Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts

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I. INTRODUCTION

Try this: in normal conversation with a friend or co-worker, relate all your activities over the past two weeks without once giving any indication of your marital or relationship status and without providing any clues as to the sex of the persons with whom you shared these

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activities. Difficult? Now imagine doing this with everyone you know at work, at school, at the grocery store, at the dry cleaners, at the health club, everyone—and not just describing the past two weeks, but all the time—for every vacation, birthday, date, anniversary, and all the little occasions and nonoccasions that make up your daily life.

Tiring, isn’t it? This is part of the world of the closet in which lesbians and gay men hide or deny their sexual orientation to others.

1. This is not merely an academic exercise, as this quote from a gay attorney surveyed in Los Angeles illustrates:

   [quote]
   I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say “we” and risk someone asking who “we” is.... [I]f someone asks, “What happened this weekend?” and I slip and [say] “we” instead of “I,” then I go through a kind of turmoil. That really requires energy that... prevents you... from achieving any peace and assurance.
   [quote]

   Committee on Sexual Orientation Bias, Report on Sexual Orientation Bias, 1994 L.A. County Bar Ass’n 28 (quoting the response given by one gay attorney who was surveyed) [hereinafter L.A. Bar Report].


   Studies have shown that it is probably more accurate to refer to “homosexualities,” as there is a diverse continuum of same-sex orientations. Alan P. Bell & Martin S. Weinberg, Homosexualities: A Study of Diversity Among Men and Women 53–61 (1978); Alfred C. Kinsey et al., Sexual Behavior in the Human Male 636–55 (1948); see also Janet E. Halley, Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1723 (1993). Nevertheless, for simplicity, this Article uses the singular. Finally, the author has avoided using “straight” to characterize heterosexuals or heterosexuality, as that term implies that lesbians and gay men are crooked or deviant. Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2452 (2000) (discussing phrase “morally straight” within Boy Scout oath as excluding gay people); see also Fajer, supra note 3, at 336 n.119.
rather than identify themselves as lesbian or gay.

The decision to acknowledge one's sexual orientation—to "come out" in common parlance—exposes gay people to a variety of responses from acceptance, to ridicule, to loss of contracts or other means to earn a living, to termination of employment or other benefits. Nevertheless, it is an essential step toward lesbian and gay persons' full and equal participation in American society. Legal rules can help or hinder this process; current doctrine, unfortunately, does both.

Coming out of the closet is only a metaphor. We literally step out of a

4. The "decision" is more correctly "decisions." Publicly acknowledging one's sexual orientation is a series of continuing choices of how and how much to disclose. See infra notes 9–12 and accompanying text.

5. Although the term "come out" is primarily connected with self-identification as lesbian or gay, the metaphor of coming out of the closet has been appropriated in a wide variety of contexts. E.g., Arms Race? Make Mine a Musket, ROCKY MNT. NEWS, Feb. 8, 2000, at 6A, http://www.newslibrary.com/deliverppdoc.asp?SMG=572400 (discussing coming out as a gun owner); Kayce T. Ataiyero, Burdened No More, They're Happily Fat, BOSTON GLOBE, July 29, 1999, at B1 (discussing coming out as a fat person); Kathryn Orth, "We Have to Begin by Being Better People," RICH. TIMES DISPATCH, May 13, 2000, at C3 (discussing coming out as a Christian); David Whitley, Miami-N.Y. Is So Ugly It's Pretty, ORLANDO SENTINEL, May 21, 2000, at C1, http://archive.orlandosentinel.com/@He0a949008ad092ea9127ce8afedc500c=sw@id=560 (discussing coming out as a N.Y. Knicks or Miami Heat fan). For a discussion of the historical evolution of the term, see William N. Eskridge, Jr., A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 YALE L.J. 2411, 2438–41 (1997).


7. See 10 U.S.C. § 654(b) (1994) (discussing armed forces' "don't ask, don't tell" policy); Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997).

8. Peter Hartlaub, Gay M.D. Sues Over Military Discharge, S.F. EXAMINER, May 22, 2000, at A9 (noting that the Air Force is suing to recover the amount spent for medical school education for military doctor who disclosed his homosexuality); Bob Roehr, Navy Continues Harassment of Gays, BAY AREA REP., May 25, 2000, at 13 (relating that the Navy is seeking to recoup cost of education at U.S. Naval Academy from former student who resigned under threat of expulsion for being gay); Christian College Bans Gay Alumni, S.F. EXAMINER, Oct. 23, 1998, at A14 (discussing that Bob Jones University bans gay alumni from campus and threatens them with arrest for trespass).
closet into a room all at one time. One is either in one place or another, in the closet or out. Unlike that literal decision to come out of the closet, publicly acknowledging one's identity as lesbian or gay is a series of continuing choices as to how and how much to disclose, and when and to whom. Thus, one can be open about one's sexual orientation to friends or family, but not at work, or open to other lesbians or gay men, but not to non-gay people. Alternatively, one may decide to answer a direct question, but not volunteer information about sexual orientation.

Complicating these decisions is that if a lesbian or gay man remains silent, other people assume that he or she is not gay. This assumption allows some gay people to hide their identity and avoid the negative consequences of being open. Nevertheless, the closet is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality. As the opening experiment illustrated, denying a part of one's life is neither easy nor comfortable. Neither legal doctrine nor societal pressures coerce non-gay persons into such denial.

Remaining silent causes some lesbians and gay men to feel they are deceiving others. The closet reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between them and non-gay persons. Some lesbians or gay men do not fit neatly

9. For several examples of coming out stories and the individual choices that those gay persons made, see Boys Like Us: Gay Writers Tell Their Coming Out Stories (Patrick Merla ed., 1996).
10. Dave Cullen, A Heartbreaking Decision, SALON, at http://www.salon.com/news/feature/2000/06/07/relationships/print.html (June 7, 2000) (describing Marine captain who originally created a separate gay life in Denver, seventy miles away from the "gay-free zone" of Colorado Springs where he was stationed); see also infra Part III.
11. See Eskridge, supra note 5, at 2439 (stating that by 1960, some lesbians or gay men equated coming out with talking to non-gays about one's sexual orientation); id. at 2440 (noting coming out means talking to people who do not share one's sexual orientation, not just those who do).
14. Dominic J. Brewer & Maryann Jacobi Gray, Survey of Sexual Orientation Fairness in the Courts (Revised Results Mar. 31, 1999), reported in materials of the Sexual Orientation Fairness Subcommittee Meeting of Apr. 9, 1999, at 21 (quoting a survey respondent: "I did not tell the truth about having a partner because I was not comfortable being 'out' in that setting. I pretended I was single—then 'passed' for heterosexual.") [hereinafter Survey Data].
16. Dominic J. Brewer & Maryann Jacobi Gray, Sexual Orientation Fairness in California Courts: Results from Two Surveys: Final Report, June 2000, at 20. This report was incorporated into the SOF Report, infra note 38.
17. For a fuller discussion of consequences, see Eskridge, supra note 5, at 2442-43; Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay,
into the standard voir dire categories of married or single. They cannot share in everyday social interactions because they must mask certain aspects of their lives.

Further, open self-identity is more significant for lesbians and gay men than it is for non-gay persons. The non-gay person may not feel any pressure to voice her sexual orientation explicitly. She may do so in any of the numerous ways in which this fact is normally communicated, by pictures of a spouse or children at work, by using the pronoun “we” to describe daily activities, or simply by allowing people to presume that she is non-gay. For the gay person, each of

18. See discussion infra notes 315–20 and accompanying text.
[At social events] gay and lesbian attorneys are most likely to feel and be perceived as ‘different’—usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious . . . not fitting in.
Id. at 33 (quoting response from a gay or lesbian attorney respondent).
20. Eskridge, supra note 5, at 2442.
21. Non-gay people are open about their sexual orientation in myriad ways without anyone thinking about it. Indeed, the awkwardness of the expression “openly non-gay” to describe the sexual orientation identity of heterosexuals illustrates how little we consider the public nature of heterosexuality.
22. Do not underestimate the significance of this distinction. The LA. Bar Report found that nearly one-half of all respondents, regardless of sexual orientation and sex, believed that simply discussing one’s personal or family life in a manner that revealed the sex of one’s partner—a matter of no consequence for non-gay attorneys—would harm a gay or lesbian attorney’s career. LA. Bar Report, supra note 1, at 31.
23. See supra text accompanying note 1; see also All Things Considered: Gay Teacher Files First Amendment Lawsuit in Utah (NPR radio broadcast Oct. 21, 1997) (discussing lesbian coach and teacher threatened by school district with termination from tenured position if she talked with students, staff, or parents about her sexual orientation or life). The report states:
[John Biewen, host]: Weaver says in Spanish Fork, a town of 12,000, the order meant she couldn’t have ordinary conversation with most people in or out of school.
[Wendy Weaver, school teacher, Spanish Fork, Utah]: If I was in a classroom and I said something about, oh, Rachel and I went somewhere for the weekend, and—that that could be in violation. I went in and asked them actually that even if I was at the ball park, and was talking to somebody, and I didn’t know whether they had a student in the school or not, if that could be part of what this memo was saying, and they said yes.
Id.
24. Indeed, gay people must affirmatively break the assumption of heterosexuality to disclose their sexual orientation publicly. When a non-gay couple kiss in public, it is not viewed as a statement about sexual orientation. Conversely, when gay people engage in those same activities, it is often perceived as “flaunting” one’s sexual
these situations calls for a conscious decision as to what to say or do, how much to disclose or allow to remain unspoken.25

Further, most lesbians or gay men are not visibly identifiable.26 Because of this, the revelation of gay or lesbian identity usually takes place through speech or communicative conduct27 in order to break the assumption of heterosexuality that silence often brings. Accordingly, the courts have often jurisprudentially intertwined lesbian or gay identity28 with the First Amendment.29

orientation. Singer v. United States Civ. Serv. Comm’n, 530 F.2d 247, 249 (9th Cir. 1976). This “fear of flaunting” has often justified negative employment consequences for lesbians or gay men. Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); see also L.A. Bar Report, supra note 1, at 5–40 (describing the consequences of being an openly lesbian or gay attorney in Los Angeles County).

25. See Cullen, supra note 10. The author noted one man’s attempt to avoid detection:

He loosened those ties [with non-gay friends] by convincing his work friends that he found Colorado Springs stifling, and shifted all his free time to Denver, routinely spending three to five nights a week up there.

But the constant questions of his juggling strategy still dog him—“What you been up to? What did you do this weekend?”—requiring an elaborate fictional life. “I have to be careful,” Alex says. “I have to be guarded when I come back from a weekend and start talking about where I’ve been or what I’ve done.”

He has spent enough time in Denver’s straight clubs to swap them with the gay bars; dates and tricks are converted to feminine counterparts. “I try to keep it as close to the truth as possible, because if I have to retell the story, I’m not going to stumble over things,” he says. “If some guy has a broad chest, she’s got a rack. A guy named Clay becomes Claire. Everything else pretty much stays the same.”

Id.26. Contrary to many people’s beliefs, non-gay persons are often incapable of identifying lesbians or gay men who do not wish to disclose their sexual orientation. WARREN J. BLUMENFELD & DIANE RAYMOND, LOOKING AT GAY AND LESBIAN LIFE 86 (1993).

27. Eskridge, supra note 5, at 2442.

28. There is a lively debate among scholars on whether a gay and lesbian identity exists, and particularly whether one can properly use “lesbian or gay man” to describe persons engaged in same-sex sexual activity before the mid-nineteenth century. E.g., John Boswell, Revolutions, Universals, and Sexual Categories, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 17, 23 (Martin Duberman et al. eds., 1989); Martin Dannecker, Towards a Theory of Homosexuality: Socio-Historical Perspectives, in GAY PERSONALITY AND SEXUAL LABELING I (John P. De Cecco ed., 1985); Mary McIntosh, The Homosexual Role, in THE MAKING OF THE MODERN HOMOSEXUAL 30 (Kenneth Plummer ed., 1981); Joseph Cady, “Masculine Love,” Renaissance Writing, and the “New Invention” of Homosexuality, 23 J. HOMOSEXUALITY 9 (1992). Fortunately, the thesis of this Article does not depend on the correctness of any one of these positions. In fact, as Professor Daniel Ortiz points out, there may be no single definition of gay identity that can serve all purposes at all times. Daniel R. Ortiz, Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity, 79 VA. L. REV. 1833, 1850 (1993).

About twenty years ago, judicial opinions began to distinguish between one's status as lesbian or gay, which they held insufficient grounds for dismissal from employment, and public disclosure or expression of one's sexual orientation, which constituted an appropriate reason for termination. The most famous modern example of this division is the military's "don't ask, don't tell" policy. Additionally, some family law courts employ a similar distinction in custody decisions involving lesbian or gay parents.

Other early cases employed free speech concepts to permit lesbians and gay men to come out of the closet. For example, in Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co., the California Supreme Court held that disclosing one's sexual orientation was a political statement about gay rights. Therefore, California statutes protecting political expression shielded openly lesbian and gay employees from termination.


31. 10 U.S.C. § 654 (1994) (codifying "don't ask, don't tell" policies of the military); see also Cole & Eskridge, supra note 29, at 332 (discussing testimony of General Colin Powell, then Chairman of the Joint Chiefs of Staff, on the difference between lesbian or gay identity and disclosure of that identity on a soldier's ability to perform in the military); Ed Bradley, 60 Minutes: Don't Ask, Don't Tell: Law Regarding Homosexuals in the Military (CBS television broadcast, Dec. 12, 1999) (discussing the policy and the conviction of a soldier for killing another soldier believed to be gay). For an interesting account of the challenges and costs associated with living as a gay man in the military, see Dave Cullen, Don't Ask, Don't Tell, Don't Fall in Love, SALON at http://www.salon.com/news/feature/2000/06/06/officers/print.html (June 6, 2000); Cullen, supra note 10; Daryl Lindsey, The Cost of the Closet, SALON at http://www.salon.com/news/feature/2000/06/06/gays/print.html (June 6, 2000). Commentators have discussed this policy thoroughly. E.g., Cole & Eskridge, supra note 29, at 332. Further discussion of the military regulations is beyond the scope of this Article.

32. E.g., S.E.G. v. R.A.G., 735 S.W.2d 164, 166-67 (Mo. Ct. App. 1987) (discussing the activities of a mother in a lesbian relationship as imposing her sexuality on her children and the community, and finding her, therefore, unfit to have custody or visitation). The court in S.E.G. noted: "She [the mother] has chosen not to make her sexual preference private but invites acknowledgment and imposes her preference upon her children and her community." Id. at 167. See also In re J.B.F. v. J.M.F., 730 So. 2d 1190, 1194 (Ala. 1998); Pulliam v. Smith, 501 S.E.2d 898, 903-04 (N.C. 1998).

33. 595 P.2d 592 (Cal. 1979).

34. Id. at 610-11.
However, recently the United States Supreme Court permitted persons to assert First Amendment rights as a sword to exclude lesbians and gay men, and to keep them closeted. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc.*\(^{35}\) and *Boy Scouts of America v. Dale,*\(^{36}\) the Court allowed the exclusion, on free speech grounds, of lesbian and gay persons from participation in American social institutions. In fact, the dissent in *Dale* cautioned that the Court’s current First Amendment jurisprudence effectively affixes a sign to openly gay or lesbian persons that justifies their exclusion.\(^{37}\) Yet, as a recent, groundbreaking, empirical study of California courts demonstrates,\(^{38}\) it would be erroneous to attribute that exclusionary sign solely to the Court’s recent doctrine. Even in settings in which legal mandates specifically require equal and unbiased treatment of lesbians and gay men, the experiences of lesbians and gay men are often very different once others learn their sexual orientation.\(^{39}\)

This Article will first explore how the Supreme Court’s recent speech decisions in *Hurley* and, particularly, in *Dale* have transformed lesbian and gay identity into speech with the result that others are able to force gay people back into the closet. This Article will then empirically detail the findings of the California Judicial Council study in order to substantiate or invalidate parts of the Court’s expressive association analysis and to illustrate the extrajurisprudential pressures on lesbians and gay men to remain closeted.\(^{40}\)

II. THE FIRST AMENDMENT PUSH TOWARD THE CLOSET

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc.*\(^{41}\) the Supreme Court held that a Massachusetts statute prohibiting discrimination based on sexual orientation could not require the Boston St. Patrick’s Day Parade to include GLIB, a group of Irish-American gay


\(^{36}\) 120 S. Ct. 2446 (2000).

\(^{37}\) Id. at 2476 (Stevens, J., dissenting).


\(^{39}\) See discussion infra Part III.

\(^{40}\) By discussing the pressures on lesbians or gay men to remain closeted, the author is not suggesting that public awareness or discussion of homosexuality is less now than in the past. On the contrary, visibility of lesbians or gay men has increased dramatically. See, e.g., John Leland, *Shades of Gay,* NEWSWEEK, Mar. 20, 2000, at 46. As one author put it, in modern American life, homosexuality has gone “from ‘the love that dare not speak its name’ to ‘the love that won’t shut up.’” Jonathan Alter, *Degrees of Discomfort,* NEWSWEEK, Mar. 12, 1990, at 27.

men, lesbians, bisexuals, and their supporters. Specifically, the Court held that the use of the statute violated the First Amendment rights of the parade sponsors, the South Boston Allied War Veterans Council (the "Council"). The Council had refused to allow GLIB to participate as its own organization carrying its own banner. The parade organizers stated that they did not exclude lesbians, gay men, or bisexuals, and would have allowed them to march as members of another group the Council had permitted to participate. Thus, a gay person could have participated in the parade as a member of the AFL-CIO, of several marching bands, of South Boston Against Drugs, or of the South Boston Baptist Bible Trolley.

The Supreme Court found that this distinction meant that the Massachusetts antidiscrimination law did not apply normally to the Council's decision. For the Court, the Council had not discriminated against any gay man, lesbian, or bisexual as such, and the law did not address any sexual orientation dispute. Rather, the Court stated that the sole issue was GLIB's admission as a parade unit under its own banner. As stated by the Court, GLIB's purpose in marching was "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there [were] such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade." Since the parade was communication, requiring GLIB's participation would have forced a particular message upon the Council's speech in organizing the march. That forced inclusion violated the Council's First Amendment autonomy to choose the content of its expression.

42. Id. at 559, 581.
43. Id. at 572.
44. Id. As others have demonstrated, the Court may have oversimplified and been overly generous to the Council's positions. E.g., Darren Lenard Hutchinson, Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality, 1 U. Pa. J. Const. L. 85, 98-100 (1998). Because this Article begins its analysis with the Hurley doctrine, it has no need to reexamine the doctrine's factual predicates.
45. These groups were all part of the 1992 parade. Irish-American Gay, Lesbian and Bisexual Group, Inc. v. City of Boston, 636 N.E.2d 1293, 1296 n.9 (Mass. 1994), rev'd sub nom Hurley, 515 U.S. at 557.
47. Id.
48. Id. at 561.
49. Id. at 572–73.
A closer examination of this reasoning, however, shows that it glossed over several important issues, although it ultimately reached the correct conclusion. Once accepted by the Court, the Council’s distinction between marching as a member of GLIB or marching as a member of another parade participant effectively erased GLIB’s lesbian and gay identity message. While an openly gay or lesbian Irish-American might have marched in the Boston St. Patrick’s Day Parade, there is little chance that any particular viewer would have known that fact. Most lesbians or gay men, even open ones, are not visibly identifiable as such. Without the GLIB banner, a marcher’s gay identity is hidden. The refusal to permit a marcher to identify him or herself openly as gay or lesbian, but only as a member of another organization, forces that open gay person back into the closet. The Court’s First Amendment doctrine reinforced that closet door.  

An analogy may clarify this reinforcement of the closet. Imagine a group of Irish-American women who wished to participate in the parade under their own banner proclaiming their pride in their identity as women of Irish ancestry. If the Council did not allow those women to march separately, but only as members of some other approved organization, their female identity would not be erased. Even if they marched as carpenters, for example, parade viewers would still see that Irish-American women exist. Unlike sexual orientation, sex is an independently visible characteristic.

Paradoxically, because lesbian or gay identity needs to communicate that fact to be open, Hurley correctly focused on speech and the First Amendment as the key to the decision. In this context, participating in the parade while carrying GLIB’s shamrock-strewn banner proclaiming “Irish American Gay, Lesbian and Bisexual Group of Boston” is precisely the crucial communication of an open lesbian, gay, or bisexual identity. The Court recognized this fact:

50. Eskridge, supra note 5, at 2461.
51. Id.
52. Of course, one’s sex is not always immediately apparent, as movie plots and some real lives can attest. E.g., BOYS DON’T CRY (Twentieth Century Fox 1999); THE CRYING GAME (Miramax Films 1992); VICTOR/VICTORIA (MGM/UA 1982); Gender-Bending Played to the Hilt: Joan Smith Tells the Strange Story of Jazz Pianist Billy Tipton, FINANCIAL TIMES, Jan. 23-24, 1999, at 6 (discussing Billy Tipton’s story); Kim A. Lawton, Joan of Arc: An Unlikely Popular Icon Today, PLAIN DEALER, May 15, 1999, available at 1999 WL 2363213 (telling the story of Joan of Arc); Deb Price, Transgendered Have Lessons for Society, DETROIT NEWS, June 26, 2000, at A9, available at 2000 WL 3482557 (telling the real-life story of Teena Brandon/Brandon Teena, on which BOYS DON’T CRY was based).
53. Hurley, 515 U.S. at 570.
Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.\textsuperscript{54}

That particular communication was exactly what the Council wanted to delete from its parade message. The Court continued:

The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.\textsuperscript{55}

The Court correctly recognized three important points. First, being openly lesbian or gay may have meant many different things to individual GLIB members;\textsuperscript{56} however, the common reason for being open in this particular context was to show that lesbians and gay men of Irish ancestry existed.\textsuperscript{57} Thus, it was not merely being lesbian or gay that was important. What was important was that others should recognize that Irish-Americans could be gay as well as marching band members or firefighters, etc.\textsuperscript{58}

Second, essential to GLIB's message of inclusion was the ability to march under an identifying banner in the same way that other parade organizations participated. GLIB's inclusion as a participant equal to other parade groups was the specific communicative goal of these particular lesbians and gay men.\textsuperscript{59} Marching in a separate parade\textsuperscript{60} would not have made the same statement and may have reinforced the idea that lesbians and gay men are not part of the mainstream.\textsuperscript{61} Accordingly,

\textsuperscript{54} Id. at 574.
\textsuperscript{55} Id. at 574-75.
\textsuperscript{56} Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2477 n.24 (2000) (Stevens, J., dissenting) ("For John Doe to make a public statement of his sexual orientation to the newspapers may, of course, be a matter of great importance to John Doe. Richard Roe, however, may be much more interested in the weekend weather forecast.").
\textsuperscript{57} Hurley, 515 U.S. at 561.
\textsuperscript{58} Id. at 574.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 570.
\textsuperscript{61} Lesbians and gay men have marched in other ethnic or racial pride parades. E.g., Gamalier De Jesus, ¿Quienes Somos? What Is This Thing Called Identity, \textit{Village Voice}, July 2, 1996, at 27 (reporting that Latino/a gay and lesbian groups have openly
GLIB's use of the Council's parade was essential to its statement of inclusion. In essence, GLIB needed to speak through the Council to convey its message.  

Third, if the Court had allowed GLIB to march under its banner in the St. Patrick's Day Parade, parade viewers would have understood GLIB's message of equality with other parade participants. GLIB would have joined the parade like all the other groups, and consequently, the audience would have seen it in that capacity—as an equal. It would have changed the mix of participants in the parade. Therefore, in this case, being openly lesbian or gay was more than mere identity. GLIB intended its openness as expressive activity. Further, the audience would have perceived it as such. Once again, the use of the parade was essential to that message. Accordingly, the Court correctly held that the Council's First Amendment rights were implicated.

In contrast, the Court's most recent foray into the First Amendment implications of lesbian or gay identity misapplied Hurley and erroneously analyzed the message that was signified by gay identity. However, because of the prevalent schemas of lesbians or gay men and their consequent experiences in much of American society, the Court accurately held that membership of an openly gay man would change the organization's message. In Boy Scouts of America v. Dale, the Court held, in a 5–4 decision, that New Jersey's public accommodation anti-discrimination statute could not require the Boy Scouts to admit James Dale, an openly gay man, as an assistant scoutmaster. Specifically, the Court held that Dale's admission as an assistant scoutmaster would unconstitutionally burden the Boy Scouts' First Amendment freedoms of


62. Brown v. Louisiana, 383 U.S. 131 (1966). African-American civil rights protesters entered the reading room of “whites only” public library and requested a book. Id. at 136. The protest message depended on black persons taking an action prohibited to them, but allowed to whites in that location. Id. at 141-43.

63. Admittedly, it was already a very eclectic conglomeration. E.g., Hurley, 515 U.S. at 569.

64. 120 S. Ct. 2446 (2000).

65. Id. at 2449. Chief Justice Rehnquist wrote for the majority, with Justices O'Connor, Scalia, Kennedy, and Thomas joining him. Id. Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. Id. at . Justice Souter also penned a dissent, joined by Justices Ginsburg and Breyer. Id. at 2478.
expressive association and their ability to advocate public or private viewpoints.  

In Dale, the Court faced the First Amendment implications of the mere presence of lesbians or gay men within private organizations.  

Significantly, the Boy Scouts did not expel Dale because of poor or inappropriate behavior, sexual or otherwise, or because he had used his assistant scoutmaster position to advocate his beliefs on homosexuality to his troop. Rather, the Boy Scouts revoked Dale’s membership because their policies “specifically [forbade] membership to homosexuals.”  

Throughout the Court’s opinion, James Dale is referred to as an openly gay man or an avowed homosexual. However, it is important to specify exactly how Dale manifested his gay identity. Dale acknowledged his homosexuality to himself and to others while in college. Scouting executives learned of Dale’s homosexuality when a local New Jersey paper interviewed Dale when he was copresident of Rutgers University’s Lesbian/Gay Alliance. Importantly, the article did not mention Dale’s connection with scouting. Dale did not express any opinion about scouting policies nor did he suggest that the Boy Scouts should allow him to advocate the acceptance of gay people. No one in the Scouting organization knew Dale was gay before seeing the article, nor did the boys in Dale’s troop or their families know of Dale’s sexual orientation before or after Dale’s statements at the University. Thus, the case turned on Dale’s gay status, and not on his conduct, advocacy, or beliefs.  

Although Dale was openly gay at college and at

66. Id. at 2449, 2455.
67. Id. at 2449.
68. Id. at 2465 (Stevens, J., dissenting).
69. Id. at 2472–73 (Stevens, J., dissenting).
70. Id. at 2449 (quoting a letter from James Kay, Executive Monmouth Council, BSA, detailing the reason for Dale’s expulsion).
71. Id. at 2454.
72. Id. at 2449, 2455.
73. Id. at 2449.
74. Id.
75. Id. at 2472–73 (Stevens, J., dissenting) (quoting the relevant sections of the article).
77. Dale, 120 S. Ct. at 2476–77, 2477 n.24 (Stevens, J., dissenting).
78. At oral argument, the Boy Scouts claimed that they were concerned with advocacy and conduct, and not status. Transcript of Oral Argument, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000) (2000 U.S. Trans. LEXIS 44, at 43 (Apr. 26,
other associated settings, there was no evidence that he was open within the Scouting community. The Court’s failure to make this distinction undermines its reasoning.

The Court’s discussion of this crucial point is both elliptical and conclusory.

We must then determine whether Dale’s presence as an assistant scoutmaster would significantly burden the Boy Scouts’ desire to not “promote homosexual conduct as a legitimate form of behavior.” [An expressive association can [not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have “become leaders in their community and are open and honest about their sexual orientation.” Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.]

The Court then examined Hurley. In particular, the Court explored the distinction between completely excluding lesbians and gay men from the parade or excluding them from marching behind the GLIB banner. Quoting Hurley’s analysis of the message GLIB’s inclusion in the parade would send, the Court in Dale continued:

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not “promote homosexual conduct as a legitimate form of behavior.” As the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout’s choice not to propound a point of view contrary to its beliefs.

Several aspects of the Court’s analysis are particularly striking. Justice Rehnquist contrasted the acceptance of a person as a member of a

2000) (statement of George A. Davidson, counsel for the Petitioner)). As the balance of this discussion shows, that statement is not entirely accurate.

79. Dale, 120 S. Ct. at 2453–54 (internal citation omitted).
80. Id. at 2454 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 574–75 (1995)). That quote is provided supra notes 54–55 and accompanying text.
81. Dale, 120 S. Ct. at 2454.
82. Id.
83. Id. (internal citation to the briefs and the record omitted).
84. There is a major dispute between the majority and dissents over the existence, content, and dissemination of the Boy Scouts’ position on homosexuality and Scouting. Compare id. at 2452–54, with id. at 2460–66 (Stevens, J., dissenting), and id. at 2479 (Souter, J. dissenting). Because this Article focuses on lesbian and gay identity and the Court’s construction of it, the author has no need to resolve that dispute. This Article takes at face value the Court’s conclusion that the Scouts desire “not to promote homosexual conduct as a legitimate form of behavior.” Id. at 2453.
particular group with the acceptance of Dale—"one of a group of gay Scouts who have become leaders in their community and are open and honest about their sexual orientation." Although the majority failed to explain the rationale for this comparison, there are two obvious possibilities. One possibility is that Justice Rehnquist was implying that Dale used his assistant scoutmaster position to advocate for gay rights or to change Scouting policy. However, there was no support in the record for such an assertion. Moreover, Justice Stevens's dissent specifically disclaimed that inference for the Court.

Alternatively, the Court might have been suggesting that Dale was such a celebrity that everyone knew his sexual orientation—even those that saw him as an assistant scoutmaster. Again, there is no evidence for that proposition in the record. Therefore, if neither of these possibilities is true, but Dale's presence as an assistant scoutmaster still forced the Boy Scouts to convey a message with which they disagreed, then something more subtle must have been at work.

The Court conflated Dale's decision to be openly gay at Rutgers with a decision by Dale to be openly gay at all times and in all aspects of his

85. Id. at 2454 (internal citation omitted).
86. The unsupported fear that gay people will use their position with an employer to advance gay rights runs throughout public employment cases. E.g., Shahar v. Bowers, 114 F.3d 1097, 1111 n.1, 1116 n.9 (11th Cir. 1997) (Tjoflat, J., specially concurring). Similarly, courts often assume that gay people are incapable of separating their identity as lesbians or gay men from positions that they must take at work. Id. at 1105, 1108. But see id. at 1134 (Barkett, J., dissenting).
87. Dale, 120 S. Ct. at 2472–73 (Stevens, J., dissenting).
88. Id. at 2474 (Stevens, J., dissenting).
89. Id. at 2475 n.21 (Stevens, J., dissenting).
90. Conceivably, the Boy Scouts could have been making a preemptive strike by terminating Dale before his sexual orientation came to the attention of his troop or others. However, this alternative does not correspond to the Court's language, which speaks of a contemporaneous change in the Boy Scouts' message, and not a future alteration. Moreover, fear of future consequences or public reaction to membership of gay men in Scouting does not support an expressive association claim. Id. at 2471 (Stevens, J., dissenting); see also Transcript of Oral Argument, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000) (2000 U.S. Trans. LEXIS 44, at 520–21 (Apr. 26, 2000) (statement of George A. Davidson, counsel for the Petitioner)). The transcript states:

QUESTION: My basic question is, how do I know, how are we supposed to find out whether the policy reflects very great concern about the conduct, or reflects very great concern about public reaction? That was my question, and how do we decide the mix of that?

MR. DAVIDSON: Well, I'm not sure as a matter of First Amendment law that one might decide for public reaction reasons to have a certain policy. I'm not sure of the legal relevance of that distinction.

Id.
life. However, the record indicated that Dale successfully separated these two areas of his life until his termination by the Boy Scouts. He was open at college, but not within Scouting. In order to be openly gay as an assistant scoutmaster, he would have had to communicate his sexual orientation within that community. Further, Dale's choice to remain silent, if it expressed anything about his sexuality, presumably conveyed that he was non-gay.

The inference of heterosexuality created by silence makes the quote from Hurley apt. In contrast, the analogy to Dale is not. The Court properly noted that the parade organizers in Hurley distinguished between entirely excluding gay people from the parade and excluding them only when they marched behind a GLIB banner. Accordingly, there was no distinction based on status, but only on viewpoint. Hurley noted that the latter situation conveyed a different message to parade watchers than having lesbians or gay men participate within other marching organizations. While that latter participation effectively closeted lesbians or gay men because people watching would assume they were not gay, it did not literally bar them from the parade. As noted earlier, that distinction is possible because lesbian or gay identity is invisible unless manifested by the GLIB banner or some other outward sign. However, this makes the analogy to Dale false. As Justice Stevens noted in Dale, Dale did not carry a banner or sign, or intend to communicate anything by his presence. He was an assistant scoutmaster who happened to be gay; once the Boy Scouts learned that fact, they excluded him.

The Court's own comparison between the acceptance of a particular group member and Dale, “one of a group of gay Scouts who have become leaders in their community and are open and honest about their sexual orientation,” seems to connote that Dale was flaunting his homosexuality and that he was excluded for that reason. Further, this

91. Dale, 120 S. Ct. at 2472–73, 2474 n.20 (Stevens, J., dissenting).
93. See supra notes 50–53 and accompanying text.
94. Dale, 120 S. Ct. at 2475 (Stevens, J., dissenting).
95. Id. at 2454 (internal citation omitted).
96. The whole question of flaunting, distinguishing between open and not open gay people runs throughout the relationship of lesbians and gay men to law. See, e.g., Cole & Eskridge, supra note 29, at 319 (discussing “don’t ask, don’t tell,” the current military policy on the compatibility of homosexuality and the armed services); see also S.E.G. v. R.A.G., 735 S.W.2d 164, 166–67 (Mo. Ct. App. 1987) (discussing the activities of a mother in a lesbian relationship as imposing her sexuality on her children and the community, and finding that she is, therefore, unfit to have custody or visitation). In S.E.G., the court noted that “[the mother] has chosen not to make her sexual
language suggests that Dale deserved his exclusion, or at least should have expected it.\footnote{93}

However, open lesbian and gay identity cannot be separated from expression. Unlike sex or race, where one’s identity is visible, lesbian or gay identity needs to be communicated to someone else to be visible and open. Women or African-Americans can be visibly present in an organization without explicitly having to communicate that fact. Accordingly, one can properly contrast mere membership of women or blacks from those who publicly “celebrate” their separate identity.\footnote{99} A gay person, on the other hand, needs to express that identity affirmatively to escape the presumption of heterosexuality. Conversely, if he is completely closeted and no one knows his sexual orientation, then the organization does not realize it has an openly gay man as a member. Consequently, the mere acceptance of Dale as a member cannot alter the Scouts’ views. The Court’s comparison is meaningless for lesbians or gay men. No organization would ever have to accept openly gay or lesbian individuals because the instant they manifest that identity to another, the organization’s speech autonomy rights attach to bar them.

Moreover, if gay men can be Boy Scouts only as long as no one knows they are gay, then the antidiscrimination laws are ineffective against these organizations’ membership policies if they include an anti-

\footnote{97. Transcript of Oral Argument, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000) (2000 U.S. Trans. LEXIS 44, at *23 (Apr. 26, 2000) (statement of George A. Davidson, counsel for the Petitioner)). The transcript states: MR. DAVIDSON: Justice Souter, he put a banner around his neck when he put—got himself into the newspaper and Scout leaders throughout Monmouth Council sent the article in to headquarters. He created a reputation. This a place he goes once a week, a camping trip once a month, summer camp for a week. These are people that see him all the time. He can’t take that banner off. He put it on himself and, indeed, he has continued to put it on himself in this week’s Time Magazine, the Out 100, the New York Times. Id.}

\footnote{98. The idea that gay and lesbian people who flaunt their sexual orientation deserve worse treatment than those who are more discrete was a common feature of early discrimination doctrine. Norton v. Macy, 417 F.2d 1161, 1166-67 (D.C. Cir. 1969); Singer v. United States Civil Serv. Comm’n, 530 F.2d 247, 255 (9th Cir. 1976).}

\footnote{99. Cf. Dale, 120 S. Ct. at 2474 (Stevens, J., dissenting) (“By donning the uniform of an adult leader in Scouting, he would ‘celebrate [his] identity’ as an openly gay Scout leader.” (quoting Petitioners’ Brief at 24)).}
The New Jersey law gives all persons the right to employment and public accommodations without discrimination because of sexual orientation. However, there can be no discrimination because of sexual orientation unless the person or organization knows of the victim’s orientation. Nevertheless, once the organization knows of this identity, it may properly exclude that individual without contravening antidiscrimination laws. Consequently, the sexual orientation protections afforded under the law are effectively nullified.

However, the majority opinion in Dale was not alone in its incorrect analysis of gay identity and speech. Justice Stevens contrasted Dale with GLIB in Hurley. His dissent mistakenly contended that because Dale carried no sign or banner, distributed no factsheet, and expressed no intent to communicate, his mere presence as a gay member was not communicative activity. This position, too, misconstrued the relationship between lesbian and gay identity and expression.

Some examples may clarify the difference between identity and expressive activity. For scenario one, imagine that Dale attends a Boy Scout meeting in his assistant scoutmaster uniform and wears a sign around his neck reading, “I am gay. Gay men are acceptable members of the Boy Scouts.” This is the closest analogy to Hurley. Dale’s identity as gay is publicly linked to his identity as a Scout. That combination helps create a message of inclusion visible to the audience at the meeting. As in Hurley, Dale’s presence as an assistant scoutmaster forces the Boy Scouts to send a message with which it disagrees.

In scenario two, picture Dale as a widely known gay celebrity. As a celebrity, everyone knows his sexual orientation. It is as if Ellen DeGeneres or Rock Hudson were assistant scoutmasters. In this

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100. This is especially true if the Court defers to the organization’s assertion of its message and the gay person’s impairment of it. See id. at 2453.
103. Dale, 120 S. Ct. at 2475 (Stevens, J., dissenting).
104. Cf. id. at 2475 n.21 (Stevens, J., dissenting).
106. Rock Hudson, that icon of 1950s movie leading men, made headlines when he disclosed his homosexuality and his AIDS diagnosis. Steve Daly, Closet Cases: Yes, There Have Always Been Gay Stars, But Few Were Out Until Recently, ENT. WKLY.,
scenario, there is no sign proclaiming that Dale is gay and that gay men are acceptable members of Scouting. Nevertheless, that sign is impliedly communicated to the audience because everyone knows his gay identity. Accordingly, his presence as an assistant scoutmaster carries additional expressive content. Here, too, Dale’s inclusion as a Boy Scout coerces the Boy Scouts into communicating something from which they dissent. This is Hurley with the GLIB banner supplied by implication. 107

For scenario three, assume that the scouting leadership knows Dale is gay, but that the scouts and their families do not. Dale is openly gay in some settings, but not in Scouting. His presence at Scouting functions as an assistant scoutmaster is outwardly indistinguishable from a non-gay assistant scoutmaster. This version of openness appears to be what the Boy Scouts require of others in their non-Scouting identities and beliefs. 108 Scenario three most closely approximates the facts in Dale. Nevertheless, the most logical reading of the Boy Scouts’ and the Court’s argument is that this scenario is only temporary and will eventually turn into scenario two. Although Dale was not open within Scouting when the leadership terminated him, at some point some of the troop, their parents, or the public would discover Dale’s sexual orientation. At that point, the Boy Scouts’ message would have changed for those who knew Dale was gay just as in scenario two.

107. Arguably, we need to present scenario four to fully illustrate the spectrum of identity and expression. In scenario four, Dale is completely closeted. He recognizes he is gay, but shares that information with no one. In this scenario, Dale’s sexual orientation can communicate nothing because it is unknown. Neither the Boy Scouts nor the Dale dissent nor majority would find that his inclusion interferes with the Boy Scouts’ First Amendment freedoms. See Transcript of Oral Argument, Boy Scouts of America v. Dale, 120 S. Ct. 2446 (2000) (2000 U.S. Trans. LEXIS 44, at *18 (Apr. 26, 2000) (statement of George A. Davidson, counsel for the Petitioner)). The transcript states:

QUESTION: May I ask one follow-up question to the one I asked before—if homosexual conduct violates the Scout code, being straight and so forth, why is it relevant whether the man is open or not?

MR. DAVIDSON: Well, in two respects. First, if nobody knows about it, it doesn’t become an issue.

Id.; see also Dale, 120 S. Ct. at 2475–76 (Stevens, J., dissenting). See generally id. at 2453–54 (contrasting the mere presence of a member of a particular group within an organization with the presence of an openly gay man within that organization).

108. Id. at 2473–74 (Stevens, J., dissenting).
Further, in the second scenario the only message that Dale’s presence actually conveys is that he is gay. The audience supplies the additional content that gay men are acceptable members of Scouting; whether or not Dale subscribes to that message is irrelevant. This jump from identity to others’ perception of a message that identity sends is at odds with the Court’s prior expressive association doctrine. The Court historically has not permitted an organization to assume that the mere presence of someone with a particular identity will change the group’s message. In Roberts v. United States Jaycees, the Court required the admission of women in the Jaycees, as long as their views were consonant with the group’s positions. The Court refused to assume substantive views merely from the sex of an aspiring group member, and refused to assume that the mere inclusion of women would necessarily alter the Jaycees’ message. Accordingly, Roberts did not permit an organization to subordinate a potential member’s actual viewpoints to his or her identity.

In Dale, Justice Rehnquist paid lip service to this distinction. He stated that Hurley anticipated the result in Dale. Hurley analogized the Council’s refusal to permit GLIB to march under its own banner to “a private club [excluding] an applicant whose manifest views were at odds with a position taken by the club’s existing members.” However, this citation undermines Dale instead of supporting it. Hurley, like Roberts, speaks of excluding applicants whose views are inconsistent with the organization’s message, not applicants whose identity is conflated with incongruent viewpoints. Nevertheless, Dale turns gay identity into substantive positions on Scouting policy. The transformation from identity into beliefs is exactly what Roberts rejected with respect to

109. See infra text accompanying note 176.
111. Id. at 627. Moreover, in other First Amendment contexts, the Court has been careful to ensure that consequences flow from a speaker’s views or activities, and not merely from his or her identity. Cf. Edwards v. South Carolina, 372 U.S. 229, 244 (1963) (Clark, J., dissenting). In Edwards, a breach of peace conviction was overturned for a civil rights protest by black high school and college students who marched in front of the state house where a crowd of 200 to 300 mostly white onlookers were gathered. Id. There was no threat of violence by the protesters or by anyone in the crowd watching. Justice Clark rejected the Court’s finding that there was no threat of violence: “anyone conversant with the almost spontaneous combustion in some Southern communities in such a situation will agree that the [town officials] [might] well have averted a major catastrophe.” Id.
113. Id. at 627.
women.

Even more directly relevant to Dale, Roberts also rejected the argument that the admission of women would change the Jaycees' message because of the gender-based assumptions the audience tied to female identity. Nor would the audience's assumptions create a different effect for the organization's public positions. Those arguments relied on generalizations about the relative perspectives of men and women, which could not be accepted uncritically in legal decision-making, even if they were statistically accurate.

While similar, Roberts does not control the outcome of scenario two. In Roberts, the Court properly refused the equation of women as members with a dilution of the Jaycees' message of support for young men in business. The member's sex told one nothing about her position on men in business. Thus, Roberts correctly refused to assume contrary views on that issue merely from female identity. However, if the

117. Id. at 627.
118. Id. at 627–28.
119. Id. at 628 (citing Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984), and Heckler v. Mathews, 465 U.S. 728, 745 (1984)). The citation to Palmore is interesting. In Palmore v. Sidoti, the Supreme Court held that private biases and the possible injury they might inflict are impermissible considerations in child custody determinations. Palmore, 466 U.S. at 433–34. There, a white mother with custody of her white child had remarried an African-American man. Id. at 433. The lower courts had taken custody away from the mother because “[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to the father and to society.” Id. at 431 (alterations and emphasis in original). Despite the social disapproval of that relationship, the Supreme Court stated that the potential for societal ostracism and resulting injury to the child was not a reason to change custody from the mother to the father. By recognizing these private prejudices in the courts, the state would be putting its imprimatur on them in violation of the Constitution. Id. at 433.

However, if the event that holds the potential for social ostracism is the mother's lesbianism, most courts either fail to recognize the parallels to Palmore or wrongly reject Palmore as inapposite precedent. Many courts find nothing inconsistent in using the mother's relationship with a person of the same sex in the same manner as the mother's relationship with a person of a different race was used by the trial court in Palmore. In S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987), the Missouri court took custody of four minor children from a lesbian mother because Union, Missouri, was a small community where gays were not common nor openly accepted. Therefore, the court believed it needed to protect the children from peer pressure, teasing, and ostracism. Id. at 165; see also Bottoms v. Bottoms, 457 S.E.2d 102, 108 (1995). In Bottoms, the court changed custody from the lesbian mother and female partner to the child's maternal grandmother. Id. The court stated that "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'" Id. (quoting Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985)).
Jaycees’ ideology were different, the result should change as well. At best, the admission of women as full voting members signified that women were equal in status to men within the organization, and by extension, equal in status in the nation as a whole. Thus, if the Jaycees’ position were that women were inferior to men, the admission of women as equal members would have sent a message to others inconsistent with that view.  

Indeed, this equality message was the heart of GLIB’s attempted participation in the St. Patrick’s Day Parade. Accordingly, while the Dale majority ignored the lessons of Roberts and assumed viewpoints from identity, the dissent mistakenly emptied identity of all expressive content. Even without carrying a sign or banner, the admission of an identifiably gay man as a Boy Scout leader does send a message; it says that gay men are acceptable members of Scouting, equal to anyone else. If lesbian and gay identity within Scouting communicates the acceptance of gay men as equal members of the Boy Scouts, it says little beyond that. In the earlier quote from Dale, the Court described the Boy Scouts’ message as disapproval of “homosexual conduct as a legitimate form of behavior.” Further, Dale’s presence as a gay man was inconsistent with that message. But, as a strictly logical matter, homosexual conduct and lesbian or gay identity are two different things. The record is silent as to Dale’s homosexual conduct inside and outside of Scouting because the case is not about his conduct or the Boy Scouts’ disapproval of his behavior. Dale is solely concerned with his presence in the organization as an openly gay man. Nevertheless, a common, but erroneous, schema of lesbians and gay men is that identity is solely a matter of sex, of what happens in the bedroom. This schema has distorted legal doctrines concerning gay

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120. Hence, the typical law professor’s hypo after Roberts became whether the American Nazi party would have to permit Jews as members. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1432 (3d ed. 1996).
123. See supra text accompanying notes 79–83.
125. Id. at 2465 (Stevens, J., dissenting).
126. SASHA GREGORY LEWIS, SUNDAY’S WOMEN: A REPORT ON LESBIAN LIFE TODAY 11 (1979). The author discusses the statement of one lesbian woman:

Something that people don’t understand is that it’s not who you go to bed with that determines if you’re straight or gay. Sex has nothing to do with it. You can be celibate and gay. Identification as gay or straight is an emotional thing—do you relate primarily emotionally to women or to men in an intimate situation? . . . That was what was missing in my marriage. Sex was okay with him. What was missing was the emotional intensity. I was never in love with
people in a variety of areas. For example, opponents have dismissed school organizations designed to provide support for lesbian and gay students as mere opportunities for sexual encounters. In Gay Student Services v. Texas A & M University, a district court in Texas upheld the denial of official University recognition for a lesbian and gay students support group at Texas A & M based, in part, on expert testimony that sexual activity would certainly take place at or shortly after group meetings. In contrast, the University had previously permitted the formation of a women's awareness group and a black students' awareness group, whose roles in the University community paralleled those proposed by the lesbian and gay organization. Nevertheless, the University refused the support group's application because it would lead to increased homosexual conduct that would violate the Texas Penal Code as it then existed. The Fifth Circuit correctly rejected this conflation, recognizing that there is a difference between being a lesbian or gay man and engaging in homosexual

127. Id.

Some of the reactions to the Sexual Orientation Fairness Court Employee Survey also illustrate this schema. Collected Responses to Court Employee Survey, Dec. 1999 ("[It is a waste of money to study sexual orientation fairness in the courts.] Let's have the courts become blind to what people do or do not do in the privacy of their bedrooms and address individual incidents as they occur." (unpublished working paper, on file with author)); L.A. Bar Report, supra note 1, at 44.

128. E.g., Jones v. Daly, 176 Cal. Rptr. 130, 133 (Cl. App. 1981) (noting that gay male cohabiters' agreement for support rejected inter alia, because the court found that use of the term "lovers" demonstrated that the agreement was based on sexual behavior, illicit meretricious consideration, although that term is often used among gay couples as the equivalent of "spouse").

129. Carol Ness, Gay in America: 1996—Stirrings in the Heartland. S.F. EXAMINER, June 24, 1996, at A1 (quoting Ron Mullins, head of the Modesto, California, conservative, antigay Traditional Values Coalition, opposing a high school group for gays because "all they want to do is have their little meetings in schools so they can have their liaisons, and that's not right"); Mike Thomas, Are Gay Rights a Civil Right? David Caton Says No, and He Wants Florida Voters to Close the Debate Forever, FLA. MAG., July 18, 1993, at 8, 10 (quoting Rev. James Sykes, a Florida minister who believes that gay men want pro-gay laws passed so that they can "walk down the streets j—ing off").

130. 737 F.2d 1317 (5th Cir. 1984).

131. Id. at 1323 n.10.

132. Id. at 1320 n.4 (discussing a letter from University Vice President for Student Affairs explaining denial); id. at 1322 n.7 (quoting from the trial transcript).
activity. This difference, if it had been recognized by the Dale majority, should have prevented the transformation of lesbian and gay identity into advocacy of homosexual conduct.

Although the distortion of legal doctrine in Dale is subtler than in Gay Student Services, it is still present. A gay man's presence in Scouting implies that he is an equal and accepted member of the organization. If the schema of gay and lesbian identity as purely sexual conduct were true, the acceptance of a gay man into an organization would also entail endorsement of his sexual practices. The Court in Dale activated this schema to find that Dale's existence as an openly gay Boy Scout leader meant that the Boy Scouts were forced to promote homosexual conduct as a legitimate form of behavior.

Without the erroneous schema, the message of encouragement of sexual behavior does not follow from Dale's membership in the Boy Scouts. Admission of a Jew to the American Nazi party would communicate equality with other party members, but it does not follow that the Nazis thereby promote keeping kosher, a Saturday Sabbath, or any of the other religious practices of Judaism. Similarly, if a Boy Scout leader were quoted in the newspaper as having antiabortion beliefs, it is hard to imagine that the Boy Scouts, therefore, would be coerced to send a pro-life message, and even less likely to be seen as promoting the blocking of clinic entrances, or other conduct. Some might argue that this analogy is inapt because one can be Jewish without keeping kosher, or pro-life without blocking clinic doors. However, most people assume that one cannot be lesbian or gay without engaging in homosexual conduct. Despite this widely held oversimplification, lesbian and gay identity is not solely a function of sexual behavior.

Even if one believes that gay identity is based on sexual behavior,

133. Id. at 1328; accord benShalom v. Sec'y of Army, 489 F. Supp. 964, 975 (E.D. Wisc. 1980) (recognizing this difference in the context of discharge for violation of the military regulations against homosexual activity).

134. Justices Rehnquist, Scalia, and Thomas, three of the five Justices in the Dale majority, were in dissent in Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Their Romer dissent similarly conflated lesbian and gay identity with sexual behavior. There, as here, the equation of identity and conduct permitted those Justices to single out lesbians or gay men for different and worse treatment. For a complete discussion of the ways in which equating gay and lesbian identity with sexual conduct shaped the opinions in Romer, see Brower, supra note 3, at 84–90.

135. Or shall we say his assumed sexual practices.

136. This was the specific message that the Court found Dale's presence forced upon the Boy Scouts. Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2453–54 (2000).

137. See, e.g., Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975) (discussing the religious practices of Judaism).

138. See Dale, 120 S. Ct. at 2476 (Stevens, J., dissenting).


140. See supra notes 126–28 and accompanying text.
merely by accepting an openly gay member, the Boy Scouts would not be sending the message that they promote homosexual conduct. Assume, for example, an assistant scoutmaster who is a smoker. Assume further that people know that member's identity as a smoker although he never smokes around his troop, nor while in uniform. Despite public knowledge of his identity, it is hard to believe that the Court would find that the presence of a smoker as an assistant scoutmaster would coerce the Boy Scouts into promoting tobacco usage. Being identified as a smoker or as gay appears different because of the distinctiveness of gay identity in modern American society. Lesbian or gay identity, once known, seems so extraordinary that people cannot move beyond that fact. It is so powerful that it alters an organization's message, even without the gay person intending to communicate anything, and despite their attempts not to do so.

This distinctiveness, and the Court's reaction to it, put lesbians and gay men at a particular First Amendment disadvantage. The more unusual lesbians or gay men appear in a specific context, the more likely their identities will be seen to overshadow other facets of their personalities for those people who know that they are gay. It is a well-known psychological phenomenon that particularly distinctive, vivid, or significant information tends to be the most accessible for the observer's recall and use. The more socially expected or accepted information is,

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141. Justice Scalia's dissent in Romer suggested that smokers and homosexuals were both members of classes defined by disfavored conduct. See Romer, 517 U.S. at 646 (Scalia, J., dissenting).

142. Of course, this phenomenon is not necessarily limited to lesbians or gay men. For example, some African-Americans feel that race is always present in the way others perceive them. Amy Harmon, How Race Is Lived in America: A Limited Partnership, N.Y. TIMES, June 14, 2000, at A1. This article contrasts the experiences of Timothy Cobb, a black internet entrepreneur, with those of his former white partner, Jeff Levy. Id. The article notes:

Told that a white executive at Mr. Levy's company had described him as a "black James Bond," Mr. Cobb knew it was meant as a nod to his fondness for gadgets and risk. But "why a 'black' James Bond?" he had wanted to know, supplying his own answer: "Black is the identifier that goes before you, always. It raises the odds that you will get a real reminder that you are an outsider every time they meet you."

Id.

143. See generally Dale, 120 S. Ct. at 2476 (Stevens, J., dissenting) (describing lesbian and gay identity as tantamount to a symbol of inferiority, citing Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 COLUM. L. REV. 1753, 1781–83 (1996)).
the more readily it recedes in value and awareness. Accordingly, few people were surprised when the musical comedy actor, Nathan Lane, disclosed that he was gay. Gay identity neither overpowers nor shocks in this setting because it is seen as typical or expected. Lane did not become "that gay actor." Lane's response to the sexual orientation inquiry played upon those facts: "Look . . . I'm 40, I'm single and I work in the musical theater—you do the math. What do you need, flashcards?" In contrast, Billy Bean, the former San Diego Padres outfielder, remained closeted in baseball in order for his teammates and the public to accept him as a ball player and so that their attention would be on his abilities and not his homosexuality.

The distinctiveness of lesbian and gay identity in certain contexts creates pressures to remain closeted. Dale's view of lesbian and gay identity enshrines that pressure into First Amendment doctrine. This doctrinal pressure creates a vicious circle for Dale and other lesbians and gay men in non-stereotypical roles. If they are open, an organization may exclude them from membership. If they hide those identities, no one knows they exist. Moreover, they also reinforce the surprise that attends the disclosure of others' gay identity because it becomes a rare event. Their perceived rarity hurts other open lesbians and gay men because it contributes to the distinctiveness that permits private organizations to exclude them.

Conversely, the more mainstream the identity, for example, church adherent, political party member, smoker, the less likely the organization is to believe that the member's identity is so extraordinary


146. But see Jill Vejnoska, 'Six Days' Shows off Ford in a Somewhat Different Light, Chi. Trib., July 2, 1998, at Tempo 4 (discussing concern that audiences would not accept Anne Heche, Ellen DeGeneres's partner, as Harrison Ford's love interest in "Six Days" once she disclose her lesbianism). Apparently, that fear did not materialize.

147. Mirken, supra note 145.

148. Lydia Martin, He's Out—Finally; Billy Bean Spent His Big-League Career Trying to Blend in, But He's Become an Unlikely Celebrity Since Revealing He Is Gay, Dallas Morning News, Oct. 31, 1999, at B20 (describing the life of Billy Bean and quoting a player who said that a gay major league player would have to be a superstar in order for the focus to be on him and not his sexual orientation); see also L.A. Bar Report, supra note 1, at 9 ("In court, I was referred to as 'the dyke attorney.'").

149. It also marginalizes lesbians or gay men. See discussion infra notes 327-30.


151. See supra note 141 and accompanying text.
as to overshadow or change the group message. If many people share that identity, others cease to notice it, except where specifically relevant. Usual or socially accepted information more easily loses its value and distinctiveness. Accordingly, the disclosure of that identity within an organization does not color the organization's message.

For example, in 1947, when Jackie Robinson joined the Brooklyn Dodgers as its first black player, his membership in that organization sent a message of integration and inclusion that everyone who saw him in the Dodgers uniform understood. His existence as a major league ball player meant that at least one African-American was joining mainstream white America. In contrast, the common presence of black baseball players in major league uniforms today sends such a weak message that people barely perceive it. The message of inclusion has not changed, only the distinctiveness of African-American identity and the audience's awareness of it.

The more people perceive lesbians or gay men to be different, with a distinct identity, the more it colors the message of the groups to which they belong. Therefore, more private groups will be able to use the First Amendment as a sword to limit nondiscrimination regulations. Moreover, when the Court defers to organizations in determining which identities interfere with their message, the Court grants greater freedom for organizations to structure their membership criteria without hindrance from antidiscrimination laws.

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153. See discussion supra note 144 and accompanying text.

154. William Hageman, Chicago's 55-Year-Old Secret: Jackie Robinson's Tryout with the White Sox, Chi. Trib., Mar. 26, 1997, at Tempo I (discussing the consequences for the Chicago White Sox as they signed Robinson, and for the Dodgers once they were identified with integration and equality for African-Americans; blacks became Dodger fans, rather than fans of their home teams).


156. African-American identity still remains distinctive in other contexts. Harmon, supra note 142.

157. Dale, 120 S. Ct. at 2453.

158. By itself, this freedom is not bad policy, and is one of the foundations of the similar public/private distinction within federal state action doctrine. See Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922, 936 (1982) ("[T]he 'state action' requirement
Truly private organizations, like other American institutions such as private residential communities, are essentially countersocial. They exist to provide places where like-minded persons can gather, different from what society in general provides, and free from restrictions imposed on governments. Accordingly, they may have an incentive to underappreciate public norms and values.\textsuperscript{159} Supreme Court doctrine has previously resolved this tension. In 1948, the Court in \textit{Shelley v. Kraemer} used the federal Constitution to combat group bias and to rein in private arrangements in order to ensure that they would not exclude people based on identity.\textsuperscript{160}

In contrast, the Court’s current free speech jurisprudence exacerbates this tendency toward insularity and permits individuals to perpetuate private biases or exclusions with constitutional protection from government interference or regulation. This creates a First Amendment version of \textit{Coppage v. Kansas}\textsuperscript{161} and its \textit{Lochner}-era\textsuperscript{162} legitimation of economic inequality through liberty of contract. \textit{Coppage} stated:

\begin{quote}
No doubt, wherever the right of private property exists, there must and will be inequalities of fortune.... [Thus, it is] impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights....

And since a State may not strike [those rights] down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise....
\end{quote}

Substitute “freedom of contract” and “private property” in the previous quote with “freedom of association,” and replace “inequalities of fortune” with “inequalities in access or membership.” Freedom of association now carries with it the ability to exclude others, and thus preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”). The difficulty arises when the Court assumes, or allows others to assume, viewpoints or speech from mere identity without critically examining the specific situation.

\textsuperscript{159} Todd Brower, \textit{Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations}, 7 J. LAND USE & ENVTL. L. 203, 249 (1992).

\textsuperscript{160} \textit{Shelley v. Kraemer}, 334 U.S. 1, 4, 20 (1948) (holding that private covenants in neighborhood barring home sales to African-Americans are unconstitutional).

\textsuperscript{161} 236 U.S. 1 (1915).

\textsuperscript{162} The \textit{Lochner} era, named for \textit{Lochner v. New York}, 198 U.S. 45 (1905), was characterized by the Court’s interpretation of liberty of contract as a Due Process right protected by the Fifth and Fourteenth Amendments. Using that right, the Court struck down nearly 200 state and federal economic regulations. That era lasted from the last decades of the nineteenth century until 1937 and the Court’s decision in \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937). \textit{Erwin Chemerinsky, Constitutional Law: Principles and Policies} 480-90 (1997).

\textsuperscript{163} \textit{Coppage}, 236 U.S. at 17-18.
legitimately provides some people with fewer options for roles in society. Accordingly, the state cannot decide that the greater public good requires that all people be treated equally with respect to membership. As amended, the quote is congruent with Dale.\textsuperscript{164}

Dale erred in extending Hurley to permit private organizations to exclude persons based on their identities and not their ideas. In Coppage, the error was not in recognizing that economic inequality exists, but in enshrining those discrepancies into constitutional law. Similarly, in Dale, the error is not in recognizing that some people assume substantive positions or beliefs merely from an individual’s identity, but in placing those misattributions into First Amendment jurisprudence. The Court’s opinion demonstrates that Dale’s identity as a gay man and others’ perceptions of the message that identity conveys are of primary importance, rather than Dale’s own views on homosexuality and Scouting.\textsuperscript{165}

One way to test this distinction is to ask whether the Boy Scouts treat gay and non-gay persons alike if they both openly disagree with Boy Scout policy on sexual orientation. The Court responded to Dale’s argument that the Boy Scouts would not revoke the membership of non-gay scout leaders who believed Scouting policy on homosexuality to be wrong:

The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other.\textsuperscript{166}

However, if those two messages are different, it is not the substantive content of the message that makes them so, but the identity of the

\textsuperscript{164} Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2457 (2000). The Court stated:

We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

\textit{Id.}

\textsuperscript{165} Or assumed views, since before the litigation, he never expressed any position on that topic. \textit{Id.} at 2474 n.20 (Stevens, J., dissenting).

\textsuperscript{166} \textit{Id.} at 2455.
message proponent. Justice Rehnquist’s language in the quoted passage reinforces the dominance of identity over viewpoint in *Dale*. He described Dale as “an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform.”

Dale’s identity was gay first, activist second, and scout third, if at all. Dale was not an assistant scoutmaster—he simply wore the uniform of one as if he were a gay man in Boy Scout drag.

Now, contrast that description with the “heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.” The noun in that clause is “scoutmaster”; he is a scout first, one who merely holds an opinion. The Court’s rhetoric illustrates the asymmetry in its comparison and dictates its result. Moreover, the Court specifically mentioned the non-gay assistant scoutmaster’s beliefs. Identity as non-gay apparently carries with it no conclusions as to one’s opinions.

This view is consistent with the Court’s prior conclusion in *Roberts* that sex was not inextricably tied to viewpoint. In *Dale*, the Court described the non-gay scout as “on record as disagreeing with Boy Scouts policy.” That statement distanced the opinion on record from the individual, as though the opinion had been expressed once in the past and had never been brought up again.

In contrast, Justice Rehnquist never said Dale held an opinion about Scouting policy nor did Dale articulate what his opinion might be. The Court assumed his beliefs from his description as an avowed homosexual and gay rights activist. Alternatively, the Court may have relied on the audience’s assumptions about Dale’s advocacy from his description as gay. Again, this reliance on the audience’s perceived views contradicts *Roberts*. Either way, Dale’s identity as gay permits the Court to assume a substantive ideological position in opposition to

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167. *Id.*
168. *Id.*
169. *Id.* at 2473 n.19 (Stevens, J., dissenting) (stating that if non-gay scout leaders are presumed to be able to separate their beliefs from their position as scoutmasters, gay scout leaders should be entitled to that same presumption).
173. *Roberts*, 468 U.S. at 627–28; *see supra* notes 117-18 and accompanying text.
the organization’s message, a position that Dale did not express until after that litigation commenced.\textsuperscript{174} Identity is conflated with advocacy, as though lesbians or gay men have a monolithic position on homosexuality and scouting\textsuperscript{175} or on any other topic. Because the Court tied Dale’s advocacy intrinsically to his identity, Dale was seen as continually expressing disagreement with Boy Scouts policy.

The transformation of gay identity into substantive views stems from the perceptions of those who know an individual’s sexual orientation. It is textbook social psychology that people have schemas about persons or situations, which enable them to know, or think that they know, what to expect from those things.\textsuperscript{176} Unsurprisingly, people also have schemas about lesbians and gay men. Thus, they might perceive a lot of information about an individual lesbian or gay man from their schema—information that might in fact be false with respect to that individual. For example, people might believe that all gay men are effeminate or uninterested in sports,\textsuperscript{177} or that all lesbians are mannish,\textsuperscript{178} when neither

\begin{itemize}
\item \textsuperscript{174} Dale, 120 S. Ct. at 2474 n.20 (Stevens, J., dissenting).
\item \textsuperscript{177} For a complete discussion of how schemas about lesbians or gay men have shaped legal doctrine, see Brower, supra note 3.
\end{itemize}
of these assumptions is true.

Moreover, even individual counterexamples may not suffice to change this schema. People often discount or ignore contradictory information rather than incorporate it and modify the schema.\textsuperscript{179} Schemas are, therefore, resistant to alteration. The most opportune time for change appears to be when the existing schema ceases to function adequately:\textsuperscript{180} that is, when the schema does not properly represent factual circumstances. Change often comes through forced and repeated confrontation with compelling contrary information, such as occurs when learning that a favorite aunt, teacher, or friend is lesbian or gay.\textsuperscript{181}

The Boy Scouts's counsel may have inadvertently acknowledged as much in oral argument. The Court asked counsel if the Boy Scouts would terminate a non-gay person who had expressed the same opinions as Dale had in the original newspaper interview. Counsel replied, "I would observe that it would be open to the Scouts to conclude that somebody who is himself presenting a personal example, as well as advocating, might be more unacceptable than somebody who was merely advocating."\textsuperscript{182} This "personal example" explains why sexual orientation identity is so crucial to the Scouts and to the Court's opinion. Only lesbians or gay men can be personal embodiments of their presumed positions on the acceptability of homosexuality.\textsuperscript{183}

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\item[179.] Stein, supra note 176, at 161.
\item[180.] An example is when the high school valedictorian needs to accommodate her "naturally smart and effortlessly successful" self-schema to her mediocre first semester college grades. Id. at 162.
\item[181.] Whether an individual personally knows a gay man or lesbian also significantly influences her attitude toward gay people. Of those who knew a gay person, seventy-three percent supported equal rights for gay people. Only fifty-five percent of those who did not know a gay person supported equal rights. Straight Talk About Gays, U.S. News & World Rep., July 5, 1993, at 42. Similarly, those who objected to gay people working as elementary school teachers were less likely to have a gay relative or close friend. Jeffrey Schmalz, Poll Finds an Even Split on Homosexuality's Cause, N.Y. Times, Mar. 5, 1993, at A14 ("[O]nly 33 percent of those who lacked a gay relative or close friend said they would not be bothered."). But see David Kirby, Does Coming Out Matter?, Advocate, Oct. 13, 1998, at 67 ("A new Harris poll suggests that knowing people who are gay makes little difference in whether one supports gay rights.").
\item[183.] See Id. at *35 (Apr. 26, 2000) (question posed to Evan Wolfson, counsel for
\end{itemize}
\end{footnotesize}
however, is the assumption that the message is intensified, or harder to ignore, when the speaker both advocates and personally exemplifies the message.

In fact, this intensification underlies the biblical story of Esther,154 who saved the Jews by disclosing to King Ahasuerus that she, too, was Jewish. Her disclosure forced the King to reconsider his edict to put the Jews to death because it required him to see someone he loved as part of the despised group. Similarly, having an exemplary scout and assistant scoutmaster like Dale disclose his sexual orientation might have forced those who knew him to reconsider the Boy Scouts policy against gay men in Scouting in a way that a non-gay scout leader’s advocacy of that position never could. The potential to provoke a reevaluation of previously held positions is one of the benefits of revealing one’s lesbian or gay identity, of coming out of the closet.185 It is also why some might wish to keep lesbians or gay men closeted and silent.186

Of course, the intensification of advocacy when coupled with a personal example is created only when his troop members know of Dale’s sexual orientation. Otherwise, his identity does not embody a contradiction of Boy Scouts policy to them, and they are not forced to reconsider that policy by seeing him in uniform. All that remains is his outside advocacy. If the Boy Scouts had stopped here and made it their policy not to have Dale discuss his sexual orientation within Scouting,187 it would have forced him to remain closeted, but only in that realm.188

Respondent). The transcript states:

QUESTION: You think it does not limit the ability of the Boy Scouts to convey its message to require the Boy Scouts to have as a Scout master someone who embodies a contradiction of its message, whether the person wears a sign or not? But if the person is publicly known to be an embodiment of the—of a contradiction of its moral message, how can that not dilute the message?

Id.184. Esther 2:5–8:9. The story was retold in JEAN RACINE, ESTHER (H.R. Roach ed., 1949), and extensively analyzed by SEDGWICK, supra note 2, at 76–79.

185. Deb Price, Gays Increasingly Become Role Models, DETROIT NEWS, Mar. 27, 2000, at Opinion 9 (describing changing attitudes of Americans towards accepting lesbians and gay men, particularly as they learn of more people who are gay).

186. Richard Rodriguez, Gay Peril: Return to the Oppression of Silence, S.F. EXAMINER, Oct. 16, 1998, at A21 (stating that by keeping lesbians or gay men from being openly gay and discussing their sexual orientation, homophobes hope to diminish gay rights by keeping the issue out of sight).


188. Apparently, Dale had already arrived at that accommodation on his own. See
However, the Court’s conflation of Dale’s identity with an anti-Scouting policy message makes that accommodation impossible. He was a personal counterexample to Scouting policy whether or not he ever engaged in advocacy. From the perspective of the Scout leadership and Rehnquist’s opinion, whether or not the recipients of the Boy Scouts’ message knew of Dale’s homosexuality, the leadership knew. Consequently, his mere presence as an assistant scoutmaster changed their message because for them Dale literally incorporated a counterexample to their policies. He was no longer their representative like any other assistant scoutmaster. He was a gay assistant scoutmaster, or in the words of the Court, “an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform.” This view uses the First Amendment as a sword to push gay men back into the closet or lose their affiliation with an organization.

According to Justice Stevens, the Court’s conclusion effectively

supra notes 68–77 and accompanying text.

189. The Court’s approach has a certain “tree falling in the forest with no one around to hear it” quality about it. The Boy Scout administration perceives something in Dale’s presence that others do not because it has information about him that others do not share. This view is at odds with prior First Amendment doctrine, which has traditionally required expressive conduct to contain both a speaker’s intent to communicate and the likelihood that the audience would understand the message perceived. E.g., Spence v. Washington, 418 U.S. 405, 410–11 (1974). In holding that the First Amendment protected the taping of a peace symbol on an American flag in violation of a flag desecration statute, the Court emphasized two factors necessary for expressive conduct: “An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” Id. Hurley recognized both halves of this definition. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 575 (1995). The Court focused on both GLIB’s message and the parade audience’s perceptions. It was relevant that people would view GLIB’s speech as that of the parade organizers. Id.; see also Pacific Gas & Elec. Co. v. Pub. Util. Comm’n, 475 U.S. 1, 15 (1986) (noting that coerced access to utility company’s billing envelope was unconstitutional because the company would be forced either to appear to agree with the inserted material or to respond to it). That perceived change in message was one of the underpinnings of the Court’s opinion, at Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 655 (1994) (upholding FCC regulations against a First Amendment autonomy challenge because of minimal risk that cable viewers would associate broadcast stations’ messages with the cable operator itself).


191. L.A. Bar Report, supra note 1, at 32. One heterosexual attorney stated: “Once it’s out [that an attorney is homosexual], interpersonal relationships with co-workers change.” Id. One gay attorney remarked: “There was a subtle chill in my relations with the office after I came out.” Id. Louis Sahagun, Lesbian Coach Sues Utah School, L.A. TIMES, Oct. 22, 1997, at A3 (noting that once one lesbian teacher told student she was gay, her school principal removed her as coach because “his perception [of her] had changed” after eight years).

192. Dale, 120 S. Ct. at 2455.
placed lesbians and gay men in an inferior position.

The only apparent explanation for the majority’s holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual’s—should be singled out for special First Amendment treatment. Under the majority’s reasoning, an openly gay male is irreversibly affixed with the label “homosexual.” That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. As counsel for the Boy Scouts remarked, Dale “put a banner around his neck when he . . . got himself into the newspaper . . . . He created a reputation . . . . He can’t take that banner off. He put it on himself and, indeed, he has continued to put it on himself.”

The metaphor of a sign around the necks of openly lesbian or gay persons, which singles them out for separate treatment, is particularly appropriate. It echoes one of the flaws Romer v. Evans found in Colorado’s Amendment 2: the segregation and stigmatization of the class of lesbian and gay persons for disfavored legal treatment. In Romer, the Court refused to let Colorado declare its gay and lesbian citizens strangers to its laws, and exclude them “from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” However, only four years later, in Dale, the Court turned the First Amendment into a tool to make gay people strangers to that same ordinary civic life.

Despite the majority opinion’s doctrinal flaws, Dale accords more accurately with the experiences of lesbians and gay men. People do perceive them as different from the rest of society, and that difference engenders unequal treatment. Justice Stevens’s dissent correctly identified the Court’s jurisprudential stigmatization of gay people, and yet was too sanguine about their treatment under more appropriate legal doctrine. Stevens’s dissent implied that ruling in favor of Dale would remove the sign around the necks of lesbians or gay men and allow them to participate equally in Scouting and other activities. Unfortunately, the reality of lesbian and gay experiences is that once others know their sexual orientation, they are often singled out for worse treatment—even

193. Id. at 2476 (Stevens, J., dissenting) (citation omitted).
194. Romer v. Evans, 512 U.S. 620, 624 (1996). Amendment 2 would have prohibited any governmental entity from protecting lesbians, gay men, or bisexuals from sexual orientation discrimination. Id.
195. Id. at 627, 633, 635.
196. Id. at 635.
197. Id. at 631.
in situations in which legal rules exist to ensure their full and equal participation.

III. THE SOCIAL AND NONDOCTRINAL PRESSURES FOR THE CLOSET

As important as legal doctrine is to equality, we should not confuse the presence of legal doctrine mandating equality with actual equal treatment and respect for lesbians or gay men. We can see this distinction in the judicial system itself. We might expect that the courts are one area of modern society in which legal doctrine and protections for gay people persuasively create fairness and equality of treatment. They are not.

California law specifically requires judges to demonstrate sexual orientation fairness and refrain from sexual orientation discrimination. Canon 3B(5) of the California Code of Judicial Ethics states:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.198

Moreover, California judges are responsible for controlling the behavior of those attorneys appearing before them to ensure that they, too, refrain from sexual orientation bias or prejudice.199

The Standards of Judicial Administration promulgated by the California Judicial Council echo these requirements:

Section 1. Court’s Duty to Prohibit Bias
(a) (General) To preserve the integrity and impartiality of the judicial system, each judge should:
(1) (Ensure Fairness) Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants;
(2) (Refrain From and Prohibit Biased Conduct) In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that

199. Id. Canon 3B(6). The Cannon states:
A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice bases [sic] upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.
Id. Attorneys and legal employers are prohibited from discrimination based on sexual orientation in employment or in accepting or ending representation of a client. CAL. LAB. CODE §§1101, 1102, 1102.1 (West 2000); CAL. RULES OF PROF’L CONDUCT Rule 2-400 (1999).
bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants;

(3) (Ensure Unbiased Decisions) Ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases.200

Further, the Standards of Judicial Administration say that each local court should establish a committee to assist and maintain a bias-free courtroom environment.201 These committees should include representation from gay and lesbian organizations.202 Additionally, the standards state that courts should sponsor or support educational programs designed to eliminate sexual orientation bias in the courts and legal community,203 as well as develop and maintain bias complaint procedures for sexual orientation incidents.204

The appointment of attorneys, arbitrators, mediators, referees, and others, should be from diverse applicant pools. Such pools should include sexual orientation diversity, and the recruitment and selection of members of such pools should be without regard to sexual orientation.205

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201. Id. § 1(b).
202. Id. § 1(b)(1).
203. Id. § 1(b)(2).
204. Id. § 1(b)(3); §1(c)(7)–(8).
205. Id. § 1.5(a)–(c). Section 1.5 states:

APPPOINTMENT OF ATTORNEYS, ARBITRATORS, MEDIATORS, REFEREES, MASTERS, RECEIVERS, AND OTHER PERSONS

(a) (Nondiscrimination in appointment lists) In establishing and maintaining lists of qualified attorneys, arbitrators, mediators, referees, masters, receivers, and other persons who are eligible for appointment, courts should ensure equal access for all applicants regardless of gender, race, ethnicity, disability, sexual orientation, or age.

(b) (Nondiscrimination in Recruitment) Each trial court should conduct a recruitment procedure for the appointment of attorneys, arbitrators, mediators, referees, masters, receivers, and other persons appointed by the court (the “appointment programs”) by publicizing the existence of the appointment programs at least once annually through state and local bar associations, including specialty bar associations. This publicity should encourage and provide an opportunity for all eligible individuals, regardless of gender, race, ethnicity, disability, sexual orientation, or age, to seek positions on the rosters of the appointment programs. Each trial court also should use other methods of publicizing the appointment programs that maximize the opportunity for a diverse applicant pool.

(c) (Nondiscrimination in Application and Selection Procedure) Each trial court should conduct an application and selection procedure for the appointment programs which ensures that the most qualified applicants for an appointment are selected, regardless of gender, race, ethnicity, disability,
Finally, judicial education and court employee training should include sexual orientation fairness as one of its components. Despite these legal protections and requirements for fairness and equal treatment for lesbians or gay men, the reality of their experiences and perceptions of the California court system is somewhat different.

Significantly, the disjuncture between legal rules and lesbians’ and gay men’s real-world experiences illustrates that it is insufficient merely to reason about lesbian or gay identity, its disclosure, or the message that it sends. We should explore empirical studies to gather information about gay people’s treatment and perceptions, as well as to corroborate or challenge the assumptions underlying legal doctrine.

On January 31, 2001, the Judicial Council of California accepted the report of its Advisory Committee on Access and Fairness entitled, “Sexual Orientation Fairness in the California Courts.” This report was among the first comprehensive, empirical studies of sexual orientation fairness within American court systems. It is noteworthy

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1. See generally id. § 1.6. Section 1.6 states:
   SELECTION OF MEMBERS OF COURT-RELATED COMMITTEES
   A court that selects members to serve on court-related committees should establish procedures ensuring that all qualified persons have equal access to selection regardless of gender, race, ethnicity, disability, sexual orientation, or age.

2. In order to achieve the objective of assisting judicial officers in preserving the integrity and impartiality of the judicial system through the prevention of bias, all judicial officers should receive education on fairness. The education should include the following subjects: race/ethnicity, gender, sexual orientation, persons with disabilities, and sexual harassment.

3. In order to achieve the objective of assisting court employees in preserving the integrity and impartiality of the judicial system through the prevention of bias, all court employees should receive education on fairness as provided in sections 25.6(d)(3), (e)(2), and (f)(3) of the Standards of Judicial Administration. The training should include the following subjects: race/ethnicity, gender, sexual orientation, persons with disabilities, and sexual harassment.

4. SOF Report, supra note 38.

5. In 1994, two local bar associations released publications addressing biased treatment and discrimination directed at gay and lesbian attorneys by legal employers. Bar Association of San Francisco, Manual of Model Policies and Programs to Achieve Equality of Opportunity in the Legal Profession 67–81 (1994); L.A. Bar Report, supra note 1. The L.A. Bar Report found that sexual orientation bias was widespread and virulent in legal employment in Los Angeles County. L.A. Bar Report, supra note 1, at 1. Among Los Angeles legal professionals surveyed, more than 50% believed that the work environment is less hospitable for gay and lesbian attorneys than for non-gay attorneys. Id. at (i). Specifically, many respondents perceived that sexual orientation
because of its subject and scope. Past surveys of lesbians or gay men and the law focused mainly on attorneys and legal employment, and suffered from a relatively small response sample. Moreover, they primarily reported on survey respondents' perceptions rather than their experiences.

As part of its mandate to ensure that all court users receive equal and fair treatment, the Access and Fairness Advisory Committee monitored discrimination negatively affected performance evaluations, promotions, career advancement, benefits, and salary. Id. at (i)-(ii), 13–24.

In 1999, the Arizona Bar found that lesbians and gay men are substantially disadvantaged as employees or participants in the justice system because of sexual orientation bias. Gay & Lesbian Task Force, State Bar of Ariz., Report to the Board of Governors 18 (Apr. 1999) [hereinafter Arizona Bar Report]. Almost one half of the judges and lawyers surveyed (47%) heard disparaging remarks about lesbians or gay men in the public areas of the courthouse, id., and 13% observed negative treatment by judges in open court toward those perceived to be lesbians or gay men. Id. at 20. Further, employment opportunities for lesbian or gay attorneys are reduced based on sexual orientation. Judges and lawyers reported that some court personnel and court participants preferred not to work with lesbian or gay lawyers. Id. at 20 (noting that 8% of court personnel and 4% of litigants, jurors, and witnesses overheard indications of such a preference).

The community-based survey also showed that the more contact lesbians or gay men had with the Arizona justice system, the more likely they were to witness discrimination or experience a hostile environment based on sexual orientation. Id. at 27–28. We must cautiously evaluate that statement, however. First, the Arizona Bar Report broadly defined "justice system" to include attorneys, police, and probation and parole officers, as well as other contacts with those persons not limited to the court or judicial context. Id. at Appendix, Discrimination Survey, Questions 7–16. Second, the more contact an individual had with the justice system, the more opportunity he or she had to observe negative treatment based on sexual orientation. Id. at 22–23. The study did not attempt to control for the number of contacts an individual might have had with that system. Finally, many of the responses reported incidents of police harassment, seemingly unrelated to respondents' experiences with the courts. Id. at 23–24 (Respondents' comments).


211. Arizona Bar Report, supra note 209, at 8–10 (stating that out of 87 judges surveyed, 29% responded; 133 lawyers surveyed, 29% responded; 11 law professors surveyed, 15% responded; 158 law students surveyed, 17% responded; 384 members of the general community surveyed, not necessarily court users, 48% responded); L.A. Bar Report, supra note 1, at 4 (approximating that out of 400 gay and non-gay attorneys in L.A. County, 20% responded; while out of approximately 60 L.A. County legal employers, 17% responded).
sexual orientation issues related to access and fairness in the state courts. The subcommittee drafted and disseminated two surveys, one for gay and lesbian court users, and another for all court employees. The subcommittee designed the court user survey to determine whether lesbians or gay men experienced or observed bias, discrimination, ridicule, or discomfort based on sexual orientation while using the courts; whether they had positive experiences based on sexual orientation; and whether they believed they were shown the same treatment and respect as others. The survey requested information on respondents’ most recent contact with California courts, as well as one other, significant contact since 1990.

In contrast to the lesbian or gay court user study, the subcommittee designed and distributed the court employee survey regardless of sexual orientation. The subcommittee created the survey to determine if

212. SOF Report, supra note 38, at 5. The subcommittee and consultants designed the surveys to focus on the California court system, to obtain data from every part of the state, and primarily to emphasize the respondents’ direct experiences and observations as opposed to solely their attitudes or beliefs. Id. at 5–11. Both surveys were anonymous, an important precaution given the sensitivity of sexual orientation bias.

213. With the assistance of various national and local lesbian and gay advocacy and service organizations, the subcommittee identified 2100 lesbian or gay court users. Fifty-eight percent completed the survey for a total response of 1225 court users. Id. at 9. The large number of survey recipients and responses is statistically remarkable. Id. at 13.

Ninety percent of court user survey respondents were white men. Sixty-nine percent were gay. Sixty-six percent lived in an urban area. Eighty-three percent had an undergraduate or graduate degree. Forty-eight percent had an income of at least $60,000 a year. Sixty-one percent were selectively open about their sexual orientation, primarily with family, friends, and at work. SOF Report, supra note 38, at 14–15. Most gay or lesbian court users had relatively few contacts with the court system. Seventy percent had only two to three contacts since 1990. Those contacts tended to be with a criminal or civil court (73%). Further, nearly twice as many contacts were as a juror or potential juror (60%), than as a participant, either a litigant or attorney (32%). Id. at 14. The subcommittee analyzed survey results by demographics (i.e., sex, race, age, income, education, and urbanicity of the court, urban, suburban or rural) and by the nature of the court experience itself (i.e., reason for using the court, type of court, in-court or out-of-courtroom contact). No significant differences appeared based on demographics, socioeconomic level, or urbanicity. Major distinctions were a function of the court users’ experiences. Brewer & Gray, supra note 16, at 16.

214. It sent questionnaires to about 5500 California court employees around the state, including court clerks, reporters, administrators, and attorneys. SOF Report, supra note 38, at 12. Of those, 1525 responded. Id.

Ninety-three percent of court employee respondents were white, heterosexual, married women. Sixty-six percent earned less than $50,000 a year and had no college degree. Ninety-eight percent were full-time, permanent court employees. The typical respondent had worked for the courts for twelve years, seven in her current position, and was employed as court clerk, clerical staff, or mediator. Most respondents participated in court proceedings at least once a month, with almost 50% participating daily. Id. at 14. The subcommittee analyzed court employee responses by sexual orientation, sex, education, urbanicity of court, type of court, type of court appointment, and whether respondents observed court daily or less than daily. Brewer & Gray, supra note 16, at
employees observed negative behaviors toward gay men or lesbians, either in open court or in other work settings; if employees personally experienced discrimination or negative actions, or heard negative comments based on their actual or perceived sexual orientation; and if employees believed that gay men and lesbians were shown equal treatment and respect in the courts. The survey asked court employees to base their responses on their experiences over the past year only.

It is significant that the findings of the SOF Report are consistent with the metaphor of a sign around the necks of lesbians and gay men which permits their worse treatment. While most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation, several contrary

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10, 42–73. Except for sexual orientation, the survey found relatively few differences in responses based on the other characteristics. Id. Out of 1525 court employee respondents, 64 identified themselves as lesbians, gay men, or bisexuals. SOF Report, supra note 38, at 12. Of those lesbian or gay court employees, one-third were totally “out” at work; over one-third were selectively “out” at work; over one-quarter were not “out” at work at all. Id. at 14. Court employee survey respondents were considerably less likely to identify openly as lesbian or gay at work as compared to court users, where 93% were totally out or selectively out in their respective workplaces (although significantly, not in the court setting).


216. The court employee survey generated an unusually high number of negative responses to the survey itself—more than other Judicial Council employee surveys. Id. at 13. For example, “I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians.” Id. “I have received your survey on sexual orientation and found it to be degrading and offensive. . . . I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel.” Id. “I decline to answer your survey as I feel it covers a matter that is not appropriate to talk about in the work place.” Id. These negative responses underscore the survey results, which indicate that court employees are unconcerned, and sometimes hostile, to sexual orientation issues in the courts.


218. In their most recent contact, 89.2% of respondents agreed somewhat or very strongly with the statement, “As far as I could tell, I was treated the same as everyone else,” and 80.4% of respondents agreed somewhat or very strongly with the statement, “I was treated with respect by those who knew my sexual orientation.” In another recent, significant contact with the courts, 74.5% of the same pool of respondents agreed somewhat or very strongly with the statement, “As far as I could tell, I was treated the same as everyone else,” and 70.4% of respondents agreed somewhat or very strongly with the statement, “I was treated with respect by those who knew my sexual orientation.” Brewer & Gray, supra note 16, at 25 tbl.10, 37 tbl.18.; SOF Report, supra note 38, at 18.
patterns emerged from the survey data. Those patterns demonstrated that a significant number of lesbian and gay court users and employees in a variety of contexts had less favorable experiences and perceptions of fairness.

The predominant pattern is the degradation in lesbian and gay court users' experiences when sexual orientation became visible, either as a topic in the court proceeding, or as a characteristic of the court users themselves. We can see this deterioration in experiences when we compare their most recent court contact to another significant, recent experience with the courts. The survey results for respondents' most recent court contact can be used to obtain a baseline for lesbian and gay court users' treatment and perceptions of fairness with the California courts.\textsuperscript{219}

By focusing on the most recent experience, the survey drew on a random sample of lesbian and gay court users' experiences, rather than having respondents describe a court contact that they deemed noteworthy, either negatively or positively.\textsuperscript{220} Moreover, that latest contact overwhelmingly tended to be one in which sexual orientation was not pertinent to the contact\textsuperscript{221} and so was likely not to be unusual in that regard. Finally, sixty percent of lesbian and gay court users' most recent experiences concerned some manner of jury service, rather than as a party, lawyer, or witness in the proceedings (44.2\%).\textsuperscript{222}

In contrast, the other, significant court contact predominantly involved sexual orientation issues.\textsuperscript{223} Further, lesbian and gay court users more actively participated in that court contact as a party, witness, or lawyer (55.1\%), as opposed to some form of jury service (22%).\textsuperscript{224} Although still favorable, survey respondents' agreement with the statement, "As far as I could tell, I was treated the same as everyone else," dropped from 89.2\% in the most recent contact to 74.5\% in other contact.\textsuperscript{225} Similarly, respondents' perception that people treated them respectfully

\textsuperscript{219} Brewer & Gray, supra note 16, at 7.

\textsuperscript{220} Id.

\textsuperscript{221} At least 81.4\% of those court contacts did not involve sexual orientation issues. SOF Report, supra note 38, at 8.

\textsuperscript{222} Brewer & Gray, supra note 16, at 17 tbl.5.

\textsuperscript{223} Lesbian and gay court users reported that the other contact focused on sexual orientation issues 74.3\% of the time. Those issues included adoption, parenting involving lesbian or gay parents, hate crimes, family dissolutions involving lesbian or gay family members, domestic violence, employment discrimination, wills and trusts, and other issues directly related to sexual orientation. Id. at 29 tbl.14.

\textsuperscript{224} Id. at 28 tbl.13. Additionally, the rank order of percentages of lesbian and gay respondents' involvement in the two court contacts is very different. Lesbian and gay court users' active participation ranks significantly higher in the other contact than in the more recent one. Compare id. at 17 tbl.5, with id., at 28 tbl.13.

\textsuperscript{225} Id. at 25 tbl.10; id. at 37 tbl.18.
fell from 80.4% to 70.4% during those two contacts. Since the survey asked identical questions in both contexts, the difference is a function of the nature and duration of these court experiences. Visibility of sexual orientation, either as a topic within the court proceeding or as a characteristic of the court users themselves, significantly affects lesbian and gay court users' treatment and perceptions of fairness.

Accordingly, individuals who have merely casual contacts with the courts (for example, paying a traffic ticket or being called for a jury panel) may understandably have more favorable impressions than those with more extended contacts or personal involvement. Those limited contacts often end up being sexual orientation neutral events, a quality often missing from lesbian and gay court users' more personally involved court experiences. Further, the more limited the court contact, the less likely others learned of respondents' sexual orientation. For example, "I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up."

226. See generally id. at 8 (making statement in the context of demographic analysis of the data).

227. Id. A high correlation between active participation by lesbian and gay court users in a court experience and deterioration in the treatment and perceptions of lesbians or gay men. While correlation is not causation, one might well view the survey responses pairing more active participation and/or pertinence of sexual orientation to the court contact with higher perceptions of unfairness and worse treatment as more than mere coincidence.

228. For many respondents, these contacts were sexual orientation neutral events. See, e.g., Brewer & Gray, supra note 16, at 19 ("My most recent contact involved paying a traffic ticket. Everyone was very nice. No one noticed/asked my sexual orientation. It did not and should not come up.").

229. In the more actively participatory contact, 74.3% of those contacts involved sexual orientation issues. Brewer & Gray, supra note 16, at 29 tbl.14.

230. Survey Data, supra note 14, at 6 (responses to question 16). In the most recent contact, at least 81.4% did not involve sexual orientation issues. SOF Report, supra note 38, at 8 (responses to question 19).

231. In the more actively participatory contact, 74.3% of those contacts involved sexual orientation issues. Brewer & Gray, supra note 16, at 29 tbl.14.

232. Survey Data, supra note 14, at 6 (responses to question 16).
Consequently, the lesbian or gay label did not attach and could not affect treatment. In contrast, when sexual orientation became an issue in the court contact, 30% believed those who knew their sexual orientation did not treat them with respect, and 39% believed their sexual orientation was used to devalue their credibility.\textsuperscript{233} Survey responses illustrate this connection: "Defendant’s lawyer . . . used my relationship and my partner as object of focus to denigrate my loss and income claim and create smoke and mirrors. That would not have been used in a non-gay situation."\textsuperscript{234} "One defendant was a gay man suing an ex-lover—snickers and comments from jury members."\textsuperscript{235} "Jury member suggested that witness was gay and therefore his testimony could not be trusted."\textsuperscript{236} "I was discredited as a witness because they said I was probably ‘out at a club or something’ before I witnessed the accident."\textsuperscript{237}

Similarly, in the other, significant court contact when more lesbian and gay court users participated actively as witnesses, parties, or attorneys,\textsuperscript{238} they also perceived the California courts as less fair.\textsuperscript{239}

\begin{itemize}
\item \textsuperscript{233} The survey found that 74.3% of respondents’ other recent, significant contact with the courts involved certain sexual orientation issues. Brewer & Gray, supra note 16, at 29 tbl.14. In that contact, 25.5% of lesbian and gay court users believed they were treated differently from everyone else, and 29.6% of lesbian and gay respondents felt those who knew their sexual orientation did not treat them with respect. In that same contact, 39% of lesbian and gay court users believed that their sexual orientation was used to devalue their credibility. \textit{Id.} at 37 tbl.18. \textit{See generally id.} at 38 tbl.19 (mean ratings). Compare the data for these same questions in respondents’ most recent contact: 10.8%, 19.6%, and 13.6%, respectively. \textit{Id.} at 25 tbl.10.
\item \textsuperscript{234} \textit{Survey Data, supra} note 14, at 4.
\item \textsuperscript{235} \textit{Id.} at 9.
\item \textsuperscript{236} \textit{Id.} at 2.
\item \textsuperscript{237} \textit{Id.} at 12.
\item \textsuperscript{238} Compare lesbian and gay court user survey respondents’ most recent contact with the California courts, which contact tended to be through jury service (60%), with a different, recent contact with the courts, which contact tended to be when they were a party, witness, or lawyer in the proceedings (55.1%, as compared with jury service during that contact, 22.2%). \textit{Compare Brewer & Gray, supra note} 16, at 17 tbl.5, \textit{with id.} at 28 tbl.13.
\item \textsuperscript{239} When more of them participated actively in a court contact, 25.5% of lesbian and gay court users believed that they were treated differently from everyone else as far as they could tell, whereas 10.8% of them believed they were treated differently in their primarily jury service contact. \textit{Compare id.} at 37 tbl.18, \textit{with id.} at 25 tbl.10; \textit{compare id.} at 38 tbl.19, \textit{with id.} at 26 tbl.11. “In a domestic abuse case, the judge did not ask me the same questions she asked potential jurors regarding my relationship with my companion or my experience with domestic abuse.” \textit{Id.} at 19. Similarly, in a court contact in which they participated more actively, 29.6% of lesbian and gay court users felt those who knew their sexual orientation did not treat them with respect; however, in their primarily jury service contact, 19.6% of respondents felt that those who knew their sexual orientation treated them disrespectfully. \textit{Compare id.} at 37 tbl.18, \textit{with id.} at 25 tbl.10; \textit{compare id.} at 38 tbl.19, \textit{with id.} at 26 tbl.11. Finally, when more respondents participated actively in a court contact, 37.7% of lesbian and gay court users agreed somewhat or very strongly with the statement, “My sexual orientation was used to devalue my credibility.” In contrast, 13.6% of them agreed somewhat or very strongly
\end{itemize}
Direct participants in a case reported more negative incidents than did lesbian or gay court user respondents as a whole. Their extended contact and more active roles may have provided others with the opportunity to learn their sexual orientation. Like James Dale's experience in the Boy Scouts, once court users are perceived to be lesbian or gay, that trait overshadows other aspects of their identity. Thus, their added visibility as lesbians or gay men increases their negative experiences and perceptions.

Beyond perceptions of fairness or equality, lesbian and gay court users also felt unsafe within the California courts. Despite the relative neutrality of their most recent court contact, over one-fifth of all lesbian and gay court users felt threatened based on their sexual orientation. However, the number of respondents who felt threatened nearly doubled once sexual orientation became more significant or more of them participated actively in the court contact. Respondents' characterization of perceived threats included: "I felt intimidated—didn't want them [two clerks and a police officer observed by Respondent while in line] to talk about me the way they were talking..."

with the statement, "My sexual orientation was used to devalue my credibility," in their primarily jury service contact. Compare id. at 37 tbl.18, with id. at 25 tbl.10; compare id. at 38 tbl.19, with id. at 26 tbl.11.

240. Fourteen percent of direct participants in a case reported ridicule compared to 12% for the entire sample of lesbian or gay respondents; 5.3% reported negative comments about themselves versus 4.2% for the overall sample, and 8% of direct participants reported negative actions compared to 6.4% overall. SOF Report, supra note 38, at 17.

241. In that contact, 28.7% of lesbian and gay court users reported that someone else disclosed their sexual orientation without respondents' approval, and 24.5% felt compelled to state their sexual orientation against their will. Brewer & Gray, supra note 16, at 37 tbl.18.

242. The same pattern exists in this finding as well: active court participation and/or increased sexual orientation visibility of gay people in the proceedings corresponded to an increased perception of threat.

243. Because the most recent court contact tended to be one in which sexual orientation was not pertinent to the contact that response may be used as a relatively neutral baseline for a comparison with the other, significant court contact. In fact, at least 81.4% of those court contacts did not involve sexual orientation issues. SOF Report, supra note 38, at 8 (responses to Question 19).

244. In their most recent contact with the California courts, 21.5% of lesbian and gay court users agreed somewhat or very strongly with the statement, "I felt threatened because of my sexual orientation." Brewer & Gray, supra note 16, tbl.10, at 25.

245. The survey found that 37.7% of lesbian and gay court users agreed somewhat or very strongly with the statement, "I felt threatened because of my sexual orientation." Id. at tbl.18, at 37.
about other gays—kept my mouth shut."  

Consequently, if lesbian and gay sexual orientation overshadows other aspects of the court users' identity and becomes a marker for unequal treatment, we should expect to see sexual orientation coloring even those proceedings in which it would otherwise not appear. The SOF Report findings corroborate this hypothesis. Lesbian and gay court users reported that their sexual orientation was raised as an issue almost as often when it did not pertain to the proceedings as when it played a relevant role in their case or in their reason for using the courts. As in Dale, lesbian and gay identity, once known, appears to shade all other aspects of the court experience, even when it is irrelevant.

Unsurprisingly, any anti-gay comments, actions, or prejudices present in the judicial system might surface when sexual orientation issues become more important in the court proceeding. Although the same level of anti-gay feeling might exist in other court experiences, it may not become apparent unless sexual orientation plays a role in the proceeding. Survey respondents' demographic profile reinforces this inference. Because lesbian and gay survey respondents were predominantly educated, relatively affluent, white males, we might assume that those respondents would have the most sophistication and ability to navigate through the judicial system. As a result, we would expect them to have the most positive experiences and perceptions of the court system. Additionally, since most lesbian and gay court users' sexual orientation is not easily identifiable, we would expect more negative experiences and unfairness when they become visible as non-heterosexual. The survey data illustrate this correlation as well.

James Dale's Scouting experience also reflects this change from a position of relative power to powerlessness. He turned from an exemplary Scout to a pariah once the Scouts learned of his gay identity. Although Dale sanctioned the marginalization of gay people

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246. Survey Data, supra note 14, at 12.
247. Id.
248. In their most recent contact, 15.3% of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was pertinent to the court proceedings," and 11.2% of those same respondents agreed somewhat or very strongly with the statement, "My sexual orientation was raised as an issue even though it did not pertain to the case." Brewer & Gray, supra note 16, at 25 tbl.10. In another, recent, significant contact with the courts, 38.2% of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was pertinent to the court proceedings," and 35% of those same respondents agreed somewhat or very strongly with the statement, "My sexual orientation was raised as an issue even though it did not pertain to the case." Id. at 37 tbl.18.
249. Id. at 12; SOF Report, supra note 38, at 14.
250. Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2449 (2000); id. at 2460
through the First Amendment, such marginalization also occurs where
the law forbids it. Lesbian and gay visibility often transforms the way
others perceive gay people.251 Readers familiar with sexual orientation
bias in modern American society should find this connection neither
unexpected nor aberrant. Some have called anti-gay animus the last
socially acceptable form of prejudice existing today.252 Indeed, fear of
negative consequences for being openly gay or lesbian is one reason
many persons remain in the closet. As one court user respondent
commented, “[M]any homosexuals, unless self-identified as
homosexuals, are assumed to be heterosexuals.... Why do I prefer to
pass as heterosexual? To avoid mistreatment.”

Similarly, the Arizona Bar Report found that judges and lawyers
reported some court participants and personnel preferred not to work
with openly gay or lesbian attorneys.254 A significant number of gay
and non-gay lawyers in Los Angeles County believed that being openly gay
or lesbian would be harmful to an attorney’s career.255 In fact, to return
to this Article’s opening experiment, nearly one-half of all Los Angeles
survey respondents, regardless of sexual orientation or sex, believed that
simply discussing one’s personal or family life in a manner that revealed
the sex of one’s partner—an inconsequential matter for a non-gay
lawyer—would harm a gay attorney’s career.256 Moreover, annual
countrywide juror polls routinely find that lesbians and gay men are
among the groups to whom jurors report they cannot be fair—three
times more likely for gay litigants than for African-Americans, Asians,
Hispanics, or Whites.257
Finally, many comments received in response to the dissemination of the court employee survey demonstrate that some California court employees are, at best, indifferent and, at worst, hostile to sexual orientation fairness in the court system. Lesbian and gay court users' treatment in the courts is consonant with these other items. Overall, 56% of gay and lesbian court users in a contact where sexual orientation became significant reported observing or experiencing a range of negative experiences directed toward themselves or other gays and lesbians. Specifically, 36% heard negative comments about someone else, and 23% heard negative comments about themselves. Of respondents, 29% heard negative remarks arising from a case; 26% experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men; and 25% heard other negative remarks.

Open-ended responses illustrated these findings. "A jury member suggested that witness was gay and therefore his testimony could not be trusted." "Two attorneys in the hall outside of courtroom were talking. One said, 'did you see that?' This was followed by a joke, then laughing. Bailiff joined attorneys briefly—all laughed."

Additionally, the court employee survey supports and corroborates court users' experiences, particularly for ridicule, snickering, or jokes. One out of every five court employee respondents heard derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with judges, lawyers, or court employees most frequently making those comments.

In the baseline contact, lesbian and gay court users who had an in-court experience saw and heard significantly more negative comments and actions than did those with non-courtroom experiences. Court

1999, at A1, available at http://www.nlj.com/1999/jury1101/ (discussing 1999 Juror Outlook Survey results: 3% of respondents said they could not be fair if a litigant were Black, Asian, American Indian, or White; 4% for Hispanic litigants; 12% if the party were a lesbian or gay man). The 1999 data show that among respondents over the age of 65, 20.4% stated they could not be fair to a lesbian or gay litigant, Id.

258. See supra note 216; see also Brewer & Gray, supra note 217, at 9; SOF Report, supra note 38, at 13. The 1999 data show that among respondents over the age of 65, 20.4% stated they could not be fair to a lesbian or gay litigant. Van Voris, supra note 257; L.A. Bar Report, supra note 1, at 43–44 (quoting comments received by the L.A. Committee on Sexual Orientation Bias in response to its survey). Those comments are strikingly similar to those the Subcommittee on Sexual Orientation Fairness received to its survey.

259. Brewer & Gray, supra note 16, at 33 tbl.16.

260. Id.

261. Id. at 19 (emphasis in original).

262. Id. at 52 tbl.29. The Arizona Bar Report contains similar findings about disparaging comments in the courthouse, Arizona Bar Report, supra note 209, at 18, and negative treatment of lesbians or gay men in court, id. at 20.

263. Brewer & Gray, supra note 16, at 22 tbl.3. For example, 12% of gay men and
employees, however, observed more negative comments or actions against lesbians or gay men outside the courtroom. Court employees' greater access to the non-public, non-courtroom areas may explain the difference between court employees' and court users' observations. Regardless of location, these experiences are more striking because the California Canons of Judicial Ethics require judges to refrain from negative behavior toward lesbian or gay court users, and also mandate that they address others' behaviors and comments within their courtrooms. Despite these legal protections, lesbians and gay men still experienced a significant amount of negative actions and comments. Some respondents noted, "I was a jury prospect but it was evident that the defense lawyer didn't want gays on the jury. One of his questions to me during selection was: Mr. X, would you say you have more straight friends or gay friends? I was discharged." "Gay group home counselor was looked upon with less respect than that normally accorded such counselors in juvenile delinquency cases." Lesbian and gay court users also reported a small number of positive comments and actions. The subcommittee inquired about positive

lesbian court users observed or experienced ridicule, snickering, or jokes about lesbians and/or gay men; 8% heard negative comments about someone else; 4% heard negative comments about themselves; 5% heard negative remarks arising from a case; 8% heard other negative remarks; and 6% had a negative action taken against them. Id. at 21 tbl.7. 264. Id. at 55 tbl.34. Of court employees, 30% heard ridicule, snickering, or jokes about lesbians and gay men in settings other than open court; 28% reported hearing negative comments; and 20% heard derogatory terms about gay men or lesbians. Id. A significant number of court employees observed negative actions or comments by judges, lawyers, or court employees in work settings other than open court in the year before the survey. Over 17% reported hearing ridicule, snickering, or jokes one to three times, 6% heard ridicule, snickering, or jokes four to six times, and 9% of respondents heard or observed ridicule, snickering, or jokes about lesbians or gay men more than six times. This frequency was similar with respect to negative comments, with 16% of employees hearing negative comments about gay men or lesbians one to three times, 6% hearing such comments four to six times, and 6% hearing negative comments more than six times. Id. 265. CAL. R. COURT, CODE OF JUDICIAL ETHICS Canon 3B(6) (Daily Journal 2000). 266. Brewer & Gray, supra note 16, at 19. 267. Brewer & Gray, supra note 217, at 34. 268. In the more active contact, 14% of gay and lesbian court users heard or observed positive comments or actions about themselves, and 9% heard comments about other lesbians or gay men; 7% saw positive actions toward someone else. Brewer & Gray, supra note 16, at 34 tbl.17. That percentage dropped to 3% for positive comments and 2% for positive actions toward themselves outside the courtroom, and 2% for positive comments and 1% for positive actions toward others. Id. at 23 tbl.9. Although the occurrences of positive comments or actions are relatively small, when occurring in the courtroom, 52% of the time, lawyers made those positive comments and 30% of the
events in order not to slant or color respondents’ answers toward only negative court experiences and to elicit a more accurate picture of their court contacts. Negative comments outweighed positive comments in the courtroom by almost four to one. In the most recent contact, fewer than 3% of all respondents answered affirmatively to any of the questions about positive comments or actions. Thus, even though gay and lesbian court users had those experiences, the negative comments and actions overwhelmed the positive, and may explain some of the bias gay and lesbian court users perceived when participating in court.

Perhaps as interesting as the few positive comments and actions is use of “positive” to refer to those particular court users’ experiences. What respondents labeled “positive” is not truly the opposite of “negative.” No lesbian or gay court users reported being treated better than others because of their sexual orientation. Rather, the open-ended survey responses show that positive comments or actions tended to be those in which gay and lesbian court users were treated with equal respect and fairness. Positive experiences included situations where the judge may have expressed support during a second parent adoption or, in another instance, a survey respondent noted, “The judge and lawyer made a point of notifying my ex that sexual orientation is not an issue in family law.” Lesbian and gay court users must have expected hostility or disrespect from the court system in order to label equal or respectful treatment “positive.” The data demonstrate that those low expectations were often accurate.

Indeed, the data reflect court users’ and court employees’ negative experiences and perceptions of bias or unfairness in the judicial system. The survey asked court users and court employees the same questions on fair treatment, access, and availability. Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men. Further, 24% of lesbian

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269. Author’s recollection of survey drafting discussions in 1997 meetings of the Sexual Orientation Subcommittee; see also SOF Report, supra note 38, at 17 (defining “positive comments and actions”).
270. Brewer & Gray, supra note 16, at 19; see also id. at 23 tbl.9. Compare these numbers to the other, significant contact, in which fewer than 15% of lesbian and gay court users had positive actions or comments. Id. at 34 tbl.17.
271. Id. at 32.
272. Id. at 20.
273. Brewer & Gray, Survey questions, reprinted in Appendix to SOF Report, supra note 38. Compare pp. 16–17 (Court User’s Survey), with p. 17 (Court Employee Survey).
274. In all their California court contacts, 50.2% of lesbian and gay survey
and gay court users believed the courts were unsuccessful on all of the following measures: being available to resolve disputes involving lesbians or gay men, being open or accessible to lesbians or gay men, providing fair and unbiased treatment of lesbians or gay men.275

Non-gay court employees and lesbian or gay employees have strikingly different attitudes from each other, and from lesbian and gay court users, about the courts' success in providing access and fairness. Non-gay court employees generally had more favorable perceptions of the judicial system's fairness than did lesbian and gay court employees.276 Moreover, when asked about the courts' success treating lesbians and gay men fairly, both gay and non-gay court employees gave higher ratings than did lesbian and gay court users.277

respondents rated the courts somewhat or very unsuccessful in providing fair and unbiased treatment for lesbians and gay men. Similarly, on a 1 to 10 scale, they gave the courts a mean rating of 5.23 for fairness to lesbians and gay men and 6.50 for fairness to people in general. (Higher scores indicate a higher level of fairness.) Brewer & Gray, supra note 16, at 39 tbl.21.

275. In all their California court contacts, 28.9% of lesbian and gay court users rated the courts somewhat or very unsuccessful in providing access for lesbians and gay men, and 71.9% rated the courts somewhat or very successful. In those same contacts, 44.9% of respondents rated the courts somewhat or very unsuccessful in being available to resolve disputes involving lesbians and gay men; 55.1% rated the courts somewhat or very successful. The distinction between the California court's openness and accessibility to lesbians or gay men and the courts' availability to resolve disputes involving lesbians or gay men was designed to explore the distinction between formal access or comfort with the judicial process and the availability of substantive legal doctrine or court officers to include lesbians or gay men's issues. However, it is possible that survey respondents defined "access" and "availability" differently. Id. at 36, n.3. Of lesbian and gay court users, 24% believed the courts were neither somewhat nor very successful on any of the three dimensions (fair treatment, access, and availability). Id. at 39 tbl.21.

276. On a 4-point scale with the higher scores indicating a higher degree of fairness, heterosexual employees gave the court a mean score of 3.33, while lesbians and gay male court employees gave the court a score of 2.83 with respect to the courts' success in providing access for lesbians and gay men. Regarding the courts' availability to resolve disputes involving gay men and lesbians, heterosexual employees gave the courts a mean score of 3.19 compared to lesbians and gay male employees' score of 2.67. Id. at 72 tbl.52.

277. Employees rated the courts a 3.29 compared to users' rating of 2.42 on a 4-point scale with higher scores indicating a higher degree of fairness. Id. at 39 tbl.21; id. at 72 tbl.52. With respect to the courts' success in providing access for lesbians and gay men, lesbian and gay users gave the courts a mean rating of 2.79; lesbian and gay employees gave the courts a mean rating of 2.83, while heterosexual employees gave the courts a mean rating of 3.33. Regarding the courts' availability to resolve disputes involving gay men and lesbians, lesbian and gay users gave the courts a mean rating of 2.50, lesbian and gay employees gave the courts a mean rating of 2.54, heterosexual employees gave the courts a mean rating of 3.19. Id. at 39 tbl.21; id. at 72 tbl.52.
Additionally, the correlation between lesbian and gay visibility and negative experiences applies to court employees as well as court users. The SOF Report found a significant disparity in the personal work experiences of gay and lesbian versus heterosexual employees. Lesbian and gay employees were over five times more likely to experience negative actions or discrimination, or to hear comments based on sexual orientation than were heterosexual employees. Further, if only 36.1% of the self-identified gay or lesbian employees were completely out to their co-workers, logically this more visible group should have experienced more discrimination than the 63.9% of lesbian or gay employees who hid their sexual orientation to some degree or who were heterosexual. One court employee stated, "There were quite a few gay men who worked at our court and were openly harassed because of it." One gay employee noted, "I've heard derisive references such as 'faggot' from judges, co-workers, and bailiffs. Questions have been asked of me [regarding] flowers/gardening and other areas where gay men are stereotyped." Another employee reported, "When helping lesbians or gays some of the clerks handle their paperwork touching only the tips or edges of the paper. One stated, 'You never know what they did or touched.'"

The distinctiveness of lesbian and gay identity underlying Dale helps explain these findings. More specifically, we do not have a separate schema for non-gay people; they are just "people" and not a group characterized by their sexual behavior. Accordingly, we rarely

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278. While 3.4% of non-gay court employees reported hearing negative comments based on their sexual orientation in the last year, 20.4% of lesbian and gay court employees reported hearing such comments. Just 3.2% of non-gay employees reported their sexual orientation being the subject of jokes or ridicule, while 16.2% of lesbian and gay employees reported such incidents; only 2% of non-gay employees reported verbal abuse based on their own sexual orientation, while 12.5% of lesbian and gay court employees reported such abuse. Id. at 62 tbl.40. Similarly, 2.5% of non-gay employees reported experiencing negative actions based on sexual orientation, compared with almost 15.7% of lesbian and gay male employees. Finally, 12.9% of lesbian and gay employees report being called derogatory names based on their own sexual orientation, compared with 1.7% of non-gay employees. Id. Finally, one in five lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their workplace based on their sexual orientation. Merely 2% of the non-gay employees reported being discriminated against based on sexual orientation. Id.

279. Id. at 44 tbl.24.
280. Id.
281. Id. at 48.
282. Id. at 49.
283. Id.
284. Some segments of the gay community use the term "breeder" to refer to all non-gay persons. E.g., Rob Morse, We're Here, We're Having Beer... S.F. EXAMINER, June 29, 1997, at A2; see also Barbara Brotman, Gay or Straight, Readers Lust for 'Savage Love', CHICAGO TRIB., Nov. 21, 1996, at 1; Rich Kane, AOHell, Can a Gay Man
perceive the sexual orientation of non-gay persons because we measure difference against that baseline. For example, sexual orientation protections apply to gay and non-gay persons alike, but we usually do not notice that symmetry. Non-gay people appear not to need that protection because they do not appear different enough to provoke a negative reaction. Unsurprisingly, few non-gay court employees suffered negative treatment because of their sexual orientation.

The SOF Report demonstrates the strong incentives for a lesbian or gay court employee to remain closeted. Specifically, 57.9% of all court employees believe it is better if gay men and lesbians are not open about their sexual orientation, and 29.5% of employees believe that being openly gay or lesbian is unsafe. If a person is suspected of being lesbian or gay, 17.3% of court employees stated that it is harder to be hired; 13.4% agreed that sexual orientation is used to devalue the credibility of some gay or lesbian employees, and 9.8% believed that anti-gay prejudice is widespread at work. Moreover, 40.4% acknowledge that people make jokes or comments about gay people behind their backs.


286. Justice Scalia’s dissent in Romer provides a striking example of this inattention in his description of Colorado’s Amendment 2 as merely banning special rights for gay people and returning Colorado law to neutrality. Romer v. Evans, 517 U.S. 620, 638–39 (Scalia, J., dissenting). On a purely descriptive level, he misstates the effect of the Colorado law. Each of the ordinances affected by the amendment, e.g., Aspen, Boulder, Denver, and the state Executive Order, barred discrimination on the basis of sexual orientation. Id. at 623–24, 626–27 (quoting Evans v. Romer, 854 P.2d 1270, 1284–85 (Colo. 1993) (en banc)). Amendment 2 prohibited antidiscrimination provisions based on homosexual, lesbian, or bisexual orientation only. Id. at 624 (citing COLO. CONST. art. II, § 30b). Thus, heterosexuals, as heterosexuals, would have remained protected against discrimination under these ordinances; gay people would not have been protected.

287. See Romer, 517 U.S. at 631.

288. But see Susan Ferriss & Erin McCormick, When a Kiss Isn’t Just a Kiss, S.F. EXAMINER, Mar. 9, 1997, at A1 (reporting that after a gay bar owner ejected a man and woman for kissing, S.F. Human Rights Commission ordered gay bar to change anti-heterosexual kissing policy to comply with sexual orientation discrimination prohibitions).

Additionally, when the gay or lesbian employee becomes more visible, employees believe that workplace policies are applied less fairly. For example, "I could never understand why all of a sudden I was being treated with disrespect by management. Then a co-worker told me that she thought management hated gays and that they were told by a different co-worker that I was gay." People expect lesbian and gay employees to remain closeted about their sexual orientation or risk suffering discrimination. Other court employees report feeling invisible or being shunned by co-workers after they complained about different treatment of gay people. Most telling of all, some employees did not report incidents of anti-gay behavior because they feared others would think they were lesbian or gay. Thus, some lesbian or gay court employees would rather remain closeted than report incidents of abuse, and some non-gay employees may have chosen to keep silent rather than risk that identification.

The most direct evidence of the stigmatizing effects in the courts of open lesbian or gay identity appears in the SOF Report’s specific findings on disclosure of sexual orientation and responses to requests for personal information. Because being an openly lesbian or gay man involves a continuing series of choices about disclosure, even otherwise openly gay people may be inhibited about revealing their sexual orientation in the courts. "One man in particular made gestures and anti-gay comments. Others would nod in agreement it was very scary to come out in that environment. [sic] The judge did dismiss this man after a while." For example, one court user noted that attorney, witness, and court audience stated that a gay man "asked for it" by being out.

At least one court user respondent specifically reported that he or

290. *Id.* at 59; *L.A. Bar Report, supra* note 1, at 16, 19 (discussing evaluations, promotions, and career paths for openly gay or lesbian attorneys).

291. Brewer & Gray, *supra* note 16, at 69 tbl.48; *id.* at 70 tbl.49.

292. *Id.* at 60. Employees noted: "It’s like I don’t exist anymore." and "Made me feel uncomfortable. Fewer invitations to group lunches, etc." *Id.* See generally *L.A. Bar Report, supra* note 1, at 32 (discussing the choice of confronting or acquiescing in anti-gay behaviors).

293. The survey found that 7.1% of court employees, who experienced incidents of negative behaviors at work and did not report them, did not do so because of this fear. Brewer & Gray, *supra* note 16, at 64 tbl.43. Second, 2.8% of employees, who observed such treatment in open court, did not report it for this reason. *Id.* at 54 tbl.33. Finally, 2.3% of employees, who observed such behavior other than in open court, did not report it for this reason. *Id.* at 58 tbl.38.


295. Survey Data, *supra* note 14, at 9. The idea that openly gay people deserve negative treatment is a common occurrence. *E.g., Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996).* In *Nabozny,* after a mock rape by male students, a gay middle school boy fled to his principal’s office. *Id.* The principal’s response was "that 'boys will be boys' and told [the complaining student] that if he was ‘going to be so openly
she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian.  

Therefore, we might expect some disparity between their openness in court and in other settings. Fifty-six percent of gay and lesbian court users did not want to state their sexual orientation during their court contact, although most of these court users were openly gay or lesbian in other contexts. Over ninety percent were totally or selectively open at work, to family, to friends, and within the community. This finding undermines the assumption in Dale that a gay man, open in one setting, is open in all. The size of the disparity in openness between the judicial system and other settings may reflect that lesbian and gay court users’ experiences are far from ideal, despite their legal protections in the courts. The Court’s First Amendment doctrine provides additional pressures to remain closeted, since their openness in court may affect their ability to participate in private organizations.

Further, choosing whether and how to reveal one’s sexual orientation is very different from being forced to disclose it or having someone else do so. Given the increased likelihood of negative consequences that gay,’ he should ‘expect’ such behavior from his fellow students.” *Id.*; see also Bradley, supra note 31 (discussing the murder of gay soldier).

Mr. JAVIER TORRES: Here is someone else, a y—another soldier, in the same position that I am, and he was gay and he got murdered over that fact. When I heard it, inside I was scared, I was shocked. But on the outside I pretended to be, like, “Cool. No big deal. Just a fag, you know.” And—and that was the part that hurt the most, because here I am gay. I—I mean, obviously I was scared. I was fearful of my own life.

BRADLEY: What—what did the—the other guys say after Barry Winchell was murdered?

Mr. TORRES: There was some who was, like, “Hey, it’s just one less fag to deal with. I mean, they don’t really belong here anyways. You know, I mean, it’s their fault for putting themselves in that position. They should know better.”

*Id.*

296. *Survey Data*, supra note 14, at 8; *L.A. Bar Report*, supra note 1, at 27 (“Most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream.”); *id.* at 27 n.179 (reporting that one lesbian lawyer married in order to make partner).

297. The survey found that 59.7% of lesbian and gay court users did not want to state their sexual orientation during their most recent contact with the California courts. Brewer & Gray, supra note 16, at 25 tbl.10. Further, 55.6% of lesbian and gay court users did not want to state their sexual orientation during another significant recent contact with the California courts. *Id.* at 37 tbl.18.

298. The survey found that 92.8% were open at work, 94.6% to family, 99.4% to friends, and 91.5% within their community. *Id.* at 14 tbl.2.

299. Commentators have discussed extensively the controversial practice of
attach to being an open lesbian or gay court user, the loss of control over that identity decision can produce a significant amount of anxiety. Thus, it is important that almost one in four lesbian or gay court users believed that someone else disclosed their sexual orientation without their approval in a court contact involving sexual orientation issues. Further, in that same setting, nearly an equal number felt forced to state their sexual orientation against their will. Even in the most recent contact with the California courts, when sexual orientation became an issue, twice as many persons observed at least one negative incident. Moreover, when respondents’ sexual orientation was revealed in that setting, nearly three times as many respondents reported at least one negative incident than when their lesbian or gay identity was not uncovered.

Despite their willingness, or lack thereof, to disclose this personal information, in their baseline contact, a few lesbian and gay court users were asked direct questions about their sexual orientation. Lawyers predominantly asked these questions and always in court. In the other, significant contact, in which more respondents participated actively in the proceedings, however, over one in five lesbian and gay court users “outing”—disclosing the sexual orientation of closeted lesbian or gay politicians or celebrities without their permission, particularly those who have taken anti-gay actions. See generally LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING (1993); MICHELANGELO SIGNORILE, QUEER IN AMERICA: SEX, THE MEDIA, AND THE CLOSETS OF POWER 70-77 (1993); Jon E. Grant, Note, “Outing” and Freedom of the Press: Sexual Orientation’s Challenge to the Supreme Court’s Categorical Jurisprudence, 77 CORNELL L. REV. 103 (1991) (discussing outing and First Amendment concerns); Mathieu J. Shapiro, Note, When Is a Conflict Really a Conflict? Outing and the Law, 36 B.C. L. REV. 587 (1995).

300. For an extreme example of the stress that forced disclosure brings, see Robert Sallady, Davis, Lawmakers Fight over Parole for Model Inmate, SAN DIEGO UNION-TRIB., May 3, 2000, at A3 (discussing parole in the case of Robert Rosenkrantz, who was so distraught over the unconsented disclosure of his homosexuality that he killed the person who revealed the information).

301. Of lesbian and gay court users, 28.7% reported that someone else stated their sexual orientation without their approval. Compare Brewer & Gray, supra note 16, at 37 tbl.18, with id. at 25 tbl.10 (noting 8.6% during their most recent contact with the California courts).

302. Of lesbian and gay court users, 24.5% reported they felt compelled to state their sexual orientation against their will. Compare id. at 37 tbl.18, with id. at 25 tbl.10 (noting 10.5% during their most recent contact with the California courts).

303. In their most recent contact with the California courts, just under 25% of the contacts involved sexual orientation issues. Of those contacts, almost 30% observed at least one negative incident versus 14% in the remaining cases. Id. at 18.

304. In the 15% of contacts in which respondents’ sexual orientation was revealed, 42% reported at least one negative incident compared to 14% reporting any negative incident where sexual orientation identity was not disclosed. Id. at 17-18.

305. Of respondents, 3% were asked directly about their sexual orientation. Id. at 17 tbl.6.

306. Id. at 15-16.
were asked to indicate their sexual orientation. Once again, three-quarters reported that a lawyer asked that question.

The significance of these findings increases because lesbian and gay court users reported that sexual orientation became an issue in court when it was not pertinent almost as often as when it was pertinent. Apparently, lawyers sometimes used lesbian or gay identity as a litigation strategy. An open response from one respondent illustrates the tactical use of identity: "[A lawyer] questioned potential jurors about whether they would accept unbiased testimony from gay witnesses. The manner of question implied gays were unreliable witnesses, thus placing a bias in the minds of potential jurors." This strategy resonates with some jurors’ negative perceptions of lesbians and gay men. Accordingly, even otherwise openly gay or lesbian court users might be reluctant to disclose their sexual orientation in the California courts.

The closeting effects felt by lesbian and gay court users might also stem from general inattention to the diversity of their lives and from

307. Of respondents, 20.4% were asked their sexual orientation directly. id. at 30 tbl.15.
308. Id. at 30.
310. Brewer & Gray, supra note 16, at 31. Other respondents reported that lawyers dismissed gay or lesbian persons from the jury after those individuals disclosed their sexual orientation. Survey Data, supra note 14, at 8–9 (responses to question 18).

On June 27, 2000, California Governor Gray Davis signed Assembly Bill 2418 into law. Press Release, Office of the Governor, Governor Davis Signs Legislation to Protect Californians from Discrimination in Jury Selection (June 27, 2000), at http://www.governor.ca.gov/briefing/pressreleases/jun00/100029627.html. That legislation added sexual orientation as a prohibited category for exclusion during peremptory challenges during jury selection, and for jury service exemption. Id. Although this law gives lesbians or gay men protections unavailable at the time of the survey, the survey data reflect that legal doctrine and actual treatment of lesbians or gay men often diverge.

312. The California Standards of Judicial Administration attempt to address the diverse lives of lesbians or gay men in the standard jury questions for judges.

It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a life style different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?

CAL. R. COURT, STANDARDS OF JUDICIAL ADMIN. § 8(c)(16) (Daily Journal 2000); id. at § 8.5(b)(18).

Although not specifically mentioning lesbians or gay men, the use of "lifestyles" rather than "lives" when referring to gay people is problematic. The term connotes a conscious and socially unacceptable choice, and not merely another manner of living. Tellingly, before the Supreme Court’s decision in Palmore v. Sidoti, 466 U.S. 429 (1984), courts had once described interracial marriages as a "lifestyle" to create the same marginalizing effect. Id. at 431 (lower court changed custody from the mother because
negative treatment or a hostile court environment. In their most recent
court experience, 44% of gay men and lesbians were jurors or venire
panelists. In that contact, 48.3% were asked if they were married.
Overall, 26% of all lesbian or gay court users were asked if they were
married. The California Judicial Council recommends that judges
request marital status during standard voir dire questioning. Many
respondents felt they could only reply incompletely or inadequately to
that query.

The judge asked all prospective jurors to state marital status and what their
spouse's occupation was. I have a long-term domestic partner, so I felt that
answering the question honestly required me to reveal my sexual orientation
and to state my partner's occupation even though legally my marital status is
single. Stating 'single' would have felt like lying.

The marital status question reinforces the assumption that individuals
are heterosexual and either married or single. Thus, the question may
create the perception of bias or foster a feeling of invisibility in anyone
whose life cannot be described by those categories.

Inquiring about marital status, unless it is specifically relevant to a
case, may undermine the credibility of the judicial process in several
ways. First, it deprives the court and the lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process. One respondent stated, "In a domestic abuse case, the judge did not ask me the same questions she asked other potential jurors regarding my relationship with my companion or my experience with domestic abuse."\(^{318}\)

Second, it forces gay or lesbian jurors or witnesses to either disclose their sexual orientation or answer the question narrowly according to its specific terms, leaving them to deny or be incomplete about their lives. As one survey respondent noted: "All prospective jurors were asked about marital status. I have been in a monogamous relationship 33 years and consider myself married. It would have been wrong to deny my relationship but it would have been legal to do so. It would have been a very public 'outing'!"\(^{319}\)

Third, it may foster a perception among gay and lesbian court users that their subsequent judicial experience may not be fully informed or fair. "I feel that the court does not take sexual orientation seriously and excludes it as an issue, which may be a mistake under certain circumstances—assuming everyone is either single or married."\(^{320}\) "Lawyers questioned jurors about relevant medical conditions of spouses and family with disregard for other relationships of gays, lesbians, and domestic partners. Judge did not clarify the lawyer's intent. The net effect: Our relationships don't count."\(^{321}\)

The California SOF Report empirically confirms some elements of Dale’s analysis, and contradicts others. The SOF Report illustrated that the Court erroneously viewed being openly gay or lesbian as a one-step, all-or-nothing process. There are many pressures on gay people to remain closeted, from negative consequences of being open to assumptions of heterosexuality and lack of sensitivity to the realities of lesbian and gay lives. Moreover, gay men and women must affirmatively communicate their identity to be visible, a decision that many do not take lightly. Thus, even otherwise open lesbians or gay men are not out in all settings. Consequently, the Court erroneously

\(^{318}\) Brewer & Gray, supra note 16, at 20. See also Survey Data, supra note 14, at 14 (quoting response to question 36: "I was serving jury duty. Questions asked of straight jurors were not asked of me. Things that excluded 'married' people were not applied to gay/lesbian even with long time partners.").

\(^{319}\) Survey Data, supra note 14, at 14 (response to question 36).

\(^{320}\) Id. at 16 (response to question 36).

\(^{321}\) Brewer & Gray, supra note 217, at 20.
assumed that because Dale was out at college, he would be open in Scouting.

Additionally, as responses to any survey question demonstrated, even a relatively homogeneous group of lesbians and gay men holds diverse views. Their shared identity does not provide a monolithic opinion on any topic. Thus, the Court mistook Dale’s gay identity for his substantive views on Scouting policy. The SOF Report also showed that non-gay people do not necessarily share the same perceptions of lesbians or gay men. Accordingly, the Court jumped too uncritically from lesbian and gay identity to the message that that identity conveyed to the audience. Although these conflations are not unique to Dale, they caused a misapplication of Roberts and Hurley and the Court placed this misattribution into constitutional doctrine.

Finally and most significantly, in modern American society, despite the gains in acceptance of lesbians and gay men, gay identity still appears so distinctive that it changes the treatment of court users, court employees, lesbians, and gay men generally. Lesbian or gay identity colors proceedings and situations even when it is not pertinent. Thus, it dominates situations in which lesbians and gay men find themselves. Accordingly, the SOF Report corroborates the Court’s premise in Dale that once some people knew that James Dale was gay, they would never look at him in the same way again. Instead of an assistant scoutmaster, he would become the gay assistant scoutmaster and, therefore, could alter the Boy Scouts message. This fact also challenges Justice Stevens’s argument that lesbian or gay identity is not communication. By allowing the First Amendment to shield gay peoples’ exclusion from private organizations, however, the Court makes it more difficult for gay people to be open and to participate fully in the diversity of American life.

IV. CONCLUSION

In Romer v. Evans, the Supreme Court prohibited Colorado’s attempt

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322. E.g., Brewer & Gray, supra note 16, at 49 (quoting response from a gay court employee: “Questions have been asked of me [regarding] flowers/gardening and other areas where gay men are stereotyped.”); Survey Data, supra note 14, at 10 (“It’s the idea that lesbian relationships cannot be abusive so there must be something wrong with the individual who is a lesbian, or maybe she’s not really a lesbian.”); L.A. Bar Report, supra note 1, at 11-13.


324. See supra notes 192 & 293 and accompanying text.

325. Dale, 120 S. Ct. at 2475 (Stevens, J., dissenting).
to marginalize its lesbian and gay citizens through Amendment 2, which would have prohibited any governmental entity from protecting lesbians, gay men, or bisexuals from sexual orientation discrimination. In holding that the amendment violated the Equal Protection clause, the Court rejected the argument that the law merely repealed special rights accorded lesbians and gay men by antidiscrimination statutes:

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

Yet even as Romer refused to permit Colorado to exclude lesbians and gay men from ordinary civic life and push them to society’s edges, the Court’s First Amendment doctrine had begun to return lesbians and gay men to the closet. Forced lesbian and gay invisibility contravenes Romer’s protection of gay people’s inclusion into American life.

The closet aids the belief that lesbians and gay men are peripheral to society because it hides their representation in a variety of positions and strata. Because many people do not see lesbians or gay men as fully functioning members of public and private life, they believe gay people to be one-dimensional—separated from the variety of roles in American society and relegated to certain professions. Gay interior decorators or lesbian gym teachers are unremarkable because people expect them. However, lesbians and gay men must also be visible as assistant scoutmasters and members of the Baptist Bible Trolley, of marching bands, fire and police departments, or else people may think that those lesbian and gay individuals do not exist. Accordingly, GLIB’s attempted message was very important. It is not enough to march in a

327. Id. at 631.
328. For a fuller discussion of the prevalent lesbian or gay schema, see Brower, supra note 3, at 71–74, 77–78, 90–92.
329. Indeed, we so completely expect gay men to fill that job that a non-gay decorator can be a plot line in a mainstream television situation comedy. Cheers: Norm Is That You? (television broadcast Dec. 8, 1988), summary available at http://s9000.furman.edu/~ejorgens/cheers/episodes/152.html. In this episode, Norm pretends to be gay in order to meet clients’ expectations and obtain a job as an interior designer. Id.
330. This image is a fixture in high school movie comedies. CLUELESS (Paramount Pictures 1995); PORKY’S (Twentieth Century Fox 1981); SCARY MOVIE (Dimension Films 2000).
separate parade or hidden within another group. Gay people must join the existing institutions of American civic life as equal and visible members.

A half century ago, people argued publicly that whites’ freedom of association to avoid integration provided significant limits on anti-discrimination law. Brown v. Board of Education foreclosed that position and people rarely express it openly today. After Brown, integration worked to break down the belief that African-Americans as a class were so different that they should be segregated and excluded from public and commercial life in order to protect others’ associative rights. Unfortunately, unlike racial equality today, the struggle for full social participation by lesbians or gay men must progress against a contrary legal doctrine.

The doctrinally sanctioned exclusion of lesbians and gay men from private groups reinforces their perceived isolation from mainstream society. That isolation subverts lesbian and gay equality, not only within private organizations, but also in legal regimes explicitly requiring fairness and respect. As the SOF Report found, the link between lesbian and gay visibility and negative experiences in the California courts pervades the experiences of lesbian and gay court users and court employees. Once lesbian or gay identity is known, it becomes a signal of difference that triggers worse treatment. When lesbian or gay identity becomes such an overshadowing characteristic, it marks gay people as separate and different from non-gay persons. This distinctiveness supports the closet door that the Court’s recent First Amendment jurisprudence has created. Sadly, the SOF Report illustrates that the Court may be correct. If all the audience sees is lesbian or gay identity once they know that fact, then the inclusion of lesbians or gay men may distort a private organization’s message.

Accordingly, if gay people are to achieve true equality, they must

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334. It is like the first time you saw a teenager with a nose ring. All you saw was the nose ring; all you thought about was what happens when that person gets a cold. Later, however, as you saw more people with similar ornaments, you started to look past it toward the individuals behind the nose rings. The audience’s perception of lesbian or gay identity is the key, which is why Hurley is correct and Dale is not.
appear more often in a wider variety of societal roles so that they shake the distinctiveness that blinds others to the ways in which lesbians and gay men resemble everyone else.335 Pushing open the closet door is not always simple or pleasant, but compounding the difficulty is the Court's recent First Amendment jurisprudence that has given private associations an additional tool to keep that door shut. Nevertheless, even legal equality is insufficient unless others see open lesbians or gay men not as separate and different, but as fellow participants in American civic life.336

335. The author is not suggesting that lesbians or gay men should deny their differences from non-gay people or hide the more flamboyant or outré aspects of some gay persons' lives. Some gay commentators do, and have called for restrictions on public behavior and persons which would reinforce negative perceptions of gay people, MARSHALL KIRK & HUNTER MADSSEN, AFTER THE BALL 279, 307–12 (1989), and for a public relations campaign aimed at showing how mainstream gay people are. Id. at 197–245. The position of this Article is that gay people should select the mechanisms of advocacy, including images, which are best suited to achieving change.

336. ROGER KAHN, THE BOYS OF SUMMER xvii (1971). When spectators of the 1950s applauded Jackie Robinson, they may not have known they were making a racial statement because "for an instant [they] had accepted Robinson simply as a hometown ballplayer." Id. However, "[t]o disregard color, even for an instant, is to step away from the old prejudices, the old hatred. That is not a path on which many double back." Id.