INSURING EQUITABLE LIVES: WHY ALL STATES SHOULD AMEND THEIR INSURABLE INTEREST LAWS TO PROVIDE EQUAL PROTECTION FOR SAME-SEX PARTNERS

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I. INTRODUCTION

In the United States, over six hundred thousand same-sex couples cohabitate—a number which may be statistically underreported, despite increasing public support for marriage between same-sex partners.[1] As of May 2014, seventeen states and the District of Columbia permit same-sex partners to marry.[2]

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[1] *See* Bernard L. McKay, *When Saying "I Do" Does Not Do It: Estate Planning for Same Sex Couples*, 21 OHIO PROB. L.J. 7 (May/June 2011) (citing U.S. Bureau of the Census, Current Population Reports (2002)).

[2] In 2003, the Supreme Judicial Court of Massachusetts held that the denial of marriage rights to same-sex couples violated the state constitution. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). The Connecticut, California, Iowa, New Jersey, New Mexico, and Oklahoma supreme or superior courts also recognized marriage between

Additionally, at least three other states allow full domestic partnerships or civil unions between same-sex partners, at least one state offers limited domestic partnerships between same-sex partners, and at least one state recognizes out-of-state marriages between same-sex partners.[3] Plaintiffs and supporting organizations continue to bring cases on behalf of same-sex partners in state and federal courts throughout the country.[4] Despite these advances for equal marriage rights, thirty-one states still ban same-sex marriage by statute or constitutional amendment.[5]

While, historically, individual states have determined their own definitions of marriage, from 1996 until 2013, the federal government refused to recognize state-sanctioned marriages between same-sex partners for federal purposes, including for tax matters, Social Security benefit issues, federal military pension survivor benefits, and more.[6] Until recently, Article 3 of the Defense of Mar-

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same-sex couples. *See generally* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009); Garden State Equality v. Dow, 216 N.J. 314, 314 (2013); Griego v. Oliver, No. 34,306, 2013 WL 6670704 (N.M. 2013); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (holding that the proponents for Proposition 8 lacked standing to appeal the Ninth Circuit's invalidation of Proposition 8, and, therefore, dismissing the case for lack of jurisdiction and remanding back to the Ninth Circuit, which then dissolved its stay of the district court's order, allowing same-sex marriage in California). The Maine, New Hampshire, Vermont, New York, Maryland, Washington, Delaware, Minnesota, Hawaii, Illinois, and Rhode Island legislatures legalized same-sex marriages without judicial action. *See* ME. REV. STAT. ANN. tit. 19-A, § 650-A (2012); N.H. REV. STAT. ANN. § 457:1-a (2010); VT. STAT. ANN. tit. 15, § 8 (2010); N.Y. DOM. REL. LAW § 10-a (McKinney 2011); MD. CODE ANN. FAM. LAW § 2-201 (West 2013); WASH. REV. CODE § 26.04.010 (2012); DEL. CODE ANN. tit. 13, § 101 (West 2013); MINN. STAT. ANN. § 517.01 (West 2013); HAW. REV. STAT. § 572-1 (2013); 750 ILL. COMP. STAT. 5/201 (effective June 1, 2014); R.I. GEN. LAWS ANN. § 15-1-1 (West 2013).

[3] *See Where States Stand*, FREEDOM TO MARRY, *available at* http://www.freedomtomarry.org/states/ (last visited May 28, 2014) (including Colorado and Nevada for full domestic partnerships or civil unions; Wisconsin for partial state protections; and Oregon for out-of-state marriage recognition).

[4] *See Marriage Litigation*, FREEDOM TO MARRY, http://www.freedomtomarry.org/litigation (last visited May 28, 2014); *see also* De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Jesty v. Heslam, No. 3:13-cv-01159, 2014 WL 1117069 (M.D. Tenn. 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014); Deboer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

[5] *See* FREEDOM TO MARRY, *supra* note 3 (including Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

[6] *See generally* McKay, *supra* note 1. *See also* De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (holding that a statute that deals with familial relationships is "primarily a state concern"); Carolyn Satenberg, Note, *Joint Bank Accounts in New York: Confusion, Discrimina-*

riage Act ("DOMA") limited the federal government's definition of marriage to the union of "one man and one woman."[7] DOMA stated that "the word 'spouse' referr[ed] only to a person of the opposite sex who is a husband or wife."[8] Additionally, DOMA also provided that "[t]he federal government [was] not allowed to treat same-sex relationships as marriages for any purpose, even if recognized by a state."[9] Currently, Article 2 of DOMA also specifies that "[n]o state or political subdivision of the U.S. must recognize a same-sex relationship even if that relationship is recognized in another state."[10]

However, public opinion, along with federal and state governments, began to shift towards acceptance with the help of legal and social advocacy.[11] On February 23, 2011, President Barack Obama ordered the Department of Justice to stop defending the constitutionality of DOMA; however, DOMA remained valid law until Congress repealed it or the United States Supreme Court overturned it.[12]

The Williams Institute, a research think-tank at the University of California, Los Angeles, School of Law, predicted that if marriage between same-sex partners were legalized across the country, then half of all same-sex couples would marry within three years.[13] These newly-married partners would gain approximately 1,049 federal rights, benefits, and responsibilities enjoyed by similarly-situated, opposite-sex married couples.[14] For years, legal advocates pushed for marital equality for same-sex partners because of these unrecognized federal rights, benefits, and responsibilities.

On June 26, 2013, the United States Supreme Court held in *United States v.*

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tion, and the Need for Change, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 607, 616 (2011) (explaining the federal income tax inequities between same-sex and opposite-sex couples).

[7] *See generally* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012), 28 U.S.C. § 1738C (2012)).

[8] *See generally id.*

[9] Joseph R. Pozzuolo & Lisa A. Leggieri, *Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples*, 83 PRAC. TAX STRATEGIES 284, 284 (2009) (citing 28 U.S.C.S. § 1738C).

[10] *Id.* (citing 28 U.S.C.S. § 1738C).

[11] *See, e.g.*, *Growing Support for Same Sex Marriage Across Generations*, PEW RESEARCH SOC. & DEMOGRAPHIC TRENDS (Mar. 5, 2014), http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/sdt-next-america-03-07-2014-2-01/.

[12] Press Release, Dept. of Justice, Statement of Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

[13] Pozzuolo & Leggieri, *supra* note 9, at 284 (citing Miriam Marcus, *The $9.5 Billion Gay Marriage Windfall*, FORBES (June 16, 2009, 6:00 AM), http://www.forbes.com/2009/06/15/same-sex-marriage-entrepreneurs-finance-windfall.html).

[14] *Id.* at 284 (citing Jill Schachner Chanen, *The Changing Face of Gay Legal Issues: Lawyers Advising Clients Face Uncertainties on Issues Ranging from Parental Rights to Estate Planning*, A.B.A. JOURNAL (July 13 2004, 3:34 PM), http://www.abajournal.com/magazine/article/the_changing_face_of_gay_legal_issues/).

Windsor that Section 3 of DOMA violated the United States Constitution as a deprivation of equal protection under the Fifth Amendment.[15] Specifically, the case involved a challenge by a partner in a legal same-sex marriage against the United States government alleging inequality in her deceased partner's federal estate tax return.[16] The Supreme Court did not affect Section 2's enforceability, allowing a state to continue to choose whether to recognize marriage between same-sex partners performed outside of its jurisdiction.[17] Following *Windsor*, not every state recognizes marriage between same-sex partners; today, the United States includes both "recognition states" and "nonrecognition states" for such marriages.[18] States continue to hold the power to choose their own domestic relations laws, while the federal government decides which benefits will follow one of two marital recognition approach: the "state of domicile," or the "state of celebration."[19] Under the "state of domicile" approach, same-sex partners marry in a jurisdiction that validly recognizes their marriage, but move to a state which chooses not to recognize such marriage, then the new "domicile" state controls for both federal and state purposes.[20] On the other hand, the "state of celebration" approach allows same-sex partners to bring their valid marriage "celebration" to their new state of domicile for federal purposes, despite the domicile state's resistance towards recognizing marriage between same-sex partners.[21] For example, in August 2013, the Department of the Treasury and Internal Revenue Service issued guidance following the latter approach,[22] "providing 'certainty and clear, coherent tax-filing guidance for all legally married same-sex couples nationwide.'"[23]

Same-sex couples, like similarly situated opposite-sex couples, require careful estate planning.[24] Some scholars argue that same-sex couples require even more sensitive and careful planning because of their unique legal situations,

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[15] *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013); *see also* Bradford S. Cohen & Elizabeth R. Glasglow, *Tax and Estate Guidance for California and Same-Sex Couples Post-Windsor*, L.A. LAW., Dec. 2013, at 14, *available at* http://www.lacba.org/Files/LAL/Vol36No9/3103.pdf.

[16] *Id.*

[17] *See id.*

[18] *See id.*

[19] *See* SCOTT E. SQUILLACE, WHETHER TO WED: A LEGAL AND TAX GUIDE FOR GAY AND LESBIAN COUPLES 94 (2013).

[20] *See id.*

[21] *See id.*

[22] *See* Cohen & Glasgow, *supra* note 15, at 14 (citing Rev. Rul. 2013-17 and Rev. Rul. 2013-72).

[23] *See* Cohen & Glasgow, *supra* note 15, at 14 (citing Annie Lowrey, *Gay Marriages in All States Get Recognition from the I.R.S.*, N.Y. TIMES, Aug. 30, 2013, at A12, *available at* http://www.nytimes.com/2013/08/30/us/politics/irs-to-recognize-all-gay-marriages-regardless-of-state.html?_r=0).

[24] *See generally* McKay, *supra* note 1.

costing the couple thousands of dollars.[25] For example, same-sex partners may fear family members will revoke or challenge the partners' estate planning documents after one of the partner's incapacitation or death, which may further exasperate the difficult estate-planning process.[26] Because of these concerns, many estate planners recommend creative strategies and solutions to protect same-sex partners, despite potentially life-altering events.[27] However, these same estate planners also advise same-sex partners that states may find some of these documents unenforceable if the partners' domicile state chooses not to extend any rights to same-sex partners.[28]

Some educated estate planners recommend that same-sex partners use life insurance policies—sometimes with long-term care insurance—as a valuable estate-planning resource.[29] They suggest these policies to same-sex partners to protect the surviving partner, and also to pay for any transfer taxes and end-of-life expenses for the deceased partner without burdening the surviving partner.[30] However, these estate planners assume that, if challenged, courts will uphold such policies. Life insurance presents one potential challenge and problem by potentially prohibiting a same-sex partner from either purchasing life insurance on her partner's life or invalidating such policy based on the state's domestic relations and insurance laws.[31] This issue arises because most states' "insurable interest" requirement for life insurance policies excludes same-sex partners from its statutory and common law definitions.[32]

In Part II, this Article explains the history of the insurable interest doctrine, including the historical and relative importance of this doctrine to the issuance and promulgation of insurance policies, the proposed rationales and policy arguments in favor of this doctrine, and the presumptive classes of individuals holding an insurable interest under a life insurance policy in many states.

In Part III, this Article explores the difficulties and issues faced by same-sex couples, both legally married under state law and unmarried, in obtaining valid

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[25] *See generally* Samuel H. Grier & Tad D. Ransopher, *Tax Compliance and Estate Planning for Same-Sex Couples*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 323, 325 (2013).

[26] *See generally id.*

[27] *See generally id.* (suggesting the importance of living trusts, durable financial powers of attorney, domestic partnership agreements, and life insurance and long-term care insurance).

[28] Pozzuolo & Leggieri, *supra* note 9, at 284.

[29] *See* James Lange, *The Demise of Federal DOMA*, 36 PA. LAW. 28, 34 (2013), *available at* http://outestateplanning.com/wp-content/uploads/2013/12/The-Demise-of-Federal-DOMA.pdf.

[30] *See id.*

[31] *See* Raymond Prather, *Considerations, Pitfalls, and Opportunities That Arise When Advising Same-Sex Couples*, 24 PROB. & PROP., May–June 2010, at 27, *available at* http://www.americanbar.org/publications/probate_property_magazine_2012/2010/may_june_2010.html.

[32] *See id.*

life insurance policies. In this Part, the Article also emphasizes the importance of life insurance policies, especially for same-sex couples as an estate-planning tool and technique. Additionally, this Part focuses on the limitations imposed by state domestic relations and insurance laws, and the possible challenge of the life insurance policy between same-sex partners by either the life insurance company or the decedent's relatives.

Finally, in Part IV, this Article proposes potential estate planning solutions, including irrevocable life insurance and revocable trusts, but with the potential complicated solution of naming the estate as the beneficiary. Also, this Part reiterates potentially abolishing the insurable interest requirement to protect state-unrecognized relationships, despite equitable justifications for creating an insurable interest. This Part concludes by abandoning this argument in favor of adding domestic partners as a presumptive class of individuals with an insurable interest in their partners' lives under state insurance law. This Article proposes that *Windsor* and its progeny provide some valid constitutional arguments for same-sex partners to use in litigation to challenge the lack of express protection under states' insurable interest laws. The solution of adding domestic partners and married same-sex partners as a presumptive class more equitably aligns estate planning and insurance law between similarly-situated same-sex and opposite-sex married partners.

II. HISTORICAL BACKGROUND OF THE INSURABLE INTEREST DOCTRINE

Life insurance is an agreement between an individual policyholder and an insurance company stating that, upon the insured's death, the insurance company will pay a specific amount to a designated beneficiary.[33] Essentially, life insurance, like other insurance contracts, indemnifies the policyholder against loss "resulting from unknown or contingent events"—in the life insurance context, unexpected but inevitable death.[34] The law in the United States requires that insurance policyholders have an "insurable interest" in the life in which the policy insures.[35] Black's Law Dictionary defines an "insurable interest" as "[a] legal interest in another person's life . . . from injury, loss, destruction, or pecuniary damage."[36] This definition has a long and rich legal and economic history.

Until 1746, English common law permitted individuals to create insurance

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[33] Mary Mahala Gardner, Note, *Trust, We Have a Problem: Chawla ex rel. Giesinger v. Transamerica Occidental Life Insurance Company, Its Revelation of a Problem in Insurable Interest Statutes and the Subsequent Effect on Irrevocable Life Insurance Trusts*, 62 OKLA. L. REV. 125, 126 (2009) (citing BLACK'S LAW DICTIONARY 945 (8th ed. 2004)).

[34] *Id.* (citing 43 AM. JUR. 2d *Insurance* § 3 (2005)).

[35] Jacob Loshin, Note, *Insurance Law's Hapless Busybody: A Case Against the Insurable Interest Requirement*, 117 YALE L.J. 474, 479 (2007).

[36] Gardner, *supra* note 33, at 127 (citing BLACK'S LAW DICTIONARY 829 (8th ed. 2004))

contracts, even if they lacked an insurable interest.[37] However, that year, the English Parliament passed a statute forbidding "wagering contracts" on maritime insurance, and, later, on life insurance.[38] The insurable interest requirement distinguished between contracts that protected against actual future loss and risk, and contracts that merely speculated on an event's future occurrence.[39] Legal scholars and advocates argued that contracts without an insurable interest incentivized beneficiaries to end the insured's life.[40] Historically, the insurable interest doctrine requires that a life insurance policyholder "have some significant interest in the continued existence" of the insured person, thereby, excluding a person from buying a life insurance policy on a stranger's life.[41] Arguably, without an insurable interest, the policyholder would not suffer an actual loss following the insured person's death, and, instead, the policy would become a "pure gamble."[42] Additionally, without this "significant interest," the compensation to the disinterested policyholder upon the insured person's death gives the policyholder a perverse incentive to kill the insured person.[43] This incentive raises numerous public policy concerns.

Legal scholars called this perverse incentive the "concern of 'moral hazard.'"[44] Moral hazard exists in situations in which an insurance policy increases incentives to accumulate loss and, thereby, increases the risk of such loss to the third parties insured by the policyholder.[45] In the case of life insurance, moral hazard increases the likelihood of the insured's death.[46] The insurable interest rule reduces this risk for insurers by providing a tool for policy invalidation, and, thus, subsidizing the cost of these risky contracts by potentially mitigating the perverse incentives.[47] By requiring an insurable interest, courts attempted to eliminate the policyholder's opportunity for moral hazard by invalidating life

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[37] Loshin, *supra* note 35, at 480 (citing FREDERICK H. COOKE, THE LAW OF LIFE INSURANCE § 58, at 91 n.1 (Baker, Voorhis & Co. 1891)).

[38] *See* Act of 1746, 19 Geo. 2, c. 37, § 1 (Eng.) ("[N]o assurance . . . shall be made by any person . . . on any ship . . . by way of gaming or wagering . . . and . . . every such assurance shall be null and void to all interests and purposes."). *See also* Act of 1774, 14 Geo. 3, c. 48, § 1 (Eng.) ("Whereas . . . the making insurances on lives . . . wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: . . . no insurance shall be made by any person . . . on the life . . . of any person . . . wherein the person . . . for whose . . . benefit such policy . . . shall be made, shall have no interest . . . .").

[39] Loshin, *supra* note 35, at 480.

[40] *Id.* at 480.

[41] *Id.* at 476.

[42] *Id.* at 480.

[43] *Id.* at 476.

[44] *Id.* at 480.

[45] *Id.* at 480-81 (citing the risk of loss "due to fraud or other willful actions").

[46] *Id.* at 491.

[47] *Id.* at 491. The difference between the contract's actual cost and the insurer's expected liability represents the insurable interest doctrine's proposed subsidy, provided the probability of invalidating the insurance contract is greater than zero. *See id.*

insurance policies without such insurable interest.[48] In the United States, courts have treated the insurable interest doctrine as a "dictate of public policy to be enforced by state common law," citing the importance of preventing insurance contracts of which are "mere wagers."[49] While early insurance law cases cited the anti-wagering rationale, the moral hazard concern remains the predominant justification for the insurable interest doctrine.[50] Courts continue to grapple with insurance contracts in the emerging socio-political landscape.

An insurance contract's enforceability depends on the court's interpretation of the state's statutory or common law definitions of this insurable interest.[51] For example, in *Warnock v. Davis*, the United States Supreme Court stated that "there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."[52] Most courts have held that a policyholder has an insurable interest in his or her spouse, and his or her minor children, but that the same policyholder lacks an insurable interest in his or her in-laws, nephew, or grandparents.[53] Scholars have recognized that the issue of the insurable interest for same-sex partners, even if legally married or in a valid civil union under their domicile state's laws, remains "largely unresolved."[54]

Even without meeting the "blood or affinity" requirement under most states' statutory or common law definitions, a person may establish an insurable interest if he can prove that he has a "reasonable expectation of pecuniary" interest on the insured's continued life and well-being.[55] For example, courts have held that a business partner meets this requirement.[56] Under this rationale, courts have focused on two factors to determine whether partners have such an insurable interest in each other's lives:

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[48] *Id.* at 476.

[49] *Id.* at 481 (citing Lord v. Dall, 12 Mass. (11 Tyng) 115 (1815); Warnock v. Davis, 104 U.S. 775, 779 (1881)).

[50] *Id.* (citing Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096, 1123 (2000)) (explaining that most people admit that insurance policies permit a certain amount of gambling, but the real focus depends on how to regulate these policies); *see also* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 201 (4th ed. 2005) (stating the modern trend for emphasizing the moral hazard concern for insurance policies lacking an insurable interest).

[51] *Id.* at 484.

[52] Warnock v. Davis, 104 U.S. 775, 779 (1881).

[53] Loshin, *supra* note 35, at 484.

[54] *Id.* at 485 n.34 (citing Peter Nash Swisher, *The Insurable Interest Requirement for Life Insurance: A Critical Reassessment*, 53 DRAKE L. REV. 477, 507–08 (2005)).

[55] *Id.* at 485 (citing Rubenstein v. Mut. Life Ins. Co., 584 F. Supp. 272, 278 (E.D. La. 1984)).

[56] *Id.* at 485 (citing Ferdinand S. Tinio, Annotation, *Insurance on Life of Partner as Partnership Asset*, 56 A.L.R.3d 892 (1974)).

> (1) [W]hether one partner advanced funds for the benefit of the other partner . . . thereby making the advancing partner a creditor of the other partner; and (2) whether the partnership relied on the expertise of the insured partner for partnership affairs, thereby creating a business relationship or a type of key employee relationship.[57]

Same-sex partners may have difficulty proving that they operate their financial affairs under a creditor-debtor relationship; they may also be uncomfortable establishing this kind of financial relationship, even just for paper transactions.[58] Courts may also require that the "business" partner quantify the alleged economic benefit in his insured "business" partner and that this benefit be "substantial."[59]

Some legal scholars critique this insurable interest requirement because of the uncertainty perpetuated by state legislatures and courts' unsettled determinations regarding the specific classes of individuals holding an insurable interest.[60] One of the main complaints that remains is the uncertainty of bargaining for an insurance contract with vague, inconsistent, and ill-guided insurable interest requirements and policies.[61] This uncertainty is perpetuated, as many scholars have lamented, by the "great diversity of judicial opinion,"[62] the "sharp conflict of authority,"[63] and the "contradictory and vague" definitions of insurable interest.[64]

At least one scholar thus advocates removing the insurable interest rule entirely.[65] This scholar argues that "the insurable interest requirement acts as an arbitrary and undesired cap on the kinds of insurance consumers may desire

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[57] Mary Ann Mancini & Caitlin L. Murphy, *The Elusive Insurable Interest Requirement: Are You Sure the Insured is Insured?*, 46 REAL PROP. TR. & EST. L.J. 409, 427–28 (2012) (internal citations omitted).

[58] *See* Adam Chase, *Tax Planning for Same-Sex Couples*, DENV. U. L. REV. 359, 377 (1995).

[59] Loshin, *supra* note 35, at 486 (citing Peter Nash Swisher, *The Insurable Interest Requirement for Life Insurance: A Critical Reassessment*, 53 DRAKE L. REV. 477, 521–22 (2005)).

[60] *Id.* at 486.

[61] *Id.* (citing Franklin L. Best, Jr., *Defining Insurable Interests in Lives*, 22 TORT & INS. L.J. 104, 112 (1986)).

[62] Edwin W. Patterson, *Insurable Interest in Life*, 18 COLUM. L. REV. 381, 381–82 (1918).

[63] Bertram Harnett & John V. Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162, 1164 (1948).

[64] Franklin L. Best, Jr., *Defining Insurable Interests in Lives*, 22 TORT & INS. L.J. 104, 112 (1986).

[65] *See generally* Loshin, *supra* note 35 (arguing that the rule "overreaches by invalidating insurance contracts which, under its own rationale of moral hazard, do not need to be invalidated").

and insurers may be willing to provide."[66] Insurance companies have their methods to reduce moral hazard beyond the mere insurable interest requirement, "including deductibles, coinsurance, coverage limits, and coverage exclusions."[67] Thus, states may alter or abolish the insurable interest rule while maintaining adequate protection for both insureds and insurers.[68] This argument carries some merit for same-sex couples.

Currently, life insurance presents a complicated issue for same-sex couples because most states' insurance laws require an insurable interest.[69] The "insurable interest" rule applies to the owner, not the beneficiary, of a policy.[70] Without an insurable interest in the insured, courts may hold that the policyholder lacks sufficient risk of loss; the absence of such risk turns the policy into "nothing more than a wager on whether the person will die during the term of the policy."[71] A same-sex partner must prove to the court that he or she has an insurable interest because he or she is so related to or concerned with the insured as to "derive a pecuniary benefit or advantage from its preservation, or . . . suffer a pecuniary loss or damage from its destruction, termination or injury."[72]

Life insurance contracts are voidable unless the policyholder has an insurable interest in the insured.[73] If a policy is declared *void ab initio*, then the insurer may decline to pay the death benefits under the insurance policy at the insured's death, or the insurer may simply return the premiums paid, plus statutory interest, to the policyholder or the insured's estate.[74] Additionally, even if the insurer pays the life insurance policy's death benefits, in some states, the insured's estate or his family members may have standing to sue the partner-policyholder in order to obtain these death benefits for the estate or family members.[75]

Three types of state statutes currently exist regarding the persons or entities

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[66] *Id.* at 498.

[67] *Id.* at 486 (citing Kenneth S. Abraham, *Insurance Law and Regulation* 7 (4th ed. 2005)).

[68] *See generally* Loshin, *supra* note 35. Loshin also argues that the current doctrine "generates perverse incentives that undermine its own purpose, creates an opportunity for insurers to take advantage of policyholders, and generally reduces the efficiency of the insurance market." *Id.* at 509.

[69] *See* Raymond Prather, *Advising Same-Sex Couples*, 28 GPSOLO 14, 14 (Mar. 2011).

[70] PATRICIA A. CAIN, DEATH, INCAPACITY, AND ILLNESS, 1 SEXUAL ORIENTATION AND THE LAW § 5.25 (2013).

[71] *Id.*

[72] Gardner, *supra* note 33, at 127 (citing 44 AM. JUR. 2d *Insurance* § 932 (2005)).

[73] *See* 44 AM. JUR. 2d, *Insurance* § 933 (2005).

[74] *See* Mancini & Murphy, *supra* note 57, at 411 (internal citation omitted).

[75] *See id.*

with an insurable interest.[76] Twenty-eight states' statutes describe an exclusive list of who, or what, may have an insurable interest in an insured, and, furthermore, bar case law from expanding this list.[77] Another group of eleven states' statutes list certain individuals who and entities that may have an insurable interest, but generally allow case law to expand this non-exhaustive list.[78] Finally, the remaining ten states' laws, including the laws in the District of Columbia, "have no statutory insurable interest rule or have a statute that states only that an insurable interest is required," and determine the extent of the insurable interest doctrine only by case law.[79]

Most states allow an individual to purchase insurance on his or her own life, who then may designate anyone as the policy's beneficiary.[80] In *Connecticut Mutual Life Insurance Co. v. Schaefer*, the Supreme Court held that an insured, or any person with an insurable interest, may purchase a policy and then assign the policy to a person without an insurable interest in the insured, so as long as "no prearrangement to assign the policy at a later date" existed.[81] A partner in a same-sex couple may encounter difficulties, however, if that partner buys the life insurance policy with the intent to transfer the policy immediately to someone without an insurable interest, including his or her same-sex partner.[82] Same-sex partners' ability to engage in this transaction depends on the jurisdiction and the insurance company. Therefore, at least one scholar recommends that the partners talk to a representative of the insurance company before such engagement.[83] This same scholar also advises that the lawyer representing the

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[76] *See* HOWARD M. ZARITSKY & STEPHAN R. LEIMBERG, TAX PLANNING WITH LIFE INS. ¶ 12.06, at *1 (2012) (describing who has an insurable interest).

[77] *See id.* (listing Alabama, Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming).

[78] *See id.* (listing Colorado, Florida, Iowa, Kansas, Minnesota, Nebraska, New Hampshire, Pennsylvania, Ohio, Oregon, and Vermont) (citing KAN. STAT. ANN. § 40-452(e); MINN. STAT. § 61A-074; VT. STAT. ANN. tit. 8, § 3711(e)).

[79] *See id.* The other two groups of states also use case law to determine if a specific individual fits within the statutes' definition, however. *See id.*

[80] *See id.* at *3. "[A]n individual has an unlimited insurance interest in his or her own life and may lawfully take out a policy of insurance on his or her own life and have the same made payable to whomever he or she pleases, regardless of whether the beneficiary so designated has an insurable interest." *Id.* (citing ALASKA STAT. § 21.42.020(a)).

[81] *See* Mancini & Murphy, *supra* note 57, at 415 (citing Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 461–63 (1876)).

[82] *See* Zaritsky & Leimberg, *supra* note 76, at *3.

[83] *See* Samuel H. Grier & Tad D. Ransopher, *Tax Compliance and Estate Planning For Same-Sex Couples*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 323, 352 (2013) (citing Matthew DuBois, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 326 (1999)).

partners not assist in this engagement.[84] Issues may arise without such legal representation, however, leaving the partners vulnerable to attack by the life insurance company or by family members.[85] Therefore, the partners should discuss all relevant legal and financial issues with a knowledgeable lawyer before proceeding.

III. ISSUES IN ESTATE PLANNING WITH LIFE INSURANCE FOR SAME-SEX COUPLES

Courts should hold that same-sex spouses legally married under their state's domestic relation laws have an insurable interest in their spouse's life within the couple's domicile state.[86] One court has held that to deny same-sex couples in legal marriages or civil unions the same benefits of marriage as held by opposite-sex couples "violates the basic premises of individual liberty and equality under law."[87] Therefore, the insurable interest rule, or the lack thereof, does not likely concern same-sex couples with the legal protections of marriage or civil unions within their state, provided the same-sex couples comply with the state's domestic relations laws.[88] For example, Vermont requires life insurers to offer civil union couples the same policies and contracts as offered to married opposite-sex couples.[89] Same-sex couples should still refer to the state statutes to see what requirements they must fulfill regarding insurable interests.[90] Generally, states require the policyholder "to be a family member, to have a reasonable expectation of an advantage of the continued life of the insured, to have a common ownership of property, or to have a business relationship with the insured."[91] A same-sex partner has difficulty meeting these requirements, however.

States that do not recognize or allow marriage, civil unions, or domestic partnerships between same-sex partners, however, present additional barriers and obstacles for same-sex couples seeking to insure their partners' lives.[92] The

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[84] *Id.*

[85] *Id.* (citing Wendy S. Goffe, *Estate Planning for the Unmarried Adult*, SR 042 A.L.I-A.B.A. 567, 614 (2010)).

[86] *See* Zaritsky & Leimberg, *supra* note 76, at *4 (arguing that the spouses' love and affection, and financial relationship recognized under the state's same-sex marriage or civil union laws create an insurable interest).

[87] *See* Peter Nash Swisher, *The Insurable Interest Requirement for Life Insurance: A Critical Reassessment*, 53 DRAKE L. REV. 477, n.95 (2005) (citing Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003)).

[88] *See* Zaritsky & Leimberg, *supra* note 76, at *4.

[89] *See id.* (citing 21-051 Vt Code. R. §§ 1–9 (2001))

[90] *See id.*; *see also* Swisher, *supra* note 87, at 508 (stating that depending on whether the state civil union or domestic partnership statute mentions insurance benefits determines the underlying requirements to establish an insurable interest).

[91] Grier & Ransopher, *supra* note 83.

[92] *See* Mancini & Murphy, *supra* note 57, at 424 (stating that while several states have

rest of this Article focuses on these same-sex partners without the explicit statutory protections, such as same-sex partners who legally marry in one state but return to their home state which may refuse to recognize the partners' marriage.[93] Life insurance provides many useful benefits for both same-sex and opposite-sex couples, including the "necessary liquidity at a partner's death" and "supplement the loss of deceased partner's income."[94] Life insurance may also correct disparate treatment because of lack of federal and state recognition.[95] The life insurance policy may also enable the partners to transfer the decedent partners' wealth outside of probate, similar to a testamentary disposition, achieving some additional privacy for the partners.[96]

Life insurance allows an insured to provide its beneficiary with financial resources following the insured's death.[97] Any couple may benefit from buying life insurance when one spouse is wealthier than the other spouse.[98] Same-sex partners may desire life insurance policies to protect the less wealthy spouse by providing proceeds under such policies after the wealthier spouse dies.[99] All couples that want to manage their affairs exclude the policy's proceeds in the wealthier partner's taxable estate at death.[100] This estate-planning technique benefits all couples by providing necessary liquidity and supplementing the "loss of the deceased partner's income."[101]

Additionally, some estate-planners encourage same-sex partners to manage their risk of untimely death by maintaining "cross-owned [life] insurance" policies.[102] Each partner owns and names himself or herself as the beneficiary of a life insurance policy on the other partner's life.[103] This technique allows the surviving partner to receive the policy's proceeds at the other partner's death.[104]

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authorized domestic partnerships, this status does not "confer upon the partners all of the benefits of an opposite sex marriage, and none of the [states'] acts mention the concept of an insurable interest") (internal citation omitted).

[93] *See generally* Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011) (arguing that because of Section 2 of DOMA, states may establish "mini-DOMAs" which allow the state to refuse to recognize a same-sex couple's valid marriage in another state).

[94] *See generally* McKay, *supra* note 1.

[95] Pozzuolo & Leggieri, *supra* note 9, at 293.

[96] Grier & Ransopher, *supra* note 83 (citing Jennifer McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75, 89 (2003)).

[97] *See* Aimee Bouchard & Kim Zadworny, *Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple*, 30 W. NEW ENG. L. REV. 713, 733 (2008).

[98] *See* Prather, *supra* note 31, at 27.

[99] *Id.*

[100] *See id.*

[101] *See generally* McKay, *supra* note 1.

[102] *See generally id.*

[103] *See generally id.*

[104] *See generally id.*

Then, the surviving partner may use these proceeds "to help meet his or her living expenses" after the other partner's death.[105] These same estate-planners also advise that the Internal Revenue Service will not include the policies' proceeds in the decedent's estate "since such person was neither the owner nor beneficiary of the policy,"[106] but this advice may be questionable.[107]

In most states, the state assumes a spouse to have an insurable interest in his or her opposite-sex spouse,[108] but a state's domestic relations laws may deny the same treatment for same-sex spouses.[109] Life insurance policies and insurance agency practices often limit life insurance's desired effects for same-sex partners.[110] Same-sex partners without a legally recognized relationship within their domicile state may encounter difficulties purchasing such life insurance.[111] The "insurable interest" doctrine varies from state to state, but most states prohibit purchasing life insurance when the purchaser or the beneficiary does not have an insurable interest in the insured.[112] Without this insurable interest, same-sex couples face uncertainty, litigation, and additional cost and confusion when developing their estate plans for even their most basic needs.[113] Estate planners suggest several solutions to minimize such uncertainty, and each of these solutions presents its own benefits and problems.

IV. SOLUTIONS TO CORRECT INEQUITY IN THE INSURABLE INTEREST DOCTRINE FOR SAME-SEX COUPLES

A. *The Business Partnership Agreement*

One solution for same-sex partners' insurance policy problems may be a business partnership agreement ("BPA"). Notably, BPAs grant individuals standing to sue in insurance interest actions because business partners can purchase life insurance on each other's lives.[114] A few scholars note that a BPA bestows a considerable benefit for same-sex partners who normally cannot purchase life

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[105] *See generally id.*

[106] *See generally id.*

[107] *See, e.g.*, Dow Chemical Co. v. U.S., 435 F.3d 594 (6th Cir. 2006) (analyzing corporate-owned life insurance under the "substance-over-form" doctrine). Under the "substance-over-form" doctrine, courts may look at the financial reality behind cross-owned life insurance policies as creating economic ownership over the proceeds and policy.

[108] Prather, *supra* note 31, at 27.

[109] *See id.*

[110] *See generally* Mancini & Murphy, *supra* note 57 (stating that an insurer may sue the recipient of the death benefits in order to declare the policy void *ab initio* for a lack of insurable interest, or the decedent's family or estate may sue the recipient to force him or her to return the insurance proceeds under a similar claim).

[111] Bouchard & Zadworny, *supra* note 97, at 733.

[112] *See* Prather, *supra* note 31, at 27.

[113] Pozzuolo & Leggieri, *supra* note 9, at 287–88.

[114] *Id.* (citing Matthew R. Dubois, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 277–78 (1999)).

insurance on a same-sex partner's life because of the "insurable interest" requirement.[115] For example, if same-sex partners share property or a business, they may qualify as "business partners" under the state's statutory or common law definitions of insurable interest because the surviving partner in a same-sex couple could clearly quantify his or her financial loss from the decedent partner's death.[116] Additionally, the dissolution of the partnership may distribute assets without the recognition of gain or loss, provided the partners do not receive assets in excess of their basis in the partnership.[117] This arrangement requires substantial financial tracking, which may limit its advantages for same-sex partners.[118] Therefore, same-sex couples may prefer an alternative with less financial management requirements.

B. *The Irrevocable Life Insurance Trust*

One alternative many high-net-worth same-sex partners choose to create is an irrevocable life insurance trust ("ILIT").[119] An ILIT may purchase and own a life insurance policy on the grantor's life, while establishing the same-sex partner—and children, if any—as the beneficiaries under the trust's terms.[120] At the grantor's death, the insurance company pays policy proceeds to the ILIT, which the trustee distributes to the beneficiaries pursuant to the trust's terms.[121] Additionally, the ILIT excludes the entire insurance policy's proceeds from the decedent's gross estate,[122] provided that the transfers meet some additional requirements.[123] This estate-planning technique may create substantial tax savings.[124] For example, the beneficiary's death benefits received from the life insurance policy will not likely be included in the beneficiary's gross income[125] and any appreciation of the policy's cash value also avoids tax liability.[126] A trust may also be less contestable and public than a will, preserving the privacy of the same-sex couple in their assets.[127]

This approach presents some estate planning problems for same-sex partners of which the prudent lawyer and estate planner should advise. First, the ILIT cannot be amended or revoked without federal estate tax inclusion for the dis-

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[115] *Id.*

[116] *See* Bouchard & Zadworny, *supra* note 97, at 732.

[117] *See* Pozzuolo & Leggieri, *supra* note 9, at 288.

[118] *See generally* STEPHEN A. LIND, ET AL., FUNDAMENTALS OF PARTNERSHIP TAXATION (8th ed. 2008).

[119] Pozzuolo & Leggieri, *supra* note 9, at 292.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *See* I.R.C. § 2035 (2012).

[124] *See* Pozzuolo & Leggieri, *supra* note 9, at 292.

[125] *See* I.R.C. § 101(a) (2012).

[126] *See* I.R.C. § 7702(g) (2012).

[127] *See* Bouchard & Zadworny, *supra* note 97, at 730.

solution of a same-sex relationship, or the conception or adoption of additional children.[128] While some solutions exist,[129] each of these solutions require careful and conscious drafting by the same-sex partners' attorney and may force the same-sex partners to revisit the trust's terms throughout their lives and relationship.[130] Second, the ILIT requires proper drafting and administering to ensure that the life insurance policy's proceeds escape federal estate taxation at the insured's death,[131] which may increase the estate planning cost for the same-sex partners.[132] Third, the grantor's funding of the trust to buy the insurance policy, and the potential subsequent additional gifts to pay the policy's annual premiums, may trigger gift taxes if such funding and gifts exceed the gift tax annual exclusion—currently $14,000 per donor per recipient per year[133]—or deplete the grantor-donor's lifetime gift exclusion—currently $5.34 million.[134] Fourth, at least one court has held that trusts do not have insurable interests in the grantor's life,[135] but this decision may have little precedential value.[136]

The legislative and judicial discussion following the *Chawla ex rel. Giesinger v. Transamerica Occidental Life Insurance Company* case presents a useful dialogue for the insurable interests of same-sex partners.[137] In this case, the Eastern District of Virginia court held that rescission of the life insurance policy was valid for two reasons.[138] First, the insured decedent falsified information on his life insurance application, which the insurance company successfully argued were material misrepresentations.[139] The second line of reasoning, explained below, though unnecessary to invalidate the life insurance policy, caused substantial confusion for ILIT trustees.[140]

The court also held that the life insurance policy was void because, under the state's laws, the ILIT lacked an insured interest in the insured's life.[141] The

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[128] Pozzuolo & Leggieri, *supra* note 9, at 292–93.

[129] *See id.* (recommending that an ILIT name a "class of children" rather than the individual children's names, and define "partner" broadly within the trust instrument, including pour-over provisions for the children's portion of the trust).

[130] *See generally* Prather, *supra* note 69.

[131] *See generally* McKay, *supra* note 1.

[132] *See generally* Pozzuolo & Leggieri, *supra* note 9.

[133] *See* Kelly Phillips Erb, *IRS Announces 2014 Tax Brackets, Standard Deduction Amounts and More*, FORBES, Oct. 31, 2013, http://www.forbes.com/sites/kellyphillipserb/2013/10/31/irs-announces-2014-tax-brackets-standard-deduction-amounts-and-more/.

[134] *See id.*

[135] *See generally* Chawla v. Transamerica Occidental Life Ins. Co., No. 03-1215, 2005 WL 405405 (E.D. Va. Feb. 3, 2005).

[136] *See* Chawla v. Transamerica Occidental Life Ins. Co., 440 F.3d 639 (4th Cir. 2006) (vacating the lower court's decision).

[137] *See generally* Gardner, *supra* note 33.

[138] *See id.* at 129 (citing *Chawla*, 2005 WL 405405, at *4).

[139] *Chawla*, 2005 WL 405405, at *3–5.

[140] *See* Gardner, *supra* note 33, at 129.

[141] *See id.* (citing *Chawla*, 2005 WL 405405, at *6–7).

decedent had transferred the policy to the ILIT because the insurer claimed that the original beneficiary, Vera Chawla, lacked an insurable interest in the insured decedent's life.[142] The state's laws provided three methods to establish an insurable interest.[143] The district court found that the ILIT failed to meet any of these methods.[144] The court held that the insurer validly rescinded the life insurance policy with the trust as beneficiary because the policy was void.[145] The trustee appealed the district court's grant of summary judgment for the insurer to the Fourth Circuit, which affirmed the district court's ruling.[146] The Fourth Circuit, however, ruled on more limited grounds by basing its opinion on the insured's material misrepresentation in the life insurance application, but vacated the district court's ruling that the policy could also be rescinded because the ILIT lacked an insurable interest in the insured decedent.[147] Many other states mirror this insurable interest statute; as of 2009, twenty states do not contain a provision within their insurable interest statutes that establishes an insurable interest in the trustee of a trust.[148]

C. *The Transfer of Life Insurance Policies Between Same-Sex Partners*

Some lawyers advocate a simpler approach to transfer life insurance policies between same-sex partners. For example, some lawyers advise the wealthier partner to purchase the life insurance policy in his or her life and transfer the policy to the less wealthy partner.[149] This approach presents its own difficulties for the same-sex partners. Many life insurance companies, under its contracts, may void the policy if the grantor transfers it within two years.[150] Also, the Internal Revenue Code requires the decedent's estate to include any gifts trans-

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[142] *See* Gardner, *supra* note 33, at 129 (citing *Chawla*, 2005 WL 405405, at *1).

[143] *See id.* (citing MD. CODE ANN., Ins. § 12-201) (listing (1) those "related closely by blood or law, a substantial interest engendered by love and affection[;]" (2) those who have "a lawful and substantial economic interest in the continuation of the life, health, [and] bodily safety of the individual . . . [excluding] an interest that rises only by, or would be enhanced in value by, the death, disablement, or injury of the individual[;]" or (3) those with a limited business interest, including "a contract or option for sale or purchase of interest in a business partnership").

[144] *See id.* (citing *Chawla*, 2005 WL 405405, at *6).

[145] *See id.* (citing *Chawla*, 2005 WL 405405, at *7).

[146] *See id.* (citing Chawla v. Transamerica Occidental Life Ins. Co., 440 F.3d 639, 641 (4th Cir. 2006)).

[147] *See id.* (citing *Chawla*, 440 F.3d at 648).

[148] *See id.* at 132 n.3 (citing ALASKA STAT. § 21.42.020(d) (2002); ARIZ. REV. STAT. ANN. § 20-1104 (1989); ARK. CODE ANN. § 23-79-103(c)(1) (2003); HAW. REV. STAT. § 431:10-202 (2005); IDAHO CODE ANN. § 41-1804 (2007); KAN. STAT. ANN. § 40-450, 452 (1991); KY. REV. STAT. ANN. § 304.14-040 (West 1994); LA. REV. STAT. ANN. § 22:613 (2004); MISS. CODE ANN. § 83-5-251 (West 1993)).

[149] *See* Prather, *supra* note 31, at 27.

[150] *Id.*

ferred within three years of the decedent's death.[151]

The Supreme Court's *Windsor* invalidation of Section 3 of DOMA eliminated some inequitable federal gift and estate tax issues for married same-sex partners.[152] For example, previously, even gratuitous transfers between same-sex partners could result in a gift tax liability.[153] Under the Internal Revenue Code, each taxpayer may make an annual, tax-free transfer of present-interest property up to a statutory amount to as many people as he chooses, including to his same-sex partner.[154] Transfers exceeding this amount, however, may result in a taxable gift, unless these gifts qualify for another gift tax exclusion.[155] In contrast, opposite-sex married spouses qualified for unlimited marital deductions for gifts between husband and wife.[156] DOMA excluded similarly-situated, married same-sex partners from utilizing the unlimited marital deduction for federal tax purposes because of DOMA's "non-recognition of [the partners'] 'marital' relationship."[157] Accordingly, a transfer of an insurance policy from the policyholder to his same-sex partner depleted the policyholder's lifetime gift tax exemption.[158] Same-sex partners found this result less than ideal, especially since they faced a multitude of other taxable gifts, including transfers between partners for birthday presents and even grocery purchases, if they exceed the annual deduction.[159] Therefore, even simple transfers between same-sex spouses were not so simple.[160]

The Supreme Court erased many of these federal tax complications when it overturned Section 3 of DOMA.[161] Under the remaining and still enforceable Section 2 of DOMA, however, many state tax issues remain because states may still choose whether they will recognize marriages between same-sex partners performed within and outside of the state.[162] This uncertainty and disparity cre-

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[151] *Id. See also* I.R.C. § 2035 (2012).

[152] *See generally* Samuel V. Schoonmaker, IV & Wendy Dunne DiChristina, *Repercussions of the* Windsor *Decision Beyond DOMA: Family, Tax, Estate, and Employment Issues*, 47 FAM. L.Q. 409 (2013).

[153] *See generally* McKay, *supra* note 1.

[154] *See generally id.*; *see also* I.R.C. § 2503 (2012).

[155] *See generally* McKay, *supra* note 1; *see also* I.R.C. § 2503 (2012).

[156] *See generally* McKay, *supra* note 1; *see also* I.R.C. § 2056 (2012).

[157] *See generally* McKay, *supra* note 1.

[158] *See generally id.*; *see also What's New—Estate and Gift Tax Form 706 Changes*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Whats-New-Estate-and-Gift-Tax (last updated July 2, 2014)

[159] *See* Matthew Fry, Comment, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising § 2702 of the Internal Revenue Code to Apply Equally to All Marriages*, 81 TEMP. L. REV. 545, 557 (2008) (citing I.R.C. § 2523 (1997), I.R.C. § 2501 (2004)).

[160] *See generally* Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW 407 (2008).

[161] *See* Schoonmaker & DiChristina, *surpa* note 152.

[162] *See* Squallice, *supra* note 19, at 103–07.

ates additional financial and legal complications for same-sex partners.[163] Same-sex partners in non-recognition states must find alternate solutions, while continuing to advocate for more equitable treatment under the law.

D. *Abolishing the Insurable Interest Rule*

While other scholars have bemoaned the insurable interest rule's lack of clarity, few scholars address the rule's inequities.[164] The insurable interest rule fails to meet its desired goals, primarily the reduction or elimination of moral hazard.[165] For example, the insurable interest rule does not acknowledge domestic violence and other malevolent activity by a spouse against his or her opposite-sex spouse.[166] The presence or presumption of an insurable interest does not guarantee that a policyholder has the appropriate affinity or interest in the insured's continued life.[167] Therefore, the insurable interest rule fails to recognize that the insurance policy's level of moral hazard will be sufficiently low for the insurer and insured.[168] Without this assurance, insurers risk unexpected loss, potentially leading to inefficiency in the insurance market.[169]

In the other direction, the insurable interest rule fails to acknowledge the love and devotion, and even financial relationship, between unmarried same-sex and opposite-sex couples.[170] This failure to recognize these relationships and this deprivation of life insurance coverage "overreaches by invalidating insurance contracts which, under its own rationale of moral hazard, do not need to be invalidated."[171] One scholar argues that the insurable interest becomes an "imperfect proxy for intolerable levels of moral hazard."[172] Both the insurer and the insured suffer; the former lacks a potential client, and the latter lacks the financial assurance of a life insurance policy.[173] The result of this failed presumption of insurable interest is deadweight loss and inefficiency.[174]

Therefore, the insurable interest rule operates as both an under-inclusive and over-inclusive measure of moral hazard in the insurance industry. State legislatures and courts may benefit from abolishing this rule because of its insidious "perverse incentives," opportunity for fraudulent behavior by both insurers and

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163 *See generally id.*

164 *See* Loshin, *supra* note 35, at 500 (internal citations omitted).

165 *Id.* at 489.

166 *See id.* (recognizing that spouses may have hidden motives that are stronger than the presumed insurable interest rationales).

167 *See id.*

168 *See id.*

169 *See id.* at 490–502.

170 *See id.* at 489 (stating that someone may have a strong affinity for someone that the court and state laws do not and will not recognize).

171 *Id.* at 498.

172 *Id.*

173 *See id.*

174 *See id.*

policyholders, and general inefficiency.[175] While this approach may be radical for the insurance industry, the inequities between same-sex and opposite-sex couples may encourage such drastic action. For example, at least one court has held that the state may not withhold benefits enjoyed by opposite-sex married couples from same-sex married couples.[176] In order to maintain this equality, state courts and legislatures may need to abolish their insurable interest rule because of its dated and inefficient mechanisms. In the alternative, these courts and legislatures may amend the inequity between opposite-sex and same-sex couples, including domestic partners and couples in civil unions, to accomplish the insurable interest rule's purposes.

E. *Amending the Insurable Interest Rule to Include Same-Sex Spouses*

Most, if not all, courts have found that an insured's opposite-sex spouse has an insurable interest in the insured's life.[177] These courts rationalize this finding on the presumed love and affection inherent in the marital relationship, which helps protect the insured from the moral hazard and assures the insurer that the policy-holding spouse is not merely gambling on the insured's life.[178] Most states consider the intimate relationship, mutual dependence, and support liability so clear between husbands and wives that nothing else is required to establish an insurable interest between them.[179]

Like similarly-situated opposite-sex couples, same-sex couples also exhibit this same love and affection within their relationships, marital or otherwise.[180] In its *amicus* brief in the *Hollingsworth v. Perry* case, the American Psychological Association stated, "Like [opposite-sex] couples, same-sex couples form deep emotional attachments and commitments. [Opposite-sex] and same-sex couples alike face similar issues concerning intimacy, love, equity, loyalty, and stability, and they go through similar processes to address those issues."[181] This intimacy mirrors the emotional relationship between opposite-sex partners, reinforcing the presumption that the federal and state governments should treat same-sex partners similarly to opposite-sex partners.

Same-sex partners may have another basis for claiming an insurable interest in each other's lives: an ongoing financial obligation and dependency between

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[175] *See id.* at 509.

[176] *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[177] *See* Mancini & Murphy, *supra* note 57, at 424.

[178] *See id.*

[179] *See* Zaritsky & Leimberg, *supra* note 76, at *4 (citing Liss v. Liss, 937 So. 2d 760 (Fla. Dist. Ct. App. 2006) and Clayton v. Indus. Life Ins. Co., 56 A.2d 292 (Pa. 2006)).

[180] *No Scientific Basis for Prohibiting Same-Sex Marriage, Key Associations Argue*, AM. PSYCHOLOGICAL ASS'N (Mar. 1, 2013), http://www.apa.org/news/press/releases/2013/03/same-sex-marriage.aspx.

[181] Brief for Am. Psychology Ass'n, et al. as Amicus Curiae Supporting Respondents at 13, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

them.[182] For example, some legal scholars posit that if the insured supports the policyholder, or if they are jointly liable for a debt or loan, then an insurable interest should exist because of the same-sex partners' financial relationship.[183] One state court broadly stated: "[i]f there exists a reasonable expectation of benefit from the continuance of the life insured, [then] it is immaterial whether it rests upon a pecuniary or contractual relation, or upon consanguinity or affinity."[184] Other states, including Massachusetts and Illinois, may follow similar policies.[185]

While no courts have recognized same-sex partners as a presumptive class of individuals holding an insurable interest in each others' lives,[186] two recent changes for same-sex partners may provide sufficient reasoning to recognize such an interest. First, the Office of Personnel Management (the "OPM") amended its regulations to add same-sex domestic partners as such a class for federal employees.[187] The insurable interest regulations list certain relationships where an insurable interest is presumed to exist for whom an employee or member of Congress may elect to provide a reduced annuity at retirement.[188] The OPM added "same-sex domestic partners" and "persons with whom the employee or Member has agreed to enter into a same-sex domestic partnership" to the list including "spouses," "former spouses," "common law spouses," and "persons to whom employees or Members are engaged to be married," among other classes of individuals.[189] While this regulation governs only federal employees, and applies only in limited circumstances, the amendment relieves same-sex partners from certain evidentiary burdens, including submitting affidavits to prove the named beneficiary's insurable interest in the insured.[190] The OPM's presumption of an insurable interest between same-sex domestic partners acknowledges the partners' emotional and economic interests in the others' continued life.[191]

The OPM regulation serves as a model for the insurable interest rule. For

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[182] *See* Mancini & Murphy, *supra* note 57, at 424.

[183] *See* Zaritsky & Leimberg, *supra* note 76, at *4 (citing Dennis Connors v. City of Boston, 714 N.E.2d 335 (1999)).

[184] *See* Rakestraw v. City of Cincinnati, 44 N.E.2d 278, 280 (1942) (internal citation omitted).

[185] *See generally* Prudential Ins. Co. of Am. v. Fabiano, 39 F. Supp. 386 (D. Mass. 1941) ("In the absence of any evidence indicating that the transaction was intended as a wagering contract, it is not necessary that the beneficiary or assignee should have an insurable interest."); *see also generally* Bowman v. Zenith Ins. Co., 384 N.E.2d 949 (Ill. App. Ct. 1978).

[186] *See* Mancini & Murphy, *supra* note 186, at 424.

[187] Presumption of Insurable Interest for Same-Sex Domestic Partners, 77 Fed. Reg. 42,909 (July 20, 2012) (to be codified at 5 C.F.R. pts. 831, 842).

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

example, the Comments found in the OPM's insurable interest presumption amendment acknowledge DOMA's preclusion of same-sex married couples from the federal definition of "spouse."[192] The OPM's response, however, creates a federal definition of "domestic partners" for which most, if not all, state-recognized married same-sex couples will satisfy.[193] This response also acknowledges the government's, and any insurer's, difficulty in discerning who qualifies as having the necessary insurable interest, namely the requisite love and affection to combat moral hazard.[194] Similar to many states' statutory requirements for insurance law's insurable interest, the OPM's statutory definitions require not only the affinity between domestic partners, but also evidence of an ongoing financial dependency and obligation.[195] These doctrinal parallels serve as a blueprint for states to amend their own insurable interest statutes to acknowledge the similarities between same-sex and opposite-sex couples.

More importantly, the *Windsor* case and its progeny of state court cases craft a series of constitutional arguments that may provide viable rationales for rejecting some states' presumptive exclusions of same-sex partners, (especially those married) from state law definitions of insurable interests.[196] For example, in *Windsor*, the five to four majority opinion, authored by Justice Anthony Kennedy, held Section 3 of DOMA to be unconstitutional, "as a deprivation of liberty of the person protected by the Fifth Amendment."[197] The opinion continues by focusing on DOMA's principal effect, "to identify a subset of state-sanctioned marriages and make them unequal."[198] It concludes by stating that the federal statute is invalid because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[199] This "rational basis with a bite" analysis caused significant controversy among constitutional scholars

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[192] *Id.*

[193] *Id.* at 910 (listing that "'domestic partners' must be 'each other's sole domestic partner and intend to remain indefinitely' and that 'domestic partners' must 'share responsibility for a significant measure of each other's financial obligations' in order to qualify for the presumption").

[194] *See id.* at 911 (stating that "domestic partners" must meet the OPM's requirements because of the lack of verifiable governmental records, namely a marriage certificate, and DOMA's preclusion).

[195] *See id.* at 909; *see also* Gardner, *supra* note 33, at 127 (citing 44 AM. JUR. 2d *Insurance* § 932 (2005)).

[196] *See supra* note 4; *see also* Bishop v. United States, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. 2014); Obergefell v. Wymyslo, No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio 2013); Glossip v. Mo. Dep't of Transp. & Highway Patrol Emp. Ret. System, 411 S.W.3d 796 (Mo. 2013); Griego v. Oliver, No. 34,306, 2013 WL 667070 (N.M. 2013); Garden State Equality v. Dow, 2013 WL 6153269 (N.J. 2013).

[197] United States v. Windsor, 133 S. Ct 2675, 2695 (2013).

[198] *Id.* at 2694.

[199] *Id.* at 2696.

and within state courts.[200]

Following the *Windsor* decision, civil rights advocates and attorneys challenged anti-marriage statutes and related state constitutional laws in state courts across the United States.[201] First, on December 20, 2013, the United States District Court for the Central Division of Utah held that the Utah's prohibition against marriage between same-sex partners conflicted with the United States Constitution's equal protection and due process clauses.[202] The plaintiffs argued that the *Windsor* Court overturned Section 3 of DOMA, not on a Tenth Amendment challenge, but, instead, found a violation of the Due Process Clause of the Fifth Amendment.[203] However, as Chief Justice John Roberts articulated in his dissent, *Windsor* did not consider or resolve the conflict among the states regarding prohibitions of marriages between same-sex partners.[204]

However, Justice Antonin Scalia thought *Windsor* predicted this issue when he attempted to fault the majority for reasoning that "DOMA is motivated by 'bare . . . desire to harm' couples in same-sex marriages" and state courts may easily "reach the same conclusion with regard to state laws denying same-sex couples marital status."[205] While the Court held for a fundamental right to marry—irrespective of race or sexual orientation or gender—the Court also analyzed the Fourteenth Amendment's Equal Protection Clause and the inequality perpetuated by the state's animus against same-sex partners in its state constitution.[206] Under this analysis, the Court held that the Constitution "protects the choice of one's partner for all citizens, regardless of their sexual identity."[207] This holding provided not only that "Utah's prohibition on same-sex marriage violated the [p]laintiffs' right to equal protection under the law," but also vio-

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[200] *See, e.g.*, Colin P. Pool, *Cracking Windsor's Code: The Unusual Judicial Review Standard of* United States v. Windsor *and Its Potential Impact on Future Plaintiffs*, U. CIN. L. REV. (Jan. 2, 2014), http://uclawreview.org/2014/01/02/cracking-windsors-code-the-unusual-judicial-review-standard-of-united-states-v-windsor-and-its-potential-impact-on-future-plaintiffs/; Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, COLUM. L. REV. SIDEBAR (Dec. 2013), http://www.columbialawreview.org/windsor-animus_pollvogt.

[201] *See, e.g.*, Bishop v. United States, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. 2014); Obergefell v. Wymyslo, No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio 2013); Glossip v. Mo. Dep't of Transp. & Highway Patrol Emp. Ret. System, 411 S.W.3d 796 (Mo. 2013); Griego v. Oliver, No. 34,306, 2013 WL 667070 (N.M. 2013); Garden State Equality v. Dow, 2013 WL 6153269 (N.J. 2013).

[202] *See* Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6687874 (D. Utah 2013).

[203] *Id.* at *6.

[204] *See id.* at *6 (citing *Windsor*, 133 S. Ct at 2696 (Roberts, C.J., dissenting)).

[205] *Kitchen*, 2013 WL 6687874 at *7 (citing *Windsor*, 133 S. Ct. at 2709 (internal citations omitted)).

[206] *See generally id.*

[207] *Id.* at *29.

lated the "rights of same-sex couples who were married elsewhere."[208] Other state courts have begun making similar holdings to expand the rights of same-sex partners

These holdings provide valuable resources for same-sex partners seeking to challenge either their states' express exclusion of same-sex partners from the insurable interest presumptive classes, or their states' lack of protection for same-sex partners in the states' insurable interest doctrine. Same-sex partners may challenge such inequities by comparing themselves to similarly-situated married opposite-sex couples, who enjoy the protection of the insurable interest rule because of their marital status under state law. State courts' increasing acceptance of constitutional arguments in favor of equity and equality may prove sufficient to establish a plausible challenge for states' insurable interest laws. Therefore, while states may choose to mirror many federal agencies, like the OPM, in their marital definitions and laws, some states may prove reluctant to change, based on social, political, or religious reasons within the state. Therefore, same-sex partners need legal arguments like the emerging Equal Protection challenges to ensure an equitable life within their domicile state.

V. CONCLUSION

With uncertain state marital recognition,[209] same-sex partners need certainty in their financial matters, especially in their estate planning.[210] Life insurance may ensure essential protection for the surviving same-sex partner to overcome any disparate treatment in state taxation, offer him financial liquidity, and compensate him for the financial loss of his decedent partner's income.[211] Legal scholars and estate planners must advise same-sex partners of the current gaps in the law that leave them vulnerable upon one partner's death.[212] Few scholars, and no courts to date, acknowledge the lack of legal protection for life insurance policies held by same-sex partners covering their partners' lives.[213] Because the insurable interest doctrine may bar same-sex partners from enjoying the financial benefits of insuring their partners' lives, it creates an inequity in insurance law and basic estate planning for same-sex partners.[214]

Consequently, state legislatures should amend their statutory provisions to include same-sex partners, legally married or in a domestic partnership, as a presumptive class of individuals with an insurable interest in their partners' lives. If the state does not have an applicable statute for its insurable interest doctrine, then state courts should acknowledge the same rights and legal protec-

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208 *Id.* at *28.

209 *See generally* Windsor v. United States, 699 F.3d 169 (2d Cir. 2012).

210 *See generally* Bouchard & Zadworny, *supra* note 97.

211 *See* McKay, *supra* note 1.

212 *See id.*

213 *See* Mancini & Murphy, *supra* note 92, at 424.

214 *See* Prather, *supra* note 31, at 27.

tions through case law. With certainty and equity in the insurable interest doctrine for all couples, insurers and the insured can more effectively bargain for appropriate life insurance policies, protect their interests in the market, and resolve conflicts.