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Andrew J. Breuner

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EXPRESSION BY ASSOCIATION: TOWARDS DEFINING AN EXPRESSIVE ASSOCIATION DEFENSE IN UNRUH-BASED SEXUAL ORIENTATION DISCRIMINATION ACTIONS

I. INTRODUCTION

This comment concerns the conflict between the application of a state public accommodations law¹ and the constitutional right of expressive association guaranteed by the First² and Fourteenth Amendments.³ The following discussion attempts to clarify issues involved in this conflict within the context of sexual orientation discrimination⁴ by voluntary associations, and the challenges to such discrimi-

1. The term "public accommodations law" or "public accommodations statute" as used in this comment refers to those state and federal provisions which regulate access to places other than schools, work places, or homes. See generally Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State & Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 217-18 (1978) (discussing the definition and scope of public accommodations laws). These areas are generally covered in separate fair employment and housing provisions, and the term "public accommodations" has come to be associated with areas not covered by these types of laws. *Id.*

2. U.S. CONST. amend. I.

3. U.S. CONST. amend. XIV, § 1. This comment considers First Amendment-based issues only within the context of expressive association, although associative interests are constitutionally protected in both expressive and intimate forms. *E.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (explaining that the freedom of association is protected in "two distinct senses," i.e., freedom of intimate association and freedom of expressive association). The First Amendment right of intimate association is considered by this comment only insofar as it forms the basis for a "private club" exemption under the Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West Supp. 1993). See *infra* text accompanying notes 78-83. When this comment refers to the "freedom of association," it is referring to this freedom in the expressive, and not the intimate sense.

4. The term "sexual orientation discrimination" in this comment refers to discrimination against individuals based on their gay or lesbian identity. The term appropriately could be applied to discrimination based on an individual's heterosexuality, but this comment will not use the term in that sense. Although the term "sexual orientation" tends to focus on the sexual preferences of an individual, this comment refers to the term in the broader sense that encompasses the sexual, emotional, cultural, and political aspects of gay and lesbian lifestyles. Sexual orientation discrimination, as discussed in this comment, accounts for discrimination based on the non-sexual aspects of a person's gay or lesbian identity. This comment makes a genuine attempt to be specific about whether sexual or non-sexual factors are involved when the distinction is relevant to the discussion.

Other terms relating to a discussion of sexual orientation issues also require clarification. The term "gay" in this comment is male-gender specific, and encompasses sexual, emotional,

nation under California's Unruh Civil Rights Act (hereinafter the Unruh Act, or Act).⁵ This comment proposes guidelines for, and limits to, a possible expressive association defense⁶ to sexual orientation discrimination claims. In conclusion, this comment suggests how the use of such a defense might impact future litigation between organizational defendants and gay or lesbian Unruh Act plaintiffs.

In the past decade, organizational membership policies excluding women from membership have been invalidated by the United States Supreme Court pursuant to state and local public accommodations laws.⁷ The Court, however, has suggested that an expressive association defense can be based on ideological differences between an organization's existing membership and the excluded individual. This comment suggests that where sexual orientation discrimination is alleged in response to an organization's exclusionary practices, both a legal practitioner's strategies, and a court's analysis, should take into account the collective beliefs expressed by the organization, as well as the unique forms of expression imminent in gay and lesbian "personhood."⁸

and ideological characteristics unique to gay men. The term "lesbian" is female-gender specific, and encompasses similar factors unique to lesbian women. The term "homosexual" in this comment refers to a person who is sexually attracted to members of that person's sex. "Homosexual" does not necessarily connote same-sex sexual experience. For another description of distinctions between the terms lesbian, gay, homosexual, sexual preference, and sexual orientation, see José Gómez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 LAW & INEQ. J. 121, 121 nn.1-2 (1983). For an insightful discussion of the imprecision associated with the use of terms regarding sexual orientation, and the significance of "naming" to gays and lesbians, see Marc Fajer, *Can Two Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 630-37 (1992).

5. CAL. CIV. CODE § 51 (West Supp. 1993). The Unruh Act states, in relevant part, that "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.*

6. This comment often refers to the term "expressive association defense." This is the author's term for First Amendment-based defenses based on the principle that expressive interests preclude the application of public accommodations laws in certain contexts.

7. See *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544-45 (1987) (holding that the Unruh Act prohibits the national office of the Rotary Club from ordering a local chapter to exclude women); *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (holding that Minnesota's public accommodations law prohibits the Jaycees organization from excluding women from membership); see also *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 8 (1987) (upholding New York City's public accommodations provision against a challenge to its constitutionality by many of the city's larger private clubs).

8. This term is used to refer to forms of expression inherent in gay and lesbian identity. See generally Gómez, *supra* note 4. Gómez's definition of personhood is largely derived from Professor Tribe's discussion of the scope of constitutionally protected privacy interests. *Id.* at 129-32. Professor Tribe suggests that personhood is experienced both as an "inward-looking

This comment discusses the Unruh Act as the basis for a sexual orientation discrimination claim and the right of expressive association as the basis for a defense to such a claim. The following discussion is divided into five parts which comprise a review and analysis of associative freedoms and limits, the expressive content of gay and lesbian personhood, and proposed guidelines for judges and litigants who must balance and articulate the constitutional rights of organizational members and the civil rights of gay and lesbian plaintiffs.

Part II of this comment briefly surveys the scope of these respective positions.⁹ Section A discusses the United States Supreme Court's recognition and treatment of rights and issues involving expressive association. Section B discusses the evolution of the Unruh Act's coverage as shaped by the California Supreme Court, culminating in the Act's application to nonprofit entities. Section B also discusses the judicial tests the California courts have utilized to determine whether acts of discrimination based on sexual orientation are in violation of the Unruh Act. Finally, Section C examines the expressive content of gay and lesbian personhood.

Part III reiterates the need for defining an expressive association defense and the importance of guidelines and limits for participants in a sexual orientation discrimination conflict. The need to balance the merits of constitutionally-based defenses against an established tradition of equal access to public accommodations pursuant to the Unruh Act is emphasized. This section explains that expressive association claims have not been articulated in the area of sexual orientation discrimination, but that organizational defendants subject to the Unruh Act can be expected to assert such defenses in the future.

The analysis section, Part IV, discusses the limitations on expressive association claims based on principles of "functional impairment"¹⁰ as suggested in recent Supreme Court cases involving gender

face of privacy" and as an "outward-looking dimension of selfhood or personality . . ." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 887-88 (1978). Gómez makes a compelling argument that expression of gay and lesbian personhood should be accorded First Amendment protection. Gómez, *supra* note 4, at 129-53.

9. See *infra* text accompanying notes 13-135.

10. See *infra* text accompanying notes 136-97. "Functional impairment" is the author's term for infringements on an organization's members' expressive interests based on state action which "impede[s] the organization's ability to engage in . . . protected activities," *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984), or which requires the organization to "alter" or "abandon" expressive activities. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987).

discrimination.¹¹ An alternative expressive association defense, based on the ideological differences between an organization's existing membership and the excluded individual is stated, and guidelines and limits for such a defense are developed and articulated.

Part V proposes guidelines for defining and limiting the ideological differences-based expressive association defense in the realm of sexual orientation discrimination.¹² This section provides an application of the proposed guidelines and limits in a hypothetical scenario involving sexual orientation discrimination by a voluntary association. The proposed guidelines seek to preserve the First Amendment principles underlying the right of expressive association, while creating a reasonable exception to the objective of equal access inherent in the Unruh Act.

Part VI concludes the comment with a legal forecast of the practical implications of the expressive association defense on sexual orientation discrimination claims.

II. BACKGROUND

A. *The First Amendment Right of Expressive Association*

1. *The United States Supreme Court's Recognition of Expressive Association as a Protected Interest*

The United States Supreme Court has long recognized that "[e]ffective advocacy of public and private points of view, particularly controversial ones, is undeniably enhanced by group association."¹³ While the First Amendment does not expressly provide for the protection of group expression, the "freedom to engage in association for the advancement of beliefs and ideas" has been construed as incidental to the scope of its protection.¹⁴ Furthermore, the "right of association"¹⁵ has been held to apply to the states through the Four-

11. See *Rotary*, 481 U.S. at 548 (rejecting the Rotary Club's expressive association claim because the organization failed to show that its ability to engage in protected activities would be impaired by the presence of women); *Roberts*, 468 U.S. at 626 (stating that the Jaycees had failed to show that the acceptance of women in the organization would "impose serious burdens" on its members' right of expressive association); see also *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (determining that law firm "[had] not shown how its ability to fulfill [protected] function[s] would be inhibited by a requirement that it consider [women] for partnership").

12. See *infra* text accompanying notes 198-230.

13. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

14. *Id.*

15. *Id.* at 461.

teenth Amendment's incorporation of the First Amendment.¹⁶ The types of organizational activities protected by the First Amendment are extensive. The Court has recognized expression pertaining to "political, economic, religious or cultural matters,"¹⁷ and expressed in the form of legal advocacy,¹⁸ group-sponsored boycotts,¹⁹ assembling for "'social, legal and economic benefit,'"²⁰ "service activities,"²¹ lobbying and fund raising programs,²² and door-to-door solicitation²³ are among the activities that the Court has recognized as being worthy of constitutional protection. Groups involved in humanitarian service, education, and member development, and which abide by and seek to promote certain ethical standards, have also received assurances of First Amendment protection for these activities.²⁴

16. *See, e.g., id.* at 460 ("It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment.").

17. *Id.*

18. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (stating that the First Amendment protects the advocacy of lawful rights and interests); *NAACP v. Button*, 371 U.S. 415, 428 (1962) (holding that the First Amendment invalidates state law prohibiting an organization from providing free legal aid for the prosecution of racial discrimination claims).

19. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982) (holding that elements of a merchant boycott involving peaceable assembly, picketing, peaceful march, and demonstrations are protected by First Amendment).

20. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1985) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)).

21. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987).

22. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (stating that the lobbying and fund raising activities of Jaycees are protected forms of expressive association).

23. *See, e.g., Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 (1987) (stating that solicitation of charitable contributions is protected speech); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 798 (1984) (holding that solicitation in the context of a charity drive aimed at federal employees is speech protected by the First Amendment); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 628 (1980) (holding that door-to-door solicitation of funds by environmental interest group protected by First Amendment even where seventy-five percent of collected monies went to pay administrative costs).

24. *See, e.g., Rotary*, 481 U.S. at 548 (stating that club's service activities were protected forms of expressive association); *Roberts*, 468 U.S. at 627-28 (stating that organization's civic and charitable activities were protected forms of expressive association). The Court in *Roberts* took notice of the fact that a "not insubstantial part of the Jaycees' activities constitut[ed] protected expression on political, cultural and social affairs." *Roberts*, 468 U.S. at 626-27. Protected activities included philanthropies, fund raising, lobbying, and other charitable activities. *Id.* The Court in *Rotary* stated that the club's "service activities" were protected forms of expressive association. *Rotary*, 481 U.S. at 537.

2. *Judicial Scrutiny of State Action Which Infringes Expressive Association*

The Supreme Court has applied strict scrutiny to state action which impairs the freedom of expressive association.²⁵ In recent cases involving conflict between state public accommodations laws and expressive association claims made by nonprofit organizations, the Court has utilized a compelling interest-incidental infringement analysis.²⁶ In *Roberts v. United States Jaycees*,²⁷ the Court considered whether requiring the Jaycees, an educational and charitable organization, to admit women as members violated the organization's members' right of expressive association.²⁸ The Court stated that the application of Minnesota's Human Rights Act²⁹ represented the "least restrictive means" of achieving the state's compelling interest in preventing gender discrimination in places of public accommodation.³⁰ Like California's Unruh Act, the Court emphasized that Minnesota's public accommodations law had been a "primary means for protecting the civil rights of historically disadvantaged groups"³¹ up until the federal government's legislative actions of the late 1950's and 1960's, and that states continued to "progressively [expand] the scope of [their] public accommodations law[s]."³² The Court asserted that the state government had a "compelling interest" in the area of discrimination prevention, and stated that a constitutionally valid government power was being exercised to further an objective unrelated to the expressive freedoms of the Jaycees.³³

Three years later, in *Board of Directors of Rotary Interna-*

25. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

26. See, e.g., *Roberts*, 468 U.S. at 623. "The right to associate for expressive purposes is not . . . absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive on associative freedoms." *Id.*

27. *Roberts*, 468 U.S. 609 (1984).

28. *Id.* at 622-29.

29. See *id.* at 614-15:

The complaint alleged that the exclusion of women from full membership . . . violated the Minnesota Human Rights Act . . . which provides in part: "It is an unfair discriminatory practice: To deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex."

Id. (quoting MINN. STAT. § 363.03, subd. 3 (1982)).

30. *Id.* at 626.

31. *Id.* at 624.

32. *Id.*

33. *Id.*

tional v. Rotary Club,³⁴ the Rotary Club, a professional and public service organization, was subject to a gender discrimination claim filed pursuant to the Unruh Act. The Supreme Court again weighed a state's interest in prohibiting gender discrimination in public accommodations against the expressive association interests of a non-profit organization.³⁵ The Court emphasized that ending gender discrimination in places of public accommodation served "compelling state interests of the highest order."³⁶ The Court stated that California's application of the Unruh Act was necessary and that it made "no distinctions on the basis of the organization's viewpoint."³⁷

The Court in *Rotary* and *Roberts* listed two infringements that would constitute significant abridgments of an organization's members' right of expressive association: 1) Impairing an organization's ability to engage in protected activities;³⁸ and 2) imposing restrictions on an "organization's ability to exclude individuals with ideologies or philosophies different from those of the group."³⁹ This latter type of infringement was subsequently referred to in *New York State Club Ass'n v. City of New York*⁴⁰ where the Court suggested that the City of New York's public accommodations law⁴¹ would significantly affect the expressive freedoms represented by those organizations covered by the law if their ability "to exclude individuals who do not share the views that the club's members wish to promote" was impaired.⁴²

The Court in *Rotary*, *Roberts*, and *New York State Club Ass'n*

34. Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987).

35. *Id.* at 548-49.

36. *Id.* at 549 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)).

37. *Id.*

38. *Rotary*, 481 U.S. at 548; *Roberts*, 468 U.S. at 627.

39. *Roberts*, 468 U.S. at 627 (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981)) (recognizing the right of political parties to protect themselves from the admission of members with political philosophies adverse to those of the party). The Court in *Rotary* suggested that inasmuch as the Rotary Club's organizational philosophy involved maintaining a membership reflective of "a cross-section of the community," the organization was not required by the Act "to abandon their classification system or admit members who do not reflect [a cross-section]." *Rotary*, 481 U.S. at 548.

40. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

41. This public accommodations provision prohibited discrimination based on race, creed, color, national origin, sex, physical or mental handicap, or sexual orientation by "any place of public accommodation, resort or amusement." *Id.* at 4 n.1 (quoting N.Y.C. ADMIN. CODE §§ 8-107.2, -108, -108.1). The law exempted "distinctly private" clubs and institutions from the public accommodations law. *Id.* at 6 (quoting N.Y.C. ADMIN. CODE § 8-102(9) (1986)). At issue in *New York State Club Ass'n* was an amendment to the law which stated that larger clubs would not thereafter be construed as "distinctly private." *New York State Club Ass'n*, 487 U.S. at 6 (quoting N.Y.C. ADMIN. CODE § 8-102(9) (1986)).

42. *New York State Club Ass'n*, 487 U.S. at 13.

suggested that had the operation of the public accommodations laws at issue in those cases worked serious infringements on associative freedoms, the Court's validation of their application to the organizations would have been unlikely. The *Roberts* Court stated that the public accommodations law at issue advanced anti-discrimination interests through the "least restrictive means."⁴³ "Indeed," the Court added, "the Jaycees ha[d] failed to demonstrate that the [law] impose[d] any *serious burdens* on the male members' freedom of expressive association."⁴⁴ The Court concluded that the public accommodations law would not restrict the Jaycees' ability to engage in expressive activities or to exclude those with ideologies different from those of the organization.⁴⁵ The Court left open, however, the question of whether a "serious burden" *could ever* satisfy judicial scrutiny in the area of associative freedoms.

The *Rotary* and *New York Club Ass'n* opinions seemed to move towards the principle that certain types of restrictions on expressive association would not be tolerated. The *Rotary* Court stated that Rotary members' rights of expressive association were not violated by the admission of women because the evidence failed to indicate that women would "affect in any significant way the existing members' ability to carry out their various purposes."⁴⁶ The Court then conducted a compelling interest-incident analysis on the hypothetical assumption that the admission of women might cause some "slight" infringement on the male members' right of expressive association.⁴⁷ In the case of a slight infringement, the Court concluded that the state's compelling interest in preventing gender discrimination would outweigh the interference with associative interests.⁴⁸

The *New York Club Ass'n* Court rejected an expressive association-based facial challenge to the City of New York's public accommodations law because on its face the law did not constitute a "significant" infringement on expressive association.⁴⁹ The Court

43. *Roberts*, 468 U.S. at 626.

44. *Id.* (emphasis added).

45. *Id.* at 627.

46. Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987).

47. *Id.* at 549.

48. *Id.* "Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women On its face the Unruh Act . . . makes no distinctions on the basis of the organization's viewpoint." *Id.* (citation omitted).

49. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (quoting Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987)).

specifically cited the absence of restrictions on club policies of ideology-based exclusion.⁵⁰ The Court noted that "an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership"⁵¹

The Court's language in these cases suggests that in the area of expressive association, the Court might recognize a class of impermissible per se infringements which includes functional impairment and restrictions on ideology-based exclusion.

The possibility does remain that the Court will subject all non-de minimis infringements to strict judicial scrutiny. The Court made clear in both *Roberts* and *Rotary* that "public accommodations laws 'plainly serv[e] compelling state interests of the highest order.'"⁵² Furthermore, it seems unlikely that the enforcement of public accommodations statutes would ever be considered content-based. However, the per se rule suggested by the *Roberts*, *Rotary*, and *New York Club Ass'n* opinions indicates that the Court might be unwilling to apply a "least restrictive means" label to restrictions that are characterized as "serious" or "significant."

3. A Summary of First Amendment Protection of Expressive Association

The Supreme Court has recognized that the First and Fourteenth Amendments protect the right of individuals to utilize group activity as a vehicle for protected expression. Infringements on expressive freedoms by state action are only justified in limited circumstances. Where the application of public accommodations laws significantly infringes upon the associative interests of an organization's members, either by impairing the organization's ability to engage in expressive activities or by compelling the organization to accept indi-

50. *Id.* ("If a club seeks to exclude individuals who do not share the views the club's members wish to promote, the Law erects no obstacle to this end.")

51. *Id.*

52. *Rotary*, 537 U.S. at 549 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)). An issue not directly addressed by this comment is whether courts would recognize a "compelling" state interest in preventing discrimination on the basis of sexual orientation. A strong case can be made for the possibility of such recognition. Neither the *Rotary* or *Roberts* courts suggested that a state's compelling interest in providing equal access to public accommodations was limited to specific groups such as women. As discussed in Part II.B, the California courts have already recognized that the Unruh Act prohibits arbitrary discrimination on the basis of sexual orientation. The State has also joined a handful of other jurisdictions in passing a job discrimination law which prohibits many types of employment discrimination on this basis. See CAL. LAB. CODE § 1102.1 (West Supp. 1993).

viduals with ideologies different from those of existing members, the Court has suggested that the invalidation of the law's application is likely.

Having established that the First and Fourteenth Amendments provide at least conditional protection for the expressive activities pursued by individuals through associations, it is necessary to consider the types of associations which are subject to California's public accommodations statute. The concept and recognition of expressive association interests have developed under the direction of the United States Supreme Court, while the scope of the Unruh Act has been shaped by California's state courts. By defining the types of organizations subject to the Act, it is possible to anticipate the kinds of entities which might seek constitutional exceptions to the Act's requirements.

B. *The Scope of California's Public Accommodations Law*

1. *Covered Entities*

California's Unruh Act is perhaps the most broadly interpreted of any state's public accommodations statute.⁵³ The starting point for

53. See Pamela Griffin, Comment, *Exclusion & Access in Public Accommodations Law*, 16 PAC. L. J. 1047, 1053-54 (1985):

In California, the Unruh Civil Rights Act contains one of the most expansive public accommodations laws in the nation. The scope of the law reaches beyond the traditional public accommodations coverage to . . . include "all business establishments of every kind whatsoever." In addition, the California definition of public accommodations is the most broadly interpreted general definition among state public accommodations laws.

Id. at 1053 (footnote omitted). Public accommodations laws were based on the common law's requirement that certain private facilities such as inns and common carriers be accessible to all persons, and that some private places were to some extent public. Lerman & Sanderson, *supra* note 1, at 218. This common law foundation led many states to pass public accommodations laws which listed a group of specific facilities covered by the law. *Id.* at 240. The almost unanimous state adoption of such legislation was a gradual and irregular progression, involving narrowly drawn laws. *See id.* at 238-40. By the late 1970's only a handful of states had amended their public accommodations statutes to cover a broad and indefinite range of private establishments across a spectrum of classifications. *Id.* at 242 & nn.205-07.

Until the passage of federal civil rights legislation in the late 1950's and 1960's, the states were the primary source of regulations aimed at private discrimination. *See id.* at 238-40. Because public accommodations laws by their very nature regulate access to private facilities, the Supreme Court invalidated the Civil Rights Act of 1875, holding that the authority for enacting such a regulation was within the exclusive domain of state police power. The Civil Rights Cases, 109 U.S. 3, 25 (1883). Not until the United States Congress recognized its commerce power as a vehicle for proscribing private discrimination was a federal public accommodations law passed. The constitutionality of this authority was unsuccessfully challenged in two noteworthy cases: *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1965) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

reviewing the scope of its coverage is the recognition that it was intended to halt narrow judicial interpretations of the Act's coverage.⁵⁴

Since its enactment, a set of critical California decisions have elucidated the broad coverage intended by the Act's "business establishment" language. In *Burks v. Poppy Construction Co.*,⁵⁵ the California Supreme Court considered whether a seller of housing units was a "business establishment" within the meaning of the Act and stated that the term was to be construed in the "broadest sense reasonably possible."⁵⁶ While this interpretation established that any commercial enterprise was subject to the Act, its applicability to non-profit organizations was less clear. Critical language in the opinion, however, stated that the Unruh Act was to be interpreted as incorporating all specific references to covered entities in earlier versions of the public accommodations bill which included "all public and private groups, organizations [and] associations."⁵⁷ The *Burks* court stated that the Unruh Act's referral to all "business establishments of every kind whatsoever"⁵⁸ made these specific references "mere surplusage, unnecessary in view of the broad language of the Act as finally passed."⁵⁹

In the landmark *O'Connor v. Village Green Owner's Ass'n*⁶⁰ opinion, the California Supreme Court reiterated the incorporation language of *Burks*.⁶¹ The court stated that the Unruh Act was to cover the entities in earlier versions of the bill per *Burks*, but with the qualification that only those which could reasonably be interpreted as constituting "business establishments of every type whatsoever" were actually incorporated.⁶² The court expressly stated that nonprofit organizations were covered by the Unruh Act if they exhibited "sufficient business-like attributes."⁶³

54. "In the late 1950's . . . the Legislature became concerned that Courts of Appeal, narrowly defining the kinds of businesses that afforded public accommodation, were improperly curtailing the scope of the public accommodations provisions. Accordingly, the legislature, enact[ed] the Unruh Act . . ." *In re Cox*, 474 P.2d 992, 997 (Cal. 1970) (citations omitted). The Unruh Act, a 1959 amendment to § 51 of the California Civil Code, substituted "in all business establishments . . . whatsoever," for a listing of particular entities. *Id.*

55. *Burks v. Poppy Constr. Co.*, 370 P.2d 313 (Cal. 1962).

56. *Id.* at 316.

57. *Id.* n.3.

58. *Burks*, 370 P.2d at 315.

59. *Id.* at 316.

60. *O'Connor v. Village Green Owner's Ass'n*, 662 P.2d 427 (Cal. 1983).

61. *Id.* at 430.

62. *Id.*

63. *Id.* at 431. The state supreme court has indicated in several of its decisions the types of activities that constitute "businesslike attributes." In *O'Connor*, the court found that a non-profit owners association had businesslike attributes in that it "perform[ed] all the customary

The California Supreme Court confirmed the expansive scope of the Unruh Act in *Isbister v. Boys' Club*.⁶⁴ The court reiterated its view that certain nonprofit organizations could come within the scope of the Act.⁶⁵ The court noted, however, that "[c]ourts in other jurisdictions [had] consistently held that broad-based nonprofit community service organizations . . . [were] 'public accommodations' covered by statutes analogous to California's pre-1959 civil rights law."⁶⁶ The *O'Connor* court recognized that it was the existence of "business-like attributes" which brought a nonprofit group within the scope of the Unruh Act.⁶⁷ The *Isbister* court found that it was the public nature of a group, the fact that it offered its services or facilities to a broad segment of the population, which established it as a business establishment.⁶⁸ While the presence of businesslike attributes continued to be relevant, the *Isbister* decision stood for the proposition that a group which generally opened its membership to the public, whether or not it had businesslike characteristics, was a business establishment for the purposes of the Unruh Act.⁶⁹

A harbinger to the *Isbister* court's broad interpretation of the Unruh Act occurred two years earlier in a California state appellate court's adjudication of a sexual orientation discrimination case. In

business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders." *Id.* The *O'Connor* court stated that the employment of workers and the charging of substantial fees for goods and services were other types of activities which constituted businesslike attributes. *Id.* In *Isbister v. Boys' Club*, 707 P.2d 212 (Cal. 1985), the state supreme court found that the Boys' Club's operation of a "permanent physical plant offering established recreational facilities which patrons may use" was sufficiently businesslike to bring the Boys' Club within the meaning of "business establishment" under the Unruh Act. *Id.* at 217.

64. *Isbister v. Boys' Club*, 707 P.2d 212 (Cal. 1985).

65. *Id.* at 216.

66. *Id.*

67. *O'Connor v. Village Green Owners Ass'n*, 662 P.2d 427, 431 (Cal. 1983).

68. *Isbister*, 707 P.2d at 220:

The [Unruh] Act is [California's] bulwark against arbitrary discrimination in places of public accommodation. Absent the principle it codifies, thousands of facilities in private ownership, but otherwise open to the public, would be free under state law to exclude people for invidious reasons . . . [California's] law, as we shall demonstrate, has long prohibited arbitrary discrimination in places of public accommodation . . . [T]he term "business establishment" was meant to embrace, rather than reject, that well established principle . . . [T]here can be no doubt that the facility operated by the Boys' Club comes within the scope of that principle: its recreational facilities are open to the community generally but closed to members of a particular group.

Id. at 214.

69. *Id.* at 219. "[W]e need not rely exclusively on the Club's functional similarity to a commercial business. As we have seen, the Unruh Act replaced a statute governing all 'places of public accommodation or amusement' and was intended at a minimum to continue the coverage of 'public accommodations.'" *Id.* (footnote omitted).

Curran v. Mount Diablo Council of the Boy Scouts of America,⁷⁰ the plaintiff filed suit against the Boy Scouts' Mount Diablo Council after the revelation to Boy Scouts officials that he was gay resulted in his expulsion from the organization.⁷¹ A major issue determined by the court of appeal was whether the Boy Scouts organization was a "business establishment" for the purposes of the Unruh Act.⁷² The court determined that the term "business establishment" referred not only to commercial institutions, but also to nonprofit organizations without fixed locations.⁷³ The court suggested that the educational and professional advantages that a nonprofit organization provided its members were relevant in determining whether it was a business establishment under the Act.⁷⁴ The court also stated that the ownership of copyrights, the publishing of books, and other commercial activities pursued by many nonprofit organizations could be characterized as "business-like attributes."⁷⁵ Aside from these factors, and consistent with the subsequent *Isbister* opinion, the court stated that all noncommercial organizations, such as the Boy Scouts, which are "open to and serving the general public," were business establishments within the meaning of the Act.⁷⁶ The court found that "to allow an organization to offer its facilities and membership to the general public, but to exclude [gay] persons on a basis prohibited by law would be contrary to the public policy expressed in the Unruh Act."⁷⁷

2. *An Exemption for Intimate Associations*

Some organizations deemed to be "private clubs" are exempt from the requirements of the Unruh Act.⁷⁸ Where the membership policies of such clubs are at issue, the First Amendment right of intimate association is involved, and both the state and federal courts

70. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 195 Cal. Rptr. 325 (Ct. App. 1983), *appeal dismissed*, 468 U.S. 1205 (1984).

71. *Id.* at 325-26.

72. *Id.* at 334.

73. *Id.* at 335 (citing *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962)).

74. *Id.* at 336.

75. *Id.*

76. *Id.* at 338.

77. *Id.* at 337.

78. The court in *Isbister v. Boys' Club*, 707 P.2d 212 (Cal. 1985), acknowledged the special status of private clubs when it stated that "the [Boys'] Club [of Santa Cruz] is classically 'public' in its operation There is no attempt to select or restrict membership or access on the basis of personal, cultural, or religious affinity, as a private club might do." *Id.* at 217 (emphasis added).

have recognized such entities as outside the scope of public accommodations laws.⁷⁹ Clubs may enact policies to ensure that they are not characterized as business establishments under the Unruh Act.⁸⁰ The United States Supreme Court in both its *Rotary Int'l*⁸¹ and *Roberts*⁸² decisions stated that the size, level of selectivity, and exclusion of outsiders in "critical aspects" of associative relationships, are relevant factors in determining whether the First Amendment creates an "intimate association" exemption for an organization from the requirements of public accommodations laws.⁸³

3. *Protected Classifications*

The classifications protected by the Act are not limited to those cited in the statute.⁸⁴ The *Isbister* court stated, "The Unruh Act accords every person an individual right against 'arbitrary' discrimination of any kind, whether or not set forth expressly in the statute."⁸⁵ The California courts have also made it clear in a number of decisions that arbitrary discrimination against gay and lesbian persons in

79. See, e.g., *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 6 (1988) (stating that the city's public accommodations law was "not intended as an attempt 'to dictate the manner in which certain private clubs conduct their activities or select their members'"); *Curran*, 195 Cal. Rptr. at 336 ("[C]onstitutional provisions only restrain the Legislature from enacting anti-discrimination laws where *strictly* private clubs or institutions are affected.").

80. "To comply with [the Unruh Act] clubs avoid listing members' professional affiliations and require them to pay all bills with personal checks. Most handbooks specifically forbid use of the premises 'in furtherance of trade, business, or a profession.'" Merla Zellerbach, *Members Only: Secrets of SF's Most Powerful Private Clubs*, SAN FRANCISCO FOCUS, Nov. 1991, at 142.

81. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987).

82. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

83. *Rotary*, 481 U.S. at 546; *Roberts*, 468 U.S. at 620; see also Zellerbach, *supra* note 80, at 82:

[C]lubs have been under attack. Much against their wishes, private clubs are making headlines as critics holler discrimination and charge that "social club" is an oxymoron. ("Social" means inclusive, while a club, by definition, excludes.) Yet even faced with charges of cultural irrelevance, members insist on retaining the right to choose their peers by gender and other criteria.

Id.

84. E.g., *In re Cox*, 474 P.2d 992, 999 (Cal. 1970):

The nature of the 1959 amendments, the past judicial interpretation of the act, and the history of legislative action that extended the statutes' scope, indicate that identification of particular bases of discrimination - color, race, religion, ancestry, and national origin - added by the 1959 amendment is illustrative rather than restrictive.

Id.

85. *Isbister v. Boys' Club*, 707 P.2d 212, 221 (Cal. 1985) (quoting *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 123 (Cal. 1982)).

public accommodations is forbidden by the Unruh Act.⁸⁶

4. *A Test for Justifying Discrimination*

The California Supreme Court has held that the defendant in an Unruh Act action has the burden of showing that its discriminatory policy is in itself reasonable and "rationally related to the services performed and the facilities provided."⁸⁷ The court in *O'Connor* suggested that less discriminatory alternatives can bear on the reasonableness of a policy.⁸⁸ Policies which provide for a "blanket exclusion" based on generalized traits or stereotypes about a group have been held unreasonable per se.⁸⁹ The state supreme court has also established that the rational relation test is not satisfied simply by the fact that the inclusion of the barred class of persons would be inconsistent with the nature of the organization.⁹⁰ The exclusion of persons from an organization must be based on individual misconduct or disruption of a group's enterprise and not on "generalization[s] about the class to which [a person belongs]."⁹¹

86. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 595 P.2d 592, 597 (Cal. 1979) (holding that the state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him or her unfit for the job in question); *Stoumen v. Reilly*, 234 P.2d 969, 971 (Cal. 1951) (holding that revocation of bar owner's liquor license based on serving homosexual patrons impermissible where bar owner not permitted to discriminate against a class of persons under § 51); *Rolon v. Kulwitzky*, 200 Cal. Rptr. 217, 218 (Ct. App. 1984) (holding that listing of classifications in Unruh Act not exclusive and prohibits arbitrary discrimination against lesbian patrons of restaurant); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 195 Cal. Rptr. 325, 339 (Ct. App. 1983), *appeal dismissed*, 468 U.S. 1205 (1984) (holding that plaintiff stated cause of action pursuant to the Unruh Act where he alleged that Boy Scouts dismissed him from the organization based on his homosexuality); *Hubert v. Williams*, 184 Cal. Rptr. 161, 162 (Ct. App. 1982) (holding that Unruh Act prohibits discrimination against potential tenants on the basis of sexual orientation).

The California Supreme Court recently acknowledged the Unruh Act's prohibition against sexual orientation discrimination in *Harris v. Capital Growth Investors XIV*, 805 P.2d 873, 879 (Cal. 1991) ("[T]he Unruh Act has been construed to apply to several classifications not expressed in the statute [including homosexuality].") (citations omitted).

87. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 124 (Cal. 1982) (quoting *In re Cox*, 474 P.2d 992, 999 (Cal. 1970)).

88. *O'Connor v. Village Green Owners Ass'n*, 662 P.2d 427, 431 (Cal. 1983).

89. *Id.* at 429 (citing *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 126 (Cal. 1982)).

90. *Isbister v. Boys' Club*, 707 P.2d 212, 214 (Cal. 1985): "[W]e also reject the contention that the [Boys' Club of Santa Cruz] may nonetheless discriminate against girls because their participation would contravene 'the nature of its business enterprise and . . . facilities provided.'" *Id.* (quoting *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 127 (Cal. 1982)).

91. *O'Connor*, 662 P.2d at 429 (citing *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 125 (Cal. 1982)).

5. *Discrimination Against Gay and Lesbian Persons: The Sexual Orientation Discrimination Cases*

California cases involving sexual orientation discrimination effectively illustrate the California courts' use of the rational relation test in actions brought pursuant to the Unruh Act. The initial case in point, *Stoumen v. Reilly*,⁹² actually pre-dates the Unruh Act, but its holding has been cited as having been incorporated into the 1959 law.⁹³ In *Stoumen*, a bar owner's liquor license was revoked based on the fact that his bar was a meeting place for homosexuals.⁹⁴ The State Board of Equalization had determined that the mere presence of homosexuals at the establishment was a violation of the Alcoholic Beverage Control Act which made it unlawful to maintain a " 'disorderly house . . . injurious to the public morals.' "⁹⁵ The California Supreme Court held that any violation of the provision had to be based on a finding of unlawful conduct and could not be construed "as an attempt to regulate any particular class of persons."⁹⁶ The court went on to state that the statutory predecessor to the Unruh Act prohibited the proprietor from ejecting a patron except for "good cause."⁹⁷

Stoumen is an important decision for two reasons. First, it stands for the proposition that the Unruh Act prohibits all arbitrary discrimination, not just discrimination against those classifications expressly mentioned. Second, the court's requirement that discrimination be based on a person's conduct as opposed to a person's classification, or stereotypes about that classification, remained highly relevant in subsequent cases.⁹⁸ *Rolon v. Kulwitzky*,⁹⁹ for example, reaffirmed the state supreme court's commitment to the "individual conduct" rationale.¹⁰⁰ In this case, a restaurant had a policy of prohibiting gay and lesbian patrons from using the restaurant's

92. *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951).

93. *In re Cox*, 474 P.2d 992, 998 (Cal. 1970). ("[T]he prosecution has not presented one shred of legislative history which would suggest an intent to disregard the sound rule of public policy enunciated by this court in our . . . *Stoumen* decision.")

94. *Stoumen*, 234 P.2d at 970.

95. *Id.* at 970 n.1 (quoting 2 Deering's Gen. Laws, 1944, Act 3796).

96. *Id.* at 971.

97. *Id.*

98. *See, e.g., Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 117 (Cal. 1982) ("Under the Act . . . an individual cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group.")

99. *Rolon v. Kulwitzky*, 200 Cal. Rptr. 217 (Ct. App. 1984).

100. *Id.* at 218-19.

booths.¹⁰¹ The court stated that while the restaurant could effectuate policies which protected the public from "acts of 'intimacy' between homosexuals," gay and lesbian patrons could not be excluded from a section of the restaurant simply because of their homosexuality.¹⁰² The court also emphasized that the policy was irrational because homosexual patrons were permitted to use the general part of the restaurant where their conduct was visible to everyone.¹⁰³

Curran v. Mount Diablo Council of the Boy Scouts of America,¹⁰⁴ which was previously discussed for its broad interpretation of the term "business establishments,"¹⁰⁵ is also significant for its language concerning sexual orientation discrimination and the Unruh Act. Consistent with the prior cases, the state court of appeal stated that the Act "precluded the exclusion of persons based on a generalization about the class to which they belong."¹⁰⁶ The court, using language particularly relevant to organizations like the Boy Scouts, stated that the exclusion of an individual from an organization "[could not] be justified on the ground that the presence of a class of persons does not accord with the nature of the organization or its facilities."¹⁰⁷ The court did, however, reiterate the rational relation test used by the state supreme court in the commercial context of *In re Cox*.¹⁰⁸

6. *The Scope of the Unruh Act: A Summary*

The provisions of the Unruh Act apply to a range of commercial and non-commercial entities, and provide broad protection against arbitrary discrimination. California state courts have held that the presence of business-like attributes or the public nature of an organization are grounds for finding that an association is a "business establishment" for the purposes of the Unruh Act. Only non-profit organizations which are sufficiently small and selective are exempt from the requirements of the Act.

101. *Id.* at 217.

102. *Id.* at 218-19 (citing *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 126-27 (Cal. 1982)).

103. *Id.* at 219.

104. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 195 Cal. Rptr. 325 (Ct. App. 1983), *appeal dismissed*, 468 U.S. 1205 (1984).

105. *See supra* text accompanying notes 70-77.

106. *Curran*, 195 Cal. Rptr. at 338.

107. *Id.*

108. "[A]n organization may 'promulgate reasonable department regulations that are rationally related to the services performed and the facilities provided.'" *Id.* (quoting *In re Cox*, 474 P.2d 992, 999 (Cal. 1970)).

An organization that discriminates on the basis of sexual orientation has the burden of establishing that its exclusionary policies are rationally related to its services or facilities. In the areas of sexual orientation and discriminatory practices generally, the courts have demanded that any proposed rationale for exclusion be based on individual conduct, and not on stereotypes or generalizations about the class to which the excluded person belongs. This principle of individual-based discrimination, as well as the judicial rejection of stereotypical labels, provides an appropriate backdrop for a discussion of gay and lesbian personhood as a basis for exclusionary practices by nonprofit organizations.

C. *The Expression of Gay and Lesbian Personhood*

1. *An Overview*

While California appellate courts have established that the Unruh Act forbids arbitrary discrimination against gay and lesbian persons by organizations characterized as business establishments, they have not analyzed the rights of expressive association which might be claimed by the members of such organizations. As discussed in Part II.A above, the United States Supreme Court has suggested that the members of an organization can claim a significant interference with their expressive rights when an organization with which they are affiliated is compelled to accept members with ideas and beliefs different from those held by its existing membership. A central thesis of this comment is that gay and lesbian personhood is characterized by a belief system that may be adverse to the ideas, beliefs, and philosophies expressed by individuals through their affiliation with an organization. By examining some of the ways in which gay and lesbian personhood is manifested, the grounds for a potential expressive association defense can be conceptualized.

2. *What Is Personhood?*

Personhood is the private and public expression of one's beliefs, preferences, and personality.¹⁰⁹ In the private sphere, personhood is expressed in personal decision making¹¹⁰ and sexual intimacy among

109. See *supra* note 8.

110. The United States Supreme Court has recognized that the Fourteenth Amendment creates a zone of protection over a range of private decisions. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the constitutional right to privacy encompasses a woman's decision whether or not to terminate her pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that the right to privacy encompasses married couple's decision to use

other forms.¹¹¹ The public expression of one's identity is also manifested in a variety of ways. The selection of one's appearance, the choice of ideological positions or symbols one endorses, the choice of one's companions, and the exhibition of one's lifestyle, are among the manifestations of the "outward-looking dimension of selfhood."¹¹² The process of identifying oneself with certain fashions, philosophies, political positions, tastes, and trends is "the freedom to have [an] impact on others [and] is central to any adequate conception of the self."¹¹³ "Makeup, clothes and hair color . . . [are] tools for expressing yourself," and the images that are expressed convey personal messages that may be cultural, social, or political.¹¹⁴ Elements of personality, conduct, language, and appearance are all components of personhood which convey personally held beliefs and ideas to others.

3. *Sexual Orientation as a Component of Personhood*

"[S]exual orientation is an integral component of personhood."¹¹⁵ An individual's identity, interests, beliefs, intimate conduct, and public viewpoints may all be shaped and characterized by an individual's sexual orientation.¹¹⁶ Whether seeking to please or to conform, it is not difficult to see the public expression of heterosexual personhood in everyday life. In many ways, "[h]eterosexual society revolves around its sexual orientation It unabashedly

contraceptives).

111. "Courts which have struck down sodomy statutes as unconstitutional violations of the right to privacy have recognized the centrality of intimate sexual conduct—heterosexual or homosexual—to the human personality." Gómez, *supra* note 4, at 130 (citing *People v. Onofre*, 424 N.Y.S.2d 566, 568 (1980)).

112. *Id.* at 130 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 888 (1978)).

113. *Id.* at 129.

114. *See, e.g.*, Laura Fraser, *In Defense of Beauty*, *SAN FRANCISCO EXAMINER IMAGE*, Dec. 8, 1991, at 16:

Attacking the symbols of women's ornamental role—constricting lingerie, high heels and girdles (they never really burned their bras, OK?)—was a liberating act. Women . . . who grew up having no choice about her [sic] dresses and white gloves, relished their new-found freedom to wear jeans and go back to graduate school In the 70's, when women entering the work force couldn't get away with a variety of feminine looks, they often adopted the "dress-for-success suit" [T]he gray-skirted suit with sensible pumps It was a uniform of equality, worn with the philosophical underwear that being sexually attractive and successful in the business world were incompatible.

Id.

115. Gómez, *supra* note 4, at 130.

116. *Id.* at 130-34.

'flaunts' its lifestyle, its personhood."¹¹⁷ Politicians parading with spouses and kissing them in public, adolescents boasting about dates, and opposite-sex partners casually displaying their preference for heterosexual relationships through hand-holding and arm-draping, are all forms of individual expression indicating a preference for and validation of heterosexuality.¹¹⁸

A preference for and validation of homosexuality may also be expressed in the public forum.¹¹⁹ As with heterosexuals, gay and lesbian persons may affirm their sexual orientation publicly in any number of unique and different ways. Frequenting gay and lesbian social clubs and bars, same-sex dancing and openly expressing affection for a same-sex partner, are some of the ways in which a gay or lesbian individual might publicly express gay or lesbian personhood.¹²⁰ As with the public expressions of all forms of personhood, there is a message communicated by the individual display.¹²¹ In a society where heterosexuality is the most accepted form of sexual orientation, public expression of gay and lesbian personhood assumes an ideological form characteristic of political expression. The organized gay and lesbian movement encourages gay and lesbian persons to "come out of the closet" to express pride in their sexuality and to work toward political equality for gay and lesbian persons.¹²² The California Supreme Court in holding that the state's constitution prohibited government employers from arbitrarily discriminating against gay and lesbian employees and job applicants,¹²³ stated that "one important aspect of the struggle for [gay and lesbian] rights is to induce homosexual individuals to . . . ac-

117. *Id.* at 133.

118. *Id.*; see also Fajer, *supra* note 4, at 602-05 (arguing that American society perceives "flaunting heterosexuality" as both "expected" and "appropriate").

119. See, e.g., Gómez, *supra* note 4, at 132. ("Lesbians and gays already project their personhood to the public world through an infinite number of expressive activities . . .")

120. *Id.* at 132.

121. See Gómez, *supra* note 4, at 130.

122. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 235 (1983):

From its beginning, gay liberation transformed the meaning of "coming out." . . . Gay liberationists . . . recast coming out as a profoundly political act that could offer enormous personal benefits to an individual. The open avowal of one's sexual identity, whether at work, at school, at home, or before television cameras, symbolized the shedding of the self-hatred that gay men and women internalized, and consequently it promised an immediate improvement in one's life. To come out of the "closet" quintessentially expressed the fusion of the personal and the political that the radicalism of the 1960's exalted.

Id.

123. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d. 592, 597-99 (Cal. 1979).

knowledge their sexual preferences, and to associate with others in working for equal rights."¹²⁴ Testifying at committee hearings, wearing political insignias, engaging in demonstrations and protests, and publicly engaging in discussion and debate are all forms of publicly expressing gay and lesbian personhood.¹²⁵

There is no one homosexual lifestyle just as there is no single form of heterosexual lifestyle. The gay liberation movement revealed that gay and lesbian persons are visible across the same varied social strata as are heterosexuals.¹²⁶ Stereotypes concerning homosexual personalities are "largely inaccurate."¹²⁷ Gay men characterized as "effeminate" or "limp-wristed" account for only a small percentage of the gay male population.¹²⁸ While gay and lesbian persons may express their sexual orientation in the form of stereotypical conduct or dress, these characteristics may also express the personhood of a heterosexual person.

Homosexuality is, nonetheless, controversial. "The new visibility of the gay community has activated political and social opposition from many quarters, including the so-called Moral Majority" ¹²⁹ The socially condemned characteristic of gay and lesbian

124. *Id.* at 610.

125. Gómez, *supra* note 4, at 132.

126. See D'EMILIO, *supra* note 122, at 238:

Not only did [gay] men and women join groups that campaigned for equality from outside American institutions; they also came out within their professions, their communities, and other institutions to which they belonged In some [religious] denominations gay men and women sought not only acceptance but also ordination as ministers. Military personnel announced their homosexuality Lesbian and gay male academicians, school teachers, social workers, doctors, nurses, psychologists, and others created caucuses in their professions Openly gay journalists and television reporters brought an insider's perspective to their coverage of gay-related news. The visibility of lesbians and gay men in so many varied settings helped make homosexuality seem less of a strange, threatening phenomenon and more like an integral part of the social fabric.

Id.

127. WILLIAM H. MASTERS, VIRGINIA E. JOHNSON, AND ROBERT C. KOLODNY, *HUMAN SEXUALITY* 413, 427 (3d ed. 1988).

128. See *id.*; see also Fajer, *supra* note 4, at 611-14. Professor Fajer states that the "cross-gender stereotype", *id.* at 607, is "simply . . . not true for most gay people." *Id.* at 612 (citations omitted). Professor Fajer convincingly argues that sexual orientation discrimination is a form of gender discrimination because homophobia and the cross-gender stereotype reflect society's desire to perpetuate "gender-role norms." *Id.* at 617-33.

129. MASTERS, ET. AL., *supra* note 127, at 416; see also JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 38-39 (1985):

The American New Right has various organisational sources. Firstly there were (largely negative) single-issue campaigns . . . against . . . sex education, abortion, ERA, pornography, and gay rights. Secondly a new political right has

personhood has historically been same-sex intimacy, which is socially labeled as "deviant" or abnormal.¹³⁰ As of 1989, twenty-four states and the District of Columbia had penal provisions criminalizing sodomy between consenting adults.¹³¹ The deeply-seeded religious aversions to homosexuality have contributed and continue to contribute to sharp divisions about the morality of homosexuality.¹³² The substantive content of gay and lesbian personhood is ironically revealed by the legal disadvantages its revelation triggers in employment, housing, and family matters.¹³³

emerged as a strong political force . . . drawing on diverse sources of support, [including] ex-Democratic neo-conservatives, alarmed by the 1960s drift to lawlessness. Finally a religiously based evangelical right has publicly emerged, of which Falwell's Moral Majority is the best publicised example.

Id. (footnote omitted).

130. "The label 'homosexual' . . . forc[es] individuals to choose exclusively between their same- and opposite-sex attractions—in effect, to choose to be 'deviant' or 'normal,' as society has defined those terms. Labeling individuals based on the gender of their sexual partners reinforces prejudice by making sexual orientation appear fundamental to their identity." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1518 (1989) [hereinafter *Developments*]; see also Fajer, *supra* note 4, at 537-70 (challenging the "non-gay" belief in the "sex-as-lifestyle" assumption which views sexual activity and gay identity as a single phenomenon).

131. See *Developments*, *supra* note 130, at 1519 n.2.

132. See D'EMILIO, *supra* note 122, at 13:

Biblical condemnations of homosexual behavior suffused American culture from its origin. For seventeenth century settlers, with only a precarious foothold on the edge of an unknown continent, the terrible destruction of Sodom and Gomorrah evoked dread. Men who lay with men, the book of Leviticus warned, committed an "abomination; they shall surely be put to death; their blood shall be upon them." Paul considered lustful behavior between men and between women "vile passions . . . against nature."

Id.

133. A survey of the legal rights and privileges deprivations suffered by gay and lesbian persons is illustrative. See generally *Developments*, *supra* note 130 (surveying legal issues and developments affecting gay and lesbian persons). Discriminatory state action against lesbian and gay employees and job applicants can be justified by "lower tier" rational relationship tests, and courts have generally refused to designate sexual orientation as a suspect classification. *Id.* at 1557, 1564-71; see also, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 576 (9th Cir. 1990) (holding that more intensive procedure for gay and lesbian persons seeking security clearances not violative of the Federal Equal Protection Clause), *petition for rehearing en banc denied*, 909 F.2d 375, 376 (9th Cir. 1991). Title VII of the Civil Rights Act of 1964 does not extend its protection to gay and lesbian persons, and only a handful of states, including California, have laws prohibiting job discrimination on the basis of sexual orientation. See CAL. LABOR CODE § 1102.1 (West Supp. 1993).

The legal prospects for gay and lesbian litigants in the sphere of privacy rights and family law are equally dismal. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the United States Supreme Court held that the constitutional right to privacy does not extend to acts of sodomy between consenting adults. *Id.* at 189. Exclusionary zoning laws, rental regulations, and a refusal to enforce marital status discrimination laws has created housing difficulties for many gay and lesbian couples. *Developments*, *supra* note 130, at 1612-18. In custody cases, courts

Gay and lesbian persons reaffirm their personhood in the face of resistance in the social and political forms discussed above. Validation of gay and lesbian pride has been expressed in the maintenance of gay "community institutions" including "churches, health clinics, counseling services, social centers, professional associations, and amateur sports leagues."¹³⁴ Gay and lesbian persons express their gay and lesbian culture through teaching, worshipping, and acquiring literature to better understand, express, or take pride in their sexual orientation.¹³⁵

4. *Gay and Lesbian Personhood: A Summary*

Gay and lesbian persons may publicly express their sexual orientation in the social forms common to both homosexual and heterosexual persons, and they may express their personhood politically in ways common to many political movements. Stereotypical forms of homosexual expression are largely inaccurate and are not definitive characteristics of gay or lesbian personhood. Homosexual intimacy, and laws premised on traditional notions of morality and family, make gay and lesbian political activity as well as other expressive forms of gay and lesbian personhood controversial. Nonetheless, many gay and lesbian persons reaffirm their gay and lesbian personhood through communal and cultural forms representative of the continued viability of gay and lesbian existence. The controversial status of homosexuality, however, presents the potential for an individual's gay or lesbian identity to conflict with the hostile and adverse attitudes and beliefs of heterosexual society.

III. THE PROBLEM

The California appellate courts have established important principles in the area of sexual orientation discrimination without evaluating the expressive rights of organizational defendants, or the

often use sexual orientation as a factor in determining whether placement with a gay or lesbian parent is in the best interest of the child. *Id.* at 1630-38 (stating that courts have expressed the belief that children are more likely to be teased at school, or stunted in their moral development, if placed with a gay or lesbian parent; molestation and the fear that the child will become a homosexual has also been expressed by some courts).

134. D'EMILIO, *supra* note 122, at 238. In a social environment made more tolerant through the efforts of gay and lesbian activists during the 1960's, "[t]he subculture of homosexual men and women became less exclusively erotic. Gayness and lesbianism began to encompass an identity that for many included a wide array of private and public activities." *Id.* at 239.

135. See Gómez, *supra* note 4, at 133.

significance of gay and lesbian personhood in their analysis.

Major United States Supreme Court decisions of the past decade involving gender discrimination recognized that First Amendment issues are involved when nonprofit organizations are compelled, pursuant to state public accommodations laws, to accept members against their collective will. Claims of sexual orientation discrimination by gay and lesbian persons excluded from nonprofit organizations raise constitutional concerns due to the controversial political and moral aspects of gay and lesbian personhood. The guidelines for adjudicating such claims in the sexual orientation discrimination context are lacking.

The United States Supreme Court has suggested that the right of expressive association includes the right of an organization to base exclusionary decisions on ideological differences between an existing membership and the excluded individual, but how such a claim would function in the context of sexual orientation discrimination, and under what limits, is unclear. Addressing this issue is important because expressive association defenses based on functional impairment have recently failed before the Supreme Court. This suggests that organizational defendants facing Unruh Act discrimination claims in the future will seek to base expressive association defenses on the principle of ideological differences between the organization and the excluded individual.

Articulating the most likely elements and limits of such a defense is important to legal strategists concerned with the implications of expressive association claims in the sexual orientation context. The potential for organizations spontaneously espousing collective ideas and beliefs inconsistent with gay and lesbian personhood, under the guise of genuine expressive interests, is apparent. It also makes defining the parameters of an expressive association defense premised on the principle of ideological differences compelling.

The challenge for the state and federal courts will be to discover when a genuine conflict between the personhood of a claimant and the viewpoints held by the discriminating organization's members are adverse to one another. Courts need guidelines for determining whether the members of an organization are utilizing their affiliation to express an idea or viewpoint. Similarly, courts must determine under what circumstances gay and lesbian personhood is expressive, and what form such expression takes. An analysis of how courts have addressed expressive freedoms and conflicting interests, as well as how precedent and pragmatism suggest defining and limiting expressive association defenses in the future, should promote results

consistent with the sometimes conflicting objectives of constitutional guarantees and public accommodations law.

IV. ANALYSIS

A. *The Expressive Association Defense: Limitations of the Functional Impairment Approach*

1. *Functional Impairment as an Expressive Association Defense*

Under what this comment has referred to as “functional impairment,”¹³⁶ the application of a public accommodations law like the Unruh Act may require an organization to alter or forego its expressive activities. This form of infringement formed the basis for invalidating laws in early civil rights cases that were held to obstruct expressive activities of groups like the NAACP.¹³⁷ In the context of exclusionary policies by organizations, the United States Supreme Court has suggested that if the application of a state public accommodations law compels an organization to admit members whose presence “impede[s] the organization’s ability to engage in . . . protected activities or to disseminate its preferred views,” then the organization is justified in claiming a significant infringement on its members’ associative rights.¹³⁸

In considering the application of the Unruh Act to the Rotary Club, the United States Supreme Court stated that “the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes [T]he Unruh Act does not require the clubs to abandon or alter any of these expressive activities.”¹³⁹ Previously, the Court in *Roberts* had expressly denounced the notion that a claim of functional impairment could be based on “archaic and overbroad assumptions about the relative needs and capacities of the sexes.”¹⁴⁰ The Court stated that in considering the merits of an expressive association defense it would refrain from relying “uncritically on . . . assumptions” about the effect the inclusion of women

136. See *supra* note 10.

137. See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (holding that disclosure of organization’s members to state would constitute undue restraint on the members’ right of expressive association).

138. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984).

139. *Board of Directors of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 548 (1987).

140. *Roberts*, 468 U.S. at 625.

would have on an organization.¹⁴¹

The Supreme Court's functional impairment approach to the gender cases is strikingly similar to the rational relations test used by the California courts in the line of sexual orientation discrimination cases.¹⁴² The judicial test utilized by the California courts under the Unruh Act requires defendants to establish a nexus between an exclusionary policy and the services and facilities of the organization.¹⁴³ Likewise, the United States Supreme Court has demanded that defendants making expressive association claims reveal a nexus between an exclusionary policy and the expressive activities of the organizational defendant.¹⁴⁴ Both approaches shun generalizations or assumptions about the impact the excluded individual will have on the organization.¹⁴⁵ The discrimination cases under the Unruh Act explicitly,¹⁴⁶ and the expressive association cases adjudicated by the United States Supreme Court implicitly, demand that the real characteristics of the excluded individual be shown as disruptive to the function or operation of the organizational enterprise.¹⁴⁷

Presumably, the exclusion of a gay or lesbian person from an organization based on the organization's belief that the individual's sexual orientation would impair the group's ability to conduct its expressive activities would not survive judicial scrutiny. This is the very type of assumption struck down by the United States Supreme Court and in the analogous Unruh Act sexual orientation discrimination cases. Organizations concerned about the impact the presence of a gay or lesbian person will have on membership recruitment,

141. *Id.* at 628.

142. *See supra* text accompanying notes 92-108.

143. *See supra* text accompanying notes 87-91 and 92-108.

144. *See, e.g., Roberts*, 468 U.S. at 626 ("[T]he Jaycees has failed to demonstrate that the [Minnesota public accommodations law] imposes any serious burdens on the male members' freedom of expressive association.").

145. The Court in *Roberts* rejected "archaic and overbroad assumptions" and "stereotypical notions" about the sexes. *Id.* at 625. The California Supreme Court in *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982), stated that "the Unruh Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class 'as a whole' is more likely to commit misconduct than some other class of the public." *Id.* at 125.

146. *E.g., Marina Point*, 640 P.2d at 126: "As our decisions teach . . . although entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior, under the Unruh Act entrepreneurs must generally exercise this legitimate interest directly by excluding those persons who are in fact disruptive. Entrepreneurs cannot pursue a broad status-based exclusionary policy." *Id.*

147. *See, e.g., Roberts*, 468 U.S. at 628 (stating that Jaycees' argument that women would alter the organization's ideological agenda relied "solely on unsupported generalizations about the relative interests and perspectives of men and women").

fund raising, public education projects, and other service activities, would be properly prohibited from excluding gay or lesbian persons whose conduct at group-sponsored activities can be commensurate with the objectives and standards of the group. While the members of an organization might object to the public expression of a co-member's gay or lesbian personhood as expressed outside the zone of organizational business,¹⁴⁸ the Supreme Court has stated that a member's right of expressive association is not substantially impaired unless the action of the applicable state law would compel the particular organization to "alter" or "abandon" its expressive activities.¹⁴⁹

2. *An Alternative Approach*

It has been suggested that the weaknesses of an expressive association defense based on functional impairment would lead future defendants to rely on expressive association claims premised on the ideological differences between the organizational defendant and the excluded individual. The elements and parameters of such a claim are unclear. Unlike an expressive association defense based on the principle of functional impairment, the ideological differences approach is linked to an organization's interest in maintaining a membership which shares common beliefs, ideas, and objectives.¹⁵⁰ The United States Supreme Court in *New York State Club Ass'n v. City of New York*,¹⁵¹ in upholding New York City's public accommodations law, stated that "[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the [city's public accommodations] law erects no obstacle to this end."¹⁵² Four years previously, the Court in *Roberts* sustained the application of Minnesota's public accommodations law to the Jaycees organization, but suggested the law would seriously infringe on the

148. This organizational concern is illustrated by analogy to a story involving a commercial enterprise. In June 1991, supervisors at a San Francisco Bay Area branch of Bank of America learned that one of their employees was a gay stripper after-hours at the "World's Largest Male Sex Emporium Under 1 Roof!" The employee was promptly discharged for allegedly unrelated reasons. Steven A. Chin, *Stripper's Suit: Bank Fired Him For Part-Time Job*, S.F. CHRON., Jan. 6, 1992, at A2.

149. Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987).

150. "[The] First Amendment freedom to gather in association for the purpose of advancing *shared beliefs* is protected by the Fourteenth Amendment from infringement by any State." Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1980) (emphasis added). An organization's interest in maintaining ideological consistency is clearly linked to the notion of "enhancing" the viewpoints of its individual members. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

151. New York State Club Ass'n v. City of New York, 487 U.S. 1 (1987).

152. *Id.* at 13.

expressive association rights of the Jaycees' members if it imposed "restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."¹⁵³

The elements of an expressive association defense based on the principle of ideological differences has not been articulated by the Court within the context of public accommodations law. The ideological differences principle, however, is potentially attractive to organizations defending against claims of sexual orientation discrimination. Organizations may be able to contrast their political and moral viewpoints against the political and moral substance of some forms of gay and lesbian personhood.¹⁵⁴ Furthermore, ideological differences between an organization and a gay or lesbian person may be identified in forums outside the scope of organizational activity.

B. *Defining the Elements of an Expressive Association Defense Based on the Principle of Ideological Differences*

1. *The Collective Belief*

Protection of the right of expressive association is based on the notion that individual viewpoints are effectively communicated when expressed by a collective voice. The Court in *NAACP v. Alabama ex rel. Patterson*¹⁵⁵ recognized this concept as the rationale for providing First Amendment protection for expressive association. The Court stated that it was "beyond debate" that the "advancement" of an individual viewpoint through group association was protected by the Due Process Clause of the Fourteenth Amendment.¹⁵⁶ It should be equally beyond debate that individual viewpoints not projected by group association can claim no protection under the concept of expressive association.

The Supreme Court has recognized the collective belief principle by stating that some organizations have standing to represent the

153. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984).

154. The Boy Scouts of America is one nonprofit organization that has not hesitated to distance itself from what it views as the immoral components of gay and lesbian personhood. "The official position of the Boy Scouts is that homosexuality is inconsistent with scout oaths and laws to be 'morally straight' and 'clean in word and deed.'" Michael McCabe, *Boy Scouts Under Attack in Court as Organization Tries to Keep up with Times, Accusations of Bias Fly in Changing Society*, S.F. CHRON, July 1, 1991, at A1 (quoting Marty Cutrone, Director of Field Service for the San Francisco Bay Area Council).

155. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

156. *Id.* at 460.

expressive association rights of their members.¹⁵⁷ In *Alabama ex rel. Patterson*, the Court stated that the “[NAACP] is the appropriate party to assert . . . rights [of expressive association] because *it and its members are in every practical sense identical* The [NAACP] . . . is but the medium through which its individual members seek to make more effective the expression of their own views.”¹⁵⁸ Subsequently, in *NAACP v. Button*,¹⁵⁹ the Court reiterated its view that organizations may assert the expressive association rights of a collective membership when it stated that, “We . . . think [that the NAACP] has standing to assert the *corresponding* rights of its members.”¹⁶⁰

Expressive association does not exist unless individuals come together to express commonly held beliefs and ideas. In *Roberts*, Justice Brennan emphasized that “an individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected unless a correlative freedom to engage in *group effort* towards those ends were not also guaranteed.”¹⁶¹ Clearly, an identifiable element and limit on any claim or defense based on the right of expressive association must be that the expressive interest asserted is collective.

2. *The Expression of Collective Beliefs*

An obvious component to expressive interests is expression itself. In Part II, the various ways in which organizations might engage in protected forms of expressive association were outlined. Among the expressive activities were group demonstrations, marches, boycotts, legal advocacy, and door-to-door solicitation.¹⁶² These political activities are the most obvious ways in which groups express collective beliefs and ideas. Identifying forms of expressive activities engaged in by some organizations may be difficult where groups do not

157. See *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 9 (1988) (holding that private clubs have standing to represent the associative freedoms of their members):

[A]n association has standing to sue on behalf of its members “when (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”

Id. (quoting *Hunt v. Washington Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977)).

158. *Alabama ex rel. Patterson*, 357 U.S. at 459 (emphasis added).

159. *NAACP v. Button*, 371 U.S. 415 (1963).

160. *Id.* at 428 (emphasis added).

161. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added).

162. See *supra* notes 17-23 and accompanying text.

engage in political forms of expressive association favored by public affairs organizations. Justice O'Connor, who has stated her belief that an organization should have complete control over its membership decisions when it engages in activities "predominantly of the type protected by the First Amendment,"¹⁶³ has acknowledged the difficulty in determining the expressive content of organizational activities, and has suggested some organizational practices that can be construed as expressive.¹⁶⁴ In *Roberts*, Justice O'Connor's concurring opinion stated that:

Determining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive. It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but *protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service.* The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression.¹⁶⁵

Justice O'Connor's statements, in combination with language in both the *Roberts* and *Rotary* opinions, suggest that the ideas and beliefs of an organization's collective membership may be evinced through a variety of activities that are not in themselves political or activist in nature.¹⁶⁶ Organizations, for example, express ideas, beliefs, and philosophies when they educate their members or the public at large. Educational expression occurs internally when a group acts "to express or satisfy interests which the members have 'in relation to themselves.'" ¹⁶⁷ Hobby clubs sponsor competitions and facilitate in-

163. *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

164. *Id.* at 635-36.

165. *Id.* (emphasis added).

166. The Court in *Rotary* stated that the "service activities" of the Rotary Club "are protected by the First Amendment." Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987). Presumably, service activities can include educational programs, community service work, and charitable functions. The Court in *Roberts* stated that the "civic, charitable, lobbying, [and] fund raising" activities as well as the "public positions" the organization maintained were "worthy of constitutional protection under the First Amendment." *Roberts*, 468 U.S. at 626-27. The Court stated that a primary purpose of the Jaycees, as stated in the Jaycees' bylaws, was to serve "as a supplementary education institution." *Id.* at 613 (quoting from the Jaycees' bylaws). So too, the Court in *Rotary* recognized that the Rotary Club functions as an educational body when it "'encourages high ethical standards in all vocations.'" *Rotary*, 481 U.S. at 539 (quoting from the ROTARY MANUAL OF PROCEDURE 7 (1981)).

167. CONSTANCE SMITH & ANNE FREEDMAN, VOLUNTARY ASSOCIATIONS 5 (1972) (citing ARNOLD ROSE, THEORY AND METHOD IN THE SOCIAL SCIENCES 50-71 (1954)).

formational exchanges between enthusiasts to promote a recreational activity, and to satisfy the informational needs of the hobbyist. Indeed, "associations develop (sometimes spontaneously, sometimes planned) to satisfy some need."¹⁶⁸ Public affairs organizations are externally expressive in their attempts to influence society and to bring about some desired condition.¹⁶⁹ Groups supporting any number of causes express their proffered views to the public in the form of leaflets, newsletters, and other publications. It is clear that the members of such organizations express these views through the expressive tactics of their organizations. This principle is true to the concept of expressive association articulated in *NAACP v. Alabama ex rel. Patterson*.¹⁷⁰

In important respects, the Boy Scouts of America exemplifies an organization dedicated to the education and training of its members. In her *Roberts* concurrence, Justice O'Connor observed that "the training of outdoor survival skills . . . might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."¹⁷¹ In *Welsh v. Boy Scouts of America*,¹⁷² the Boy Scouts faced a federal discrimination claim brought by parents of a boy excluded from a local "Tiger Scout" troop because the parents had refused to sign a required parental oath affirming a belief in God.¹⁷³ The Boy Scouts maintained that:

The Boy Scout movement is designed and intended to transmit moral, spiritual, and cultural values. One of the purposes of the Scouting program is to help boys become honorable men. The members of Boy Scouts believe that this objective is best accomplished when a boy is taught to believe in God and to acknowledge a duty owed to a Supreme Being.

. . . Teaching boys to become men by insisting on recognition of a duty to God is expressive association "intended to develop good morals, reverence, patriotism, and a desire for self-improvement."¹⁷⁴

168. *Id.* at 9 (citing F. Stuart Chapin, *Social Institutions and Voluntary Associations*, REVIEW OF SOCIOLOGY 263-64 (Joseph B. Gittler ed., 1957)).

169. *Id.* at 5.

170. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The basic principle of expressive association is that an individually held viewpoint is magnified through the activities of a group. *Id.* at 460.

171. *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

172. *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (N.D. Ill. 1990).

173. *Id.*

174. *Id.* at 1431.

The Scouts' position in *Welsh* illustrates how an organization might argue that its education or training programs are manifestations of the collective membership's ideas and beliefs. Where these ideas and beliefs are adverse to gay and lesbian political rights, or endorse an interpretation of morality condemning homosexuality, an organization might claim that the personhood of a gay or lesbian individual is incompatible with the expressive interests of its existing members.

C. *Drawing Inferences from Expressive Activities*

The *Welsh* court articulated the concept that there is a difference between the presence of collective beliefs in an organization, and the existence of expressive interests in those beliefs.¹⁷⁵ "Without more than . . . a common belief," the court stated, "[we] cannot find, as a matter of law, that an organization engages in expressive association."¹⁷⁶ Unless individuals "seek to make more effective the expression of their own views" through group affiliation,¹⁷⁷ constitutional protection is gratuitous. Recognizing when expressive versus purely discriminatory motives are present in an expressive association defense is critical if the purpose of constitutional protection for expressive association is to be preserved. Drawing limits is relatively unproblematic when dealing with public affairs groups because their ideological positions are generally clear and strong. Organizations with a broad-based appeal, however, also engage in expressive conduct. An organization might offer recreational facilities, valuable training, important business connections, and community service opportunities, and yet claim that a creed, philosophy, public position, or common belief of existing members justifies the exclusion of an applicant with allegedly different views. The shared ideas and beliefs of a collective membership can be expressed in a variety of ways ranging from the overtly political to the quietly persuasive.¹⁷⁸ The potential for discriminatory abuse is elevated, however, where loose or suspect inferences about expressive interests are drawn from the mere existence of common beliefs in an organization, or from isolated and insignificant expressive activities.¹⁷⁹ Courts must be able to

175. *Id.*

176. *Id.*

177. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

178. *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

179. *See, e.g., Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1431 (N.D. Ill. 1990). "Defendants appear to argue that because the Boy Scouts is bound by a common belief,

determine under what circumstances a primary purpose of individuals in joining and associating with an organization is the desire to express certain shared beliefs and ideas.

The First Amendment has been held to protect the right of expressive association because individuals join groups to express personally-held views. The expressive effectiveness of the individual-association union is promoted in two primary ways. First, individuals seeking to express a point of view affiliate with organizations whose purpose it is to express that point of view.¹⁸⁰ Second, organizations promoting a point of view admit only those individuals whose views accord with the organization's views and beliefs.¹⁸¹ In her *Roberts* concurrence, Justice O'Connor stated that "the purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression."¹⁸² If it cannot be reasonably inferred that individuals seek membership in an organization to express a belief, idea, or philosophy, it is unreasonable to conclude that expressive interests exist as a basis for excluding those individuals with allegedly different viewpoints.

The expressive interests, if any, of individuals seeking membership in a given group can be evaluated based on that group's ability to promote the ideas and beliefs of its collective membership. Unless identifiable ideas and beliefs are "undeniably enhanced"¹⁸³ by association with the group, the substantive basis for constitutional protection is suspect. Where an organization subscribes to explicit oaths and creeds, takes public positions on certain issues, or uses educational materials to promote certain philosophies, it is reasonable to conclude that individuals join the organization to express certain viewpoints.

The principle that organizations have standing to represent the views of members provides one basis for determining that genuine expressive interests may be reasonably inferred from expressive ac-

it follows as a matter of law that it engages in expressive association. A whites-only athletic club might similarly argue that its members are engaged in expressive association merely because they are bound by a common belief that whites are better than blacks." *Id.*

180. This statement follows from the Supreme Court's acknowledgment in *Alabama ex rel. Patterson* that "private points of view" are "undeniably enhanced" through association. *Alabama ex rel. Patterson*, 357 U.S. at 460.

181. *Alabama ex rel. Patterson* is again illustrative. In that opinion the Court pointed out the NAACP's written policy of allowing any person to join the organization "who is in accordance with [NAACP] principles." *Id.* at 459.

182. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

183. *Alabama ex rel. Patterson*, 357 U.S. at 460.

tivities. In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court noted that the political objectives of individual NAACP members and the organization were expressed in the NAACP's constitution which provided, "'Any person who is in accordance with [NAACP] principles and policies . . . may become a member.'"¹⁸⁴ That members are admitted into an organization on the condition of ideological conformity is tangible evidence that those members use the organization as a vehicle for expressing shared beliefs and ideas.

Justice O'Connor's statements in *Roberts* provide further guidance for drawing reasonable inferences concerning the presence of expressive association interests. Justice O'Connor maintained that organizations should have "complete control" over membership policies where the activities pursued by the group are "predominantly" of the protected variety.¹⁸⁵ This statement suggests that those organizations which may properly exercise the power of exclusion are those which serve the expressive purposes of their members. It is reasonable to conclude that an individual does not seek membership in an organization to enhance personal viewpoints unless expression itself is a primary function of the organization. Empowering organizations which are predominantly expressive to exclude those who subscribe to different ideologies would preserve the expressive objectives of those seeking membership for expressive purposes; this in turn would preserve First Amendment-based principles of expressive association.

D. *Establishing That a Different Ideology Is Expressed by the Excluded Individual*

As the previous section illustrates, guidelines can be established and a reasonable determination made as to whether an idea or belief is collectively held by an organization's existing membership. Where an organization seeks to exclude an individual based on ideological differences, however, the existence of these differences must also be determined.

The Court in *Roberts*, in holding that the exclusion of women from Rotary Clubs could not be based on stereotypical notions about the ideological views of women, stated, "In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations . . . the Jaycees relies solely on unsupported generalizations about the rela-

184. *Id.* at 459.

185. *Roberts*, 468 U.S. at 635-36 (O'Connor, J., concurring).

tive interests and perspectives of men and women.”¹⁸⁶ This principle is also consistent with the functional approach of Unruh Act cases which have demanded that the exclusion of gay and lesbian persons from organizations be based on the individual conduct of a particular individual, and not on generalized predictions that gay and lesbian persons as a class are likely to be disruptive to an organization’s affairs.¹⁸⁷

While the basis for finding ideological differences between an organization and an excluded individual is unclear from the *Rotary* and *Roberts* cases, past cases involving the right of exclusion accorded “political associations” provide some guidance. The Supreme Court in *Democratic Party v. Wisconsin*¹⁸⁸ recognized that admitting “outsiders” to a political organization “may seriously distort its collective decisions [and impair the organization’s] essential functions.”¹⁸⁹ Previously, the Court in *Cousins v. Wigoda*¹⁹⁰ held that even a state’s interest in maintaining the integrity of its electoral system was not sufficiently compelling to require that political parties seat delegates at a national convention in contravention of a party organization’s rules.¹⁹¹ These cases suggest that the right of expressive association in political associations “presupposes the freedom to identify the people who constitute the association, and to limit the association to those members.”¹⁹²

Outside the realm of political associations, the Court in *Roberts* suggested that the right to exclude those with different ideologies was connected to a concern that “the message communicated by the group’s speech” would be changed.¹⁹³ The Court in both *Roberts* and *Democratic Party* cited identical language in *Ray v. Blair*¹⁹⁴

186. *Id.* at 627-28.

187. *See supra* text accompanying notes 92-108.

188. *Democratic Party v. Wisconsin*, 450 U.S. 107 (1980).

189. *Id.* at 122.

190. *Cousins v. Wigoda*, 419 U.S. 477 (1974).

191. *Id.* at 491.

192. *Democratic Party*, 450 U.S. at 122; *see e.g.*, *Cousins*, 419 U.S. at 491 (1974) (holding that Illinois’ interest in maintaining the integrity of its electoral system did not outweigh the Democratic Party’s interest in selecting its own delegates to the national convention).

193. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984).

194. *Ray v. Blair*, 343 U.S. 214 (1952). The *Blair* decision is relevant both to a discussion of a political party’s exclusionary rights, and also to the principle of oath-taking as a method of maintaining the collective ideas and beliefs of an organization. In the case, a Democratic Party elector refused to take a party oath pledging himself to vote for the party’s primary election victor at the national party convention. *Id.* at 215. The Court held that political parties could, without violating the Federal Constitution, require electors to submit to oaths of party allegiance. *Id.* at 225. Furthermore, the Court viewed such oaths as justified under the party’s legitimate interest in “securing [electors] pledged to the philosophy and leadership of

that political parties are justified in protecting themselves " 'from intrusion by those with adverse political principles.' " ¹⁹⁵ That *Roberts* cited this language in its discussion of the right of organizations generally to exclude those with ideologies different from those of the organization's existing membership, suggests that such exclusion must be based on a fear that the ideological differences involved are sufficiently adverse to threaten the organization's own expressive agenda.

Presumably, the potential for functional impairment caused by the presence of incompatible viewpoints in the organization is relevant in determining whether real ideological differences exist. After stating that the City of New York's public accommodations law did not restrict the ability of larger clubs to "exclude individuals who do not share the views the club wishes to promote," ¹⁹⁶ the Court in *New York Club Ass'n* stated that "an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired views nearly as effectively if it cannot confine its membership . . ." ¹⁹⁷ An important consideration for courts to address when evaluating whether real ideological differences exist between an organization and an excluded individual is the degree to which that organization can show that the individual's viewpoint might impair or change the message communicated by the organization's existing membership. The distorting effect that an individual's presence might have on an organization's preferred views is an important factor in determining whether the ability of existing members to use the organization as an expressive forum is genuinely in need of constitutional protection.

E. *The Analysis: A Summary*

The right of expressive association protects the ability of individuals to utilize group association as a vehicle for expressing individual viewpoints. Expressive association claims have been unsuccessful in cases before the United States Supreme Court because of organizations' inability to convince the Court that organizational activities would be disrupted by the presence of an excluded class of individuals.

that party." *Id.* at 227.

195. *Roberts*, 468 U.S. at 627 (quoting *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1980)); *Democratic Party*, 450 U.S. at 122 (quoting *Ray v. Blair*, 343 U.S. 214, 221-22 (1952)).

196. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1987).

197. *Id.*

Expressive association claims based on ideological differences between an organization's existing membership and an excluded individual have apparent advantages over the functional impairment approach. Such claims can be established without showing actual impairment. Furthermore, such claims pertain to the views and philosophies of an individual whether or not expressed in the context of interaction with an organization.

Both past cases and common sense suggest limits to such a claim. The following principles, discussed above, suggest such limits. First, groups claiming that certain beliefs and ideas justify the exclusion of persons with different philosophies must establish that the organizational views asserted are collective ones. Second, the organization must establish that the collective beliefs are expressed in some manner. Third, there must be a reasonable basis for inferring the presence of expressive interests from the organization's expressive activities. Finally, real ideological differences between the organization and the excluded individual must be identified.

The principles developed above seek to ensure that expressive association claims involve genuine expressive interests. This objective is particularly important when the expressive association claim is used as a defense to claims of discrimination filed pursuant to public accommodations laws. The Unruh Act protects the interests of all persons in having equal access to organizations and other entities generally open to and serving the public. This access should not be obstructed without a constitutional basis in protecting the interests of an organization from outside interference.

V. PROPOSAL

A. *Objectives*

The principles of 1) collective belief, 2) group expression, 3) reasonable inference-drawing, and 4) real ideological differences should be observed in cases of sexual orientation discrimination involving nonprofit organizations. Courts should require that parties utilizing an expressive association defense indicate a firm basis for an exception to public accommodations laws like the Unruh Act. The right of expressive association should preserve the right of some organizations to exclude gay and lesbian persons from membership, but this right should only be recognized in those limited instances where genuine, well-defined expressive interests are involved. This is particularly important in light of the protection the Unruh Act affords gay and lesbian persons from arbitrary discrimination.

What follows is a reiteration of the four expressive association principles developed in Part IV, and how they might apply within the context of sexual orientation discrimination. These principles should serve to limit the expressive association claim to the legitimate protection of real expressive interests.

B. *The Principles in Context*

1. *Expressive Association Interests Should Be Based on Collective Beliefs*

In a case of sexual orientation discrimination, the notion of an expressive association defense based on ideological differences should depend upon collective beliefs which are inconsistent with gay and lesbian personhood. As the United States Supreme Court recognized in *New York State Club Ass'n*, many larger, professional and charitable organizations are simply not the kinds of organizations in which collective beliefs exist.¹⁹⁸ Organizations which provide training programs, recreational facilities, or professional opportunities to the general public, without some form of expressive agenda, cannot claim that the discriminatory decisions of a board member or other officer are based on collective beliefs inconsistent with expressive forms of gay and lesbian personhood. The existence of oaths, creeds, or bylaws inconsistent with gay or lesbian personhood may form a tangible basis for identifying the collective beliefs of an organization. Organizational creeds that do not carry messages expressly inconsistent with gay or lesbian personhood, however, should not form the basis for establishing that such beliefs are shared by a collective membership. Any less demanding standard is inconsistent with the principle of protecting genuine expressive interests and with the Unruh Act's protection against all forms of arbitrary discrimination.

2. *Collective Beliefs Must Be Expressed by the Discriminatory Organization*

Expressive association interests involve the enhancement and projection of ideas and beliefs. This was the foundation for the protection of expressive associations stated in *NAACP v. Alabama ex rel. Patterson*.¹⁹⁹ An organization which claims to espouse a collective philosophy but does not engage in activities which express that philosophy cannot be engaged in expressive association. Nor can the

198. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 12 (1987).

199. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

organization's members claim expressive interests through the organization. As mentioned above, an organization's members may affirm their adoption of ideas and beliefs which oppose gay and lesbian personhood politically or morally in an oath, creed, or set of bylaws. This practice may be legitimate evidence of collective beliefs. Unless these ideas and beliefs are expressed publicly, however, there is no interest in the protection of these views as expressive forms. The political and moral underpinnings of gay and lesbian personhood cannot conflict with the collective expression of an organization's members' ideas and beliefs unless those ideas and beliefs are outwardly manifested in some manner.

3. *The Expressive Interests of an Organization's Members Should Be Reasonably Inferred from the Expressive Activities of the Organization*

a. *The Organization Must Serve an Expressive Purpose*

The right of expressive association is properly invoked by those who want to protect the role of an organization as a vehicle for expressing shared viewpoints. Organizations should not be permitted to exclude gay and lesbian persons from membership on the basis of expressive association interests unless it can be reasonably inferred that their members sought affiliation to enhance views incompatible with gay and lesbian personhood.

b. *Expressive Forms*

Some organizational activities clearly express ideological or moral viewpoints inconsistent with gay or lesbian personhood. An organization might choose to demonstrate against the passage of homosexual rights legislation or to boycott merchants who sell gay or lesbian literature or who publicly endorse equal treatment of gay and lesbian employees and job applicants.²⁰⁰ Other previously recognized forms of expressive association might also be used. An organization might provide legal representation for employers facing sexual orientation discrimination lawsuits, distribute anti-homosexual rights

200. Members of Americans For Decency, a conservative traditionalist society which "rejects the gay and lesbian way of life," refuse to purchase "newspapers and magazines featuring stories and photographs that . . . contain sex . . . [and] refuse[] to buy manufacturers' products if they sponsor telecasts the group considers offensive." 1 ENCYCLOPEDIA OF ASSOCIATIONS: NATIONAL ORGANIZATIONS OF THE UNITED STATES 1654 (Deborah M. Burek ed., 1992).

literature,²⁰¹ or solicit funds for anti-gay and lesbian rights causes. These are the kinds of activities clearly protected under the First and Fourteenth Amendment. The fact an organization engages in these activities is also an effective and obvious way to infer that the collective membership of such organizations holds ideas and beliefs inconsistent with gay and lesbian personhood.

To compel an overtly anti-homosexual organization to accept gay or lesbian persons as members is the clearest and most unrealistic example of an expressive association rights abridgment based on the ideological differences principle. However, the associative right of exclusion and the Unruh Act's guarantees of inclusion have conflicted and will continue to produce litigation where discriminatory practices of popular organizations like the Boy Scouts, nonprofit recreational facilities, or other charitable organizations are involved. Such organizations can express viewpoints incompatible with gay and lesbian personhood through various types of expressive activities. In the socialization of young members, the organization may choose to define morality in a manner which rejects or condemns homosexuality. An organization seeking to promote its conception of the traditional family might promote an initiative or legislation which prohibits statutory protections based on sexual orientation.²⁰² As part of its membership indoctrination, an organization may require that neophytes affirm their belief in standards or philosophies contained in an organizational oath or motto, the substance of which is public knowledge.²⁰³ Such standards may expressly contradict homosexual-

201. The Liberty Foundation, an organization formed in response to "developments such as . . . support for homosexual rights" seeks to persuade "morally conservative Americans" to vote for candidates who will promote traditional conservative values. Towards this end, the organization distributes letters and leaflets to show the public where candidates stand on issues important to the group. *Id.* at 1653.

Proclaiming that "gay rights threaten the family unit and extend civil rights beyond what [is] . . . appropriate," the American Coalition for Traditional Values publishes its views in annual and monthly publications. *Id.* at 1654.

202. In their November 1992 election, Colorado voters passed by a 100,000 vote margin an ordinance which prohibits state and local laws providing special civil rights protection on the basis of sexual orientation. The ordinance, Amendment 2, was initiated by the Colorado for Family Values organization. Gary Massaro, *Angry Gays Vow to Keep Fighting-Lawsuits and Boycotts Appear to be Coming After Amendment 2 Wins by 100,000 Votes*, ROCKY MOUNTAIN NEWS, Nov. 6, 1992, at 6 (Local section).

203. The Boy Scouts asserted that their creed expressed the ideas and values of their organization in *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1430-31 (N.D. Ill. 1990). They argued that the inclusion of atheists in the organization would "require a change in the Boy Scouts' creed that 'no member can grow into the best kind of citizen without recognizing an obligation to God' . . . [and] it would restrict Boy Scouts' ability to 'exclude individuals with ideologies or philosophies different from those of existing members.'" *Id.* at 1430.

ity. The anti-homosexual beliefs of an organization might also be found in the bylaws, manuals, or handbooks that the organization uses to educate its members or the public.²⁰⁴ These expressive forms are reliable indicators of the ideas and beliefs held by the members of an organization because they express the ideals the organization represents as well as its "efforts [in] the society in order to bring about some [desired] condition."²⁰⁵ Still, unless the indicators of a collective belief are expressed to the public generally, the presence of expressive interests in the collective beliefs is doubtful.

c. Individuals Seeking to Express Ideas and Beliefs Will Associate with Organizations Predominantly Engaged in Expressive Activities

Where organizations are not predominantly expressive, the danger exists that expressive forms will be used as a basis for exclusion, even though the primary purpose of the organization is recreational, social, or professional. Justice O'Connor has stated her belief that organizations should be given complete discretion over their membership decisions when they are "predominantly engaged" in protective forms of expression.²⁰⁶ Like the requirement that the expressive interests of an organization's members should only be inferred from expressions that are explicit, the presence of expressive interests should likewise only be inferred from organizations that are predominantly expressive. If this is not the case, the presence of expressive interests is uncertain and a constitutional foundation for permitting discriminatory membership decisions is weak. A social club which occasionally takes public positions against gay and lesbian rights, but is otherwise a convenient meeting place for professionals, is not the type of organization individuals join to express views against gay or lesbian personhood on political or moral terms. The expressive interests of such an organization cannot be reasonably inferred from the club's isolated and infrequent expressive activities. Conversely, an organization whose public positions, literature,

204. See PAUL FUSSELL, *THE BOY SCOUTS HANDBOOK AND OTHER OBSERVATIONS* 7-8 (1982), quoted in *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (footnote) (1984): "The Official Boy Scout Handbook for all its focus on Axmanship, Backpacking, Cooking, First Aid, Flowers, Hiking, Map and Compass, Semaphore, Trees, and Weather, is another book about goodness. No home, and certainly no government office, should be without a copy." *Id.*

205. SMITH & FREEDMAN, *supra* note 167, at 5 (citing ARNOLD ROSE, *THEORY AND METHOD IN THE SOCIAL SCIENCES* 50-71 (1954)).

206. *Roberts v. United States Jaycees*, 468 U.S. 609, 635 (1984) (O'Connor, J., concurring).

and training programs are inundated with beliefs and ideas which are expressly adverse to gay and lesbian personhood might exist as a vehicle for representing the parallel ideas and beliefs of its members.

4. *Exclusions Based on the Right of Expressive Association Should Be Premised on Real Ideological Differences*

a. *Ideological Differences Should Be Genuine and Individually Determined*

Exclusionary policies based on the right of expressive association should be premised on real ideological differences between an organization's collective membership and the excluded individual. This concept is well represented in the Supreme Court's *Roberts* opinion where the Court rejected exclusionary practices premised on generalizations and assumptions about women.²⁰⁷ The concept underlies the treatment of Unruh Act sexual orientation discrimination cases by the California courts which have demanded that discriminatory policies be based on the individual conduct of the excluded individual and not on preconceived notions about the class to which the individual belongs.²⁰⁸ Where an organization claims that an individual's gay or lesbian personhood is grounds for exclusion from the organization, that determination should be based on the ideas and beliefs expressed by the excluded individual and not upon rumors or generalizations regarding purported homosexual conduct or viewpoints.

The notion of an expressive association defense premised on ideological differences between an organization and an individual is without substance if real ideological differences do not in fact exist. This determination is as important in considering the viewpoints of an individual as it is in evaluating the ideas and beliefs of a collective membership. The initial issue is whether any manifestation of gay or lesbian personhood is grounds for asserting that an individual is homosexual or promotes gay and lesbian interests. An affirmative answer here is problematic. First, many forms of behavior which are viewed as "homosexual characteristics" are actually groundless stereotypes.²⁰⁹ Second, a gay or lesbian person may choose to express his or her sexual orientation in a manner that does not conflict with the views of an organization's membership.

207. *Id.* at 627-28.

208. *See supra* text accompanying notes 92-108.

209. *See supra* text accompanying notes 126-28.

b. *Some Forms of Gay and Lesbian Personhood Which Might Form a Basis for Exclusion*

Political activity and public expression of intimacy are two ways in which an individual might affirmatively and publicly express gay or lesbian personhood. First, an individual might express gay or lesbian personhood in an overt, political manner. Participating in demonstrations,²¹⁰ taking public positions in support of homosexual rights, or wearing gay rights insignias are forms of gay or lesbian personhood that are inherently ideological. The political activism revealed in "manifest homosexuality" was recognized in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*,²¹¹ where the California Supreme Court recognized the political significance of individuals who identify themselves as homosexual to "make an issue of their homosexuality" for the purposes of challenging restrictive employment or other discriminatory policies.²¹² The same form of political expression might be directly imposed on a nonprofit organization where an individual openly discloses his or her homosexuality as a way of challenging the membership requirements of the organization, or simply to publicly express open gay and lesbian movement into mainstream clubs and associations. Such expressions are ideologically inconsistent with beliefs which view gay and lesbian personhood as deviant or morally repugnant.

An individual might also choose to publicly express his or her homosexuality in an intimate, non-political manner. Overt expressions of homosexuality, like public expressions of heterosexuality, are the outward expressions of one's sexual preference. The homosexual element of gay and lesbian personhood might take the form of publicly displaying one's sexual preference for a same-sex partner or verbally acknowledging one's preference for the same. An organization whose concept of morality condemns homosexuality should be permitted to exclude an openly homosexual individual, just as an organization whose concept of morality condemns promiscuity should

210. The gay community's vocal response to the Boy Scouts' official policy of excluding gay persons from membership typifies how political activity might express both political and moral forms of gay personhood. In July 1991, self-proclaimed "Queer Scouts" staged a "kiss-in" at San Francisco's Boy Scouts regional headquarters. The group chanted the slogan, "If you're gay and know it, snap your fingers . . . shake your tush . . . kiss a boy." Maitland Zane, *Gay 'Kiss-In' at Boy Scout Offices in S.F.*, S. F. CHRON., July 4, 1991, at A20.

211. *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, 595 P.2d 592, 611 (Cal. 1979).

212. *Id.* at 610-11.

have the right to exclude both homosexual and heterosexual individuals whose public expressions or statements exhibit a preference for non-monogamous sexual relationships. In either case, it seems that an individual's decision to publicly express his or her sexuality is a personal affirmation that such conduct is legitimate or acceptable.

Labeling the ideology of an individual based on generalizations, stereotypes, or rumors about private conduct, is an invalid basis for establishing real ideological differences. Using ideological differences as a basis for excluding an individual from an organization requires that the excluded individual not share the views of the collective membership. Unless the ideological incompatibility is unequivocally expressed by the individual, an organization has no basis for exclusion under an ideological differences principle.

c. *Potential Impairment as a Factor*

The foundation for finding that genuine ideological differences exist between the collective beliefs of an organization and the gay and lesbian personhood of an individual should be based on the individual's potential for changing the message expressed by the organization. This principle underlies past decisions involving the expressive rights of political associations and was suggested by the court in the *Roberts* decision.²¹³ While organizations should not be required to show actual impairment,²¹⁴ a reasonable basis should exist for believing that such impairment might occur. An organization which publicly endorses positions opposed to gay and lesbian political rights or which rejects interpretations of morality consistent with homosexuality would legitimately be opposed to the compelled participation of an openly homosexual person. The mere participation of the gay or lesbian person would likely alter the intolerant message communicated by the group.

An organization which bases expressive decisions about the content of its ideological positions on a democratic process might also claim that the presence of pro-gay and lesbian rights activists could

213. The Court remarked: "[R]equiring the Jaycees to admit women as full voting members . . . works an infringement . . . Such a regulation may impair the ability of the original members to express . . . those views that brought them together." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

214. See *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1980). The Court based the exclusionary rights of the Democratic Party on the recognition "that the inclusion of persons unaffiliated with a political party *may* seriously distort its collective decisions." *Id.* (emphasis added).

potentially distort the results of such decisions.²¹⁵ A real basis might exist for this argument where the organization maintains public positions inconsistent with gay and lesbian personhood.

C. *The Guidelines and Limits Applied*

A hypothetical scenario follows and illustrates the application of the guidelines and limits proposed above to a fictional plaintiff and organizational defendant. References to past decisions show that a more complete formulation of an expressive association defense, based on ideological differences between an organization and an excluded individual, can be addressed by courts in ways which are consistent with preserving constitutionally protected expressive interests and the civil rights guarantees of California's Unruh Act.

1. *The Organization*

The Family Club is a nonprofit organization with community-based chapters throughout California. The organization boasts thousands of members spanning all age groups. The Family Club's official motto, which appears on the club's community signs, publications, letterhead, and official merchandise, is "*how the traditional family fares, so fares America.*" The organization's primary purpose, as stated in its official bylaws, is the "promotion of traditional family values through education." Family Club books dealing with family communication skills, suicide prevention, depression, and drug abuse are valuable educational resources for club members and the general public alike. Information regarding gay and lesbian issues are not presented in Family Club publications or its other educational materials. While the organization does take "official" public positions on laws concerning drug enforcement, gun control, and educational spending, the Family Club has not taken official positions against gay and lesbian rights or the morality of homosexuality. The club is open to any interested member who wishes to receive the organization's newsletters or to attend the organization's various "family education" classes. At informal ceremonies across the state, new members pledge themselves to uphold the club's official creed of "*strengthening the family by enlightening the self.*"

2. *The Plaintiff*

John Doe Excluded is an openly gay city council member in an

215. *See id.*

urban California community. Mr. Excluded's political platform is largely and openly based on equal rights for gay and lesbian persons in public accommodations, employment, and family matters. It is not uncommon to see Mr. Excluded at gay rights marches and other demonstrations. Mr. Excluded believes that an important part of changing laws which discriminate against gay and lesbian persons is to foster societal acceptance of homosexuality. Mr. Excluded openly appears with his long-time same-sex partner in public places and at social events. Casual kissing and hand-holding in public is frequently engaged in by the two men. Although he has chosen not to pursue heterosexual marriage or the raising of children, Mr. Excluded is deeply concerned about supporting the family unit. He strongly believes that community problems such as teenage suicide, drug use, and other forms of delinquency can be offset by healthy family environments.

3. *The Controversy*

To show his support for the efforts of groups like the Family Club, Mr. Excluded decides to join one of its local chapters. There is a vocal community uproar when the elected officers of the organization's central office inform Mr. Excluded that the Family Club has an official but unwritten policy against admitting "openly gay and lesbian persons as members." True to his political support for gay and lesbian rights, Mr. Excluded files a complaint alleging a violation of his civil rights under the Unruh Act, and seeking an injunctive order against the officers of the Family Club.

The officers of the Family Club file an answer claiming that the organization has standing to represent the expressive interests of its collective membership. The organization maintains that the political positions of Mr. Excluded, as well as his public displays of homosexual intimacy, are inconsistent with the organization's purpose in promoting the interests of the traditional family. The organization states that forcing it to accept members with ideological viewpoints different from those of its existing members would be a violation of its members' expressive association freedoms. The answer expressly states that "compelling the Family Club to accept Mr. Excluded as a member pursuant to California Civil Code section 51, constitutes a serious infringement of the Fourteenth Amendment rights of existing Family Club members in violation of the United States Constitution."

4. *Evaluating the Expressive Association Defense*

There is little doubt that the Family Club is a "business establishment" for the purposes of the Unruh Act. The size of the club, its publishing and educational services, and its "open door" policy satisfy the California Supreme Court's definition of a "public accommodation" as articulated in cases like *O'Connor v. Village Green Owners Ass'n*²¹⁶ and *Isbister v. Boys' Club*.²¹⁷ The organization is, therefore, answerable to the provisions of the Unruh Act.

In arguing that Mr. Excluded's conduct and public positions are inconsistent with the viewpoints of its existing members, the Family Club is making what this comment has referred to as an expressive association defense premised on the principle of ideological differences. A court considering the constitutional claims of the Family Club could apply the principles of 1) collective beliefs, 2) group expression, 3) reasonable inference-drawing, and 4) real ideological differences, to determine whether legitimate constitutional interests should invalidate the application of the Unruh Act in this particular situation.

It is evident that Family Club members do adopt certain collective beliefs. The importance of healthy families to America's future and the individual's responsibility to promote strong families through learning are ideas and beliefs derived from the Family Club motto, creed, and educational mission. The Supreme Court in *NAACP v. Alabama ex rel. Patterson* suggested that the existence of organizational standards or policies may form a basis for establishing the common purpose of an organization and an individual.²¹⁸

It is also evident that these collective beliefs are expressed. The Family Club motto appears in various forms open to the public. Furthermore, the organization has taken public positions on certain matters it deems important to family stability. The Court in *Roberts* stated that "public positions" taken by the Jaycees organization "on a number of diverse issues" were protected forms of expression.²¹⁹ Justice O'Connor, in her concurring opinion, also argued that the educational activities of groups similar to the Family Club may constitute forms of protected group expression.²²⁰

The federal district court in *Welsh v. Boy Scouts of America*

216. *O'Connor v. Village Green Owners Ass'n*, 662 P.2d 427, 430 (Cal. 1983).

217. *Isbister v. Boys' Club*, 707 P.2d 212, 219-20 (Cal. 1985).

218. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

219. *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

220. *Id.* at 636 (O'Connor, J., concurring).

stated that the existence of "common beliefs" is not by itself proof of expressive association interests.²²¹ Such interests may be inferred from the expressive activities in which the organization is engaged. Several protected forms of expression are utilized by the Family Club; the Family Club motto, its public stance on select issues, and its various educational activities. It is reasonable to conclude that individuals join the Family Club to enhance individual viewpoints which promote the importance of family to the nation's overall strength. An individual's expressive interests in using group activity as a basis for enhancing individual viewpoints was the foundation of the Supreme Court's recognition of expressive association as a constitutionally protected right in *Alabama ex rel. Patterson*.²²² A court could find that Family Club members have an expressive interest in promoting the idea that facilitating discourse between family participants is a critical part of solving contemporary social problems. An essential part of this communicative process might be locating desirable participants and having the associative freedom to "exclude individuals who do not share the views that the club's members wish to promote."²²³

A court might accept the argument that compelling the Family Club to accept gay and lesbian members, those that the organization's representatives view as living outside of the traditional family circle, would be analogous to compelling the Rotary Club "to abandon [its] classification system" and to "admit members who do not reflect a cross section of the community."²²⁴ As an educational organization, the Family Club could claim that it is the type of expressive organization which should be permitted to exercise total discretion over its membership policy. A court adopting Justice O'Connor's reasoning in *Roberts* might find that the Family Club is a "private organization engaged exclusively in protected expression" and that the "First Amendment is offended by direct state control over [its] membership"²²⁵

Based on the expressive activities of the Family Club, however, it would be difficult for a court to conclude that individuals join the organization to oppose gay rights politically or to oppose homosexuality on moral terms. There are any number of organizations that a person could join to express these views more effectively than by tak-

221. *Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1431 (N.D. Ill. 1990).

222. *Alabama ex rel. Patterson*, 357 U.S. at 460.

223. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988).

224. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987).

225. *Roberts*, 468 U.S. at 638 (O'Connor, J., concurring).

ing Family Club classes or wearing Family Club T-shirts bearing the organization's motto. The Family Club could make a solid argument that it represents shared beliefs and ideas and that as an educational organization its members express these beliefs by participating in Family Club programs. Expressive interests can be reasonably inferred from the Family Club's educational agenda. What the Family Club lacks is a basis for concluding that Mr. Excluded and others similarly situated espouse "ideologies or philosophies different from those of its existing members."²²⁶

There is no doubt that Mr. Excluded embraces views and engages in conduct which promote gay rights and seem to validate homosexuality. His decision to join the Family Club may even be viewed as a politically motivated form of "manifest homosexuality" treated by the California Supreme Court in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.* as "political activity."²²⁷ These forms of expression, however, do not seem to contradict the collective ideas and beliefs promoted by the Family Club. In fact, the individual viewpoints of Mr. Excluded appear to be largely consistent with the objectives of the organization. He supports the Family Club's pro-family agenda and is in a position to promote its objectives. Requiring the organization to accept Mr. Excluded certainly will not appear to "impair the ability of the original members to express those views which brought them together."²²⁸

The Family Club might maintain that the inclusion of gay and lesbian members would tend to change the organization's ideological agenda. It is this type of assumption, however, that the *Roberts* Court rejected in considering gender discrimination under Minnesota's public accommodations law.²²⁹ Furthermore, the California Supreme Court has a well established history of rejecting class-based generalizations in considering discrimination claims under the Unruh Act.²³⁰

A court applying the above principles could be true to the interests promoted by both the Federal Constitution and the Unruh Civil Rights Act. A court could reject the constitutional claims of the Family Club confident that an objective basis existed for concluding that the genuine expressive interests of the organization's members were

226. *Id.* at 627.

227. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 611 (Cal. 1979).

228. *Roberts*, 468 U.S. at 623.

229. *Id.* at 627-28.

230. *See supra* text accompanying notes 87-108.

not infringed. A court could not find that real ideological differences exist between the Family Club and Mr. Excluded without accepting certain assumptions and generalizations about gay personhood. Such a finding would pose the real possibility of upholding loosely-alleged constitutional freedoms at the risk of allowing arbitrary discrimination to proceed unchecked. The traditional justification for permitting discriminatory practices under the Unruh Act is the finding that there is a rational nexus between an individual's conduct and the services and facilities provided by the business establishment. If the protected expressive activities of an organization like the Family Club are viewed as "services," the proposed guidelines are consistent with the traditional test. The guidelines allow courts to determine whether there is a sufficiently strong connection between the ideology of the excluded plaintiff and the expressive freedoms of the organizational defendant to justify an invalidation of the application of the public accommodations law.

VI. CONCLUSION

This comment began with the proposition that members of organizations covered by the Unruh Act might, under some circumstances, have a constitutional right of expressive association to exclude gay and lesbian persons from membership in their organizations. This idea was proffered despite the fact that recent United States Supreme Court cases sustained gender discrimination claims in the face of expressive association arguments, and despite the fact that a line of California cases dealing with sexual orientation discrimination did not consider expressive association claims. Nonetheless, the Court has suggested that organizations can use the principle of ideological differences to exclude applicants in spite of public accommodations laws. The main objective of this comment was to give some form and definition to this principle.

Unless the courts decide, however, to give organizations substantial discretion in the use of ideological differences as a basis for exclusion, the expressive association defense greatly resembles traditional Unruh Act discrimination defenses. The Supreme Court's traditional aversion to stereotypes and generalizations suggests that organizations and other "business establishments" using an expressive association defense will have to justify exclusionary practices based on the individualized characteristics of the excluded individual. In this way, an expressive association defense based on ideological inconsistencies differs from the traditional rational relations defense only in that it looks at individual ideology and not individual

conduct.

In the final analysis, the impact of the expressive association defense will depend upon the inferences that courts are willing to draw about the expressive interests of an organization's membership and about the ideological components of gay and lesbian personhood. Such inferences should be solidly grounded if the constitutional objectives of an expressive association claim are to be preserved and the civil rights of gay and lesbian persons are not to be arbitrarily sacrificed.

Andrew J. Breuner

