activities. See, e.g., I.R.C. §§ 4401-24 (West 1989) (excise tax on wagering); I.R.C. § 4181 (West 1989) (manufacturer’s sales tax on firearms); I.R.C. § 5811 (West 1989) (transfer tax on firearms); I.R.C. § 5821 (West 1989) (excise tax on making firearms). These excise taxes are distinct from, and in addition to, the income tax provisions of the Code.


61. Another factor that makes the I.R.S.’s “morals police” role rather anomalous is the “marriage penalty” exacted when a couple does obtain state sanction. If cohabitant have children in their home and both work, their combined taxes are less if they are not married. Assuming that tax motivations are the only factor, the most beneficial (tax-wise) relationship for a couple with children would be to be unmarried and both working. The least beneficial is for them to be unmarried and one working. If the couple is unmarried, significant tax savings result if the children’s parent is the working partner (a $1750 difference at $40,000 gross income). If the children’s biological parent works at home, the worst tax rate is realized. If the non-parent partner works out of the home, there is a significant tax incentive to risk audit and penalties by filing a joint return (a $2600 tax difference at $40,000 gross income). Of course, it could be argued that the Turnipseed rule provides an economic incentive to marriage because the difference in tax for even one year exceeds the cost of an uncontested divorce, even at $20,000 per year gross income.

62. As demonstrated in Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979), § 152(b)(5) requires the I.R.S. to enforce state law, as written, even though the state itself chooses not to enforce its own law.
the loss of license or privilege to engage in a trade or business.\textsuperscript{63}

By adding the parenthetical phrase of § 162(c)(2) to § 152(b)(5), Congress would not be infringing on state policy. In fact, it would be more consistent with actual, day-to-day state policy than the current statute. If the statute was so amended, the previously discussed decisions would remain precedent, but only in states that actually enforced their morals laws.

IV. CONCLUSION

There can be little doubt that the \textit{Turnipseed} decision, and the subsequent adoption of § 152(b)(5), were not based on economic considerations or tax policy. Even if they did represent the public opinion of their day, that day has passed. State and local prosecution of persons for fornication, illegal cohabitation, and the like is essentially nonexistent, except when minor children are victims. To the contrary, in fact, many state and local laws prohibit discrimination based on marital status in the areas of employment, housing, and other matters. It does not seem appropriate federal public policy to use federal tax law to indirectly enforce state statutes that are not enforced by the state and are also frequently inconsistent with contemporary state law and policy. The state “morals” statutes, with their colorful, righteous language, no doubt remain “on the books” because of the political pressure of America’s schizophrenic attitude concerning sexual activities. Public officials are expected to punctiliously comply (before and after they become public figures) with the strictest standards of Nineteenth Century, religion-derived sexual practices; any politician voting to repeal “morals” laws risks defeat in the next election. However, for everyone else, wholly different standards apply—cohabitation is so commonplace as to be unnoticed and unremarkable. The states’ unofficial solution has been to neither repeal nor enforce the “morals” statutes. Enforcement of §152(b)(5) actually interferes with, rather than supports, the states’ solution.

The simplest resolution of this problem is repeal of § 152(b)(5). However, that would require federal legislators to take a political risk that state legislators have refused to take. Congress could reach the same result by inserting in § 152(b)(5) the parenthetical phrase from § 162(c)(3). That would harmonize the Internal Revenue Code with state law, as enforced, with little political cost.

\textsuperscript{63} I.R.C. § 162(c)(2) (West Supp. 1994) (emphasis added).