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**TAX PROTEST, “A HOMOSEXUAL,” AND FRIVOLITY:
A DECONSTRUCTIONIST MEDITATION**

ANTHONY C. INFANTI*

“Even though a state may recognize a union of two people of the same sex as a legal marriage for the purposes within that state’s authority, that recognition has no effect for purposes of federal law. A taxpayer in such a relationship may not claim the status of a married person on the federal income tax return.”

—The Internal Revenue Service¹

“I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail in order to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law.”

—Martin Luther King, Jr.²

When I was approached about making a contribution to this symposium, *Out of the Closet and into the Light: The Legal Issues of Sexual Orientation*, I was told that it had been inspired by the recent momentous developments in gay rights.³ Sadly, however, I worried that a contribution discussing tax issues relating to sexual orientation would provide too stark a contrast to the themes of openness and freedom suggested by the title of the symposium. I was afraid that any contribution that I might make would be too somber because tax is an

* Associate Professor of Law, University of Pittsburgh School of Law. I would like to thank Alice Abreu, Dorothy Brown, and Leandra Lederman for their helpful comments on an earlier draft of this essay. I would also like to thank Hien Ma for his love and support while I was researching and writing this essay.

1. Letter from the Internal Revenue Service to Eugene A. Delgaudio, President, Public Advocate of the United States, Inc. (June 14, 2004), <http://www.publicadvocateusa.org/news/article.php?article=95> (last visited July 28, 2004) [hereinafter Letter from IRS to Delgaudio]. For reporting on the letter, see Allen Kenney, *IRS: Joint Filing Not Allowed for Same-Sex Married Couples*, 103 TAX NOTES 1466, 1466 (2004).

2. THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., 1996), available at <http://www.bartleby.com> (quotation No. 32710) (last visited Nov. 17, 2004).

3. In particular, the U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down Texas’ sodomy law, and the Massachusetts Supreme Judicial Court decision in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), legalizing same-sex marriage in that state.

area where gay and lesbian issues generally remain shrouded in darkness, forcibly banished to the invisibility of the closet.⁴

Indeed, shortly after I began working on this essay, the Internal Revenue Service (“IRS”) reaffirmed the invisibility of gay and lesbian couples for U.S. federal tax purposes in a response to a letter from a conservative, “pro-family” organization that opposes same-sex marriage.⁵ Following President Bush’s

4. See Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 764 (2004) (noting that the contributors to a 1998 symposium on critical tax theory “primarily focused their attention on critical tax scholarship exploring issues relating to race and gender” and that only one contributor focused a “significant amount of attention on scholarship exploring issues relating to sexual orientation”); *id.* at 782 (“Thus, not satisfied that a mere slap in the face would keep gay and lesbian couples in the tax closet, Congress apparently decided to deal them a body blow [(by enacting the Defense of Marriage Act, Pub. L. No 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2000))], that would ensure that its hostility is clear and unmistakable.”); *id.* at 789 (“Their task is not made any easier by Congress or the Internal Revenue Service . . . , both of whom have been conspicuously silent on the question of how the tax laws should be applied to gay and lesbian couples.”); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 134–35 (1998) (“Critical tax scholarship has made great strides in bringing new perspectives to bear on issues of tax policy. Surprisingly absent from this progressive critique has been any extended discussion of the heterosexual bias imbedded in the numerous tax provisions that reference a taxpayer’s marital status. This relative silence on matters of sexual orientation reinforces the heteronormative nature of the federal tax code and necessarily limits the depth of any analysis of the marital provisions.”) (footnote omitted—in the omitted footnote, Knauer cites the work of Patricia Cain as “a noted exception” to the general lack of discussion of gay and lesbian issues in critical tax scholarship).

This silence on gay and lesbian issues contributes, in part, to the anachronistic and myopic feel of tax. See Paul L. Caron, *Tax Myopia, Or Mamas Don’t Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994). As Michael Livingston has noted:

If tax scholarship lags behind developments in economics and other social sciences, it is also frequently behind the curve within the legal academy. With its emphasis on neutrality as a policy goal, and its faith in analogical reasoning, tax scholarship recalls the world of the 1950s, when most legal scholars produced essentially doctrinal work and a broad political consensus prevailed throughout the law schools. The world has changed, but tax has remained behind, resulting in a scholarship that is frequently quaint and isolated even by law school standards. In particular, the apolitical nature of tax scholarship, while responsible for much of the coherence and majesty of the field, seems increasingly out of touch with the remainder of the academy.

Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 383–84 (1998) (footnote omitted).

5. The organization, Public Advocate of the United States, Inc., describes itself in the following terms:

Since its founding in 1981, Public Advocate has grown into a dedicated group of young conservatives in Washington, D.C., with a network of volunteers and supporters nationwide. Our continuous growth over the years is due to the fact that we have never wavered from our firm conviction that political decisions should begin and end with the best interests of American families and communities in mind. In recent years, our efforts

endorsement of a constitutional ban on same-sex marriage,⁶ this organization wrote the Commissioner of the IRS to alert him about "a potential fraudulent tax scheme."⁷ The organization was alarmed by "rebellious state and local officials reportedly permitting persons of the same sex to marry in flagrant disobedience of applicable laws defining marriage as a union between a male and a female," and was further alarmed by the prospect that these "married" same-sex couples (their quotes, not mine) might attempt to file joint federal income tax returns.⁸ The organization urged the Commissioner to deter these individuals from attempting to evade income tax by threatening to investigate and prosecute any same-sex couples who attempt to file joint returns.⁹ An excerpt from the IRS response to this letter serves as the first epigraph to this essay. In that excerpt, the IRS reassures the conservative organization that same-sex couples legally married under state law "may not claim the status of a married person on the federal income tax return."¹⁰

This disturbing correspondence only reinforced the impression left on me by a set of cases that immediately came to mind when I learned of the topic of this symposium. As we will see, these cases¹¹ partially (in *both* senses of the

have focused on supporting: A federal marriage amendment to the Constitution and an end to lawful same sex marriage; . . . [t]he promotion of the Boy Scouts. . . ; [t]ax cuts and the exposure of wasteful "pork barrel" spending for the benefit of liberal special interests.

PUBLIC ADVOCATE OF THE UNITED STATES, PUBLIC ADVOCATE: WHERE THE DEFENSE OF AMERICA'S TRADITIONAL FAMILY VALUES BEGINS, at <http://www.publicadvocateusa.org/> (last visited Nov. 17, 2004).

6. President Bush announced his support for a constitutional ban on same-sex marriage after the Massachusetts Supreme Judicial Court issued a decision legalizing same-sex marriage in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003), and the City of San Francisco began to issue marriage licenses to a deluge of same-sex couples. See Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1; Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1 (stating that the City of San Francisco issued more than 4100 marriage licenses to same-sex couples before the California Supreme Court ordered it to cease issuing such licenses, and that an additional 2600 couples had made appointments for a license before the order was issued). The marriage licenses issued by the City of San Francisco to these same-sex couples were recently invalidated by the California Supreme Court. Dean Murphy, *California Court Rules Gay Unions Have No Standing*, N.Y. TIMES, Aug. 13, 2004, at A2.

7. Letter from Eugene A. Delgaudio, President, Public Advocate of the United States, Inc., to Mark W. Everson, Commissioner of Internal Revenue, Internal Revenue Service (Apr. 13, 2004), <http://www.publicadvocateusa.org/news/article.php?article=89> (last visited Nov. 17, 2004).

8. *Id.*

9. *Id.*

10. Letter from IRS to Delgaudio, *supra* note 1.

11. *United States v. Mueller*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,205 (7th Cir. 2000); *Mueller v. Comm'r*, 82 T.C.M. (CCH) 764 (2001), *aff'd*, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,505 (7th Cir. 2002), *cert. denied*, 537 U.S. 1003 (2002); *Mueller v. Comm'r*, 79 T.C.M. (CCH) 1887

word) recount the story of Robert Mueller, a gay man and “tax protester” whose story appears to have gone largely unnoticed by academics.¹² After much thought, and despite my worries and fears, I decided that a retelling and pondering of Mueller’s story would serve as a particularly appropriate contribution to this symposium because his story not only provides a compelling illustration of the forcible closeting of gay and lesbian issues in tax, but also points us in the direction of the next front in the battle for gay rights—a battle that may just allow us to kick the tax closet door open and finally let in the light.

I. TAX PROTEST

Before we can begin Mueller’s story, a bit of a digression is necessary. In describing Mueller above, I referred to him as a gay man *and* a “tax protester.” Apparently, I no longer need to worry about adversely affecting your views of Mueller by referring to him as a gay man;¹³ however, I am concerned that labeling Mueller a “tax protester” may have tainted your view of him even before I have begun a retelling of his story. In fact, out of this concern, I have until now placed this label in quotation marks in the hope that you will resist the temptation to allow these words to conjure in your mind the associations that they normally evoke when you hear or read them. So, for the next several

(2000), *aff’d*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,391 (7th Cir. 2001), *cert. denied*, 534 U.S. 887 (2001).

12. I came across a handful of articles citing Mueller’s tax cases, but none of them discusses his story in any depth. See Michael T. Morley et al., *Emerging Issues in Family Law*, 21 YALE L. & POL’Y REV. 169, 194 n.200 (2003); Sarah A. Shubert, Comment, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immigration Act*, 74 TEMP. L. REV. 541, 544 n.29, 550 n.89, 559 n.181, 563 n.214, 566–67 (2001); Burgess J.W. Raby & William L. Raby, *Tax Problems of Cohabiting Clients*, 102 TAX NOTES 1635 (2004). In an unscientific survey of the federal income tax casebooks in my office, I only encountered two that include references to Mueller’s tax cases. MICHAEL A. LIVINGSTON, *TAXATION: LAW, PLANNING, AND POLICY* 618–23 (2003); PAUL R. MCDANIEL ET AL., *FEDERAL INCOME TAXATION: CASES AND MATERIALS* 973–76 (5th ed. 2004).

13. See *Albright v. Morton*, 321 F.Supp.2d 130, 132 (D. Mass. 2004) (“In 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning.”); see also Jay Blotcher, *Gay Libelous No More?*, *ADVOC.*, July 6, 2004, at 15 (reporting on *Albright*). Mueller himself noted this in his petitions for writ of certiorari filed with the U.S. Supreme Court. Petition for Writ of Certiorari at *11, *Mueller v. Comm’r*, 2002 WL 32135138 (No. 02-513) (“Judge Pajak in his decision states ‘(petitioner) is homosexual.’ The Petitioner has been so identified by many federal courts, being no stranger in challenging the stance of the federal government to this group. Twenty years ago this would have been a demeaning accusation. Through the evolution of society, that means only that petitioner has standing.”); Petition for Writ of Certiorari at *10, *Mueller v. Comm’r*, 2001 WL 34115848 (No. 01-44) (“Judge Laro in his decision states ‘Petitioner is homosexual.’ Twenty years ago this would have been a demeaning accusation. Through the evolution of society, that means only that petitioner has standing.”).

pages, please do me the favor of holding this label in abeyance in your mind, and allow me to explain why Mueller is not your conventional tax protester.

A. *The Stigma*

When you read the words "tax protester," they probably conjured in your mind the image of a crackpot, deadbeat, or charlatan (and, if they did not, I am afraid that I have just now conjured this image for you).¹⁴ So tainted is the label that Congress has prohibited the IRS from referring to anyone as an "illegal tax protester" or "any similar designation."¹⁵ As explained by the

14. *E.g.*, Susan Clary, *IRS Says Dentist Evaded Taxes*, ORLANDO SENTINEL, Sept. 21, 1999, at D3; Terry Horne, *Man Loses Home, Freedom for Skipping Taxes*, INDIANAPOLIS STAR, Oct. 3, 2000, at B1; David Cay Johnston, *U.S. Warns Businesses on Tax Protest*, N.Y. TIMES, June 7, 2001, at C1; Thomas Korosec, *Businessman Gets 7-Year Term for Tax Protest*, HOUS. CHRON., May 1, 2004, at A33; Torsten Ove, *Jurors Hear of Tax Protest: IRS Says Failure to Pay Deliberate*, PITT. POST-GAZETTE, Nov. 19, 2002, at A13; Liz Pulliam Weston, *Money Talk: The Federal Government Is Not Amused by Tax Protests*, L.A. TIMES, Apr. 7, 2002, at C3; Tom Zeller, *These Artful Dodgers Doth Protest Too Much*, N.Y. TIMES, Apr. 15, 2001, § 4, at 5; *see* David Lupi-Sher, *Antitax Promoters: A Close-Knit Group Preying on the Gullible*, 85 TAX NOTES 1129, 1130 (1999) (describing a loose affiliation of extreme right-wing organizations as the most important group of tax protesters during the last three decades); Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 WIS. L. REV. 939, 942 [hereinafter Kornhauser, *Taxing Conscience*] (referring to this group as "[s]tandard tax protesters"); Marjorie E. Kornhauser, *Not All Tax Protestors are Cheats and Crooks*, 85 TAX NOTES 1469, 1469 (1999) [hereinafter Kornhauser, *Cheats and Crooks*] (responding to Lupi-Sher's article, but acknowledging that the group of extreme right-wing tax protesters "may be more important numerically"); ANTI-DEFAMATION LEAGUE, EXTREMISM IN AMERICA: TAX PROTEST MOVEMENT, at http://www.adl.org/Learn/Ext_US/TPM.asp (last visited Sept. 22, 2004) ("The tax protest movement, originating in the 1950s and 1960s, is the oldest right-wing anti-government movement still in existence in the United States and one of the most active. Along with the better-known militia and sovereign citizen movements, the tax protest movement is a key component of the strain of extreme right-wing anti-government activism often referred to as the 'patriot' movement."); FIN. & TAX FRAUD EDUC. ASSOC., INC., QUATLOOS! SCAMS & FRAUDS EXPOSED: TAX PROTESTORS, at http://www.quatloos.com/Tax_Protestors_Page.htm (last visited Nov. 17, 2004).

15. (a) PROHIBITION. – The officers and employees of the Internal Revenue Service –
- (1) shall not designate taxpayers as illegal tax protesters (or any similar designation); and
 - (2) in the case of any such designation made on or before the date of the enactment of this Act—
 - (A) shall remove such designation from the individual master file; and
 - (B) shall disregard any such designation not located in the individual master file.

Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3707, 112 Stat. 685, 778 (1998); I.R.C. § 6651 note (West 1998) (Illegal Protestor Designation). As Leandra Lederman so helpfully pointed out to me, the use of the adjective "illegal" before the

Treasury Inspector General for Tax Administration, who is charged with monitoring compliance with this prohibition,¹⁶ “[t]he Congress had concerns that some taxpayers were being permanently labeled and stigmatized by the [illegal tax protester] designation.”¹⁷

That a stigma is attached to the “tax protester” label may seem odd, given that tax revolts and rebellions have played an important role in the history of the United States.¹⁸ The Boston Tea Party, Shays’ Rebellion, the Whiskey Rebellion, and Fries’ Rebellion were all tax protests.¹⁹ Indeed, the Boston Tea Party and its protest of “taxation without representation” have become iconic symbols in the United States.²⁰ For example, to protest its lack of

label “tax protester” here seems to imply the existence of “legal” tax protest. What, however, would “legal” tax protest look like?

16. I.R.C. § 7803(d)(1)(A)(v) (West 2004).

17. TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF TREASURY, FISCAL YEAR 2004 STATUTORY AUDIT OF COMPLIANCE WITH LEGAL GUIDELINES PROHIBITING THE USE OF ILLEGAL TAX PROTESTER AND SIMILAR DESIGNATIONS 1, at <http://www.ustreas.gov/tigta/2004reports/200440109fr.html> (last visited July 28, 2004).

18.

In the United States, anti-tax sentiments, along with anti-government sentiments generally, are an intrinsic aspect of American patriotism and national character . . . Americans celebrate their patriotism and commitment to liberty through resistance—often violent resistance—to taxes This patriotic aversion to taxes helps explain why Americans vociferously complain about over-taxation despite the fact that they are one of the least taxed developed nations.

Given the centrality of tax rebellions in America’s history, it is not surprising that tax rhetoric in the United States is frequent—and frequently heated. It is inextricably intertwined with America’s conception of democracy, often serving as a “lightning rod” [sic] for politics.

Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 824 (2002) (footnotes omitted) [hereinafter Kornhauser, *Anti-Tax Rhetoric*]; see also Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 294 (1997) (“[Justice-based] [t]ax protesters view themselves as patriots following the standards set by our forefathers.”); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 191 (2001) (“One cannot study American history for long before noticing the conspicuous role of tax revolts. Time and again Americans have turned mutinous against taxes—the Boston Tea Party, the Whisky Rebellion, the Depression-era tax strikes. ‘Tax revolts,’ as one commentator put it, ‘are as American as 1776.’” (quoting Joseph D. Ried, Jr., *Tax Revolts in Historical Perspective*, 32 NAT’L TAX J. 67, 69 (1979)) (footnotes omitted); Lupi-Sher, *supra* note 14, at 1130 (“These promoters like to refer to themselves as this generation’s ‘Founding Fathers,’ rebelling against a tyrannical government. And they are more than willing to share their proprietary information in exchange for money. Through seminars and conferences, the promoters advertise their wares. They constantly seek funds to defeat the U.S. government.”).

19. See Kornhauser, *Anti-Tax Rhetoric*, *supra* note 18, at 840–51; Stark, *supra* note 18, at 191.

20. See BENJAMIN WOODS LABAREE, *THE BOSTON TEA PARTY*, at vi (1964).

representation in Congress, the District of Columbia ("D.C.") allows its residents to purchase license plates emblazoned with this slogan,²¹ and D.C.'s delegates to the 2004 Democratic National Convention replicated the original protest by dumping tea into Boston Harbor.²² Yet, despite the storied role of tax rebellion in U.S. history, it seems that the phrase "tax protester" has come to be associated with an assortment of crackpots, deadbeats, and charlatans who wish to tap into this nostalgia in order to legitimize (i) their assault on government and its ability to impose taxes, (ii) their desire simply to avoid parting with their money, or (iii) their exploitation of individuals who fall into one or both of the latter two groups.²³

1. Crackpots

The individuals in the first of these three groups may be sincere in their beliefs, but they are generally viewed as fringe elements of society who are trying to make a statement about the nature of government:

There are a variety of direct tax protests ranging from not paying taxes, to threatening IRS personnel to actual physical violence against IRS property or personnel. Motivation for these protests range [sic] from frustration to a sincere belief that the income tax itself is illegal. Some individuals act alone; others are part of semi-organized movements. Many of these tax protesters are members or adherents of radical right wing groups such as the Posse Comitatus, Christian Identity, Sovereign Citizens, the common-law movement, the militia movement, and the Patriot movement. Some of these are violent; others not. All, however, hold similar views about the size and role of government and its potential for corruption, including a commonly held belief that any government beyond the county level is illegitimate and must be resisted. The more extreme groups often form isolated communities complete with their own governments, and feel justified in resisting the illegitimate laws of unconstitutional state and federal governments, using arms if necessary. These radical protestors believe that it is they who are the true patriots, trying to return the country to its authentic nature.²⁴

21. DIST. OF COLUMBIA, DEPT. OF MOTOR VEHICLES: 'TAXATION WITHOUT REPRESENTATION' TAGS, at <http://dmv.dc.gov/serv/plates/tax.shtm> (last visited Nov. 17, 2004).

22. Brian MacQuarrie & Bryan Bender, *For D.C. Delegates, a Modern Tea Party*, BOSTON GLOBE, July 27, 2004, at C4.

23. See *supra* note 14 and accompanying text.

24. Kornhauser, *Anti-Tax Rhetoric*, *supra* note 18, at 919 (footnotes omitted).

Moreover, some of the protests also contain an element present in other historic tax protests: a complaint not merely against the current form of the income tax or the income tax itself, but against the justness of all tax and against the right of the government to impose it. In other words, these protests concern the nature of the government which in some instances rises to the level of questioning the legitimacy of the government itself.

2. Deadbeats

Those in the second group are less principled in their protest; they just do not seem to like the idea of being told what to do with their money.²⁵ How else would you describe individuals who buy expensive tax protester books, videos, and other products in an effort to avoid the payment of taxes? Consider, for example, those who would purchase a “pure trust” costing as much as \$1,000 or an “Untax Package” costing as much as \$2,500, along with those who would even buy letters (at \$50 each) to send to the IRS when contacted about their “avoided” tax liabilities.²⁶

3. Charlatans

The last group promotes or foments tax protest by selling ideas and arguments that no tax lawyer would sanction, exploiting and profiting from the first group’s distrust of government and the second group’s naïveté.²⁷ The ideas and arguments that they peddle (for example, the Sixteenth Amendment was not properly ratified, Federal Reserve Notes are not legal tender, only

Tax is merely one battlefield in the struggle to define the political structure of the government.

Id. at 906–07; *see also* Jackson, *supra* note 18, at 293–95 (making a distinction between those who engage in tax protest for individual gain and those who engage in tax protest because they are dissatisfied with government); Kornhauser, *Taxing Conscience*, *supra* note 14, at 942–43 (“Standard tax protesters . . . refuse to pay tax because they resent having to pay so much tax, because they oppose the concept of the State in principle, or because they oppose the particular government.”); Lupi-Sher, *supra* note 14, at 1130 (“The second and more important tax protest group is mostly found in loosely affiliated extreme right-wing organizations. This group claims that—based on interpretations of the U.S. Constitution and the Internal Revenue Code—people do not have to pay income taxes.”).

25. Jackson, *supra* note 18, at 293–95 (making a distinction between those who engage in tax protest for individual gain and those who engage in tax protest because they are dissatisfied with government); Kornhauser, *Taxing Conscience*, *supra* note 14, at 942–43 (“Standard tax protesters . . . refuse to pay tax because they resent having to pay so much tax, because they oppose the concept of the State in principle, or because they oppose the particular government.”); Kornhauser, *Anti-Tax Rhetoric*, *supra* note 18, at 819 (“‘Do you know what it’s called when someone else controls the fruits of your labor. It is tax slavery by the government.’” (quoting Alan Keyes, candidate for the Republican presidential nomination in 2000)); *id.* at 821–22 (“Most people never pay their taxes voluntarily, in the ordinary sense of the word. Rather, they are generally anti-tax, in that they usually would prefer to keep any income they receive than pay it to the government in taxes.”).

26. *See* Helen Huntley, *Anti-Tax Groups Hit Their Stride*, ST. PETERSBURG TIMES, Mar. 24, 1996, at 1H; David Cay Johnston, *The Anti-Tax Man Cometh*, N.Y. TIMES, July 5, 1995, at D1; Kathy M. Kristof, *Ex-IRS Man Declares Himself Tax-Exempt*, L.A. TIMES, Apr. 4, 2004, at C1; Janet Novak, *Protesters? What Protesters?*, FORBES, Mar. 5, 2001, at 126; David Rosenzweig, *Author, Associates Guilty in Tax-Avoidance Scheme*, L.A. TIMES, May 4, 2004, at B5; ANTI-DEFAMATION LEAGUE, *supra* note 14.

27. Lupi-Sher, *supra* note 14, at 1130–34; ANTI-DEFAMATION LEAGUE, *supra* note 14.

foreign source income is taxable, or claiming to be a citizen of a given state and not a citizen of the United States)²⁸ are so wooden and torturous that they make the hypertextualist drafters of the now ubiquitous corporate tax shelters seem like purposivists or Eskridgean dynamists.²⁹ The intent of these arguments is to undermine (and, in some cases, to annihilate)³⁰ the authority of the government to enact or impose the income tax (or any other tax).³¹

B. *Avoiding the Stigma*

However, as Marjorie Kornhauser has so forcefully pointed out, not all tax protesters can be characterized as crackpots, deadbeats, or charlatans.³² There are others who do not readily come to mind when you hear or read the words "tax protester," but who clearly fall within the ambit of that term. What these individuals have in common, and what distinguishes them from the crackpots, the deadbeats, and the charlatans, is that they acknowledge the legitimacy of the taxes (particularly the income tax) enacted by Congress.³³

28. INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS 12–16, 24–25, http://www.irs.gov/pub/irs-utl/friv_tax.pdf (last visited July 28, 2004); Jackson, *supra* note 18, at 301, 310–11, 316–17.

29. Purposivism and Eskridgean dynamism are two approaches to statutory interpretation. Purposivists argue that, when interpreting individual provisions within a statutory framework, the meaning or application of the provisions should be determined by looking to the purpose or structure of the statute as a whole. See Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492 *passim* (1995); see also Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677 *passim* (1996) (discussing Geier's purposivism). In contrast, the dynamic approach to statutory interpretation described by William Eskridge takes into account "present societal, political, and legal context" when interpreting a statute. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479, 1482–98 (1987). In the tax literature, Michael Livingston has advocated the adoption of Eskridge's dynamic approach to statutory interpretation (which Livingston refers to as a "practical reason" approach). Livingston, *supra*, at 720–24.

30. Kornhauser, *Anti-Tax Rhetoric*, *supra* note 18, at 823 ("From a practical standpoint, successful anti-tax rhetoric increases non-compliance with tax laws which in turn can endanger the existence of the state by strangling its means of support."); *id.* at 826–27 ("In its most extreme form the [anti-tax] rhetoric often appears to attack not just the current income tax or the particular politics of the party in power, but tax and government more generally.").

31. The IRS has on its website a fifty-four page document debunking the most common arguments directed against the income tax. See generally INTERNAL REVENUE SERV., *supra* note 28; see also Jackson, *supra* note 18, at 300–21 (listing and briefly responding to a number of these arguments).

32. Kornhauser, *Cheats and Crooks*, *supra* note 14; see also Kornhauser, *Anti-Tax Rhetoric*, *supra* note 18, at 824–25, 828, 842–49, 860–61, 867; Kornhauser, *Taxing Conscience*, *supra* note 14, at 940–45, 1015–16.

33. See Kornhauser, *Taxing Conscience*, *supra* note 14, at 960 ("War tax resisters' legal challenges to the income tax differ from those of other tax protesters. In contrast to the others, conscientious objectors rarely claim that the income tax is unconstitutional or otherwise legally

1. Non-Tax Protest

Some of these people use the tax system as a vehicle for non-tax protest. Most prominently, this group includes pacifists who, for religious, moral, or ethical reasons,³⁴ do not wish to support war—either directly (through military service) or indirectly (through financial support).³⁵ These war tax protesters frequently “seek no personal gain from not paying their taxes because they either put their tax money in escrow or donate it to peace-promoting organizations.”³⁶ Some have advocated accommodating this form of tax protest through the creation of a peace tax fund to which war tax protesters could direct their tax payments and the proceeds of which would only be used to defray the cost of non-military activities of the government.³⁷ As a result of the preemptive war on Iraq in 2003, interest in war tax protest has recently increased.³⁸

illegitimate.”); Colleen M. Garrity, Note, *The Religious Freedom Peace Tax Fund Act: Becoming Conscious of the Need to Accommodate Conscience*, 64 OHIO ST. L.J. 1229, 1229 (2003) (“Conscientious objectors to tax, unlike other tax protestors, generally accept the legal legitimacy of the income tax.”).

34. Kornhauser, *Taxing Conscience*, *supra* note 14, at 950 (“Over the years, however, the Court has broadly interpreted the religious exemption in the draft laws to cover an individual whose belief is not only religious, but also moral and ethical This broad interpretation is in keeping with an expansion of conscientious objection in western countries, which today largely stems from secular rather than religious beliefs.”) (footnotes omitted); *id.* at 987 (“[T]he purpose and intended effect [of the peace tax fund bills] has remained the same: to allow taxpayers who are conscientious objectors to pay their taxes without violating their moral, ethical, and religious beliefs.”); Garrity, *supra* note 33, at 1239 (“Despite its apparent plain meaning, the Supreme Court has ruled that the Act’s exemption applies to both religious and secular conscientious objectors.”).

35. Kornhauser, *Taxing Conscience*, *supra* note 14, *passim*.

36. *Id.* at 943–44. War tax protesters are a varied group and engage in different strategies to resist financially supporting the military. These strategies include, among others: making “contributions to religious, charitable, and peace organizations”; “living below the taxable income level”; “joining or forming a support group”; “supporting war tax resistance of others by contributing to a tax resisters’ penalty fund”; “paying federal income taxes but writing ‘paid under protest’ on the form”; and “paying the tax due but with a check made out to the Department of Health and Human Services.” *Id.* at 956–57; *see also* Garrity, *supra* note 33, at 1241 (“Conscientious objectors voice their discontent with this use of tax dollars to fund the military in a multitude of ways.”).

37. Kornhauser, *Taxing Conscience*, *supra* note 14, at 982–1015; Garrity, *supra* note 33, at 1244–62; Kornhauser, *Cheats and Crooks*, *supra* note 14. The first peace tax fund bill was introduced in Congress in 1958. Garrity, *supra* note 33, at 1244. Others are not, however, quite so approving of war tax resisters and consider them to be lawbreakers. Sheldon S. Cohen, “Good” Protesters Are Still Lawbreakers, 86 TAX NOTES 127, 127 (2000).

38. *E.g.*, Jim Getz, *30-Year Tax Resister Will Refuse to Pay Again, Protesting War in Iraq; Not All Are Prosecuted*, ST. LOUIS POST-DISPATCH, Apr. 15, 2003, at B3; Roselyn Tantraphol,

The group of individuals who engage in non-tax protest through the tax system also includes those pressing claims for reparations for slavery. While the reparations tax credit is generally viewed as a scam,³⁹ there are individuals who maintain that they claim the credit in order to protest the treatment of African-Americans in the United States.⁴⁰ In addition, during the nineteenth century, women suffragists refused to pay taxes in order to protest their inability to vote, metaphorically invoking the "no taxation without representation" slogan from the Boston Tea Party.⁴¹

2. Protesting Tax Discrimination

Other individuals acknowledge the legitimacy of the tax laws, but protest their application to a specific group.⁴² They seek to highlight and to remedy wrongful discrimination codified in the Internal Revenue Code ("Code") by Congress.⁴³ The story of Robert Mueller is the story of just such a tax protester—which is precisely why I asked your indulgence in allowing me to explain why, in this case, you should not immediately associate a pejorative connotation with this label. With this background (and hopefully with an open and untainted mind), we can now proceed to consider the story of the tax trials and tribulations (and incarceration) of Robert Mueller, "a homosexual."⁴⁴

II. "A [THE] HOMOSEXUAL"

From 1975 until 1982, Robert Mueller was "in a traditional heterosexual marriage which allowed the filing of joint returns and other benefits."⁴⁵ After that marriage ended in divorce, Mueller "decided to stop hiding his

Tax Statement: Some War Protesters Withhold Payments to IRS, HARTFORD COURANT, Apr. 13, 2003, at A1.

39. *E.g.*, William P. Brown & Richard D. Adams, *Tax Fraud and Tax Protesters*, 33 TAX ADVISER 790, 790 (2002); *Justice Department Files Suit to Stop Slave Reparations Scams: IRS Warns Blacks to Beware*, JET, Mar. 25, 2002, at 19, 19; *Scam Alert!*, ESSENCE, Aug. 2002, at 88, 88.

40. *See* Michelle Boorstein, *Va. Man, Daughter Get Prison for Slavery Tax Claim*, WASH. POST, Oct. 24, 2003, at A10.

41. Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. ILL. L. REV. 265, 268–69, 275–88.

42. *See* Kornhauser, *Taxing Conscience*, *supra* note 14, *passim*; Garrity, *supra* note 33, *passim*.

43. Garrity, *supra* note 33, *passim*.

44. *United States v. Mueller*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,205, at 87,342 (7th Cir. 2000). Mueller is apparently not alone in making this type of protest. *See* Tammye Nash, *Lesbian Tells Tax Man to Take a Hike*, GAY FIN. NETWORK, at <http://www.gfn.com/archives/story.phtml?sid=933> (last modified Mar. 22, 1999).

45. Petitioner's Brief at 4, *Mueller v. Comm'r*, 79 T.C.M. (CCH) 1887 (2000) (No. 15289-98).

homosexuality.”⁴⁶ A few years later, angered by the fact that he could not receive the same tax benefits in a same-sex relationship as he could while married to his wife,⁴⁷ Mueller ceased filing tax returns and paying taxes as a protest against being limited to filing a tax return as “single,” no matter what his actual relationship status.⁴⁸ In 1989, Mueller entered into a relationship with Todd Bates that continued throughout the remaining years of this tax protest.⁴⁹

Mueller continued his protest for a decade; he did not file a tax return again until 1996.⁵⁰ During this period, Mueller worked “as a computer programmer/consultant for various companies and hospitals,”⁵¹ earning a relatively comfortable living.⁵² In 1996, the IRS finally caught up with Mueller and charged him with three counts of willful failure to file an income

46. *Id.*

47. There are a number of tax benefits and detriments associated with marriage. *See* Knauer, *supra* note 4, at 160 (“an estimated 60 provisions on the income tax side alone” refer to a taxpayer’s marital status). Among the benefits are the ability to transfer property between spouses without triggering income, estate, or gift tax, I.R.C. §§ 1041, 2056, 2523 (West 2004), and the ability to split income between the spouses for income tax purposes, *id.* § 6013 (i.e., to obtain what is colloquially referred to as a marriage “bonus,” see *infra* note 89). Among the disadvantages are the marriage “penalty,” see *infra* note 89, and the inability to obtain beneficial results from transactions between spouses, see, e.g., I.R.C. § 267 (West 2004) (disallowing losses incurred in transactions between related parties, including spouses); *id.* § 318(a)(1)(A)(i), (b) (cross-referencing *id.* §§ 302, 958(b), and 6038(d)(2)) (attributing the ownership of stock between family members, including spouses, for a number of purposes in the Code—including determining whether a redemption of stock will be treated as a distribution or exchange, whether the controlled foreign corporation regime will apply to a foreign corporation, and whether certain information must be furnished to the IRS with respect to a foreign corporation). For a discussion of the oppressive nature of the federal treatment of same-sex couples, see Infanti, *supra* note 4, at 779–804.

48. Petitioner’s Brief at 4, *Mueller* (No. 15289-98).

49. *Id.* And this relationship appears to have been a difficult one in the sense that Bates (with Mueller’s help) appears to have battled a drug problem throughout much, if not all, of the period that the relationship continued. *See id.* at 14. At trial, Mueller indicated that he had suffered a theft loss during one of the years in which he did not file a tax return; Bates had apparently stolen Mueller’s television to feed his drug habit. Transcript of Trial at 33–36, *Mueller* (No. 15289-98); see also *Mueller*, 79 T.C.M. (CCH) at 1888 n.1.

50. *See Mueller*, 79 T.C.M. (CCH) at 1888; *Mueller v. Comm’r*, 82 T.C.M. (CCH) 764, 765 (2001).

51. *Mueller*, 79 T.C.M. (CCH) at 1888.

52. According to the notice of deficiency issued by the IRS, Mueller’s combined employee and non-employee compensation ranged from a low of \$44,090 in 1986 to a high of \$102,491 in 1991. Petition at sched. 2(b), *Mueller* (No. 15289-98). On average, he earned approximately \$84,500 each year during the decade that this portion of the protest continued. *Id.*

tax return.⁵³ In a trial before a magistrate judge in 1997, Mueller was convicted on all three counts "and sentenced to a total of 13 months' imprisonment and one year of supervised release."⁵⁴

A. *Mueller I*

In 1998, the IRS then pursued Mueller for the taxes that he owed for the years 1986 through 1995.⁵⁵ In its notice of deficiency, the IRS alleged that

53. See *United States v. Mueller*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,205, at 87,342 (7th Cir. 2000); *Information, United States v. Mueller*, 96-CR-243 (N.D. Ill. Apr. 10, 1996) (indicting Mueller under I.R.C. § 7203 with respect to calendar years 1989 through 1991).

A few words are necessary to put Mueller's criminal prosecution in perspective. Over the past several decades, the number of federal criminal tax prosecutions has been on the decline. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NATIONAL PROFILE AND ENFORCEMENT TRENDS OVER TIME, at <http://trac.syr.edu/tracirs/newfindings/current/> (last visited Nov. 17, 2004) ("According to information collected separately by the Justice Department and the federal courts . . . , tax prosecutions have . . . continued their decades long downward slide, now totaling about half what they were a decade ago and one third what they were five years ago."). *But see* Amy Hamilton, *IRS Refutes Figures Showing Less Prosecution of Tax Cheats*, 99 TAX NOTES 311 (2003) (noting that data provided by the Transactional Records Access Clearinghouse ("TRAC") are widely cited, but also containing criticism of the TRAC data and analysis). According to a TRAC analysis of information provided by the federal courts, there were only 847 federal tax prosecutions in 1996, the year of Mueller's indictment. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NATIONAL PROFILE AND ENFORCEMENT TRENDS OVER TIME: TOTAL FEDERAL TAX PROSECUTIONS ACCORDING TO U.S. COURTS, at <http://trac.syr.edu/tracirs/trends/v09/aousc.html> (last visited Nov. 17, 2004). According to a TRAC analysis of information provided by the U.S. Justice Department, there were 935 total federal tax prosecutions in 1996, with 855 of those prosecutions having resulted from IRS criminal referrals. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NATIONAL PROFILE AND ENFORCEMENT TRENDS OVER TIME: TOTAL FEDERAL TAX PROSECUTIONS ACCORDING TO U.S. ATTORNEYS, at <http://trac.syr.edu/tracirs/trends/v09/title26fil.html> (last visited Nov. 17, 2004). Only 186 out of the 855 tax prosecutions that resulted from IRS criminal referrals had willful failure to file a tax return listed as the statutory lead charge. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, NATIONAL PROFILE AND ENFORCEMENT TRENDS OVER TIME: SPECIFIC STATUTORY LEAD CHARGE ON TAX PROSECUTIONS RESULTING FROM IRS CRIMINAL REFERRALS, at <http://www.trac.syr.edu/tracirs/findings/national/taxprosDetailhtml> (last visited Nov. 17, 2004). Thus, Mueller was one of a very small handful of non-filers prosecuted in 1996. Apparently, Mueller had the opportunity to avoid jail time, but chose not to take that opportunity because he felt that bringing the issue of sexual orientation discrimination to the fore was too important. See *infra* text accompanying note 118.

54. *Mueller*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,205, at 87,342. In 1999, Mueller's supervised release was revoked and he was ordered back to prison for an additional ninety days, because he had violated the terms of his supervised release by failing to file a U.S. federal income tax return for 1997. *Id.*

55. *Mueller*, 79 T.C.M. (CCH) at 1888.

Mueller owed more than \$249,000 in taxes and over \$69,000 in penalties⁵⁶ (with, of course, interest—compounded daily).⁵⁷ Mueller promptly contested the asserted deficiency in Tax Court.⁵⁸

During the course of this first of two Tax Court cases in which he represented himself, Mueller made a general attack on the marital classifications in the Code. Early on, he stated that his goal was to extend to the tax laws the definition of family set forth in *Braschi v. Stahl Associates*:⁵⁹ “A more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence.”⁶⁰

So, when the IRS made a request for admissions inquiring about Mueller’s marital status, his relationship with Bates, and whether the two had applied for a marriage license from the state of Illinois, Mueller refused to respond to the request on the ground that

he and the group he belongs to are denied the benefits of such a classification. Also, because of the U.S.’s stance on gay partners, the Petitioner was denied the sanction of marriage or a partnership, and, therefore, his status for the entire period in question cannot be judged by whether or not he was “married”.⁶¹

As might be expected, the IRS did not take kindly to Mueller’s refusal to respond to its request for admissions; it filed a motion with the Tax Court to impose sanctions on Mueller.⁶² The Tax Court granted this motion and ordered Mueller’s response to the request for admissions stricken as a sanction.⁶³ The court further ordered that all matters set forth in the IRS’ request for admissions would be deemed admitted by Mueller.⁶⁴

56. *Id.* The deficiency appears to be attributable to Mueller’s having earned much of his income as an independent contractor and his subsequent failure to pay estimated income tax and self-employment tax on that income. Petition at sched. 2(b), *Mueller* (No. 15289-98).

57. I.R.C. §§ 6601, 6622 (West 2004). Mueller was assessed a penalty for failure to file a return under § 6651(a)(1) as well as a penalty for underpayment of estimated taxes under § 6654(a). *Mueller*, 79 T.C.M. (CCH) at 1890. Interest on the penalty for failure to file a return accrues beginning on the date when the return was required to be filed. I.R.C. § 6601(e)(2)(B) (West 2004). Interest on the penalty for underpayment of estimated taxes only accrues from the date of the notice and demand therefore, and only if that penalty is not paid within twenty-one calendar days (reduced to ten calendar days under certain circumstances) from the date of the notice and demand. *Id.* § 6601(e)(2)(A).

58. Petitioner’s Brief at 4, *Mueller* (No. 15289-98).

59. 543 N.E.2d 49 (N.Y. 1989).

60. Petitioner’s Response to Request for Admission at 2, *Mueller* (No. 15289-98).

61. *Id.* at 3.

62. Respondent’s Motion to Impose Sanctions, *Mueller* (No. 15289-98).

63. Order on Motion to Impose Sanctions, *Mueller* (No. 15289-98).

64. *Id.*

Mueller did not fare any better at trial. In the course of a very short trial,⁶⁵ most of which consisted of a give and take concerning the admissibility of exhibits into evidence,⁶⁶ Judge Laro made it abundantly clear that he was not receptive to Mueller's challenge to the tax laws. He told Mueller that the "[c]ourt only interprets existing law," and admonished him not to make arguments about changing the law "[b]ecause, frankly, it's not anything I can relate to."⁶⁷

Unsurprisingly, Judge Laro issued an opinion sustaining the IRS' proposed deficiencies and penalties.⁶⁸ In his opinion, Judge Laro immediately desexualized Mueller's challenge to the Code's discrimination against gay and lesbian couples:

Petitioner's sole claim in this case is that he should be accorded married, rather than single, filing status on his tax returns for the years 1989 to 1995. Petitioner does not claim to have ever been married. Rather petitioner argues that he had an "economic partnership" with his *roommate* and that he was unconstitutionally denied the opportunity to file a joint tax return with him in recognition of such partnership.⁶⁹

The purposefulness of this desexualization was made clear later in the opinion when Judge Laro stated that "[p]etitioner claims discrimination not as a homosexual but as a person who shares assets and income with someone who is not his legal spouse. Petitioner therefore places himself in a class that includes nonmarried couples of the opposite sex, family members, and friends."⁷⁰ Having desexualized the issue presented to the court, Judge Laro quite easily dismissed what he interpreted as a new gloss on an old equal protection challenge to the marital classifications in the Code.⁷¹

While taking the gay issue off of the table may have made Judge Laro feel more comfortable and may have allowed him more easily to render his decision in favor of the IRS, Judge Laro engaged in a far less than charitable reading of the record in Mueller's case. In fact, the record is replete with references to the Code's discriminatory treatment of gay and lesbian couples—as well as to Mueller's self-described "civil disobedience" to bring this issue to

65. Transcript of Trial at 1, 44, *Mueller* (No. 15289-98) (indicating that the trial began at 9:30 a.m. and concluded at 10:23 a.m.).

66. *Id.* at 8–33.

67. *Id.* at 41.

68. *Mueller*, 79 T.C.M. (CCH) at 1890.

69. *Id.* at 1888 (emphasis added). For a discussion of the general desexualization of gay and lesbian relationships in the federal tax context, see Infanti, *supra* note 4, at 783–88.

70. *Mueller*, 79 T.C.M. (CCH) at 1889.

71. *Id.* at 1889–90.

light so that it might be addressed in the appropriate forum.⁷² In closing, Judge Laro made a nod to these references and told Mueller that if he wished to petition for redress of any discrimination in the Code against gays and lesbians, such a petition would have to be addressed to Congress:

While petitioner makes several arguments on policy and sociological grounds, in the face of the cases cited above to the contrary, they have no legal bearing on the issues in this case. Whether policy considerations warrant narrowing of the gap between the tax treatment of married taxpayers and homosexual and other nonmarried economic partners is for Congress to determine in light of all the relevant legislative considerations.⁷³

The Seventh Circuit Court of Appeals affirmed Judge Laro's decision in an unpublished order.⁷⁴ The Seventh Circuit reiterated its decision in previous cases that the marital classifications in the Code do not violate the Constitution,⁷⁵ and it declined to address Mueller's challenge to the federal Defense of Marriage Act⁷⁶ ("DOMA") because that law "was not in effect during the 10-year period for which Mueller was assessed deficiencies."⁷⁷ The Seventh Circuit also indicated that Mueller had not rebutted the presumption of correctness enjoyed by the IRS' notice of deficiency; his evidence "discussing the status of homosexuals in various countries . . . did not establish that the Commissioner erred in computing the deficiencies."⁷⁸ The court concluded by stating that Mueller's "testimony only reenforced the appropriateness of the deficiencies and additions because he admitted earning substantial income during the relevant tax years . . . but filing no returns."⁷⁹

B. *Mueller II*

72. Petitioner's Brief at 15, *Mueller* (No. 15289-98); e.g., Petitioner's Response to Motion to Impose Sanction, *Mueller* (No. 15289-98) (indicating that Mueller felt that the courts, and not the legislature, were the appropriate place to challenge the treatment of gay and lesbian couples); Petitioner's Response to Request for Admission, *Mueller* (No. 15289-98) (discussed in the text above); Transcript of Trial at 15-24, 28-33, *Mueller* (No. 15289-98) (attempting to introduce into evidence various exhibits concerning the tax treatment of gay and lesbian couples); see also Brief for Petitioner at 10, *Mueller v. Comm'r*, 82 T.C.M. (CCH) 764 (2001) (No. 4743-00) (discussing Judge Laro's misinterpretation); Transcript of Trial at 25-26, *Mueller* (No. 4743-00) (same).

73. *Mueller*, 79 T.C.M. (CCH) at 1890.

74. *Mueller v. Comm'r*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,391 (7th Cir. 2001).

75. *Id.*

76. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7).

77. *Mueller*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,391, at 87,901.

78. *Id.*

79. *Id.*

In 1996, Mueller changed his method of protest. In that year, he did file a tax return—a return that he had completed jointly with his partner, Todd Bates. On the return, Mueller listed his name first and Bates' name second, striking out the word "spouse" where it appeared in the label block of the return.⁸⁰ Mueller marked filing status 2 ("Married filing joint return"),⁸¹ but "struck out the word 'Married' on that line so that it read 'filing joint return' instead of 'Married filing joint return.'"⁸² Mueller claimed an exemption for a "spouse" on line 6b of the return, and claimed a standard deduction "based upon his claimed filing status of 'filing joint return.'"⁸³ Mueller also used the married filing jointly tax rate schedule.⁸⁴ He had Bates sign the return on the line below his name, but again struck out the word "spouse" in the signature block.⁸⁵

In its notice of deficiency, the IRS asserted a deficiency of \$8,712 in tax.⁸⁶ This deficiency was due to (i) the reclassification of certain wage income as self-employment income (with a resulting liability for self-employment tax), (ii) the determination that Mueller was only entitled to the standard deduction for singles, and (iii) the determination that Mueller was required to use the tax table for singles in computing his tax.⁸⁷ Mueller's tax had been reduced by filing jointly because Bates was unemployed in 1996.⁸⁸ Had they been allowed to file a joint return, they would have benefited from a marriage "bonus,"⁸⁹ saving \$1,897 in additional taxes.⁹⁰

80. *Mueller v. Comm'r*, 82 T.C.M. (CCH) 764, 765 (2001).

81. INTERNAL REVENUE SERV., DEP'T OF TREASURY, FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN 1 (1996), available at <http://www.irs.gov/pub/irs-96/f1040.pdf> (last visited Nov. 17, 2004).

82. *Mueller*, 82 T.C.M. (CCH) at 765.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Mueller*, 82 T.C.M. (CCH) at 765. Mueller was allowed the benefit of the claimed exemption for Bates; however, it was classified as a dependency exemption rather than a spousal exemption. *Id.*

88. *Id.*

89. As explained by Dorothy Brown:

A marriage penalty occurs whenever a couple pays higher federal income taxes as a result of their marriage than they would pay if they remained single and filed individual returns.

A marriage bonus occurs whenever a couple pays lower federal income taxes as a result of marriage than they would pay if they remained single and filed individual returns.

Marriage penalties are the greatest where there are two wage earners; marriage bonuses are the greatest where there is only one wage earner.

Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 787 (1997). A leading treatise adds that:

Having learned from his prior experience in the Tax Court (where Judge Laro misconstrued the argument that he was making), Mueller was much more specific, careful, and direct in fashioning the question that he wished the court to address in this case. In contesting the deficiency proposed by the IRS, Mueller made a direct challenge to the constitutionality of DOMA, which was in force during his 1996 taxable year and provided that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁹¹

Mueller challenged the constitutionality of DOMA on a number of grounds, including “equal protection, due process, separation of church and state, and the prohibition on cruel and unusual punishment.”⁹²

Mueller’s second Tax Court case was heard by Special Trial Judge Pajak, who, at least at trial, proved more sympathetic to Mueller’s cause than Judge Laro had been. In fact, Judge Pajak told Mueller at trial, “I’m very sympathetic to your case.”⁹³ Nevertheless, Judge Pajak ultimately sustained the IRS’ proposed deficiency.⁹⁴ Judge Pajak’s thinking was foreshadowed by the comments that followed his statement at trial in support of Mueller’s cause: “I think there’s merit in it [i.e., Mueller’s case], but I think you’re in the wrong

[B]ecause the rate brackets for a married couple filing jointly are less than twice as wide as those . . . for unmarried persons, many couples pay more taxes than they would if they could file as unmarried persons. These ‘marriage penalties’ are greatest for spouses whose incomes are equal and decline and eventually become ‘marriage bonuses’ as spouses’ incomes become more unequal.

4A BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 111.3.2, S111-44 (2nd ed. Supp. 2004) (footnotes omitted). To provide marriage penalty relief, Congress has increased the standard deduction and the 15% rate bracket for married taxpayers filing jointly to twice the size of the standard deduction and the 15% rate bracket of single individuals—but this relief is only in effect from 2003 through 2010. Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, §§ 101(b)–(c), 105, 118 Stat. 1166, 1167–68, 1169; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 102, 103, 107, 117 Stat. 752, 754–55; Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301, 302, 901, 115 Stat. 38, 53–54, 150.

90. See Appellee’s Brief at 8, 20, *Mueller v. Comm’r*, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,505 (2002) (No. 02-1189).

91. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7).

92. Appellee’s Brief at 9, 10, *Mueller* (No. 02-1189).

93. Transcript of Trial at 12, *Mueller* (No. 4743-00).

94. *Mueller*, 82 T.C.M. (CCH) at 766.

forum. This is a statutory court. We can only do what the laws say we can do."⁹⁵

As mentioned above, in an attempt to avoid the misconstruction of his arguments by a second Tax Court judge, Mueller had been more specific in fashioning the question that he wished the court to address. But by solving one problem, Mueller had created another. In his opinion, Judge Pajak held that DOMA was irrelevant to Mueller's case.⁹⁶ In 1996, no state recognized same-sex marriage. As a result, Mueller was unable to marry Bates before the close of his 1996 taxable year.⁹⁷ Because Mueller was not married to Bates at any time during 1996, DOMA's redefinition of marriage as a union between a man and a woman "effect[ed] no change in the law otherwise applicable in this case."⁹⁸

Then, completely ignoring the fact that he was actually incorporating DOMA-type discrimination into the Code by relying on state law to define "marriage,"⁹⁹ Judge Pajak quickly concluded that Mueller's federal tax filing status for 1996 was single, and he reaffirmed Judge Laro's earlier conclusion

95. Transcript of Trial at 12, *Mueller* (No. 4743-00); see also *id.* at 19 ("What the Court will tell you ultimately is that you'll probably have to go to Congress, and there are congressman who are sympathetic to your position.").

96. *Mueller*, 82 T.C.M. (CCH) at 765-66.

97. The determination whether a taxpayer is married is generally made at the close of the taxpayer's taxable year. I.R.C. § 7703(a)(1) (West 2004).

98. *Mueller*, 82 T.C.M. (CCH) at 766.

99. Absent the application of DOMA, whether a taxpayer is married for federal income tax purposes is determined under state law. *Boyter v. Comm'r*, 668 F.2d 1382, 1385 (4th Cir. 1981) ("We agree with the government's argument that under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status."). During 1996, Mueller lived in Illinois and Washington. Transcript of Trial at 34-35, *Mueller* (No. 4743-00). During that year, Illinois enacted a statutory prohibition on same-sex marriage. 750 ILL. COMP. STAT. 5/212(a)(5) (2004) (effective May 24, 1996). Although Washington did not enact its statutory prohibition on same-sex marriage until 1998, WASH. REV. CODE ANN. § 26.04.020(1)(c) (West Supp.), the Washington Court of Appeals had held more than two decades earlier that same-sex marriage is not authorized under the Washington marriage statutes. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974). *But see infra* text accompanying notes 190-94 for a discussion of recent developments in the State of Washington with regard to excluding same-sex couples from access to civil marriage. In petitioning the Supreme Court for review of his case, Mueller noted this problem as well:

Judge Pajak ruled that homosexuals in the United States can only use single or head of household status when it comes to taxation, while heterosexuals have several additional options. Both the respondent and the Court cite the fact that the Petitioner was not married, knowing full well that such a status is not available to homosexuals. The Petitioner states that because the status is not available, *de facto* discrimination is being used to support the decision.

Petition for Writ of Certiorari at *3, *Mueller v. Comm'r*, 2002 WL 32135138 (No. 02-513).

that the marital classifications in the Code do not violate the Constitution.¹⁰⁰ Judge Pajak closed his discussion of Mueller's challenge with the same advice that Judge Laro had given:

In Mueller I, the Tax Court also observed that whether policy considerations warrant narrowing of the gap between the tax treatment of married taxpayers and homosexual and other nonmarried economic partners is for Congress to determine in light of all relevant legislative considerations. We agree with all of these statements which answer petitioner's pertinent contentions.¹⁰¹

The Seventh Circuit again affirmed the Tax Court's decision in an unpublished order.¹⁰² Like Judge Pajak, the Seventh Circuit decided that "the constitutionality of the Defense of Marriage Act [was] irrelevant" to Mueller's case.¹⁰³ Also like Judge Pajak, the Seventh Circuit then completely ignored its incorporation of DOMA-type discrimination into the Code when it held that Mueller's federal tax filing status for 1996 was single.¹⁰⁴ The Seventh Circuit concluded its order with the following warning: "We remind Mr. Mueller once again that despite his personal dissatisfaction with the current tax laws, he does not have license to ignore them. We also warn Mr. Mueller that if he continues to file frivolous tax appeals, he faces the possibility of sanctions."¹⁰⁵

III. FRIVOLITY

A. *The "Force" of Etymology*

Frivolous? The Seventh Circuit's intent in choosing this rather harsh and derogatory label is unmistakable.¹⁰⁶ Although the word "frivolous" enjoys more than one meaning,¹⁰⁷ its meaning is clear when used as a legal term of art: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful."¹⁰⁸ By ostensibly labeling Mueller's arguments in both of his Tax

100. *Mueller*, 82 T.C.M. (CCH) at 766.

101. *Id.*

102. *Mueller v. Comm'r*, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,505, at 85,113 (7th Cir. 2002).

103. *Id.* at 85,112.

104. *Id.*

105. *Id.*

106. And a choice it was—the IRS did not even mention the word "frivolous" once in its brief to the Seventh Circuit. See Brief for Appellee, *Mueller* (No. 02-1189). Furthermore, the docket for this appeal, which is available at <http://www.ca7.uscourts.gov/dkt.htm> (last visited July 28, 2004), makes no mention of the IRS having filed a separate motion, as required by FED. R. APP. P. 38, requesting that sanctions be imposed on Mueller for having filed a frivolous appeal.

107. See 4 OXFORD ENGLISH DICTIONARY 556 (1961).

108. BLACK'S LAW DICTIONARY 677 (7th ed. 1999); see, e.g., *In re Gulevsky*, 362 F.3d 961, 964 (7th Cir. 2004) ("An appeal is frivolous when the appellant's arguments are utterly meritless and have no conceivable chance of success."); *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d

Court cases "frivolous,"¹⁰⁹ the Seventh Circuit tainted Mueller's protest in precisely the fashion that I assiduously tried to avoid at the outset of this essay.¹¹⁰ They branded Mueller as some sort of a crackpot whose arguments are not even worth considering. This allowed the court to shove Mueller back into the closet and slam the door shut on him. The sound of the slamming door can be heard in the threat to impose sanctions on Mueller¹¹¹—a threat that effectively forecloses the possibility of any future challenges by Mueller to the constitutionality of the Code's discrimination against gay and lesbian couples.

The violent imagery of Mueller being shoved into the closet and having the door slammed shut on him is actually quite apposite here, because the word "frivolous" etymologically implies the application of force.¹¹² It has been suggested that the word "frivolous" was probably borrowed from the Latin word *frivolus* (meaning silly, empty, or trifling).¹¹³ The Latin *frivolus*, in turn, is a diminutive of a lost adjective *frivos* (meaning broken or crumbled), which was derived from the verb *friare* (meaning to break, rub away, or crumble).¹¹⁴

By labeling Mueller's arguments "frivolous," the Seventh Circuit applied force to those arguments, attempting to crumble them in their hands.¹¹⁵ At the

928, 938 (7th Cir. 1989) (en banc) ("An appeal is 'frivolous' when the result is foreordained by the lack of substance to the appellant's arguments.").

109. Note that the word "appeals" in the last sentence of the quoted language in the text above is plural, the word "continues" in that same sentence gives the impression that the conduct is ongoing, and the words "once again" in the prior sentence make clear that the Seventh Circuit had Mueller's prior appeal in mind when it wrote this passage. *Mueller*, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,505, at 85,112 (7th Cir. 2002).

110. See *supra* Part I.

111. See FED. R. APP. P. 38.

112. For other applications of deconstructive etymological analysis, see JACQUES DERRIDA, *ARCHIVE FEVER: A FREUDIAN IMPRESSION* (Eric Prenowitz trans., 1995) (deconstructing the concept of archiving through an exploration of the etymology of the word "archive"); J. M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1619–25 (1990) (deconstructing Justice Scalia's and Justice Brennan's opinions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), by exploring the etymological link between the words "tradition" (which Justice Scalia cites and relies upon in his opinion) and "betrayal" (which is what Justice Brennan essentially accuses Justice Scalia of doing to prior precedents)) [hereinafter Balkin, *Tradition*]. For a description of other deconstructionist techniques and their application to the law, see J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1986).

113. *THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY* 300 (Robert K. Barnhart ed., 1995) [hereinafter *BARNHART DICTIONARY*]; *ONLINE ETYMOLOGY DICTIONARY*, at <http://www.etymonline.com> (last visited Nov. 17, 2004) [hereinafter *ONLINE DICTIONARY*].

114. *BARNHART DICTIONARY*, *supra* note 113, at 300; *ONLINE DICTIONARY*, *supra* note 113.

115. For a deconstruction of the hierarchical opposition of justified/unjustified force in law, see Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3, 5–6, 13–14 (Drucilla Cornell et al. eds., Mary Quaintance trans., 1992).

same time, the court clearly attempted to break Mueller's spirit, to discourage and dishearten him, to dissuade him from making future challenges to the constitutionality of the discrimination against gay and lesbian couples that Congress has embedded in the Code. In applying this force to crumble and to break, the court attempted to rub away, to erase the specter of Mueller (both past and present) from their consciousness, because they did not want to be reminded of Mueller or of the arguments that he was making. They justified this erasure—the effacing of their very discussion of Mueller's case from the official public record¹¹⁶—by stating that his arguments were not even worth taking the time to consider. But, despite the court's best efforts, a trace of Mueller remains: a record where we can bear witness again to Mueller's efforts to raise awareness of a wrong and to have that wrong rectified by the government that committed it.

This application of force by the court is designed to banish gays and lesbians to the closet, to make them invisible, to silence them, which is by no means an anomaly in tax. The open discomfort at dealing with gay and lesbian issues in the tax laws can also be seen in the actions of Congress and the IRS:

In defining marriage for purposes of federal law, DOMA makes no explicit mention of gay and lesbian couples—even though its purpose is to brand them inferior. Its condemnation of homosexuality comes instead by implication and through explanation in committee reports that few will ever read. This discomfort at officially and prominently acknowledging the existence of gay and lesbian couples can also be detected in the noticeable failure of Congress and the IRS to address the application of the Code to gay and lesbian couples. It can additionally be detected in the need to shoe-horn gay and lesbian couples into desexualized tax categories (e.g., donor-donee, business partners, or employer-employee) at odds with the reality of their relationships. Relationships between gay men and lesbians are apparently so repugnant that they cannot be acknowledged as such; instead, they must either be ignored or reshaped into more acceptable, and less loathsome, molds.¹¹⁷

A concerted, forcible silencing of gay and lesbian dissent manifests itself in the microcosm of Mueller's case. After I spent a day in the Tax Court public files room reading through the records of Mueller's two Tax Court cases, I was able to see a common thread running through his submissions to

116. Neither of the orders issued by the Seventh Circuit in Mueller's appeals from the Tax Court were officially published. The court issued both as "unpublished orders," which means that they cannot be cited or used as precedent in the Seventh Circuit. 7TH CIR. R. 53; *see also* Petition for Writ of Certiorari at *i, *Mueller v. Comm'r*, 2002 WL 32135138 (No. 02-513) ("The Court of Appeals then applied rule 42(b) and (c) [sic] to suppress publication of the case and its decision."); Petition for Writ of Certiorari at *i, *Mueller v. Comm'r*, 2001 WL 34115848 (No. 01-44) (same).

117. *Infanti*, *supra* note 4, at 802-03 (footnote omitted).

the court: Mueller felt that a wrong was being done to gays and lesbians, and he wanted to bring that wrong to the attention of the appropriate authorities so that it could be rectified. Mueller had spent years publicly protesting the treatment of gay and lesbian couples under the Code—feeling so strongly about the issue that he was willing to spend thirteen months in prison

so he could place these issues before the federal Courts [sic]. He could have had probation if he would just do as he was told, but he views this as a chance to help the next generation. [He] believes the issues presented to the federal Courts [sic] to be valid Constitutional [sic] questions. His civil disobedience was justified to serve as an opportunity for change, to present issues that need to be addressed to the forums that can address the issues.¹¹⁸

In bringing this issue out into the open, Mueller was engaging in “protest” in the etymological sense of that word. The verb “to protest” comes from the Latin *protestari*, which means to “declare publicly, testify, protest (*pro-* forth, before, *pro-* + *testari* testify, from *testis* witness).”¹¹⁹ Mueller was declaring publicly by testifying about the discrimination that he and others had suffered under the Code. Yet, despite his plaintive testimony, Mueller was turned away (literally or figuratively) each time; he kept asking where he should go to press his case, but everyone’s answer seemed to be “not here.”

Mueller had thought about going to Congress, but, given its overt hostility toward gay and lesbian couples,¹²⁰ he knew that it would *not* be receptive to his arguments.¹²¹ He asked the IRS to recognize his relationship with Bates, but was told that if he wanted to be a test case he would need to get into the court system and seek change there.¹²² In his criminal tax case, Mueller pressed his claim that the discrimination against gays and lesbians in the Code violated a number of rights guaranteed to him by the U.S. Constitution.¹²³ However, the Department of Justice attorneys who were prosecuting him argued that a criminal trial was not the appropriate forum for his protest; they contended that

118. Petitioner’s Brief at 16, *Mueller v. Comm’r*, 79 T.C.M. (CCH) 1887 (2000) (No. 15289-98).

119. BARNHART DICTIONARY, *supra* note 113, at 611; ONLINE DICTIONARY, *supra* note 113.

120. The enactment of DOMA is a prime example of this hostility. *See Infanti, supra* note 4, at 782.

121. *See, e.g.*, Trial Memorandum for Petitioner at 2–4, *Mueller v. Comm’r*, 82 T.C.M. (CCH) 764 (2001) (No. 4743-00); Brief for Petitioner at 7–9, *Mueller* (No. 4743-00); Petitioner’s Brief at 15, *Mueller* (No. 15289-98); Petitioner’s Response to Motion to Impose Sanction at 2, *Mueller* (No. 15289-98).

122. *See* Transcript of Trial at 18–19, *Mueller* (No. 4743-00); Petitioner’s Response to Motion to Impose Sanction at attachment V, *Mueller* (No. 15289-98).

123. Motion to Dismiss Indictment and to Declare 26 USC 7203 Unconstitutional as Applied to Defendant at 1–2, *United States v. Mueller*, No. 96-CR-243 (N.D. Ill. Nov. 19, 1996).

Mueller should seek the relief that he desired in a civil tax case.¹²⁴ When Mueller finally made it into the Tax Court, he was met with varying levels of receptivity to his arguments, but, in the end, Mueller was told by two different judges that civil court was not the right forum for his protest either and that he should petition Congress for redress—the same Congress that he had earlier concluded it would be pointless to approach.¹²⁵ Then, to make sure that Mueller could in no way misunderstand his being rebuffed, the Seventh Circuit labeled his arguments frivolous and told him not to darken its door again.¹²⁶

Viewed from this perspective, Mueller's story is both frustrating and depressing. After reading through Mueller's Tax Court files, I felt a cloud of despondency settle around me as I was sitting in the airport waiting for my flight home. I could only imagine how discouraged and disheartened Mueller must have felt after engaging in this long and ultimately futile search for someone to hear his protest and to rectify the wrong that was being done to him and Bates—and every other gay and lesbian couple in the United States. Mueller's story almost makes you feel as if all of the advances in gay rights over the past several decades—advances that have helped to move gay and lesbian issues out of the closet and into the light—have had no effect upon those who make, enforce, or interpret the federal tax laws.

124. See Government's Response to Defendant's Motion to Dismiss at 2–4, *Mueller* (No. 96-CR-243); Transcript of Trial at 15–16, *Mueller* (No. 4743-00).

125. See *supra* Part II.

126. See *supra* Part II.

B. *The Frivolity of "Frivolousness"*

Almost—but not quite. This concerted application of force is, in fact, a reaction to these very advances. Without the advances and Mueller's attempt at furthering them, there would be no need for a reactionary application of force. Thus, once we recognize the force being applied against Mueller, we can see more clearly the two opposing forces at work in his case: a force attempting to effect change and a force attempting to resist change. Through the simple expedient of this shift in context, we can begin to see Mueller's story in an entirely different light. No longer mired in a narrow, oppressive tax perspective,¹²⁷ we can see Mueller's struggle from a wider, more hopeful perspective that embraces the entire gay rights movement.¹²⁸ Furthermore, in this different light, we will see the Seventh Circuit's words turned on their head, revealing just how very *frivolous* the court's attempt to disparage Mueller's arguments was.¹²⁹

1. A Wider Perspective: Human Rights

In his submissions, Mueller repeatedly claimed that the Code's discriminatory treatment of gay and lesbian couples constitutes a violation of human rights.¹³⁰ However, none of the courts that heard Mueller's tax cases ever addressed this issue. Nonetheless, we will briefly explore the treatment of sexual orientation discrimination as a human rights issue because it is an integral part of the progressive force that opposes and resists the reactionary force that Congress, the IRS, the Tax Court, and the Seventh Circuit all brought to bear against Mueller.

a. European Court of Human Rights

More than twenty years ago, the European Court of Human Rights ("ECHR") began "[the] development of international human rights law in the

127. *See supra* note 4.

128. Mueller mentioned this wider perspective in his petitions to the Supreme Court for review of the Seventh Circuit's decisions: "This is not a unique issue for the United States of America. This is an issue that much of the world is starting to deal with." Petition for Writ of Certiorari at *12, *Mueller v. Comm'r*, 2001 WL 32135138 (No. 02-513); *see also* Petition for Writ of Certiorari at *10, *Mueller v. Comm'r*, 2001 WL 34115848 (No. 01-44) (same).

129. Mueller himself turned the Seventh Circuit's words back on the government: "This law [DOMA] would be considered frivolous if it were not for the discrimination behind its enactment." Petition for Writ of Certiorari at *12, *Mueller*, 2002 WL 32135138 (No. 02-513); *see also* Petition for Writ of Certiorari at *10, *Mueller*, 2001 WL 34115848 (No. 01-44) (same).

130. Petition for Writ of Certiorari at *i, *4, *12, *Mueller*, 2002 WL 32135138 (No. 02-513); Petition for Writ of Certiorari at *i, *3, *10-11, *Mueller*, 2001 WL 34115848 (No. 01-44); Transcript of Trial at 8, 39, *Mueller v. Comm'r*, 82 T.C.M. (CCH) 764 (2001) (No. 4743-00); Petitioner's Brief at 15, *Mueller v. Comm'r*, 79 T.C.M. (CCH) 1887 (2000) (No. 15289-98).

area of gay and lesbian sexuality”¹³¹ by holding that Northern Ireland’s sodomy laws violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”).¹³² Article 8 of the Convention provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹³³ In the late 1980s and early 1990s, the ECHR reaffirmed its interpretation of Article 8 in finding that the sodomy laws of Ireland and Cyprus also violated the Convention.¹³⁴

Even though not all of the ECHR’s decisions over the past twenty years concerning sexual orientation and gender identity have been positive,¹³⁵ commentators have noted that, since the late 1990s, the ECHR has become “increasingly receptive to human rights claims brought by lesbian and gay applicants.”¹³⁶ For example, the ECHR has held that:

- Employing different ages of consent for heterosexual and homosexual relations violated Article 14 of the Convention (taken in conjunction with Article 8 of the Convention).¹³⁷ Article 14 provides that “[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex . . . or other status.”¹³⁸
- The United Kingdom’s ban on gays and lesbians serving in the military violated Article 8 of the Convention.¹³⁹

131. Kristen L. Walker, *Evolving Human Rights Norms Around Sexuality*, 6 ILSA J. INT’L & COMP. L. 343, 344 (2000).

132. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A), 4 Eur. H.R. Rep. 149 (1981).

133. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8(1), 213 U.N.T.S. 222, 230.

134. *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A), 16 Eur. H.R. Rep. 485 (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A), 13 Eur. H.R. Rep. 186 (1988).

135. Walker, *supra* note 131, at 344.

136. Laurence R. Helfer, *International Decision: Salgueiro da Silva Mouta v. Portugal; A.D.T. v. United Kingdom*, 95 AM. J. INT’L L. 422, 422 (2001); *see also* Kristen Walker, *Sexuality and Human Rights in Europe: An Update*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 185 (2000).

137. *B.B. v. United Kingdom*, App. No. 53760/00 (2004), *available at* <http://www.echr.coe.int/Eng/Judgments.htm> (last visited July 28, 2004); *L & V v. Austria*, 36 Eur. H.R. Rep. 55 (2003); *SL v. Austria*, 37 Eur. H.R. Rep. 39 (2003). Each of these decisions relied upon *Sutherland v. United Kingdom*, an unreported 1997 decision of the European Human Rights Commission in which a violation of the Convention was found in the United Kingdom’s use of different ages of consent for heterosexual and homosexual relations. *See* Walker, *supra* note 131, at 344 & n.5.

138. Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 133, art. 14, 213 U.N.T.S. at 232.

139. *Lustig-Prean v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999); *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

- A Portuguese appellate court violated Article 14 of the Convention (taken in conjunction with Article 8 of the Convention) when it overturned a lower court ruling awarding custody of a young girl to her father because of his sexual orientation.¹⁴⁰
- The criminalization of homosexual relations between more than two men in private violated Article 8 of the Convention.¹⁴¹
- The failure legally to recognize the reassigned sex of a post-operative transsexual violated Article 8 of the Convention. The ECHR further held that the individual's inability to marry someone of the sex opposite her reassigned sex violated Article 12 of the Convention,¹⁴² which provides that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."¹⁴³
- An Austrian Supreme Court decision denying the surviving member of a same-sex couple the benefit of a rent law, which permitted surviving life companions to succeed to decedent companions' tenancies, violated Article 14 of the Convention (taken in conjunction with Article 8).¹⁴⁴

b. U.N. Human Rights Committee

The United Nations Human Rights Committee has on several occasions considered the application of the International Covenant on Civil and Political Rights ("ICCPR") to sexual orientation discrimination.¹⁴⁵ In 1994, the Human

140. *Salgueiro da Silva Mouta v. Portugal*, 31 Eur. H.R. Rep. 47 (1999).

141. *ADT v. United Kingdom*, 31 Eur. H.R. Rep. 33 (2001).

142. *Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18 (2002).

143. Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 133, art. 12, 213 U.N.T.S. at 232.

144. *Karner v. Austria*, 38 Eur. H.R. Rep. 24 (2003).

145. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. In contrast to the Convention, the United States is a party to the ICCPR. However, the United States ratified the ICCPR subject to a declaration that its operative provisions would not be self-executing, which effectively prevents an action from being brought under the ICCPR in U.S. courts until such time as implementing legislation is enacted. 138 CONG. REC. 8068-71 (1992); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) & cmt. h (1987) (explaining the difference between self-executing and non-self-executing treaties); *see, e.g.,* *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2763 (2004) ("Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing."); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003) ("it is clear that the ICCPR is not binding on the federal

Rights Committee found that Tasmania's sodomy law violated the right of privacy embodied in Article 17 of the ICCPR.¹⁴⁶ In that decision, the Human Rights Committee also noted that the references to "sex" in Articles 2 and 26 of the ICCPR, which guarantee equal protection of the law without regard to status, include sexual orientation within their ambit.¹⁴⁷ The Human Rights Committee later reaffirmed this interpretation of Article 26 of the ICCPR in another case brought against Australia.¹⁴⁸ In that case, the Human Rights Committee held that Australia's denial of pension benefits to the surviving same-sex partner of a veteran violated Article 26 where those same benefits would have been provided to the surviving opposite-sex partner of a veteran (whether or not the two had been married).¹⁴⁹

In a case brought against New Zealand, the Human Rights Committee held that the ICCPR does not obligate states that have ratified the treaty to extend the right to marry to same-sex couples.¹⁵⁰ This interpretation was based on the language of Article 23(2) of the ICCPR, which guarantees "[t]he right of men and women of marriageable age to marry."¹⁵¹ The Human Rights Committee noted that, in contrast to other provisions of the ICCPR, Article 23(2) "is the only substantive provision in the [ICCPR] which defines a right using the term 'men and women', rather than 'every human being', 'everyone' and 'all

courts"); *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), *cert. denied*, 514 U.S. 1049 (1995) ("Appellants' contention that their right to vote in the presidential election is secured by Article 25 of the International Covenant on Civil and Political Rights . . . is without merit. Even if Article 25 could be read to imply such a right, Articles 1 through 27 of the Covenant were not self-executing . . . and could not therefore give rise to privately enforceable rights under United States law."); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 86 & n.26 (2004) ("For several human rights treaties [including the ICCPR], the United States has accompanied its ratification with a declaration of non-self-executing character, thereby limiting the role of the domestic courts in treaty enforcement.").

In addition, the United States has not ratified the optional protocol to the ICCPR that would allow the Human Rights Committee to accept individual complaints concerning U.S. compliance with the ICCPR. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, 302 n.1 (entered into force on Mar. 23, 1976); OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *available at* <http://www.unhcr.ch/pdf/report.pdf> (last modified June 9, 2004).

146. *Toonen v. Australia*, U.N. Human Rights Comm., Communication No. 488/1992, Doc. No. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

147. *Id.* at ¶ 8.7.

148. *Young v. Australia*, U.N. Human Rights Comm., Communication No. 941/2000, Doc. No. CCPR/C/78/D/941/2000 (Sept. 18, 2003).

149. *Id.* at ¶ 12.

150. *Joslin v. New Zealand*, U.N. Human Rights Comm., Communication No. 902/1999, Doc. No. CCPR/C/75/D/902/1999 (July 30, 2002).

151. ICCPR, *supra* note 145, art. 23(2), 999 U.N.T.S. at 179.

persons’.”¹⁵² Two members of the committee wrote an opinion concurring in this interpretation of the ICCPR, but concomitantly issued the following warning:

As to the Committee’s unanimous view that it cannot find a violation of article 26, either, in the non-recognition as marriage of the same-sex relationships between the authors, we wish to add a few observations. This conclusion should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee’s jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination.

Contrary to what was asserted by the State party, it is the established view of the Committee that the prohibition against discrimination on grounds of “sex” in article 26 comprises also discrimination based on sexual orientation. And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences. No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria.¹⁵³

2. *A Wider Perspective: Constitutional Rights*

This “very strong international trend towards treating sexual orientation as a suspect classification under . . . human rights treaties”¹⁵⁴ has now begun to affect the decisions of U.S. courts. In *Lawrence v. Texas*, more than twenty years after the ECHR decision in *Dudgeon* and some nine years after the Human Rights Committee’s decision in *Toonen*, the U.S. Supreme Court finally overruled *Bowers v. Hardwick*¹⁵⁵ and struck down Texas’ sodomy law on the ground that it violated the right to liberty guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.¹⁵⁶ Notably, in

152. *Joslin*, *supra* note 150, at ¶ 8.2.

153. *Id.* at app. (citations and footnotes omitted).

154. Robert Wintemute, *The Massachusetts Same-Sex Marriage Case: Could Decisions from Canada, Europe, and South Africa Help the SJC?*, 38 NEW ENG. L. REV. 505, 506 (2004).

155. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

156. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

reaching its decision in *Lawrence*, the Supreme Court specifically referred to the ECHR and its decision in the *Dudgeon* case:

The sweeping references by Chief Justice Burger [in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), *the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.*¹⁵⁷

As Harold Hongju Koh has noted, “[d]espite nearly a half century of coexistence between the United States Supreme Court and the [ECHR], *Lawrence* was the first U.S. Supreme Court majority opinion ever to cite an ECHR judgment in the text of its opinion.”¹⁵⁸ A few pages later, the *Lawrence* Court again referred to international human rights law:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.¹⁵⁹

157. *Id.* at 572–73 (emphasis added) (citation omitted).

158. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 50 (2004); see also Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT'L L. 913, 915 (2004) (in referring to the *Lawrence* case, stating that, “[f]or the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution”).

159. *Lawrence*, 539 U.S. at 576–77 (citations omitted).

In this passage, the Court cited the pages in Mary Robinson's amicus brief that refer to the Human Rights Committee's 1994 decision in *Toonen* (finding that Tasmania's sodomy law violated Article 17 of the ICCPR) and to the action taken by Australia to implement the Committee's decision.¹⁶⁰

Several years before *Lawrence*, the Supreme Court had already eroded the force of *Bowers* when it decided *Romer v. Evans*.¹⁶¹ In *Romer*, the Court struck down an anti-gay amendment to the Colorado Constitution (commonly referred to as "Amendment 2") on the ground that it violated the Equal Protection Clause of the U.S. Constitution.¹⁶² Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians."¹⁶³ The Court found that Colorado had "classified homosexuals . . . to make them unequal to everyone else," essentially rendering gays and lesbians "stranger[s] to its laws."¹⁶⁴ The Court held that Amendment 2 could not even withstand the lenient rational basis test:

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.¹⁶⁵

3. A Wider Perspective: The States and Same-Sex Marriage

In the wake of *Romer* and *Lawrence*, many opponents of same-sex marriage now fear (and many proponents of same-sex marriage now hope) that one of the Court's next steps in the gay rights area will be to strike down prohibitions against same-sex marriage on constitutional grounds.¹⁶⁶ Over the past decade, there has been movement among the several states toward recognizing the fact that same-sex couples in the United States are not afforded the same possibility of recognition through marriage as are heterosexual couples. This movement has primarily taken place in state courts¹⁶⁷ and has

160. See Koh, *supra* note 158, at 50 & n.49; Neuman, *supra* note 145, at 89–90 & nn.40–41.

161. *Romer v. Evans*, 517 U.S. 620 (1996).

162. *Id.* at 623.

163. *Id.* at 624.

164. *Id.* at 635.

165. *Id.* at 632.

166. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting); Richard Lessner, *Judicial Tyranny*, WASH. TIMES, Aug. 10, 2003, at B4; William Safire, *The Bedroom Door*, N.Y. TIMES, June 30, 2003, at A21; Cheryl Wetzstein, *Gay "Marriages" Ahead: Debate Stirs in the States*, WASH. TIMES, July 13, 2003, at A1.

167. Exceptions include California and New Jersey, which have both enacted domestic partnership registries. Beginning January 1, 2005, the rights and benefits of marriage are being

resulted in a patchwork of different types (and levels) of recognition for same-sex couples.¹⁶⁸

The movement began in 1993 with the Hawaii Supreme Court's decision in *Baehr v. Lewin*.¹⁶⁹ In that case, a plurality of the court found that Hawaii's marriage laws discriminated on the basis of sex by limiting the issuance of marriage licenses to opposite-sex couples.¹⁷⁰ The court held this discrimination to be a presumptive violation of the Equal Protection Clause of the Hawaii Constitution—a presumption that the state could rebut only by showing that (i) the sex-based classification in the statute was justified by a compelling state interest, and (ii) “the statute is narrowly drawn to avoid unnecessary abridgments of . . . constitutional rights.”¹⁷¹ After a hearing on remand, the trial court found that the state could not meet this heavy burden and, therefore, held that Hawaii's marriage laws violated the Equal Protection Clause of the Hawaii Constitution.¹⁷²

While an appeal was pending before the Hawaii Supreme Court, the state constitution was amended in 1998 to empower the state legislature to limit marriage to opposite-sex couples.¹⁷³ In December 1999, the Hawaii Supreme Court took judicial notice of this constitutional amendment, and held that the amendment validated Hawaii's marriage laws “by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples.”¹⁷⁴ It is worth noting that even though

extended to California domestic partners. CAL. FAM. CODE § 297.5 (West Supp. 2004). It is worth noting that the New Jersey Domestic Partnership Act, 2003 N.J. Laws 246, N.J. STAT. ANN. § 26:8A-1 (2004), which does not provide the full panoply of rights and benefits accorded to married couples, see Editorial, *Still Not First Class Citizens*, STAR-LEDGER (Newark, N.J.), July 8, 2004, at 18, was enacted while a court challenge to the New Jersey marriage laws was pending. See Plaintiffs-Appellants' Brief at 3–4, 45 n.10, *Lewis v. Harris*, No. A-2244-3T5 (N.J. Super. Ct. App. Div. May 6, 2004), http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/281.pdf (last visited July 28, 2004). The New Jersey Domestic Partnership Act went into effect on July 10, 2004. Peggy O'Crowley, *Gay Pairs Set to Party as Domestic Partners*, STAR-LEDGER (Newark, N.J.), July 9, 2004, at 17; Katie Wang, *United They Stand, Under New Law: Up to 700 Same-Sex Jersey Couples Register as Domestic Partners on Act's First Day*, STAR-LEDGER (Newark, N.J.), July 11, 2004, at 23.

168. For a description of the difficult planning issues that arise as a result of this patchwork, see Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, A.B.A. J., July 2004, at 46, 46–51.

169. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

170. *Id.* at 64–67.

171. *Id.* at 67.

172. *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235, at * 22 (Haw. Cir. Ct. Dec. 3, 1996).

173. HAW. CONST. art. I, § 23.

174. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999).

same-sex marriages were never legalized in Hawaii, the state legislature did pass a law allowing any two persons legally prohibited from marrying (including, but not limited to, same-sex couples) to register as "reciprocal beneficiaries," a status that allows the pair to obtain a limited number of rights and benefits accorded to married couples under Hawaii law.¹⁷⁵

Similarly, in 1998 an Alaska trial court held that "marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right."¹⁷⁶ In the court's view, limiting the issuance of marriage licenses to opposite-sex couples thus raised the specter of a violation of both the right to privacy and the right to equal protection of the law found in the Alaska Constitution.¹⁷⁷ Accordingly, the trial court held that the state would be required to show a compelling interest justifying the abridgment of these constitutionally protected rights.¹⁷⁸ However, before a hearing could be held to determine whether the state could make this showing, the Alaska Constitution was amended to limit marriage to opposite-sex couples.¹⁷⁹

In 1999, the Vermont Supreme Court held that the exclusion of same-sex couples from the rights and benefits attendant to marriage violated the Common Benefits Clause of the Vermont Constitution.¹⁸⁰ This clause provides "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."¹⁸¹ Because the court held only that "plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples," it left open to the state legislature the choice of affording same-sex couples either the right to marry or some other recognition of their relationships that would offer them the benefits and protections afforded to married couples.¹⁸² In the end, the Vermont legislature

175. 1997 Haw. Sess. Laws 383. Like the amendment to the Hawaii Constitution, this law was passed while the *Baehr* case was pending and was an effort to "derail[]" that case. Susan Essoyan, *Hawaii's Domestic-Partner Law a Bust; Ambiguity Blamed*, L.A. TIMES, Dec. 23, 1997, at A5; see also Bettina Boxall, *A New Era Set to Begin in Benefits for Gay Couples*, L.A. TIMES, July 7, 1997, at A3.

176. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Feb. 27, 1998).

177. *Id.* at *3-*6.

178. *Id.* at *6.

179. ALASKA CONST. art. I, §§ 25.05.011-013.

180. *Baker v. State*, 744 A.2d 864, 877-86 (Vt. 1999).

181. VT. CONST. ch. I, art. 7.

182. *Baker*, 744 A.2d at 886-87.

chose to enact a civil union law that affords same-sex couples all of the benefits and protections associated with marriage.¹⁸³

In 2003, the Massachusetts Supreme Judicial Court held that excluding same-sex couples from access to civil marriage violates both the due process and equal protection guarantees in the Massachusetts Constitution.¹⁸⁴ To remedy this violation, the court reformulated “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresse[d] the plaintiffs’ constitutional injury and further[ed] the aim of marriage to promote stable, exclusive relationships.”¹⁸⁵ The court then stayed its judgment for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of [the court’s] opinion.”¹⁸⁶

During this 180-day period, the Massachusetts Senate submitted a question to the Massachusetts Supreme Judicial Court, asking it whether the enactment of a law prohibiting same-sex couples from marrying but allowing them to form civil unions would satisfy the constitutional concerns raised by the court in its opinion.¹⁸⁷ The court answered that it would not:

The same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, Senate No. 2175. Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or “preserve” what we stated in *Goodridge* were the Commonwealth’s legitimate interests in procreation, child rearing, and the conservation of resources. Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in *Goodridge*, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.¹⁸⁸

On May 17, 2004, the first same-sex couples were legally married in Massachusetts.¹⁸⁹

More recently, two Superior Court judges in the State of Washington have ruled that excluding same-sex couples from access to civil marriage violates the Washington Constitution. The first of these two cases was decided in August 2004 by a judge in King County, which embraces the City of Seattle.

183. VT. STAT. ANN. tit. 15, § 1204 (2004).

184. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 960–68 (Mass. 2003).

185. *Id.* at 969.

186. *Id.* at 970.

187. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004).

188. *Id.* at 569 (citation omitted).

189. Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts: Advocates Hail a Triumph for Civil Rights*, N.Y. TIMES, May 18, 2004, at A1.

In that decision, it was held that the Washington Defense of Marriage Act¹⁹⁰ violates both the Privileges and Immunities and Due Process Clauses of the Washington Constitution.¹⁹¹ The second case was decided a month later by a judge in Thurston County, which embraces the City of Olympia. In that decision, it was likewise held that the Washington Defense of Marriage Act violates the Privileges and Immunities Clause of the Washington Constitution;¹⁹² however, the judge in that case went further and held that "homosexuals in the context of state action, in authorizing civil contracts between adult citizens, constitutes [sic] a suspect class under the state constitution calling for a higher level of scrutiny than merely finding a rational basis to justify the action."¹⁹³ Neither of these cases has yet resulted in the issuance of marriage licenses to same-sex couples, because "both cases will be merged and likely heard before the state Supreme Court."¹⁹⁴

4. The Unbounded Text

As Jacques Derrida has stated, "*il n'y a pas de hors-texte*."¹⁹⁵ This statement, which has been translated as "[t]here is nothing outside of the text,"¹⁹⁶ means that relevant interpretational context is boundless.¹⁹⁷ In pondering Mueller's story, it is toward this boundlessness that we have naturally been led. By recognizing and tracing the outlines of the force behind the words of the Seventh Circuit, we have been able to leave behind a bounded, myopic view of the text of Mueller's civil tax cases and to move instead toward an unbounded view that infuses the Seventh Circuit's words with new meaning.

The Seventh Circuit warned Mueller that "if he continues to file *frivolous* tax appeals, he faces the possibility of sanctions."¹⁹⁸ These "frivolous"

190. See *supra* note 99.

191. Andersen v. King County, No. 04-2-04964-4 SEA, slip op. at 22 (Wash. Super. Ct. Aug. 4, 2004), available at http://seattletimes.nwsources.com/news/local/gaymarriage/downing_opinion.pdf (last visited Nov. 17, 2004).

192. Castle v. Washington, No. 04-2-00614-4, slip op. at 36-37 (Wash. Super. Ct. Sept. 7, 2004), available at <http://www.co.thurston.wa.us/superior> (click on "Recent Opinions") (last visited Nov. 17, 2004).

193. *Id.* slip op. at 25-26.

194. Lornet Turnbull, *Gays Are Protected Class, State Judge Says*, SEATTLE TIMES, Sept. 8, 2004, at A1.

195. JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., 1997).

196. *Id.* Literally, this statement is translated as "there is no outside-text." *Id.*

197. See Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1, 17 (1994).

198. Mueller v. Comm'r, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,505, at 85,112 (7th Cir. 2002) (emphasis added).

arguments challenged the sexual orientation discrimination that had been tacitly present in the Code for decades until Congress made its discriminatory intent explicit in 1996 by enacting DOMA.¹⁹⁹ But how frivolous do these arguments really seem when we consider them against the background of the expanded horizon sketched above?

Both the ECHR and the Human Rights Committee have strong records of acknowledging and rectifying sexual orientation discrimination as a human rights matter.²⁰⁰ Importantly, a number of these decisions directly address the issue of according legal recognition to same-sex couples.²⁰¹ In *Romer* and *Lawrence*, the U.S. Supreme Court also acknowledged and rectified sexual orientation discrimination as a constitutional matter.²⁰² In *Lawrence*, the Court even referred, explicitly or implicitly, to decisions of the ECHR and the Human Rights Committee in reaching its own decision.²⁰³ In the wake of *Lawrence*, many opponents of same-sex marriage now fear (and many proponents of same-sex marriage now hope) that one of the Court's next steps in the gay rights area will be to strike down prohibitions against same-sex marriage.²⁰⁴ These fears (and hopes) are stoked by the growing recognition that excluding same-sex couples from the benefits and protections associated with marriage is unjustified and unjustifiable.²⁰⁵ Court decisions in Hawaii,

199. Petition for Writ of Certiorari at *7, *Mueller v. Comm'r*, 2001 WL 32135138 (No. 02-513) ("Congress felt bold enough to codify discrimination against homosexuals in 1996 with the Defense of Marriage Act. The discrimination has been present for many years, but it has seldom been so openly demonstrated as in 1996."); Petition for Writ of Certiorari at *6, *Mueller v. Comm'r*, 2001 WL 34115848 (No. 01-44) (same); see also *Infanti*, *supra* note 4, at 780-83 (describing this move from latent to patent hostility).

200. See *supra* Part III.B.1.

201. *E.g.*, *Karner v. Austria*, 38 Eur. H.R. Rep. 24 (2003) (affording benefits of rent law to surviving member of a same-sex couple); *Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18 (2002) (affording recognition to the reassigned sex of a transsexual); *Young v. Australia*, U.N. Human Rights Comm., Communication No. 941/2000, Doc. No. CCPR/C/78/D/941/2000 ¶ 10.4 (Sept. 18, 2003) (affording pension benefits to surviving member of a same-sex couple); *Joslin v. New Zealand*, U.N. Human Rights Comm., Communication No. 902/1999, Doc. No. CCPR/C/75/D/902/1999 ¶ 8.3, app. (July 30, 2002) (holding that the ICCPR does not require a state party to extend the right to marry to same-sex couples, but stating, in a concurring opinion, that this holding does not mean that differential treatment of same-sex couples cannot constitute a violation of the ICCPR).

202. See *supra* Part III.B.2.

203. See *supra* Part III.B.2.

204. See *supra* note 166.

205. Polls show that a majority of Americans "support equal access to the specific obligations, responsibilities and recognitions of marriage." NAT'L GAY AND LESBIAN TASK FORCE, *Recent National Polls on Same-Sex Marriage and Civil Unions* 1 (2004), http://www.thetaskforce.org/marriage_center/RecentNationalMarch2004.pdf (last visited Sept. 18, 2004).

Alaska, Vermont, Massachusetts, and Washington have all found that prohibitions against same-sex marriage violate their state constitutions.²⁰⁶ To rectify this discrimination, Hawaii permits same-sex couples to register as reciprocal beneficiaries, Vermont allows same-sex couples to enter into civil unions, and Massachusetts permits same-sex couples to marry.²⁰⁷ In addition, the California and New Jersey legislatures have each enacted statutes allowing same-sex couples to register as domestic partners.²⁰⁸

These decisions and developments, many of which occurred *before* the Seventh Circuit issued either of its opinions in Mueller's civil tax cases, undermine the Seventh Circuit's bald assertion that Mueller's arguments were "frivolous." With courts at the international, national, and state levels recognizing and rectifying instances of what can only be described as pervasive sexual orientation discrimination, how can it be meritless to ask a court to recognize and rectify the sexual orientation discrimination that exists in the federal tax laws? Obviously, like the court in *Bowers*, the judges on the Seventh Circuit (and, for that matter, in the Tax Court) chose to turn a blind eye to the world around them. To paraphrase the Supreme Court in *Lawrence*, these numerous decisions and developments in gay rights over more than two decades are at odds with the Seventh Circuit's premise that the claims put forward by Mueller were insubstantial.²⁰⁹

Once we abandon the court's bounded, myopic view of Mueller's tax cases in favor of a more realistic, unbounded view that allows us to see Mueller and his arguments in a broader context, it becomes clear that the Seventh Circuit's assertion about the meritoriousness of Mueller's arguments was itself without merit. Suddenly, this serious threat seems rather silly and groundless. In other words, it appears that it was the Seventh Circuit (and *not* Mueller) who was making frivolous arguments in this case (arguments that were *frivolous* in *all* senses of the word). Even if the Seventh Circuit's assertion were somehow considered plausible when made in June 2002, that plausibility has been severely eroded (if not completely washed away) by the additional judicial developments that have occurred since that time.

C. Facing a Choice

Having recognized the vapidness of the Seventh Circuit's epithet/threat, where does that leave us? Has this deconstructionist meditation merely killed some time with interesting word play at the expense of some judges in Illinois? Or is there a larger meaning to what we are contemplating here that is

206. See *supra* Part III.B.3.

207. See *supra* Part III.B.3.

208. See *supra* note 167.

209. See *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003).

somehow redolent of the themes of openness and freedom suggested by the title of this symposium?²¹⁰

Between May 17, 2004, and the end of the calendar year, hundreds of same-sex couples will have been married in Massachusetts. Although these marriages will be legally recognized for Massachusetts state law purposes, DOMA prevents them from being recognized at the federal level.²¹¹ Most of the same-sex couples who get married in Massachusetts will probably not

210. As Vivian Curran and J. M. Balkin have both explained, the application of deconstructive techniques to a text is not a random occurrence. Curran states that

Derrida has made clear that deconstruction is applied in response to textual components: “[Deconstruction is an] incision, precisely [because] it can be made only according to lines of force and forces of rupture that are localizable in the discourse to be deconstructed.” Moreover, in his keynote speech at the 1990 “Deconstruction and the Possibility of Justice” colloquium at Cardozo Law School, Derrida again made clear that the deconstructionist exploration of meaning through hierarchy reversal is not imposed randomly, but, rather, on those word combinations whose juxtapositions draw the attention of the deconstructionist to the likelihood of rich interpretive possibilities.

Curran, *supra* note 197, at 21 (quoting JACQUES DERRIDA, POSITIONS 37, 41 (Alan Bass trans., 1981)) (citations omitted). Balkin agrees that “[w]e deconstruct a particular text because we think that the text has a particular form of richness that speaks to us, either for good or for ill,” and, in considering why one deconstructs Plato or Saussure but not a laundry list or the back of a cereal box, he further asserts that “in each case, one deconstructs because one has a particular ax to grind, whether it be a philosophical, ideological, moral, or political ax.” Balkin, *Tradition, supra* note 112, at 1626–27; *see also* J. M. Balkin, *Being Just with Deconstruction*, 3 SOC. & LEGAL STUD. 393, 399 (1994) (“So the target of deconstruction, and the way that the particular deconstructive argument is wielded, may vary with the moral and political commitments of the deconstructor.”); J. M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1138 (1994) (“I shall argue that Derrida’s encounter with justice really shows that deconstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political commitments of the deconstructor.”); J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 124–27 & n. 34 (1993) (“One could engage in deconstruction of a legal text without the desire to offer a normative alternative, or without a belief that the difficulties one found in the text were due to failures of substantive rationality However, the deconstruction practiced by legal critics is almost always rational deconstruction, because it seeks to criticize law on the basis of some proposed normative alternative.” (citation omitted)). Derrida has spoken to this issue as well: “*Taking a position in philosophy*: nothing ‘shocks’ me less, of course. Why engage in a work of deconstruction, rather than leave things the way they are, etc.? Nothing here, without a ‘show of force’ somewhere. Deconstruction, I have insisted is not *neutral*. It *intervenes*.” *Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta*, in JACQUES DERRIDA, POSITIONS 37, 93 (Alan Bass trans., 1981); *see also* DERRIDA, OF GRAMMATOLOGY, *supra* note 195, at 161–64 (explaining his “exorbitant” choice of certain of Rousseau’s texts for deconstruction).

211. Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (1996)). DOMA also permits other states to refuse to recognize these marriages. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419, 2419 (codified at 28 U.S.C. § 1738C (1996)).

encounter the practicalities of this difference in treatment until some time between January 1 and April 15, 2005, when they sit down to complete a U.S. federal income tax return.²¹² As the first epigraph to this essay indicates, the IRS has recently reaffirmed its adherence to the holding in Mueller's civil tax cases, stating that "[a] taxpayer in [a same-sex marriage] may not claim the status of a married person on the federal income tax return."²¹³

Thus, each of these married same-sex couples will be faced with an unavoidable choice. On the one hand, they can choose to be intimidated by a show of reactionary force, to file separate returns on which they check the "single" box, to follow the "law" as interpreted by the Seventh Circuit and the IRS, and, ultimately, to remain locked in the darkness of the tax closet. On the other hand, they can choose to dismiss the empty threats, to follow Mueller's example by filing joint returns, to risk the negative repercussions that may follow, and, ultimately, to attempt to kick the tax closet door wide open and finally let in the light. Squarely pointed in the direction of the next front in the battle for gay rights, these couples can either retreat into darkness or stand and fight in the light—the choice will soon be theirs.

212. Because Massachusetts has resisted allowing nonresidents to marry, it is unlikely that the question of interstate recognition of a Massachusetts same-sex marriage under DOMA and the Full Faith and Credit Clause will arise in more than a handful of cases in the near future. Jessica Bennett, *P-Town Follows Order, for Now*, BOSTON GLOBE, May 27, 2004, at B2; Michel H. Hodges, *Gay Wedding Bells Ring—In Canada*, DETROIT NEWS, June 2, 2004, at 1D. A number of out-of-state couples have, however, filed lawsuits challenging the validity of the law upon which the state's resistance is based. Pam Belluck, *Eight Diverse Gay Couples Join to Fight Massachusetts*, N.Y. TIMES, June 18, 2004, at A22; Elizabeth Mehren, *Couples, Officials Target Marriage Law*, L.A. TIMES, June 18, 2004, at A18.

213. See *supra* note 1 and accompanying text.