

# THE INTERNAL REVENUE CODE AS SODOMY STATUTE

*Anthony C. Infanti*<sup>1</sup>

“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”

– Justice Kennedy’s majority opinion in *Lawrence v. Texas*<sup>2</sup>

## I. INTRODUCTION

I recently had occasion to read an issue of the *North Carolina Law Review* containing a symposium on critical tax theory.<sup>3</sup> This symposium consisted of an article by Lawrence Zelenak critiquing a number of applications of critical tax theory in recent scholarship (and praising a few others),<sup>4</sup> followed by responses from those who had been criticized and reactions from a number of other tax scholars. Most of the contributors, including Zelenak, primarily focused their attention on critical tax scholarship exploring issues relating to race and gender. Nevertheless, one of the contributors, Steve Johnson, did focus a significant amount of attention on scholarship exploring issues relating to sexual orientation.

Indeed, Johnson devoted nearly one-half of his article to evaluating what he referred to as “critical sexual-orientation studies.”<sup>5</sup> Johnson began his contribution by setting forth what he views as the four elements of any “fully persuasive” claim that the Internal Revenue Code (the “Code”) discriminates against a particular group:

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1. Assistant Professor of Law, University of Pittsburgh School of Law. I would like to thank the University of Pittsburgh School of Law for providing financial support for the writing of this essay. I would like to thank Vivian Curran, Richard Delgado, Michael H. Imbucuán, Jean Stefancic, and Lu-in Wang for their helpful comments on previous drafts of this essay. I would also like to thank Hien Ma for his support while I was writing this essay.

2. 123 S. Ct. 2472, 2484 (2003).

3. Symposium, *Critical Tax Theory: Criticism and Response*, 76 N.C. L. REV. 1519 (1998).

4. Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521 (1998).

5. Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. REV. 1771, 1772-79 (1998).

- (1) There is some particular Code feature that operates to the substantial disadvantage of some group. Typically, this would involve showing that as a result of the Code feature, group members pay proportionately more tax than non-members.
- (2) The offending Code feature is not compensated for by other aspects of the Code that disproportionately benefit the group in question. That is, there must be an on-balance or on-net evaluation, a showing that unfavorable Code aspects hurt group members more than the favorable Code aspects help them.
- (3) The appropriate way to redress the problem would be changing the Code, rather than changing non-tax rules or practices.
- (4) A reasonable solution exists. That is, a way exists to reform the offending Code section, and that way is technically feasible, efficacious, and unlikely to create other serious problems.<sup>6</sup>

Johnson then measured “two significant articles”<sup>7</sup> in the critical sexual orientation literature against this standard. In Johnson’s eyes, both of the articles came up short for the same reason: they had failed adequately to address the standard’s first and second elements; namely, whether, on balance, same-sex couples pay more tax than married couples do.

Johnson concluded his discussion of critical sexual orientation studies with the following sentence: “For these reasons, I believe that scholars and advocates have not yet convincingly demonstrated that, on net, the failure to recognize same-sex couples as married hurts them by imposing substantially higher federal income tax liabilities on them.”<sup>8</sup> Not having carried the burden of persuasion placed on them,<sup>9</sup> these scholars and advocates apparently did not convince Johnson that the Code in fact discriminates against gays and lesbians.

My immediate reaction to Johnson’s article can be summarized in one word: astonishment. As a gay man, I was puzzled at how equal treatment could be boiled down to a simple cost-benefit analysis. How could Johnson have ignored the ways in which the Code stigmatizes gays and lesbians and attempts to force them into the closet? Can any net tax benefit really make up for the patently unequal and discriminatory treatment visited by the federal government upon gays and lesbians through the medium of the

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6. *Id.* at 1771-72 (footnote omitted).

7. *Id.* at 1773. The two articles are Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97 (1991) [hereinafter Cain, *Same-Sex Couples*], and Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359 (1995).

8. Johnson, *supra* note 5, at 1779.

9. *Id.*

Code? Put another way, can my recognition as a full-member of society be bought<sup>10</sup> at such a cheap price as exempting me from the marriage penalty and the various attribution and loss disallowance rules that apply to married couples?<sup>11</sup>

I eventually set my astonishment aside and moved on with other work. But then, not more than a day or so later, I happened upon Patricia Cain's *Feminist Legal Scholarship*.<sup>12</sup> In that article, Cain speaks about "gendered misunderstanding," which she describes in the following terms:

Gendered misunderstanding occurs because men and women have different life experiences. Thus, they sometimes fail to understand conclusions drawn by the opposite sex that are based on those different life experiences. The potential for misunderstanding is greater in the case of conclusions based on women's experience because much of women's experience has been buried from male view. Part of the feminist project is to uncover these buried experiences.<sup>13</sup>

At any other time, the notion of gendered misunderstanding would simply have rung true to me; however, given my recent experience with Johnson's article, it more than rang true – it resonated. I realized that, because of our different life experiences, Johnson and I had essentially been communicating past (rather than with) each other.

To paraphrase Cain, what had occurred was "hetero-homo misunderstanding" – our different life experiences (mine as a gay man and Johnson's as a man who does not

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10. If you can even call it a "sale." No one ever asked me if I was willing to surrender my rights in exchange for compensation.

11. This footnote is designed to explain this sentence a bit further for non-tax readers. Among the potential tax disadvantages of marriage, Johnson points out that "[d]epending on [their] income levels, . . . the spouses [may] pay more in income tax than they would have had they stayed single." Johnson, *supra* note 5, at 1778. As explained further by a leading treatise, "because 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." 4 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 111.3.2, at S111-43 (3rd ed. Supp. 2002). Johnson also points out that "several Code sections bar favorable tax results if related parties – including spouses – are involved in a transaction." *Id.* at 1777. For example, § 267 disallows losses incurred in transactions between related parties (including spouses), and § 318 attributes 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 Internal Revenue Service with respect to a foreign corporation. I.R.C. § 267(a), -(b)(1), -(c)(4) (2003); I.R.C. § 318(a)(1)(A)(i), -(b) (2003) (cross-referencing §§ 302, 958(b), and 6038(e)(2)).

12. Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19 (1991) [hereinafter Cain, *Feminist Scholarship*].

13. *Id.* at 33.

identify as gay<sup>14</sup>) were producing in us different perspectives on the taxation of same-sex couples. Johnson was articulating a view based on the “traditional” tax narrative, which is a product of the group (i.e., white heterosexual males) that has always dominated the creation and application of the Code. In the traditional narrative, the Code is facially neutral and progressive;<sup>15</sup> it seems to benefit and burden all groups and, on the whole, to be tilted in favor of the less fortunate because it demands less of them. Seeing the Code through the lens of this narrative, members of the traditionally dominant group find it difficult to understand why minorities, women, or gays and lesbians would choose to make the Code a target for accusations of discrimination.

I perceive the Code somewhat differently from those who accept the traditional tax narrative as a form of received truth. My own view of the Code and its treatment of same-sex couples is necessarily colored by my experience of life as a gay man. The sum of this experience, which constitutes a narrative in its own right, casts a far less favorable light on the Code. For me, the Code is not neutral; rather, it appears to be just another manifestation of the fluid mixture of hostility, bewilderment, and discomfort that generally characterize society’s reaction to homosexuality. From my perspective, I can’t help but see the Code as another weapon for discrimination and oppression in society’s already well stocked arsenal.

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14. In the *The AALS Directory of Law Teachers*, Johnson is not listed among those who identify as gay, lesbian, or bisexual. ASS’N AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 2002-2003, at 1425-27 (2002) [hereinafter AALS DIRECTORY].

15. See, e.g., James D. Bryce, *A Critical Evaluation of the Tax Crits*, 76 N.C. L. REV. 1687, 1687 (1998) (expressing incredulity at the attacks by women and African-Americans on the income tax, which “[t]hroughout its history in the United States, . . . has been an instrument for redistributing income”); Charles O. Galvin, *Taking Critical Tax Theory Seriously – A Comment*, 76 N.C. L. REV. 1749, 1749 (1998) (“A tax system should be neutral in its effect on each citizen’s decisionmaking. Therefore, assuming a democratic ideal of a free society with equal opportunity for all, the framers of tax policy should strive for a system that is blind as to gender and color. I agree with Professor Zelenak that any attempt to tailor the system to meet the criticisms of feminists or racial groups rapidly becomes a nightmare of dilemmas that are just not resolvable. . . . A better course is to achieve neutrality by the attainment as nearly as possible of a pure Haig-Simons comprehensive model or a pure consumed income model.”); Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1762 (1998) (“If racial subordination is really so pervasive that it exists even when legislators are drafting facially neutral tax statutes, with the best of intentions, what in the world are people of good will to do? Indeed, can there be any people of good will?”); Johnson, *supra* note 5, at 1780-81 (“If this part of critical race theory has merit, then every important American institution should reflect racial subordination, even such a seemingly neutral institution as the American tax system. . . . In so marbled a system, to say that one set of Code rules (those related to home ownership) has disparate class-based effect is not a powerful statement, especially since the federal income tax is, on net, progressive.”); Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1834 (1998) (“As I noted at the outset, I first read Moran and Whitford’s article skeptically. The federal income tax is certainly facially race-neutral. And the tax is progressive, which must greatly favor African-Americans in light of their significantly lower average incomes. I continue to believe that those things are true, and that the progressivity of the tax system is a far more important characteristic from an African-American viewpoint than are any of the characteristics Moran and Whitford consider in their article.”).

Like women's experiences, my experiences and those of other gays and lesbians have long been buried from view. Even with the significant progress made by the gay rights movement during the past several decades, frank discussion of how gays and lesbians experience life is generally not welcome outside of the circle of those with shared experiences.<sup>16</sup> It is no wonder then that, having been suppressed by society, these gay narratives have never been woven into the traditional tax narrative, with the quite natural result that society remains insensitive to the impact of the Code on gays and lesbians. Inspired by Cain and others,<sup>17</sup> I have decided to make an attempt at bridging the gap between gay and straight understanding of the Code by relating a portion of my gay narrative and showing how it colors my view of the taxation of same-sex couples. By explaining the experiences behind my perceptions, I hope that I will be able to help my overwhelmingly heterosexual colleagues<sup>18</sup> to understand just how demeaning and oppressive the Code can seem to gays and lesbians – regardless of any net financial benefit that same-sex couples may receive, or any net financial detriment that they may suffer, under the Code.<sup>19</sup>

The remainder of this essay is divided into three parts. In Part II, through a series of vignettes,<sup>20</sup> I share my personal experience with the fluid mixture of hostility, bewilderment, and discomfort that our overwhelmingly straight society directs at gays

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16. See, e.g., Eric Dyer, *Gay Documentary Gets Audience; The Documentary on Gay Issues in Schools Was Kept off Public Television*, NEWS & RECORD (Greensboro, NC), Feb. 11, 2000, at D1; Stephen Karam, *Generation Quiet*, ADVOCATE, Oct. 14, 2003, at 12; Cristina Smith, *Lawyer Life After "Lawrence,"* TEX. LAW., July 28, 2003, at 24, available at [www.law.com](http://www.law.com) (last visited Aug. 14, 2003); Rick Telander, *It's Not Safe to Be Out; Magazine Editor Says He's Having Affair with Player*, CHI. SUN-TIMES, May 20, 2001, at 146; Jose Antonio Vargas, *HIV-Positive Without a Clue; Black Men's Hidden Sex Lives Imperiling Female Partners*, WASH. POST, Aug. 4, 2003, at B1.

17. See Cain, *Feminist Legal Scholarship*, *supra* note 12, at 38 (near the end of her article, Cain proposed that feminist legal scholars explain women's experiences to those who are "stranger[s] to those experiences"); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (on the general value of stories told by outgroups); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994) (on the particular value of stories told by gays and lesbians).

18. Of the 627 individuals listed under the heading "Taxation, Federal" in the 2002-2003 edition of *The AALS Directory of Law Teachers*, only eleven (or 1.75%) self-identified as gay, lesbian, or bisexual. AALS DIRECTORY, *supra* note 14, at 1356-61, 1425-27.

19. Patricia Cain has also attempted to combat "the notion that discrimination in tax law should be viewed merely as a comparison of direct economic benefits and burdens." Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 466-67 (2000) [hereinafter Cain, *Heterosexual Privilege*].

20. Carolyn Jones has attempted to open tax scholars up to the use of narrative by mapping tax narratives that already exist around us. Carolyn C. Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653 (1998). There are now examples of both ingroup and outgroup narratives in tax. Examples of ingroup narrative include the recently published TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES (Paul L. Caron ed., 2003), and George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553 (1980). An example of outgroup narrative is Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 683-89, 696-700 (2000) [hereinafter, Cain, *Death Taxes*].

and lesbians. In Part III, I turn to more traditional legal analysis and discuss the ways in which the Code can be viewed as just another manifestation of straight society's reaction to homosexuality. Part IV consists of concluding remarks.

## II. THE NARRATIVE

Coming out was a rather slow and somewhat painful process for me – in spite of (or maybe because of) my always having had a clear sense of my sexual orientation. I've known for as long as I can remember that I'm gay. To some, this statement probably sounds trite; to others, it may be fodder for the debate over the immutability of sexual orientation. The point of this narrative is not, however, to please or to provide proof – it is to share my own experience of knowing, from an early age, that I am not part of the heterosexual majority.

In retrospect, even some of my early childhood memories bespoke the existence of this difference. At recess in the early years of elementary school, the kids in my class usually broke off into gendered groups; in other words, the boys played with the boys, and the girls with the girls. I proved the exception to this rule, spending every recess playing hopscotch and other games with the girls. Even at such a young age, one of my classmates recognized both the norm and my variation from it. She tried a number of times to persuade me that I should be playing with the boys instead of the girls, going so far as to bring me over and introduce me to some of the boys in an attempt to get me to start playing with them. But her efforts were to no avail. I never ended up playing with the boys, and the girls ended up accepting me as I was. At the end of that year, one of the girls held a birthday party to which she invited all of the other girls in the class – and me.

Nevertheless, the potential for continued acceptance of my difference quickly faded away. I vividly recall the torture visited upon one of my classmates nearer the end of elementary school (which was sixth grade where I grew up), simply because his father had gone away on a business trip to San Francisco. This may not seem like an event that would warrant, or could even give rise to, torture; yet, he was relentlessly taunted by the other boys over a period of several days. They kept calling his father a faggot, and saying that he had gone to San Francisco to be with the other fags (why else would he have gone there?). They teased him that this wasn't a business trip at all, just an opportunity for his father to go visit his boyfriend. All of the accusations and insinuations clearly hurt and upset the son. He quickly went on the defensive, asserting that his father wasn't a fag at all – he was just there for work.

Plainly, these elementary school boys had already learned from people around them that calling someone a faggot is an insult, and had further ascertained that, in the hierarchy of insults, questioning a man's heterosexuality is one of the more potent forms of attack. Somehow, they had also learned that San Francisco is the gay capital of the United States, which was the crucial piece of knowledge that had furnished the connection between the ostensibly innocuous business trip and the sustained, malicious taunting.

What amazes me most about this incident is that these boys had absorbed several important pieces of information about sexual orientation years before they would understand what sex is or what it involves. At the time of the incident, they probably didn't understand what being gay means or what gay sex represents. In any case, the finer points of homosexuality were irrelevant, because all they really needed to know for their attack to be successful was that being a fag is bad and that all fags live in San Francisco. Society had obviously armed them with these weapons at an early age.<sup>21</sup>

When I was growing up, these events formed part of an atmosphere of rejection and hostility towards homosexuality. They were accompanied by an endless parade of fag jokes, derogatory remarks, and whispers about someone's sexual orientation (because such a discussion was *not* a topic for polite conversation). And the Catholic church (to which my family belonged) seemed to be the grand marshal of this parade with its focus on the traditional family and loud condemnation of homosexuality. My fifth-grade catechism teacher epitomized this pious self-righteousness. She was a frustrated, would-be nun who liked to regale us with stories of how she prayed the rosary while driving (and you thought cell phones were a hazard), and who seemed to derive great enjoyment from telling us that we would burn in hell for the least infraction of religious law. So the clear message from all quarters was that being gay is abnormal, wrong, and a ticket straight to hell.

Faced with this level of disapprobation, I found the closet to be a necessity once I realized that this scorn was appropriately directed at me. I began to deny my sexual orientation to myself and to others – in the idle hope that I could simply wish being gay away and not have to spend eternity in blazes.

Interestingly, denial became both a means of defending myself from attack and a proxy for those attacks. Through denial, I was able to try to fend off attacks from others, but at the same time began to attack myself – questioning what was wrong with me, why I was different, why I couldn't change and be normal like everyone else. By high school, society had so successfully ingrained in me its hostility toward gays and lesbians that, even when defending myself from its attacks, I was still being attacked. I had simply traded one oppressor (society at large) for another (myself). To cope with the anguish created by this self-loathing, I redirected my energy and attention toward studying.

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21. Straight people can't help but be aware of the hostility that is directed at gays and lesbians – highly-publicized examples that leap to mind are the murder of Matthew Shepard (a hate crime), Colorado's Amendment 2 (prohibiting the enactment of laws that protect gays and lesbians from discrimination), and Fred Phelps (famous for traveling the country to picket the funerals of people with AIDS, carrying signs bearing such aphorisms as "Fags Burn in Hell" and "Gays Deserve to Die"). See, e.g., James Brooke, *Gay Man Beaten and Left for Dead; 2 Are Charged*, N.Y. TIMES, Oct. 10, 1998, at A9; James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1; Chris Bull, *Us vs. Them: Fred Phelps*, ADVOCATE, Nov. 2, 1993, at \_\_\_; Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996, at A1. Nonetheless, I don't think that many straight people realize how deeply ingrained this hostility is in society and how early on children begin to mimic it.

School work helped to lessen the constant pain and anguish, and brought the added bonus of serving as a convenient excuse for not dating.

Things didn't improve in college. Not many people at school were out of the closet, and the environment wasn't particularly welcoming for the few who were open about their sexual orientation. I learned this myself within about a week of arriving at school. I had been assigned to an all-male dormitory that year, which, you would think, would be a dream come true for any young gay man. But, in reality, it was more like a nightmare. The testosterone level in the dorm ran high, and the anti-gay remarks and fag jokes were more pervasive and biting than I had ever experienced before (or, for that matter, since). During that first week, when, no matter who you are, you're feeling vulnerable, nervous, and anxious about being away from home, I had a rather negative encounter with two upper-class students. I had just passed them in the stairwell when they started spitting "queer" and "fag" at me – in a tone that oozed venom and with a physical presence that can only be described as menacing. I couldn't understand why they had targeted me. Was it *that* obvious? Whether it was or not, they had made it abundantly clear that being open about my sexual orientation at college would likely culminate in hospitalization. After that episode, I became all the more firmly ensconced in the closet, because I was not about to risk having to come out to my parents from a hospital bed.

In law school, I eventually came to the realization that this was just no way to live a life. As I grew older and approached the point where I would both be self-sufficient and not accountable to others, the closet became an intolerable burden – one that far outweighed any benefits that it might confer. Slowly, I began to take steps toward coming out to myself. I started to become comfortable with the idea of being gay and with allowing myself to be gay. By the end of law school, I had reached a point where I was relatively comfortable with myself and was ready to start to explore my sexuality with other gay men.

I started dating – at the age of 24. While I resented the way society, through its hostility, had robbed me of valuable time, I also felt as though I had been rewarded in the end for my suffering and forbearance. The third person that I met after I started dating was Michael, a master's student in chemical engineering at Berkeley. We soon became inseparable, spending nearly every minute of our free time together. When I met him, I was in my last semester of law school and he had not quite finished his master's degree. I had already accepted a clerkship in San Diego that was to start at the end of the summer and had accepted a summer associate position with a firm in New York that would occupy my time between graduation and the clerkship. But we had fallen in love, and I knew that I wanted to make a life with Michael. So, I asked him to move with me to San Diego, and he agreed.

In San Diego, we soon learned what it can be like to live as an openly-gay man outside of relatively gay-friendly cities like San Francisco and New York. It started with the deceptively simple task of searching for an apartment. All we were looking for (and could afford) was a one-bedroom apartment. We started searching through the

advertisements in the newspaper, and I responded to several of them. I made sure each time to be clear that the two of us would be sharing the apartment, because I figured that it was better to avoid problems at the outset rather than to have to deal with them after we had settled in an apartment. This policy quickly paid off. I will never forget the conversation that I had with one landlady. When I told her that the two of us would be sharing the apartment, she responded that she could not conceive of why two men would want or need a one-bedroom apartment, and then, in no uncertain terms, told me that she would not – under any circumstances – rent a one-bedroom apartment to us.

We eventually went to a property management company that helped us find an apartment in Hillcrest, which is the gay section of San Diego. Hillcrest is a nice neighborhood that is located on the edge of Balboa Park; indeed, we lived across from the park and within walking distance of the San Diego Zoo, which we visited regularly during our year there. Hillcrest also happens to be unfortunately (and, in San Diego, nearly unavoidably) located near a military installation. While we lived there, military men came through to taunt the “fags” and “dykes.” Not long after we moved into our apartment, we attended a candle light vigil for a youth who had been stabbed to death a year earlier for *appearing* to be gay. Later in the year, someone who had stopped at the Hillcrest Jack in the Box (a fast-food restaurant) had all of his car windows smashed in by some teenagers, and another person was shot at late in the evening. This was our introduction to life as openly gay men in “America’s Finest City”!<sup>22</sup>

While working as a summer associate in New York between law school and my clerkship in San Diego, I lived with my parents and commuted to the City from their house in New Jersey. Shortly before I was to return to California, my mother, prompted by suggestions from others in my family, asked me straight up (so to speak) if I were gay. As denial was no longer an option for me, I honestly answered “yes.” She then asked if Michael (whom my parents had met at graduation) was my “special friend” (where she got that term from, I still don’t know). Again, I honestly answered “yes.” Although a little upset, she generally took it in stride. I was her son, and my being gay was not going to change how much she loved and cared for me.

My father was, however, a different story. A first-generation American whose parents had emigrated from Italy a few years before he was born, he had been brought up in a highly traditional, patriarchal home where the husband/father ruled. Our home was run exactly the same way – my father’s word was supposed to be law.

In September, after I had moved back to California and begun my clerkship, my mother decided to tell my father about our conversation earlier in the summer, and informed him about my sexual orientation. Needless to say, he did not take the news nearly as well as my mother had. My father telephoned to “talk” while I was cooking dinner one evening. I had just sent Michael to the grocery store to pick up something that

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22. For a description of the pervasiveness and forms of, as well as the motivations behind, anti-gay violence, see Lu-in Wang, *The Complexities of “Hate,”* 60 OHIO ST. L.J. 799, 867-94 (1999). For another example of how the specter of anti-gay violence can impact gays and lesbians and their decision to come out of the closet, see Susan J. Becker, *Being out and Fitting in,* 46 J. LEGAL EDUC. 269, 273 (1996).

we had forgotten, so I was home alone at the time. My father started the conversation by asking me whether what my mother had said was true. I answered him honestly, but apparently had not given the answer that he wanted to hear.

He proceeded to excoriate me for doing “this” to them (he couldn’t even bring himself to talk about it directly), as if I was intentionally trying to hurt or defy him. When he had also confirmed that Michael was my “special friend,” he told me that Michael was not welcome in their home. I told him that if Michael was not welcome in their home, then neither was I – and he shouldn’t expect to see me in New Jersey anytime soon. After informing him that he was also not welcome in my home (which was largely a symbolic gesture because he hated to fly and had only been to California twice during the four years that I lived there – and then only after a great deal of cajoling), I told him that I had my own life, I was supporting myself, I did not have to answer to him anymore, and that I did not appreciate being upset by him while I was trying peacefully to prepare dinner after having worked all day. I then unceremoniously hung up the phone.

I didn’t talk to my father again until after Christmas. I had called my mother often while in college and law school, but after that conversation, started calling only once a month to avoid having to talk to my father. When he did answer the phone, I would simply ask him to put my mother on and refuse to respond to anything that he said. When my mother eventually asked if I was coming home for the holidays, which I had always done throughout college and law school, I told her that I would not be going back East because I was not welcome in their home. My father and mother placed a great deal of importance on family – especially at the holidays. I knew that if I didn’t go home for the holidays they would understand that I was standing firm and that I was not going to change who I was or go back into the closet just to obey my father.

And when I didn’t return home for the holidays, my father did, in fact, realize how serious the situation had become. My mother later recounted how he had gotten up from the table at Thanksgiving dinner because he was so upset. One of my mother’s sisters went out to see what was troubling him. He explained the situation to her (which, of course, she already knew about from my mother), and she told him that it was really no big deal. After Thanksgiving, he went to the local library and began taking out books on homosexuality. In contrast to my mother, my father did not enjoy reading. He read the newspaper and did crossword puzzles, but did not read for pleasure. Having grown up on a farm, he much preferred working in the garden. My knowing this made his effort all the more touching. His reading and conversations with others in my family finally led him down the path to acceptance and reconciliation. He called me around Christmas to apologize for the way that he had treated me on the telephone in September. After that, he was squarely in our corner and never wavered in his support of me, Michael, or our relationship.

When my mother had asked me earlier that year if Michael was my “special friend,” it was the first time that I had seen someone react to homosexuality with a combination of bewilderment and discomfort (rather than unadulterated hostility). She found herself stumped by how to refer to our relationship. By now, I have experienced

this uncomfortable groping for words on countless occasions. You see, most straight people can handle gay men one at a time, but a gay couple equals gay sex, which is something that most straight people decidedly can't (and don't want to) handle.<sup>23</sup> When my mother acknowledged our relationship, she, like most straight people, was clearly uncomfortable with admitting to herself that there was a sexual dimension to it. This discomfort, when combined with the lack of a ready label for a relationship between two gay men, has generated any number of desexualized euphemisms such as "friend" or my mother's term "special friend" (both of which have a decidedly platonic overtone), "partner" (which sounds like you're in business together), and "significant other" ("significant" – I would describe my dog Kasha as a significant part of my life; "other" – other than what?).<sup>24</sup>

I have encountered this combination of bewilderment and discomfort in other settings as well. The reaction to my inquiry about the one-bedroom apartment in San Diego, which I described above, evinced bewilderment and discomfort mixed with outright hostility. Paying with a check written on a joint account suddenly becomes a political statement when the joint account holders listed on the check are two men with different surnames. The check is often greeted with a raised eyebrow or a puzzled look. One time, Michael's secretary at a law firm that he worked at in New York<sup>25</sup> whited out my name on a copy of one of our checks that she was submitting for reimbursement, ostensibly to protect him from the possibility of reprisals.

Then there are the solicitations. I can't tell you how often we received calls asking if "Mrs. Infanti" was home. After a while, Michael started saying that he was Mrs. Infanti. The responses ranged from perplexed hang-ups to truly clueless telemarketers who would just keep pitching whatever it was they were being paid to sell. In the mail, solicitations sent to both of us (because we held nearly everything jointly)

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23. Whether they want to admit it or not. I only know one straight person who has any interest in seeing, or who has actually sat through, an entire episode of *Queer as Folk*, which is chock full of relatively explicit gay sex.

An on-screen kiss between two men is still a relative rarity even on the gayest of network television shows (e.g., *Will and Grace*). And when there is a kiss, it usually occurs under less than romantic circumstances. Although cable television has been hailed for being more progressive than network television when it comes to portraying gays and lesbians, Bravo's new gay-dating reality series, *Boy Meets Boy*, prohibits "any physicality beyond kissing" (and closed-mouth kissing at that – half of the potential suitors are straight) because they don't want the show "to be all about sex." Gail Shister, *Bravo Is Set to Air Gay Reality Series*, HOUS. CHRONICLE, May 31, 2003, at 9; see also David Zurawik, *For Best Gay Fare, You've Got to Pay*, BALT. SUN, June 25, 2003, at 1C (describing the disparity in the depth and quality of gay programming on network television versus cable television).

24. See Anthony C. Infanti, *Baehr v. Lewin: A Step in the Right Direction for Gay Rights?*, 4 LAW & SEXUALITY 1, 2-3 (1994) ("*Baehr v. Lewin* is not an unfettered victory for gay rights. In fact, it may be somewhat of a failure. The plurality took every opportunity to distance itself from gay marriage and explicitly based its decision on the farcical construct of a 'same-sex marriage': a marriage touted to be not just for gays, but for any two persons of the same sex who wish to marry.>").

25. When we moved to the New York area, Michael enrolled in law school at New York University, and he now works as a patent attorney.

were often addressed to Anthony and “Michele.” You can just hear the thought process behind this one: “Two men listed together? Must be a mistake. What would two men be doing living together? It must be a typo, I’ll just fix it.” And, bang! Michael just became Mrs. Infanti after all.

And so as not to be accused of unfairly singling out San Diego as hostile to gays, I will tell one last story of discomfort from my time working as a lawyer in New York City. During the six years that I spent in New York after completing my clerkship, I worked at three different firms. At the last firm, I was put in an office that was situated between one of the partners and a conference room. Because of where I was located, I was assigned to share a secretary with the partner next door. Shortly after I arrived, this partner apparently learned about my being gay. He called our secretary into his office and began to grill her about why I had been seated next to him, whether she knew that I was gay, and how the other partners could do this to him. She told him that she knew about my being gay, but said that she didn’t understand what he was making such a big fuss about. Before he let her go back to work, he ordered her not to answer my phone and *never* to do any work for me (an order that she refused to follow).

From that time on, he had a wholly irrational fear of me. Even though I saw him all the time because our offices were right next to each other, he refused to speak to me for the first two years that I worked at the firm – no hello, good-bye, or drop dead. Seeing an opportunity to turn the tables for once, I exploited his discomfort by being sure to say hello to him every time I saw him, by holding the door to the library (which was right across from my office) open for him, and by asking him how his weekend was when I would see him at our secretary’s desk on Monday mornings. Any of these gestures would send him running. It also quickly became clear that all I had to do was enter the men’s room and I could clear him (as well as a couple of the other partners) out immediately.

Eventually, the partner next door found himself in a situation where he had no choice but to give me an assignment. When this happened, I was called into the office of another partner with whom I regularly worked. The two were already seated in his office talking. The partner that I normally worked with was sitting behind his desk and the partner next door was seated in a chair in front of the desk. The other chair in front of the desk was piled high with papers (which was the usual state of affairs in this partner’s office), and I had to sit on the sofa in the back of the office. During the ten or fifteen minutes that this meeting lasted, the partner next door never turned once to speak to me, and in fact, never addressed me directly. Everything was said to the partner that I normally worked with, who then relayed the information to me.

After I had completed the assignment, the partner next door realized that, despite being gay, I could actually do my job. He began to give me assignments directly, but, when doing so, never crossed the threshold into my office. He would stand in the doorway, but never get any closer. I can only imagine what caused him to do this – was he afraid that if he got too close I might cause him to become gay? And if I had a cold, he would stand even farther away. I guess that in addition to being able to turn men gay,

I was also presumptively an incubator for HIV. When I left the firm to start teaching, the partner next door did, however, manage to overcome his irrational fear of me long enough to shake my hand and wish me luck.

### III. THE CODE: A GAY PERSPECTIVE

By recounting this series of experiences, I have tried to explain why I view society's visceral revulsion to homosexuality as being comprised of a fluid mixture of hostility, bewilderment, and discomfort. In this Part, I turn from narrative to more traditional legal analysis in order to explore how society's revulsion manifests itself in the Code's treatment of gay and lesbian couples. You may see interesting parallels between some of the experiences that I described in the narrative and the ways in which the tax laws are applied to gay and lesbian couples. In addition, notice some ways in which the Code takes its hostility toward gay and lesbian couples to a higher level and operates in much the same fashion as society's ultimate condemnation of homosexuality – the sodomy statute.<sup>26</sup>

#### A. Hostility . . .

For many years, an atmosphere of hostility toward gay and lesbian couples merely hovered over this “scheme of taxation where considerations of marital status are pervasive.”<sup>27</sup> The Code did not itself purport to define marriage; that task had been left to the states.<sup>28</sup> But, because no state recognized same-sex marriage, it was effectively impossible for gay and lesbian couples to gain recognition as married for federal tax purposes. Absent recognition of their relationships, these couples were treated as no more than tax strangers to each other.<sup>29</sup> The federal government (with the complicity of the states) had thus quietly banished gay and lesbian couples to the closet by failing to acknowledge the existence of their relationships.

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26. Some commentators have taken critical tax theorists to task for being too willing to find discrimination in the Code. *See, e.g.*, Bryce, *supra* note 15, at 1688 (“The second general observation is that most of [the critical tax] literature starts with the premise that either women or blacks are oppressed. Starting with the premise that something is wrong, it is not surprising that things are found about which to complain.”); Zelenak, *supra* note 4, at 1523 (“The first problem [with critical tax scholarship] is an overeagerness to accuse the tax laws of hostility to women or blacks.”). This response can only be expected from adherents of the traditional tax narrative, because critical analysis undermines the basic tenets of their view of the tax system. The problem, however, with such blind adherence to the traditional tax narrative is that it runs counter to the mirror theory of the relationship between law and society, which is well-accepted among comparative law scholars. *See* Anthony C. Infanti, *The Ethics of Tax Cloning*, \_\_\_ FLA. TAX REV. \_\_\_, \_\_\_ (forthcoming 2003). This theory (or, more accurately, group of theories articulated with differing levels of strength) posits that law is a reflection of the society that created it. This leaves me with a question for adherents of the traditional tax narrative: If the law (including tax law) is a reflection of the society that created it, why wouldn't the law reflect the biases and prejudices of that society just as well as its core values and goals?

27. Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 132 (1998); *see also* Cain, *Heterosexual Privilege*, *supra* note 19, at 465-66 (“Laws that recognize only heterosexual marriage privilege heterosexuals by indicating their relationships are more valuable than same-sex relationships. . . . [T]he difference in treatment [in the Code] between married and unmarried couples, whether the economic effect is beneficial to one class or the other, always carries stigmatic harm

Congress was content with this arrangement until gay and lesbian couples began to make some progress in having their relationships legally recognized.<sup>30</sup> In the wake of a 1993 decision by the Hawaii Supreme Court that for the first time raised the specter of legalized same-sex marriage,<sup>31</sup> Congress decided to step in<sup>32</sup> and ensure that gay and lesbian couples would never be treated as married for federal tax purposes.<sup>33</sup> To this end, Congress enacted (and President Clinton signed) the Defense of Marriage Act (“DOMA”), which provides 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

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to the extent that the message heard by gay and lesbian taxpayers is that their relationships do not count.”); Chase, *supra* note 7, at 360 (“For a married couple whose legal status carries substantial automatic tax preferences and protections, the task of tax planning is less difficult than for a similarly situated lesbian or gay couple that must resort to complex legal arrangements in an attempt to achieve parity.”). Knauer points out that “an estimated 60 provisions on the income tax side alone” refer to a taxpayer’s marital status. Knauer, *supra*, at 160.

28. I.R.C. § 7703 (2003); Boyter v. Commissioner, 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.”).

29. Knauer, *supra* note 27, at 134 (“same-sex partners always act as strangers under the tax code regardless of the economic or contractual realities of their relationship”); Cain, *Heterosexual Privilege*, *supra* note 19, at 466 (“The Code presumes that persons are either married or live their lives with a fair degree of financial separation from others.”).

30. H.R. Rep. No. 104-664, at 10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2914 (“With regard to the issue of same-sex ‘marriages,’ federal reliance on state law definitions has not, of course, been at all problematic. Until the Hawaii situation, there was never any reason to make explicit what has always been implicit – namely, that only heterosexual couples could get married.”); *see also id.* at 30, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2934.

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

32. H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 (“H.R. 3396 is a response to a very particular development in the State of Hawaii. . . . [T]he state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples. The prospect of permitting homosexual couples to ‘marry’ in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.”); *id.* at 4, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2908 (“Because H.R. 3396 was motivated by the Hawaiian lawsuit, the Committee thinks it is important to discuss that situation in some detail.”).

33. *Id.* at 11 n.40, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2915 (referencing the prepared statement of Lynn D. Wardle); *Hearing Before the House Subcomm. on the Constitution of the Comm. on the Judiciary on H.R. 3396 (Defense of Marriage Act)*, 104th Cong. 171 (1996) (statement of Lynn D. Wardle, Professor of Law, Brigham Young University School of Law) (specifically enumerating tax benefits as being among the federal benefits that would have to be extended to same-sex couples if a state were to legalize same-sex marriage).

word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>34</sup>

As described by Nancy Knauer, the impact of DOMA on the application of the Code to gay and lesbian couples was not accidental:

The exclusion of same-sex couples from the marital provisions is intentional. As a result, there is nothing hidden or covert about the heterosexist bias of the tax code. There is no neutral principle at work. The rationale for the exclusion is not that same-sex couples do not pool their resources like opposite-sex married couples. Instead, the rationale for the exclusion is based on the beliefs that a same-sex couple is not a family, that no civilized society has ever countenanced such unions, and that our Judeo-Christian heritage forbids them.<sup>35</sup>

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 that would ensure that its hostility is clear and unmistakable.<sup>36</sup>

Yet nothing is new or different about this hostility – it is little more than an extension of the hostility that I have experienced all my life. The hostility in the Code has simply moved from the background to the foreground in the same way that the

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

35. Knauer, *supra* note 27, at 233; *see also id.* at 190 (“Numerous members of Congress returned again and again to the cost of providing federal benefits to same-sex partners. The effect of DOMA on the marital provisions of the tax code was not an unintended consequence.”); *supra* note 33 and accompanying text.

36. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. As Representative Henry Hyde, the Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396: “[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . felt ought to be illegitimate. . . . And in so doing it trivializes the legitimate status of marriage and demands it by putting a stamp of approval . . . on a union that many people . . . think is immoral.”

It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government’s legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

H.R. Rep. No. 104-664, at 15-16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2919-20 (footnotes omitted).

atmosphere of hostility that I experienced in my childhood and adolescence (i.e., the childhood taunting, fag jokes, derogatory remarks, and whispers) gave way to physical menacing when I went to college and to the violence that occurred in San Diego before and during the year that I spent there.

### B. *Mixed with Bewilderment and Discomfort*

Mixed in with this now-explicit hostility are the twin elements of bewilderment and discomfort. Because Congress refuses to treat gay and lesbian couples as “married,” it becomes difficult to settle on an appropriate tax classification for transactions that occur within the couple. Are they transactions between donor and donee? creditor and debtor? employer and employee? parent and child? business partners?<sup>37</sup> This is the same difficulty that straight people encounter when, refusing to use the word “husband” or “wife,” they grope to find the right word to describe the relationship between two gay men or two lesbians. As a result of its aversion to gay sex, straight society finds itself struggling once again to shoe-horn gay and lesbian couples into desexualized categories that just don’t comport with reality.<sup>38</sup> These categories are simply the tax versions of the desexualized euphemisms (e.g., “friend,” “partner,” and “significant other”) that gay and lesbian couples encounter in daily life.

In the context of taxation, this bewilderment and discomfort have more than just symbolic consequences. During the nine years that Michael and I were together, we pooled our income (which, as might be expected, was never equal) and shared all of our expenses.<sup>39</sup> All of our income went into our joint checking or savings account, and we held all of our investments (including our home) in joint tenancies. This arrangement had nothing to do with tax planning (which would probably be obvious to anyone who has read anything on tax planning for gays and lesbians<sup>40</sup>), but had everything to do with how

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37. See Chase, *supra* note 7, at 373-89.

38. Cain, *Heterosexual Privilege*, *supra* note 19, at 466 (“The reality is that many same-sex, committed couples do not live in a world of financial separation. The tax laws, in effect, force them into a reporting stance that is not reflective of their day-to-day lives.”); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN’S STUD. 471, 472 (1997) [hereinafter Cain, *Taxing Lesbians*] (“The law generally refuses to recognize their relationships and the tax law is no different. Every year when [lesbian couples] file income tax returns, they are required to fill out forms that force them into separate spheres from each other as though their lives were lived separately.”).

39. Although Nancy Knauer has stated that “there is little evidence on the pooling patterns of same-sex couples,” she does cite two sources that indicate that a significant number of gays and lesbians favor pooling. Knauer, *supra* note 27, at 155 & n.112. In a more recent article, Patricia Cain cites a 1998 survey and, on the basis of the results of that survey, asserts that “it is fair to conclude that same-sex couples share ownership of assets at a much higher rate than opposite-sex unmarried couples.” Cain, *Death Taxes*, *supra* note 20, at 689-90.

40. See, e.g., Cain, *Death Taxes*, *supra* note 20, at 694-95 (“responsible estate planning experts always advise clients to sever their joint tenancies and create revocable trusts”); Patricia A. Cain, *Tax and Financial Planning for Same-Sex Couples: Recommended Reading*, 8 LAW & SEXUALITY 613 *passim* (1998).

we perceived our relationship and how we wanted it to be perceived by others. Whenever, like us, a gay or lesbian couple pools all or a portion of its income and investments and one partner<sup>41</sup> earns more than the other, the couple must confront the enigmatic task of characterizing the annual net transfer from the higher-earning partner to the lower-earning partner (the “net interspousal transfer”) both for income and for gift tax purposes.<sup>42</sup>

For income tax purposes, the higher-earning partner might be treated as making a gift each time the utility bills are paid, a trip is made to the grocery store, or a withdrawal is made from the ATM.<sup>43</sup> If so, the higher-earning partner would continue to pay tax on her wages,<sup>44</sup> and the lower-earning partner would have no income tax inclusion as a result of receiving those gifts.<sup>45</sup> Alternatively, the pooling might be characterized as a support arrangement.<sup>46</sup> In that case, the higher-earning partner would still be subject to tax on her wages,<sup>47</sup> while the lower-earning partner would again have no income tax inclusion as a result of receiving the support payments.<sup>48</sup> A more frightening alternative would require *both* partners to pay tax on the portion of the higher-earning partner’s income that is transferred to the lower-earning partner – on the ground that it technically constitutes “income” to each of them.<sup>49</sup> Yet another possibility is that the net interspousal transfer could represent some combination of the above (e.g., part support, part gift; part support, part income; or part gift, part income).

For gift tax purposes, a net interspousal transfer might be treated as a taxable gift.<sup>50</sup> Or, depending on the facts and circumstances, the transfer might instead be

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41. Despite my dislike for such desexualized euphemisms, I feel constrained here to use the term “partner” to refer to the individual members of a gay or lesbian couple both because it is, in my experience, the most commonly-used term in everyday speech and because it will help to sharpen the tax distinction between straight couples and gay and lesbian couples in the remainder of the essay.

42. Although a measure of uncertainty may also face gay and lesbian couples in other contexts (e.g., the dissolution of their relationship), I focus here only on the application of the tax laws to gay and lesbian couples while their relationship is on-going. See Cain, *Death Taxes*, *supra* note 20, at 482-83 (discussing the uncertainty surrounding the appropriate tax characterizations of transfers attendant to the dissolution of a relationship); Chase, *supra* note 7, at 389-91 (same); Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240, 1284-90 (1980) (same).

43. See Cain, *Same-Sex Couples*, *supra* note 7, at 114-15, for an argument that gift characterization is most appropriate in this context. See also Cain, *Taxing Lesbians*, *supra* note 38, at 476 (reiterating her belief that such transfers should be characterized as gifts).

44. See *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930).

45. I.R.C. § 102 (2003).

46. Cain, *Same-Sex Couples*, *supra* note 7, at 115-16.

47. *Earl*, 281 U.S. at 114-15.

48. 1 BITTKER & LOKKEN, *supra* note 11, ¶ 10.2.6, at 10-22 to 10-23; Cain, *Same-Sex Couples*, *supra* note 7, at 116.

49. Wolk, *supra* note 42, at 1244-62; see also Cain, *Taxing Lesbians*, *supra* note 38, at 476.

50. Cain, *Same-Sex Couples*, *supra* note 7, at 125; Knauer, *supra* note 27, at 174; Wolk, *supra* note 42, at 1275-81. Because she argues that a net interspousal transfer should be characterized as a gift for income tax purposes, see *supra* note 43, Cain feels constrained by consistency to treat the transfer likewise

characterized, in whole or in part, as a non-taxable payment made in exchange for rendering domestic services or for furnishing some other consideration in money or money's worth.<sup>51</sup> Alternatively, the net interspousal transfer might be characterized as a non-taxable support payment.<sup>52</sup> Yet another possibility is that the transfer could represent some combination of the above (e.g., part non-taxable support payment, part taxable gift or part non-taxable payment for services, part taxable gift).

If a net interspousal transfer were treated as a taxable gift, then, for gay and lesbian couples, the gift tax would effectively be transformed from a wealth transfer tax into a consumption tax. Gay and lesbian couples would not only have to worry about paying gift tax on transfers of stocks and securities, real property, and other assets that they accumulate as they grow old together, but would also have to worry about paying gift tax on every rent or mortgage payment, every purchase of clothing, and even food.<sup>53</sup>

As soon as the total of wealth transmission and consumption transfers from the higher-earning partner to the lower-earning partner exceeded the gift tax annual exclusion (\$11,000 in 2002),<sup>54</sup> the higher-earning partner would begin spending down her lifetime unified credit of \$1 million.<sup>55</sup> Any gay or lesbian couple with jointly-held property and a significant disparity in income could easily find itself exceeding the annual exclusion each year.<sup>56</sup> Once the unified credit had been exhausted, which is a distinct possibility over the course of a long-term relationship (or a series of long-term relationships),<sup>57</sup> the higher-earning partner would begin paying gift tax on both wealth transmission and consumption transfers at a rate of 41%.<sup>58</sup> Thus, for gay and lesbian couples, gift taxation

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for gift tax purposes. Cain, *Same-Sex Couples*, *supra* note 7, at 125. *But cf. infra* note and accompanying text (indicating that consistency is not required).

51. Wolk, *supra* note 42, at 1277-78. For gift tax purposes, "[a] consideration not reducible to a value in money or money's worth, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." Treas. Reg. § 25.2512-8 (as amended in 1992); *see also* Commissioner v. Wemyss, 324 U.S. 303 (1945); Merrill v. Fahs, 324 U.S. 308 (1945).

52. *See* Rev. Rul. 68-379, 1968-2 C.B. 414; *see also* Cain, *Same-Sex Couples*, *supra* note 7, at 126-29; Knauer, *supra* note 27, at 174.

53. *See* Cain, *Death Taxes*, *supra* note 20, at 696; Cain, *Heterosexual Privilege*, *supra* note 19, at 474-76. They would not, however, have to worry about certain payments for tuition or medical care. I.R.C. § 2503(e) (2003).

54. I.R.C. § 2503(b) (2003). The figure in the parenthetical in the text above is the inflation-adjusted annual exclusion for 2002. INTERNAL REVENUE SERV., DEP'T OF TREASURY, INSTRUCTIONS FOR FORM 709, at 3 (2002).

55. I.R.C. §§ 2010(c), 2505(a) (2003).

56. Even in Pittsburgh, which has a modest cost of living compared to other areas in the country, one-half of my annual mortgage payment (including the escrow for real property taxes and insurance) is nearly \$9,000. *See* MERCER HUMAN RES. CONSULTING, WORLD-WIDE COST OF LIVING SURVEY (2003), available at <http://www.finfacts.ie/costofliving1.htm> (last visited Aug. 4, 2003) (indicating that Pittsburgh was ranked nineteenth out of the twenty-one U.S. cities included in the worldwide survey).

57. *See* Cain, *Heterosexual Privilege*, *supra* note 19, at 475-76.

58. INTERNAL REVENUE SERV., DEP'T OF TREASURY, INSTRUCTIONS FOR FORM 709, at 11 (2002). From 2003 through 2009, the gift tax rate schedule will be adjusted to take into account the progressive

cannot be dismissed as the product of an overactive or misdirected imagination; rather, it is a very real possibility whose importance should not be trivialized or ignored.<sup>59</sup>

Furthermore, when the income and gift tax consequences of a net interspousal transfer are considered together, the tax cost may be even higher than it initially appears. Because the income tax and the gift tax operate independently, the characterization of a net interspousal transfer need not be consistent across these taxes.<sup>60</sup> In other words, a net interspousal transfer might be characterized as income to *both* partners for income tax purposes *and* as a taxable gift from the higher-earning partner to the lower-earning partner for gift tax purposes.<sup>61</sup> Consequently, a portion of the income of the higher-earning partner might be subject to *triple* taxation.<sup>62</sup>

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lowering of the top marginal gift tax rate that was prescribed by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 511(c), 115 Stat. 38, 70 (2001) [hereinafter EGTRRA 2001]. In 2010, the top marginal gift tax rate will equal the top income tax rate of 35%. I.R.C. § 1(i)(2) (2003); EGTRRA 2001, *supra*, § 511(d), -(f)(3), 115 Stat. at 70-71. In 2011, however, the top marginal gift tax rate will return to its pre-EGTRRA 2001 level of 55%, unless Congress intervenes before then and makes the reduction permanent. I.R.C. §§ 2001(c), 2502(a) (2001) (prior to amendment by EGTRRA 2001); EGTRRA 2001, *supra*, § 901, 115 Stat. at 150.

59. *Cf.* Johnson, *supra* note 5, at 1776 (“It is possible to overstate the significance of some of the asserted advantages available to married couples. For example, the estate and gift tax considerations mentioned above do not matter for the clear majority of Americans, including (presumably) the majority of same-sex partners.”); Zelenak, *supra* note 4, at 1549 (“But in the overall feminist scheme of things any arguable injustice caused by QTIPs to affluent (and overwhelmingly white) widows is simply trivial.”).

60. *See, e.g.*, United States v. Davis, 370 U.S. 65, 69 n.6 (1962) (“In interpreting the particular income tax provisions here involved, we find ourselves unfettered by the language and considerations ingrained in the gift and estate tax statutes.”); Commissioner v. Beck’s Estate, 129 F.2d 243, 246 (2d Cir. 1942) (“Perhaps to assuage the feelings and aid the understanding of affected taxpayers, Congress might use different symbols to describe the taxable conduct in the several statutes, calling it a ‘gift’ in the gift tax law, a ‘gift’ in the income tax law, and a ‘gift’ in the estate tax law.”).

61. *See* Cain, *Same-Sex Couples*, *supra* note 7, at 124-25; Chase, *supra* note 7, at 375.

62. To get an idea of what triple taxation might look like, let’s consider a simple example. Assume that the higher-earning partner of a single-earner lesbian couple has \$100,000 in income for the 2003 taxable year. The couple are advanced in years, have paid off their home, and have no children (or, at least, no children at home). The couple pools their income and shares their expenses equally. Under this scenario, the higher-earning partner will pay \$19,708 in income tax on her income (assuming that she takes the standard deduction and two personal exemptions). Ignoring state taxes, that leaves the couple with \$80,292 on which to subsist.

For the sake of simplicity, let’s assume that one-half of the higher-earning partner’s after-tax income (or \$40,146) is the amount of the net interspousal transfer for the year. Using average tax dollars, the transfer has already borne \$9,854 ( $\frac{1}{2} \times \$19,708$ ) in income tax in the hands of the higher earning partner (i.e., the before-tax transfer was \$50,000, or one-half of the higher-earning partner’s gross income). In the hands of the lower-earning partner, this \$40,146 will be subject to another round of income tax, with the lower-earning partner being required to pay \$6,659 in income tax on the transfer (assuming no other income, no personal exemption, and a standard deduction of only \$750). Assuming that the higher-earning partner has just exhausted her gift tax unified credit, \$29,146 of the net interspousal transfer (\$40,146 less the \$11,000 annual exclusion) will be subject to gift tax at a rate of 41%, producing an additional \$11,950 in tax.

In total, the net interspousal transfer will have borne \$28,463 in income and gift tax, for an effective tax rate of 56.9% ( $\$28,463 \div \$50,000$ ). In contrast, a married couple’s tax bill on the same

### C. . . and back to Hostility Again

In a mark of the fluidity of the mixture, this intolerable level of uncertainty opens the door to a further, and arguably more insidious, form of hostility. Faced with a veritable constellation of potential tax characterizations, gay and lesbian couples must examine all of the possibilities and settle on an appropriate combination of income and gift tax characterizations for their net interspousal transfers. Their task is not made any easier by Congress or the Internal Revenue Service (“IRS”), both of whom have been conspicuously silent on the question of how the tax laws should be applied to gay and lesbian couples. Although Congress took the time to debate and decide that gay and lesbian couples should never be treated as married for federal tax purposes, it did not spend any time spelling out how these couples should be treated in the absence of qualifying for application of the marital provisions in the Code.<sup>63</sup> And the IRS has made no attempt to fill this gap in the application of the tax laws either; it has been noticeably remiss in issuing public guidance<sup>64</sup> to help gay and lesbian couples comply with the tax laws and avoid the unnecessary incurrence of “additional, real, out-of-pocket costs” in seeking “tax advice from lawyers and accountants.”<sup>65</sup>

Yet, despite this lack of guidance, the tax laws place the burden on gay and lesbian couples to prove that their chosen treatment is correct.<sup>66</sup> The tax laws

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transfer (based on average tax dollars and a single round of income tax) would have been only \$7,554, for an effective tax rate of 15.1% ( $\$7,554 \div \$50,000$ ).

N.B. All inflation-adjusted amounts were taken from FEDERAL INCOME TAX: CODE AND REGULATIONS: SELECTED SECTIONS, at ix- xii (Martin B. Dickinson ed., 2003-2004 edition).

63. Congress has never taken any positive action toward the recognition of same-sex relationships under the tax law. For example, during the debate over DOMA, Congress debated whether same-sex couples should be spouses and never considered what default rules might apply to them if they are not treated as spouses. Thus, the message from Congress, as currently embedded in the tax laws, is that same-sex couples are not worthy of spousal treatment and, furthermore, their treatment under the tax laws is not even worthy of discussion.

Cain, *Heterosexual Privilege*, *supra* note 19, at 493.

64. While it is easier to see that stigmatic harm occurs as a result of the explicit discrimination against gay men and lesbians in DOMA, harm also occurs because neither Congress nor the IRS has chosen to give any attention to the tax situation of same-sex committed partners. There are no published revenue rulings, IRS publications, or official guidelines of any sort that relate to a single tax issue affecting same-sex partners. . . . The IRS’s silence on these matters is astounding given the frequency with which these matters are debated at national conferences and in academic journals.

*Id.* at 492-93.

65. *Id.* at 494.

66. TAX CT. R. 142(a)(1) (“The burden of proof shall be upon the [taxpayer], except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the [IRS].”); *United States v.*

additionally attach a presumption of correctness to whatever treatment the IRS deems appropriate – after the fact and without any advance public notice.<sup>67</sup> Because of the need to shoe-horn interspousal transfers into categories that don't quite fit, these burdens – the burden of proof and the burden of going forward with evidence – will prove quite difficult for gay and lesbian couples to bear. If they fail to carry one or both of these burdens, a gay or lesbian couple may find that they are not only liable for additional tax, but also for one or more of the civil penalties authorized by the Code. Among the potentially applicable penalties are:

- *Failure to file.* A penalty for failure timely to file an income or gift tax return.<sup>68</sup> The penalty is equal to 5% of the amount required to be shown as tax on the return (after the application of any credits that the taxpayer may claim).<sup>69</sup> The 5% penalty is imposed for each month (or fraction thereof) that the return is late.<sup>70</sup> The total penalty cannot, however, exceed 25% in the aggregate.<sup>71</sup>
- *Failure to Pay.* A penalty for failure to pay any amount of tax required to be shown on an income or gift tax return, but not so shown.<sup>72</sup> The penalty only applies if the payment is not made within 21 calendar days from the date of notice and demand (10 business days if the amount exceeds \$100,000).<sup>73</sup> The penalty is equal to 0.5% of the amount demanded for each month (or fraction thereof) that the failure to pay continues.<sup>74</sup> The total penalty cannot, however, exceed 25% in the aggregate.<sup>75</sup>
- *Negligence penalty.* A penalty for negligence or disregard of rules or regulations.<sup>76</sup> “Negligence” is defined to include “any failure to make a

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Janis, 428 U.S. 433, 440 (1976) (“In a refund suit the taxpayer bears the burden of proving the amount he is entitled to recover.”). It is unlikely that gay and lesbian couples will be able to avail themselves of recently-enacted burden-shifting provisions because of the problems that they will encounter in satisfying the Code’s recordkeeping requirements (which are described more fully in the text below). See I.R.C. § 7491(a)(1), -(2)(A) (2003).

67. *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

68. I.R.C. § 6651(a)(1) (2003).

69. *Id.*; Treas. Reg. § 301.6651-1(d)(1) (as amended in 2000).

70. I.R.C. § 6651(a)(1) (2003).

71. *Id.*

72. I.R.C. § 6651(a)(3) (2003).

73. *Id.*

74. *Id.* Under certain circumstances, the amount of the penalty is increased to 1% of the amount demanded. See I.R.C. § 6651(d) (2003).

75. *Id.*

76. I.R.C. § 6662(b)(1) (2003). The penalty for disregard of rules or regulations will not apply if the taxpayer adequately discloses her position on a Form 8275 or Form 8275-R, as appropriate, and the

reasonable attempt to comply with the provisions” of the Code.<sup>77</sup> “Disregard” is defined to include “any careless, reckless, or intentional disregard.”<sup>78</sup> The penalty is equal to 20% of the portion of any underpayment that is attributable to negligence or disregard of rules or regulations.<sup>79</sup>

- *Substantial Understatement Penalty.* A penalty for substantial understatement of income tax.<sup>80</sup> An understatement of income tax is “substantial” if it exceeds the greater of (i) 10% of the tax required to be shown on the return or (ii) \$5,000.<sup>81</sup> The penalty is equal to 20% of the portion of any underpayment that is attributable to the substantial understatement.<sup>82</sup>

Other more obscure penalties may also be imposed on gay and lesbian couples in connection with net interspousal transfers. Because they cannot be considered married for federal tax purposes, gay and lesbian couples are subject to easily-overlooked information reporting and withholding requirements if they jointly hold interest-bearing investments (e.g., a savings account or certificate of deposit).<sup>83</sup> Normally, the bank will send the couple a Form 1099-INT at the beginning of the year reporting the amount of interest paid to them during the previous year. The couple then use this information to calculate the amount of interest that must be reported on their respective federal income tax returns. As is plainly stated on the face of the Form 1099-INT furnished to the couple, a copy of the form is also sent to the IRS.<sup>84</sup> Most joint account holders probably

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taxpayer has a reasonable basis for her position, the position is properly substantiated, and the taxpayer has kept adequate books and records with respect to the position. Treas. Reg. § 1.6662-3(c) (as amended in 1998).

77. I.R.C. § 6662(c) (2003).

78. *Id.*

79. I.R.C. § 6662(a) (2003).

80. I.R.C. § 6662(b)(2) (2003). An item will not be included in the “understatement” if the taxpayer has “substantial authority” for the item or if the item is adequately disclosed on a Form 8275 or Form 8275-R, as appropriate, (or, if permitted by the IRS, on the return itself) and the item has a reasonable basis, is properly substantiated, and the taxpayer has kept adequate books and records with respect to the item. I.R.C. § 6662(d)(2)(B) (2003); Treas. Reg. § 1.6662-4(d)-(e) (as amended in 1998).

81. I.R.C. § 6662(d)(1)(A) (2003).

82. I.R.C. § 6662(a) (2003). If a portion of an underpayment is due to negligence or disregard of rules or regulations and also constitutes a “substantial” understatement, the total penalty on that portion of the underpayment is limited to 20% (i.e., there is no stacking of accuracy-related penalties under § 6662). Treas. Reg. § 1.6662-2(c) (as amended in 1998).

83. It is worth noting that the opposite rule applies for purposes of reporting dividend payments. *See* Treas. Reg. § 1.6042-2(a)(2) (as amended in 2000).

84. INTERNAL REVENUE SERV., DEP’T OF TREASURY, FORM 1099-INT: INTEREST INCOME, at Copy B (2003) (“This is important tax information and is being furnished to the Internal Revenue Service.”).

believe that the reporting by the bank fully informs the IRS of the interest income received by both partners. But they would be wrong . . .

Even though both partners' names are listed on the form sent to them (and to the IRS) by the bank, the Code requires the partner listed first on that statement to file with the IRS another Form 1099-INT (as well as a Form 1096) reporting the other partner's share of the interest income reported to them by the bank.<sup>85</sup> The first-listed partner must furnish a copy of this Form 1099-INT to the other partner.<sup>86</sup> Beginning in 2003, the first-listed partner is also required to withhold tax at the flat rate of 28% on the other partner's share of the interest income (and, of course, pay it over to the IRS<sup>87</sup>), unless the other partner provides her with a Form W-9 in which she furnishes her taxpayer identification number, certifies under penalties of perjury that her taxpayer identification number is correct, and further certifies that she is not subject to withholding due to notified payee underreporting.<sup>88</sup>

These duplicative and burdensome information reporting and withholding requirements are *not* imposed on married couples.<sup>89</sup> Gay and lesbian couples that ignore or overlook these information reporting and/or withholding requirements risk the imposition of one or more of the following additional penalties:

- *Failure to File Correct Information Returns.* A penalty for failure timely to file correct information returns.<sup>90</sup> The penalty is \$50 per return,

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85. I.R.C. § 6049(a)(2) (2003) (requiring middlemen to report interest payments); Treas. Reg. § 1.6049-4(a)(2)(ii), -4(c)(3)(i) (as amended in 2002) (same); Treas. Reg. § 1.6049-4(f)(4)(i) (as amended in 2002) (“A person shall be considered to be a middleman as to any portion of an interest payment made to such person which portion is actually owned by another person, whether or not the other person’s name is also shown on the information return filed with respect to such interest payment, except that a husband or wife will not be considered as acting in the capacity of a middleman with respect to his or her spouse.”); *see also* INTERNAL REVENUE SERV., DEP’T OF TREASURY, GENERAL INSTRUCTIONS FOR FORMS 1099, 1098, 5498, AND W-2G, at GEN-6 (2003) (“Generally, if you receive a Form 1099 for amounts that actually belong to another person, you are considered a nominee recipient. You must file a Form 1099 (the same type of Form 1099 you received) for each of the other owners showing the amounts allocable to each. You must also furnish a Form 1099 to each of the other owners. File the new Form 1099 with Form 1096 with the Internal Revenue Service Center for your area. . . . A husband or wife is not required to file a nominee return to show amounts owned by the other.”).

86. I.R.C. § 6049(c) (2003); Treas. Reg. § 1.6049-6 (as amended in 1999).

87. I.R.C. § 6302 (2003); Treas. Reg. § 31.6302-4 (1993); Treas. Reg. § 31.3406(h)-2(f)(3) (as amended in 2002) (incorporating by reference the deposit rules of § 6302).

88. I.R.C. § 3406(a)(1) (2003); Treas. Reg. § 31.3406(a)-1 (1995); Treas. Reg. § 31.3406(a)-2(a) (as amended in 2002); Treas. Reg. § 31.3406(b)(2)-1(a)(1) (1995); Treas. Reg. § 31.3406(d)-1(a), -1(b)(3) (1995); Treas. Reg. § 31.3406(h)-3 (as amended in 2000); *see also* Information Reporting Requirements for Certain Payments Made on Behalf of Another Person, Payments to Joint Payees, and Payments of Gross Proceeds from Sales Involving Investment Advisers, 65 Fed. Reg. 61,292, 61,293 (proposed Oct. 17, 2000) (codified at Treas. Reg. § 31.3406(a)-2) (indicating that the change in the definition of “middleman,” which became effective January 1, 2003, was intended to conform the definition of that term in the regulations to the definition used in § 3406(h) and the relevant information reporting sections of the Code).

89. Treas. Reg. § 1.6049-4(f)(4)(i) (as amended in 2002).

90. I.R.C. §§ 6721, 6724(d)(1)(A)(iv) (2003).

up to a maximum of \$250,000 per year;<sup>91</sup> however, if the failure is due to intentional disregard of the filing requirement, then the penalty is \$100 per return or 10% of the aggregate amount of the items required to be reported, whichever is greater, and there is no overall limitation on the amount of the penalty.<sup>92</sup>

- *Failure to Furnish Payee Statements.* A penalty for failure timely to furnish correct payee information statements.<sup>93</sup> The penalty is \$50 per return, up to a maximum of \$100,000 per year;<sup>94</sup> however, if the failure is due to intentional disregard of the requirement to furnish a payee statement, then the penalty is \$100 per return or 10% of the aggregate amount of the items required to be reported, whichever is greater, and there is no overall limitation on the amount of the penalty.<sup>95</sup>

- *Failure to Comply with Other Information Reporting Requirement.* A penalty may be imposed on the other partner for failing to provide her taxpayer identification number to the first-listed partner upon request (because it must be included on the Form 1099-INT).<sup>96</sup> The penalty is \$50 for each failure, up to a maximum of \$100,000 per year.<sup>97</sup>

- *Failure to Deposit.* A penalty for failure timely to deposit taxes as required by the Code or the Treasury Regulations.<sup>98</sup> The penalty is imposed on a sliding scale depending on the length of the delinquency; it ranges from 2% of the underpayment (for a failure that continues for less than 5 days) up to 10% (for a failure that continues for more than 15 days).<sup>99</sup>

A taxpayer can avoid these penalties if she can demonstrate that: (i) she had reasonable cause for her failure<sup>100</sup> and (ii) depending on the penalty, she either acted in

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91. I.R.C. § 6721(a)(1) (2003). The penalty is reduced if the failure is corrected no later than August 1 of the calendar year in which the return is required to be filed. I.R.C. § 6721(b) (2003). Lower overall limitations are available for small taxpayers. I.R.C. § 6721(d) (2003).

92. I.R.C. § 6721(e) (2003).

93. I.R.C. §§ 6722, 6724(d)(2)(H) (2003).

94. I.R.C. § 6722(a) (2003).

95. I.R.C. § 6722(c) (2003).

96. I.R.C. §§ 6723, 6724(d)(3)(B)(ii) (2003); *see also* I.R.C. § 6109(a)(2) (2003); Treas. Reg. § 301.6109-1(b)(1) (as amended in 2003).

97. I.R.C. § 6723 (2003).

98. I.R.C. § 6656 (2003).

99. I.R.C. § 6656(b)(1)(A)(iii) (2003). Under specified circumstances, the amount of the penalty is increased to 15% of the underpayment. *See* I.R.C. § 6656(b)(1)(B) (2003).

100. I.R.C. §§ 6651(a)(1), -(a)(3), 6656(a), 6664(c), 6724(a) (2003).

good faith<sup>101</sup> or did not willfully neglect her legal obligations.<sup>102</sup> To establish the existence of reasonable cause, the taxpayer must generally demonstrate that she exercised ordinary care and prudence in ascertaining and complying with her tax obligations.<sup>103</sup> Ignorance of the law, by itself, does not constitute reasonable cause for a failure to comply with the tax laws.<sup>104</sup>

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101. I.R.C. § 6664(c) (2003). Two commentators have defined “good faith” as “an honest belief, without knowledge of circumstances that would put the taxpayer under a duty to inquire further, and free of any intention to defraud.” Alan J. Tarr & Carol F. Burger, *Civil Tax Penalties*, 634 Tax Mgmt. (BNA) at A-73 (Apr. 9, 2001).

102. See I.R.C. §§ 6651(a)(1), -(a)(3), 6656(a), 6724(a) (2003). The Supreme Court has defined “willful neglect” as “a conscious, intentional failure or reckless indifference.” *United States v. Boyle*, 469 U.S. 241, 245 (1985).

103. See *Del Commercial Props., Inc. v. Commissioner*, 251 F.3d 210, 218 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002) (“Because the same terms are used [sic] § 6651(a)(1) and § 6656(a) to define the circumstances in which a taxpayer is not required to pay additions, we see no reason why ‘reasonable cause’ and ‘willful neglect’ should not be interpreted consistently.”); Treas. Reg. § 301.6651-1(c)(1) (as amended in 2000) (“If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship . . . .”); Treas. Reg. § 301.6724-1(d)(1)(i) (as amended in 2003) (“Acting in a responsible manner means . . . . [t]hat the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations and in handling account information such as account numbers and balances”).

Notwithstanding the use of the same two words (i.e., “reasonable cause”), the Treasury Regulations promulgated under § 6664 interpret this phrase somewhat differently than the regulations cited in the previous paragraph. Treasury Regulations § 1.6664-4(b)(1) (as amended in 1998) does not use the “ordinary care and prudence” language, but instead provides that “the most important factor is the extent of the taxpayer’s effort to assess the taxpayer’s proper tax liability.” Among the examples of situations in which reasonable cause and good faith may be indicated, the Treasury Regulations include “an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer.” Treas. Reg. § 1.6664-4(b)(1) (as amended in 1998).

104. See, e.g., *Niedringhaus v. Commissioner*, 99 T.C. 202, 222 (1992) (“As a general rule, taxpayers are charged with knowledge of the law. While a showing of good faith by the taxpayer may preclude the existence of fraud, good faith does not always negate negligence. Although taxpayers are not subject to the addition to tax for negligence where they make honest mistakes in complex matters, they are required to take reasonable steps to determine the law and to comply with it.” (citations omitted)); *Beck Chem. Equip. Corp. v. Commissioner*, 27 T.C. 840, 859 (1957) (“The personal good faith belief that the taxpayer is not required to file an excess profits tax return is insufficient alone to discharge the addition to tax under section 291(a).”); *Heller v. Commissioner*, 40 T.C.M. (CCH) 1338, 1346 (1980), *aff’d without opinion*, 679 F.2d 873 (2d Cir. 1981) (“The duty of timely filing a tax return is the personal duty of a taxpayer, and the taxpayer cannot excuse himself from the proper performance of that duty by claiming to be unaware of the correct due date.”); see also Marilyn E. Brookens, *The Section 6651(a)(1) Penalty for Late Filed Tax Returns: Reasonable Cause and Unreasoned Decisions*, 35 CASE W. RES. L. REV. 183, 191-93 (1985).

When it comes to grappling with the uncertainty surrounding the tax characterization of net interspousal transfers, gay and lesbian couples likely fall into one of three categories: (i) the blissfully ignorant, who are simply unaware of this tax issue; (ii) the informed and well-intentioned, who are aware of this tax issue and make their best effort at compliance; or (iii) the informed but disobedient, who are aware of this tax issue but purposefully refuse to allow themselves to be made a party to their own oppression.<sup>105</sup> Only gay and lesbian couples that fall in the second category (i.e., the informed and well-intentioned) will be able to avail themselves of the reasonable cause exception, because they will have made a good faith (albeit erroneous) attempt to comply with an uncertain area of the law.<sup>106</sup> Couples in the other two categories will be faced with penalties either because they were ignorant of the law (which does not constitute reasonable cause) or because they were aware of the law and ignored it (which also does not constitute reasonable cause).

If they are liable either for additional tax or for penalties (or both), then the couple will also be liable for interest on the additional tax due and on any penalties – compounded *daily*<sup>107</sup> The Code’s use of compound interest imposes a heavier burden on the taxpayer than using simple interest would, especially given the length of time it can take to identify and resolve a dispute with the IRS.<sup>108</sup> Taken together, compound interest and penalties can quickly increase the size of a tax bill. For example, after five years, a \$100,000 deficiency subject to a 20% negligence penalty and compound interest at a rate of 5%<sup>109</sup> would result in a liability of \$154,080.41 – an amount that is more than 150% of the initial tax deficiency.

Even if a gay or lesbian couple manages to win the battle with the IRS over an alleged failure appropriately to characterize a net interspousal transfer, the couple may find that a battle is all that they’ve won because the war with the IRS may be far from over. Until now, we have considered only the need for gay and lesbian couples to ascertain the amount of, and to settle on an appropriate tax characterization for, net interspousal transfers. Their obligations under the tax laws do not, however, end there. The Code also imposes on gay and lesbian couples several recordkeeping and reporting

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105. For an example of tax civil disobedience spurred by the Code’s treatment of gay and lesbian couples, see *Mueller v. Commissioner*, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,505 (7th Cir.), *cert. denied*, 123 S. Ct. 477 (2002); *Mueller v. Commissioner*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,391 (7th Cir. 2001); and *Mueller v. Commissioner*, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,205 (7th Cir. 2000).

106. Tarr & Burger, *supra* note 101, at A-76 (“On the other hand, ignorance of the law in conjunction with other facts and circumstances, including the taxpayer’s knowledge, may support a claim of reasonable cause. For example, where the IRS has not provided any guidance as to difficult and complex issues, reasonable cause may exist for a position taken in good faith.” (footnote omitted)).

107. I.R.C. §§ 6601, 6622 (2003).

108. See MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 6.04[1], at 6-65 (rev. 2d ed. 2002); Gerald W. Padwe, *Tax Clinic*, 14 *TAX ADVISER* 144, 145 (1983).

109. Rev. Rul. 2003-63, 2003-25 I.R.B. 1037 (indicating that a 5% interest rate applies to underpayments beginning July 1, 2003).

requirements that are ostensibly designed to help the IRS verify the accuracy of the couple's returns.

For income tax purposes, each taxpayer is required to "keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information."<sup>110</sup> Likewise, for gift tax purposes, each taxpayer is required to "keep such permanent books of account or records as are necessary to establish the amount of his total gifts . . . together with the deductions allowable in determining the amount of his taxable gifts, and the other information required to be shown in a gift tax return."<sup>111</sup> Moreover, if a taxpayer makes gifts to a person in excess of the annual exclusion, she is required separately to list on her gift tax return *each and every gift* made during the calendar year to that person, including gifts that are not taxed because of the annual exclusion.<sup>112</sup>

These requirements impose a Sisyphean compliance burden on any gay or lesbian couple that pools income and shares expenses. The Code essentially requires these couples to keep records documenting every penny that they spend, save, or give away to third parties.<sup>113</sup> Every trip to the grocery store, the clothing store, and the bank must be documented to determine who spent what and on whom. Without these records, the couple will find it difficult, if not impossible, to counter an assertion by the IRS that: (i) the net interspousal transfer is larger than claimed by the couple; (ii) for income tax purposes, a larger portion of the transfer should be treated as taxable income (as opposed to a non-taxable gift or support payment); and/or (iii) for gift tax purposes, a larger portion of the transfer should be treated as a taxable gift (as opposed to a non-taxable support payment).

Simply put, these recordkeeping and reporting requirements are demeaning and oppressive. Think for a moment of the mountain of receipts that you collect from shopping trips (both real and virtual) every month. Then think of having contemporaneously to catalogue each of these receipts according to what was spent and on whom. Then think about having to tally up the total at the end of the year. Then think about having to list every one of these transactions on a tax return, showing the

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110. Treas. Reg. § 1.6001-1(a) (as amended in 1990).

111. Treas. Reg. § 25.6001-1(a) (as amended in 1977).

112. Treas. Reg. § 25.6019-3(a) (as amended in 1994) ("The return must set forth each gift made during the calendar year . . . that . . . is to be included in computing taxable gifts . . ."); *see also* INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 709, at 6 (2002) (indicating that *all* gifts must be separately listed, even those to be excluded by reason of the annual exclusion).

113. *See Cain, Death Taxes, supra* note 20, at 696 (describing the plight of Alice and Barb; when Alice's estate was audited for estate tax purposes, "the auditing agent took the position that since Alice was the wealthy partner, everything she paid for over the forty years that benefited Barb was an adjustable [sic] taxable gift. Thus, Alice's ownership of the couple's residence which was used by Barb created an adjusted taxable gift. Vacation trips for the two of them paid out of Alice's funds created an adjusted taxable gift. Entertainment expenses and meals at fancy restaurants – all items of joint consumption – were proposed as adjusted taxable gifts.").

particulars of what was given, by whom, and to whom. Finally, think about having to find a place to store this small mountain of paper for six or more years (depending on the relevant tax statute of limitations)<sup>114</sup> in order to provide support for the claimed amount and tax characterization of a net interspousal transfer (if any).

For gay and lesbian couples, these recordkeeping and reporting requirements represent not only an onerous burden, but also a severe invasion of privacy. After *Lawrence v. Texas*,<sup>115</sup> the government can no longer break into our bedrooms to determine with whom and how we have sex, but it can still use the Code to knock on the front door, come in, and probe our every move (financial and otherwise) with our partners. No straight couple is (or likely ever will be) required to put up with this level of intrusion into their relationship.<sup>116</sup>

Such a crushing (not to mention insulting) recordkeeping and reporting burden can only breed non-compliance. Non-compliant gay and lesbian couples will again likely fall into one of three categories: (i) the blissfully ignorant, who simply have no idea that the recordkeeping and reporting requirements exist; (ii) the informed and well-intentioned, who attempt to comply, but (as can only be expected) fail to do so; or (iii) the informed but disobedient, who are aware of the requirements but purposefully refuse to comply because they do not wish to be made a party to their own oppression.<sup>117</sup> Whatever the reason, this non-compliance with the recordkeeping and reporting requirements may give the IRS an opportunity to increase the amount of additional tax owed and to impose penalties.<sup>118</sup>

For those who either throw up their hands at the impossibility of the task or who refuse to acquiesce in the oppression, the specter of criminal liability is added to the array of civil penalties discussed above. Gay and lesbian couples who are aware of the recordkeeping requirements and decide not to comply with them may be found guilty of the crime of willful failure to keep records.<sup>119</sup> This is a misdemeanor punishable by a

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114. INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. NO. 552, RECORDKEEPING FOR INDIVIDUALS 6 (1999).

115. 123 S. Ct. 2472, 2484 (2003).

116. See Knauer, *supra* note 27, at 216 (“The costs involved in requiring a married couple to file as individuals are routinely cited as a reason against the adoption of individual filing.”). Although unmarried heterosexual couples are technically subject to the same uncertainties and recordkeeping and reporting requirements as gay and lesbian couples, they have a privilege that we do not – the privilege to choose to get married and avoid all of these problems. See Cain, *Heterosexual Privilege*, *supra* note 19, at 491.

117. See *supra* note 105.

118. It is worth noting that the Treasury Regulations define “negligence” for purposes of the accuracy-related penalty provisions of § 6662, see *supra* notes 76-79 and accompanying text, to include “any failure by the taxpayer to keep adequate books and records.” Treas. Reg. § 1.6662-3(b)(1) (as amended in 1998).

119. I.R.C. § 7203 (2003). It is worth noting that if willfulness also characterizes the failure to withhold and deposit taxes as required by I.R.C. § 3406 (2003), then the partner required to withhold and deposit the taxes may be subject to a civil penalty equal to 100% of the underpayment, I.R.C. § 6672(a) (2003), as well as criminal penalties under I.R.C. § 7202 (2003). Violations of § 7202 are punishable by a

fine of up to \$100,000,<sup>120</sup> imprisonment of up to one year, or both – together with the costs of prosecution.<sup>121</sup> These criminal penalties are in addition to, and not in lieu of, the civil penalties discussed above.<sup>122</sup>

The “willfulness” necessary to be convicted of this crime does not require “evil motive, bad purpose, or corrupt design.”<sup>123</sup> Rather, it requires only “a voluntary, intentional violation of a known legal duty.”<sup>124</sup> Couples who are aware of the recordkeeping requirement and refuse to comply (either as an act of civil disobedience or because they find the task impossible to complete) arguably satisfy this definition of “willfulness.” The blissfully ignorant may, however, escape criminal liability for their failure:

Congress has . . . softened the impact of the common-law presumption [that every person knows the law] by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term “willfully” as used in the federal criminal tax statutes as carving out an exception to the traditional rule [that ignorance of the law or mistake of law is no defense to criminal prosecution]. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.<sup>125</sup>

The Supreme Court has further held that a mistake of law need not be objectively reasonable in order to negate the knowledge requirement of “willfulness”; the mistake of law need only be based on a good-faith belief.<sup>126</sup>

Given the array of civil and criminal penalties that the IRS has at its disposal, gay and lesbian couples who pool income and share expenses are nearly assured that they will not escape an IRS assault unscathed. Those who remain blissfully ignorant of these tax issues may not be subject to criminal penalties for failing to keep appropriate records; however, they may be liable for civil penalties because of their inability to rely on the reasonable cause exception. Those who are aware of their legal obligations and make a good faith attempt at compliance may be able to avoid civil penalties by relying on the reasonable cause exception; however, they may have a tougher time avoiding criminal

fine of up to \$250,000, 18 U.S.C. § 3571(b)(3) (2003), and/or imprisonment of not more than five years, and the defendant may also be made to pay the costs of prosecution. I.R.C. § 7202 (2003).

120. 18 U.S.C. § 3571(b)(5) (2003) (fine for a Class “A” misdemeanor); *see also* 18 U.S.C. § 3559(a)(6) (2003) (defining a Class “A” misdemeanor).

121. I.R.C. § 7203 (2003).

122. *Id.*

123. *Wilson v. United States*, 250 F.2d 312, 319 (9th Cir. 1957), *reh’g denied*, 254 F.2d 391 (1958).

124. *United States v. Pomponio*, 429 U.S. 10, 12 (*per curiam*), *reh’g denied*, 429 U.S. 987 (1976); *see also* *Cheek v. United States*, 498 U.S. 192, 200-01 (1991).

125. *Cheek*, 498 U.S. at 200.

126. *Id.* at 203-04.

penalties if they are aware of the recordkeeping requirements, but voluntarily and intentionally fail to comply with them because they impose a crushing burden. Those who engage in civil disobedience get the worst treatment, as they face the possibility of both civil *and* criminal penalties for failing to comply with their tax obligations.

Seen in this light, the Code takes on the aspect of another codification of society's hostility towards homosexuality: the (now outmoded) sodomy statute. Like a sodomy statute, the Code targets and punishes gay sex, albeit indirectly through the proxy of gay coupling.<sup>127</sup> And despite being underenforced<sup>128</sup> (much like a sodomy statute<sup>129</sup>), the Code and its civil and criminal penalties nonetheless "hang as an ominous Sword of Damocles over the heads of lesbians and gay men throughout the country."<sup>130</sup>

For those who are targeted, the punishment can be quite severe: double or triple taxation of a portion of the higher-earning partner's income, plus one or more civil penalties (some of which can reach as high as 20-25% of the amount owed), plus interest on the additional tax and penalties (compounded daily), plus a criminal fine of up to \$100,000, plus up to one-year in jail. This punishment is much harsher than the fine of no more than \$500 that was imposed by Texas<sup>131</sup> before its sodomy statute was recently declared unconstitutional.<sup>132</sup> On the other hand, it is not nearly so draconian as the five years to life in prison that Idaho meted out for violating its sodomy statute before the decision in *Lawrence*.<sup>133</sup>

Moreover, as is the case with a sodomy statute, the impact of the Code on gays and lesbians is not confined to the civil and criminal penalties that may be imposed on the occurrence of the rare audit or prosecution.<sup>134</sup> The Code can also harm gays and lesbians in other ways. As one of the more prominent applications of the Defense of Marriage Act, the Code is overtly hostile to gays and lesbians. This overt hostility toward gay and lesbian couples stigmatizes them by branding their relationships inferior to those of

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127. For discussion of this conflation of homosexual identity and homosexual conduct, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 689-94 (2001), Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 *passim* (1993), and Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 168-78 (2000).

128. The audit rate for individuals in 2002 was only 0.57%, down from 0.92% in 1993 and the high of 1.67% during the ten-year period from 1993-2002. GEN. ACCOUNTING OFFICE, REP. NO. GAO-03-378, TAX ADMINISTRATION: IRS SHOULD CONTINUE TO EXPAND REPORTING ON ITS ENFORCEMENT EFFORTS 38 app. III at tbl. 6 (2003).

129. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) ("In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.").

130. Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB. L.J. 997, 997 (1994).

131. TEX. PENAL CODE ANN. §§ 12.23, 21.06 (2003).

132. *Lawrence*, 123 S. Ct. at 2484.

133. IDAHO CODE § 18-6605 (2003).

134. For a discussion of the myriad ways in which the mere existence of sodomy statutes harmed gays and lesbians, see Goodman, *supra* note 127, *passim*, and Leslie, *supra* note 127, *passim*.

straight couples. In effect, the Code at once embodies and perpetuates societal prejudice, discrimination, and hostility toward gays and lesbians by giving such activity the imprimatur of the federal government.

The bewilderment and discomfort that follow on the heels of this overt hostility further reinforce the stigma. 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.<sup>135</sup> 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.

This bewilderment and discomfort engender a more insidious form of hostility that attempts to make gay and lesbian couples a party to their own oppression by driving them into the closet (or for those already there, further into the closet). The Code encourages gay and lesbian couples not to file returns or statements with the IRS that connect one partner with the other.<sup>136</sup> If they dare to do otherwise, they expose themselves to a panoply of civil and criminal penalties, and, for those in the closet, to the public outing that tax litigation would necessarily entail (should they choose to fight the IRS' determination in court). The Code thus attempts to banish our relationships from sight, making us invisible once again.

#### IV. CONCLUSION

So, you see, I am not concerned with whether my tax bill would go up were I allowed to check the “married filing jointly” box on my Form 1040. As a gay man, that is the least of my worries. Much more important to me is finding someone with whom I can share my life. About a year and a half ago, I was lucky enough to meet a wonderful man and fall in love for a second time. We've recently begun a conversation about moving in together. Naturally, as a geeky tax lawyer/academic, all of the problematic tax aspects of our relationship lurk in the back of my mind, but they will never be a reason not to allow our relationship to grow and progress. Where the relationship goes will ultimately be about my (and his) feelings, and not about the attendant tax costs.

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135. The DOMA amendment to the full faith and credit statute does, however, mention “relationship[s] between persons of the same sex.” Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7).

136. See Cain, *Taxing Lesbians*, *supra* note 38, at 478.

What *is* important to me, however, is that we, as a couple, be treated with dignity and respect. All I ask is that we be treated the same as – not better, not worse, just the same as – straight couples. But equal treatment is not what we get, either from society or, as should by now be clear, from the Code. Instead, both society and the Code treat us with a combination of hostility, bewilderment, and discomfort that, to paraphrase the epigraph at the beginning of this essay, demeans our existence and attempts to control our destiny by essentially making our private sexual conduct a tax crime. If that's not discrimination, what is?