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"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual After *Boy Scouts of America v. Dale*

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“Simply So Different”:
The Uniquely Expressive Character
of the Openly Gay Individual After
Boy Scouts of America v. Dale

BY NANCY J. KNAUER*

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I. INTRODUCTION

The recent five to four decision of the U.S. Supreme Court in *Boy Scouts of America v. Dale*¹ was uniformly viewed as a setback for gay rights.² The majority ruled that the forced reinstatement of openly gay Assistant Scoutmaster James Dale, as mandated by the New Jersey public accommodations law, impermissibly infringed upon the Boy Scouts' First Amendment associational freedoms.³ As a result, the Boy Scouts—the largest youth organization in the United States⁴—is constitu-

¹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

² See, e.g., Harriet Chiang, *Scouts Can Bar Gays, Court Rules*, S.F. CHRON., June 29, 2000, at A1 (stating that the “Supreme Court dealt a setback to the gay rights movement”); David Jackson, *Boy Scouts Can Keep Gays From Becoming Troop Leaders, Supreme Court Rules*, DALLAS MORNING NEWS, June 29, 2000, at A1 (describing the decision as “[d]ealing a setback to gay rights advocates”); Emilie Lounsberry, *Scouts Can Bar Gay Leader: N.J. Ruling Reversed By Divided High Court*, PHILA. INQUIRER, June 29, 2000, at A1 (characterizing the decision as “a setback for gay-rights activists”); David Osborne, *Setback for Gay Movement as Court Rules Against Sacked Scoutmaster*, INDEPENDENT (London), June 29, 2000, at 14, available at 2000 WL 22926855 (stating that “[t]he gay movement in the United States suffered a setback”).

³ *Dale*, 530 U.S. at 661. Writing for the majority, Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 642. Justice Stevens filed a dissenting opinion that was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 663 (Stevens, J., dissenting). Justice Souter filed a separate dissent that was joined by Justices Ginsburg and Breyer. *Id.* at 700 (Souter, J., dissenting).

⁴ The Boy Scouts' promotional materials describe Scouting as “the largest youth movement the free world has ever seen.” Brief for Respondent at 1, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). At the time the litigation began, the Boy Scouts had four million youth members and one million adult members. *Id.* The New Jersey Supreme Court summarized the membership statistics of the Boy Scouts in its statement of facts. *Dale v. Boy Scouts of Am.*,

tionally empowered to continue its practice of excluding openly gay members. To provide otherwise, the majority held, would force the Boy Scouts to send a message of inclusion and tolerance regarding homosexuality that was at odds with the group's requirements that a Scout be "morally straight" and "clean."⁵

The majority's decision was based on the belief that if an organization has an openly gay member, the existence of that member sends a message, not just about the sexual orientation of that individual, but about the views of the organization as well.⁶ This message is communicated by virtue of the mere presence of an openly gay member, or in the words of the majority, the presence of an "avowed homosexual," without any further affirmative acts of advocacy.⁷ Justice Stevens characterized the majority's contention as, "Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so."⁸

Many liberal commentators, following Justice Stevens' dissent, have rejected this construction of the openly gay individual as a uniquely expressive subject.⁹ In an attempt to craft a response that is devoid of

734 A.2d 1196, 1200 (N.J. 1999). The court noted that "[s]ince the program's inception in 1910 through the . . . [early 1990s] over eighty-seven million youths and adults have joined BSA." *Id.*

⁵ *Dale*, 530 U.S. at 649. The Boy Scouts consistently argued that homosexuality was contrary to the provision in the Scout Oath requiring that a Scout be "morally straight" and the provision in the Scout Law requiring a Scout to be "clean." *Id.* For a discussion of this argument, see *infra* notes 67-85 and accompanying text.

⁶ *Dale*, 530 U.S. at 653.

⁷ See *id.* at 644. The majority referred to Dale as "an avowed homosexual and gay rights activist." *Id.* To Justice Stevens, Dale was "an openly gay male." *Id.* at 696 (Stevens, J., dissenting). The Boy Scouts also referred to Dale as an "avowed homosexual." Brief for Petitioners at 9, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

⁸ *Dale*, 530 U.S. at 692 (Stevens, J., dissenting).

⁹ E.g., Anna Quindlen, *The Right to Be Ordinary*, NEWSWEEK, Sept. 11, 2000, at 82 (asserting that "ordinary people who happen to be gay have become unremarkable"); see, e.g., *The Court Exits in Controversy*, N.Y. TIMES, June 29, 2000, at 30A (stating that the Boy Scouts "failed to show that admitting gays was fundamentally incompatible with the organization's core mission"); see also *The Boy Scout Decision; What Could be a 'Pyrrhic Victory,'* THE RECORD (Bergen County, N.J.), June 30, 2000, at L10; Marie Cocco, *The Court Says Gay Bias is a Scout's Honor*, NEWSDAY (New York, N.Y.), July 3, 2000, at A27; *Scouts are Stuck in the Past*, THE HARTFORD COURANT, June 30, 2000, at A14; Cynthia Tucker, *Cowardly Court Lends Legitimacy to Prejudice*, TIMES-PICAYUNE, July 3,

sexual orientation bias, these commentators have instead produced critiques that ignore the political reality of what it means to be an openly gay individual.¹⁰ It is incredible, the argument goes, that Dale's status as a lone (and presumably silent) "avowed homosexual" would be sufficient to impair the ability of a national organization with close to five million members to dispense its message.¹¹ It is just not possible, as Justice Stevens characterized the majority's holding, to believe "that homosexuals are simply so different from the rest of society."¹²

This Article contends, with all due respect to Justice Stevens, that perhaps avowed homosexuals are, at least currently, "simply so different from the rest of society,"¹³ and that well-meaning attempts to deny this difference in the name of equality will only hinder and not help the broader goal of securing civil rights protections based on sexual orientation. To be sure, this difference is not caused by a special gay essence, a newly discovered homosexual gene, or even the intractable immorality of same-sex desire.¹⁴ Instead, it is the result of the confluence of two strong social

2000, at B05.

¹⁰ See generally *supra* note 9.

¹¹ *Dale*, 530 U.S. at 697 (Stevens, J., dissenting). It was simply the fact of Dale's presence as an "avowed homosexual," without any additional advocacy or otherwise communicative statements, that the majority reasoned would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653.

¹² *Id.* at 696 (Stevens, J., dissenting). The quote continues, "that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment." *Id.* To believe otherwise, Justice Stevens reasoned, would be to saddle homosexuals with a "constitutionally prescribed symbol of inferiority." *Id.* Justice Stevens rejected categorically any claims based on the potential expressive nature of Dale's mere presence in the organization and concluded that Dale's "participation [in Scouting] sends no cognizable message to the Scouts or to the world." *Id.* at 694.

¹³ *Id.* at 696 (Stevens, J., dissenting).

¹⁴ Accordingly, the difference asserted is not a claim about the essential nature of gay men and lesbians, assuming that one could arrive at a workable definition to describe the class. The difference is a condition that arises from the combination of a variety of societal factors. It represents a shared experience by individuals who publicly self-identify as gay, lesbian, bisexual, or queer. It necessarily calibrates differently on different individuals depending upon their other intersecting and overlapping identities. For a discussion of the "multivalent nature of identity," see Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 230-32 (1998) [hereinafter Knauer, *Heteronormativity*].

The expressive nature of the openly gay individual is indifferent to whether

currents: heteronormativity, with all its prescriptive force, and the escalating ferocity of the Culture War.¹⁵ Working in concert, these two factors produce a unique (and necessarily temporal) category of subjects—openly gay individuals—for whom third party knowledge of their status is both expressive and politicized.

There is nothing particularly surprising or new about the contention that an openly gay individual speaks volumes. The contemporary gay rights movement is based on a commitment to openness and visibility that privileges "coming out."¹⁶ The movement places considerable value on

sexual orientation is an innate characteristic or a social construction. A considerable amount of gay/lesbian/queer scholarship addresses the ongoing essentialist/constructivist debate over the nature of gay/lesbian/queer identity. Edward Stein provides a critique of both the essentialist position that 'gays are born that way' and the constructivist position that, historically speaking, sexual orientation is a relatively new and hopelessly contingent concept. EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* (1999); see also Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument of Immutability*, 46 STAN. L. REV. 503, 506 (1994) (arguing that "sexual orientation, no matter what causes it, acquires social and political meaning through the material and symbolic activities of living people" and that it is in this "arena of representation" that "we signify to one another who we are, negotiate the norms attaching to that, and arrange and rearrange power along the sexual orientation hierarchy").

¹⁵ For a discussion of heteronormativity, see *infra* Part III. For a discussion of the Culture War, see *infra* Part IV. The concern about the Culture War is not restricted to organizations on the political fringe. At least two U.S. Supreme Court Justices, Antonin Scalia and Clarence Thomas, have expressed their concern over the Culture War. In recent remarks before a conservative policy organization, Justice Thomas was reported to say "that the nation was engaged in a cultural war in which people who stood for their beliefs were often intimidated into silence." Neil A. Lewis, *Justice Thomas Raises Issue of Cultural Intimidation*, N.Y. TIMES, Feb. 13, 2001, at A28 (paraphrasing Justice Thomas). Justice Scalia introduced the term into Supreme Court jurisprudence in his dissent in *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting). For an explanation of Scalia's use of the term "Kulturkampf," see *infra* note 270.

¹⁶ The notion that coming out is a public good began with the early gay liberation movement. For the gay liberation movement of the 1970s, the process of coming out was valued and encouraged because of its socially transformative power. ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* 38 (1996). Indeed, it was the urging of "the public assumption of identity" that distinguished the gay liberation movement from the earlier homophile movement. *Id.* (comparing the two movements). The identity-based lesbian and gay rights movement that emerged in the 1980s interpreted coming out as a signal of gay pride. *Id.* For a

openly gay role models, regularly lobbies the entertainment industry to include gay-positive media images, and praises companies with “gay-friendly” policies.¹⁷ Meanwhile, anti-gay pro-family organizations, such as the Family Research Council, view openly gay individuals as militant gay activists whose lifestyle threatens the very foundation of society.¹⁸ With equal vigor, pro-family organizations decry gay role models, protest homosexual encroachment in schools, and condemn any entity that gives openly gay individuals a platform, whether that be an employer, a television network, a school, or a Scout troop.¹⁹

Despite this broad popular understanding of the expressive power of the “avowed homosexual,” Dale and the judges who ruled against the Boy Scouts steadfastly denied that a human being could be speech and emphasized instead how Dale was really *the same* as the heterosexual Scoutmaster or *the same* as the (presumably heterosexual) African-American Scoutmaster.²⁰ Of course, there were obvious reasons for Dale to reject the expressive nature of the openly gay individual given the context of the case. The view of the expressive homosexual endorsed by *Boy Scouts of America v. Dale*, however, may have consequences far beyond simply limiting the ability of public accommodation laws to address

discussion of the emphasis placed on “coming out” by the contemporary gay rights movement, see *infra* Part IV.A.1.

¹⁷ Ironically, it was Dale’s interview with a reporter concerning the importance of role models for gay youth that first brought his homosexuality to the attention of the Boy Scout leadership. See *infra* notes 46-51 and accompanying text. By the time Dale’s counsel prepared his case, Dale reported that he was not interested in using his position as a “bully pulpit.” Brief for Respondent at 41, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁸ The Family Research Council (“FRC”) is a pro-family organization with a particular interest in homosexuality. See *infra* Part IV.B. (discussing the ideology of pro-family organizations). This Article uses FRC writings as representative of general pro-family views regarding homosexuality. FRC exercises considerable political influence and was a major lobbying force on behalf of the 1996 Federal Defense of Marriage Act. See Knauer, *Heteronormativity*, *supra* note 14, at 185. For an in-depth discussion of the FRC and its views on homosexuality, see Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 459, 456 n.319 (2000) [hereinafter Knauer, *Homosexuality as Contagion*] (explaining that as pro-family organizations go, FRC is “relatively mild in its approach to homosexuality[] and . . . has considerable political influence[]”).

¹⁹ For a description of the efforts of pro-family organizations, see *infra* Part IV.B.

²⁰ *Dale*, 530 U.S. at 655-56.

discrimination based on sexual orientation. In other settings, Dale's message may finally be recognized (and valued) as a matter of the utmost public concern leading to greater and not lesser First Amendment protection for openly gay individuals.²¹

Ultimately, the legal impact of the expressive homosexual will depend on our ability to articulate a nuanced identity that, once known or revealed to third parties, springs into being and has the power of speech. This Article considers the notion of the expressive homosexual first against the backdrop of heteronormativity and then in the context of the contentious Culture War. Part II summarizes the legal and factual arguments as presented by the parties and accepted by the courts.²² In particular, it notes that the fundamental difference between the opinions that held for Dale and those that held for the Boy Scouts was centered around two questions: Did the Boy Scouts have an anti-gay message?, and Would Dale's presence disrupt that message or even send an alternative one?²³ Part III examines both of these questions through the lens of heteronormativity—"the largely unstated assumption that heterosexuality is the essential and elemental ordering . . . [principle] of society"²⁴—and answers each in the affirmative.²⁵ Until recently, there would have been no need for the Boy Scouts to adopt an expressly anti-gay policy because it would have been inconceivable that a degenerate invert or sexual psychopath could be considered morally straight and clean. Moreover, Dale's avowal of his homosexuality would certainly disrupt the Boy Scouts' expressive

²¹ In the public employment setting, coming out speech is not protected speech under the First Amendment because it is not a matter of "public concern." *Rowland v. Mad River Local Sch. Dist.*, 730 F. 2d 444, 449 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985). In his dissent to the denial of certiorari, Justice Douglas, who was joined by Justice Marshall, wrote that "[t]he fact of petitioner's bisexuality once spoken, necessarily and ineluctably involved her in [the] debate" that is "currently ongoing regarding the rights of homosexuals." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (1985).

²² See *infra* notes 30-114 and accompanying text.

²³ See *infra* notes 59-114 and accompanying text.

²⁴ Knauer, *Heteronormativity*, *supra* note 14, at 133 (defining heteronormativity). For the seminal definition of heteronormativity, see Michael Warner, *Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* at xxi (Michael Warner ed., 1993) (defining heteronormativity as the view that heterosexuality is "the elemental form of . . . association, as the very model of intergender relations, as the indivisible basis of . . . community, and as the means of reproduction without which society wouldn't exist").

²⁵ See *infra* notes 115-269 and accompanying text.

message because every admission of non-normative sexuality is necessarily marked and remarkable. Not only does it break “the representational contract,”²⁶ but it risks being read as a solicitation or a point of contagion. Part IV notes that the Culture War further politicizes an open avowal of same-sex desire beyond simple disruption of the hetero-homo binary.²⁷ From the pro-family perspective, in this climate, an open avowal of homosexuality not coupled with shame is a statement of militant homosexual pride. Forcing the Boy Scouts to admit Dale requires the organization to signal its approval of homosexual conduct, which is contrary to its “sincerely” held belief that homosexuality is immoral.²⁸ A brief conclusion in Part V argues, as did an earlier generation, that perhaps this is an instance where the personal is truly the political.²⁹ The homosexuality debate has produced a category of contested subjects—openly gay individuals—whose relationships, identity, and very existence are subject to challenge and erasure.

II. *BOY SCOUTS OF AMERICA V. DALE*

The facts of the case are by now very familiar. The story of the Eagle Scout turned “avowed homosexual and gay rights activist”³⁰ was told and retold hundreds of times by the print and broadcast media during the eight years between the time James Dale filed his complaint against the Boy Scouts and the Supreme Court decision.³¹ In the process, Dale became a

²⁶ EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 56-57, 254 (1990).

²⁷ See *infra* notes 270-358 and accompanying text.

²⁸ Referring to the belief that homosexuality is inconsistent with Scouting, Justice Rehnquist wrote that “[w]e cannot doubt that the Boy Scouts sincerely holds this view.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

²⁹ See *infra* notes 359-79 and accompanying text.

³⁰ The first paragraph of the majority opinion describes Dale as “an avowed homosexual and gay rights activist.” *Dale*, 530 U.S. at 644. This is exactly how the Boy Scouts characterized Dale in the organization’s brief submitted to the Supreme Court. Brief for Petitioners at i, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). The Boy Scouts framed its Question Presented as “[W]hether a state law requiring a Boy Scout Troop to appoint *an avowed homosexual and gay rights activist* as an Assistant Scoutmaster responsible for communicating Boy Scouting’s moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.” *Id.* (emphasis added).

³¹ A Lexis-Nexis search for the search terms “James Dale and Eagle Scout” in the combined newsgroup produces over 1000 responses. When the search is limited to sources from the last two years, it yields 760 sources. Finally, when the search

minor gay celebrity gracing the covers of gay publications and even appearing in the pages of an Abercrombie & Fitch catalog.³² Pro-family organizations closely monitored Dale's "assault" on the Boy Scouts and applauded the organization's resolve.³³ The Boy Scouts' implacable public commitment to discrimination has prompted numerous municipalities and sponsoring organizations to consider where they stand in the Culture War. Many have decided to withdraw their sponsorship, while others have pledged their continued support.³⁴

The Boy Scouts did not deny that it revoked Dale's adult membership because he was an avowed homosexual. Instead, it asserted a constitutionally protected right to limit its membership on the basis of sexual orientation, contrary to the express mandate of the New Jersey public accommoda-

is limited to articles appearing in *The New York Times*, it yields twenty-six articles.

³² For a discussion of Dale's status as a gay celebrity and his appearance in the Abercrombie & Fitch catalog, see *infra* note 316.

³³ The Boy Scouts have been applauded by a host of pro-family organizations. Robert H. Knight, a Senior Editor of *Culture Facts*, a weekly publication of FRC, explains that it is time to take sides:

A battle is raging all over America over what kind of nation we are going to be. People are going to have to make a choice. Either they support the values and traditions of groups like the Boy Scouts, or they side with the moral wrecking crew that is trying to remake America to suit their appetites.

Robert H. Knight, *Letter on Scouts*, CULTURE FACTS (Family Research Council, Washington, D.C.) Nov. 22, 2000, <http://www.frc.org/papers/culturefacts/index.cfm>.

³⁴ See, e.g., Shaila K. Dewan, *Manhattan School District Withdraws Support for Scouts, Citing Bias*, N.Y. TIMES, Sept. 27, 2000, at B3; Jane Gross, *Scouting Debate Leaves Children Caught in Middle*, N.Y. TIMES, Oct. 1, 2000, § 1, at 33; Kate Zernike, *Scouts' Successful Ban on Gays Is Followed by Loss in Support*, N.Y. TIMES, Aug. 29, 2000, at A1. In addition, a number of high profile members have resigned from the Boy Scouts. See, e.g., Carol Ness, *Judge Quits as Scoutmaster Over Gay Policy*, S.F. EXAM'R, Sept. 15, 2000, at A4.

Even President Clinton, as the then ex officio head of the Boy Scouts weighed in on the subject. See Chris Bull, *Triumphs, Trials and Errors: President Clinton Talks about His Successes, Battles and Hopes*, THE ADVOCATE, Nov. 7, 2000, at 30. In an interview with a national gay magazine, President Clinton said that the Boy Scouts' "policy is wrong," and "we should keep working on [the Boy Scouts]" to get them to change. *Id.* President Clinton attributed the Boy Scouts' policy to fear, stating "I think they're afraid. And I think there are all these sorts of preconceptions . . . that gay adults are more likely to abuse children than straight adults. And if you look at the evidence every year in cases of child abuse that have a sexual component, there's just no evidence to support that. But I think there's a fear factor there." *Id.*

tion law.³⁵ The argument that First Amendment associational freedom place limitations on the ability of jurisdictions to reach discrimination in private associations on the basis of gender had earlier been rejected by the U.S. Supreme Court.³⁶ Sexual orientation proved to be a different matter.

A reading of the various opinions rendered by the Supreme Court and the New Jersey state courts reveals a clear distinction between the decision ruling for Dale and those ruling for the Boy Scouts. The distinction centers on the answers to two questions: Did the Boy Scouts' expressive message include the disapproval of homosexuality?, and, if so, would Dale's presence significantly burden the Boy Scouts' ability to disseminate the message or even force the Boy Scouts to send a contrary message? The majority answered these questions in the affirmative with little elaboration. The pro-Dale decisions refused to believe the Boy Scouts' articulation of its own policies, finding instead that Dale's dismissal was based on "unfounded stereotypes."³⁷ They further found that Dale's self-identifying speech would not send any sort of message.³⁸

A. *An Eagle Scout Becomes an Avowed Homosexual*

Given the expressive power that the U.S. Supreme Court attributed to the "avowed homosexual," it is instructive to consider the set of facts under which Dale earned this appellation.³⁹ Dale's association with Scouting began at the age of eight when he joined the Cub Scouts.⁴⁰ He eventually rose to the rank of Eagle Scout and was considered "an exemplary Scout."

³⁵ The Boy Scouts also asserted that the organization was not a "place of public accommodation" within the meaning of the statute. See *infra* Part II.B.

³⁶ See *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

³⁷ In his concurrence, Justice Handler of the New Jersey Supreme Court told the trial judge to task for "impermissibly invok[ing] stereotypical assumptions about homosexuals to give a specific meaning to 'traditional morality.'" *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1243 (N.J. 1999) (Handler, J., concurring *rev'd*, 530 U.S. 640 (2000)). He also referred to "unfounded stereotype[s]" "baseless assumptions," and "unsupported generalizations." *Id.* at 1243, 1244 (Handler, J., concurring).

³⁸ *Id.* at 1229.

³⁹ See also Knauer, *Homosexuality as Contagion*, *supra* note 18, at 483-84 (discussing how relatively easy it is to be considered a gay activist).

⁴⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

⁴¹ *Id.* Justice Stevens' dissent notes that the rank of Eagle Scout is "an honor given to only three percent of all Scouts." *Id.* at 665 (Stevens, J., dissenting).

In 1989, Dale applied for adult membership when he turned eighteen and was awarded the position of Assistant Scoutmaster.⁴² When Dale received the letter in 1990 from the Executive of the Monmouth Council division of the Boy Scouts revoking his membership, Dale had been involved in Scouting for twelve years.⁴³

At college, Dale self-identified as gay and joined the student Lesbian/Gay Alliance, eventually becoming its co-president.⁴⁴ While attending a seminar on the "psychological and health needs"⁴⁵ of gay teens, Dale was interviewed by a reporter from a local newspaper. The newspaper later ran an article about the seminar.⁴⁶ The article included a quote from Dale regarding the need for role models for gay teenagers and was accompanied by a photograph of Dale.⁴⁷ The photograph clearly identified him as the co-president of the student group.⁴⁸

After the article appeared, Monmouth Council revoked Dale's adult membership.⁴⁹ When Dale requested an explanation for the action, the

⁴² *Id.* at 644.

⁴³ *Id.* Justice Stevens' dissent notes that the notice of revocation came "after more than 12 years of active and honored participation." *Id.* at 665 (Stevens, J., dissenting).

⁴⁴ *Id.* at 644-45.

⁴⁵ *Id.* at 645.

⁴⁶ *Id.*

⁴⁷ *Id.* The majority characterized this event by saying that Dale was "interviewed . . . about his advocacy of homosexual teenagers' need for gay role models." *Id.* This arguably exaggerates Dale's prominence in the article. The article itself deals mainly with the seminar and contains several interviews of various individuals in attendance. Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens*, STAR-LEDGER (Newark, N.J.), July 8, 1990, § 2, at 11. Justice Stevens' dissent quotes, in full, the three paragraphs of the article that involved Dale:

James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.

He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.

"I was looking for a role model, someone who was gay and accepting of me," Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends.

Dale, 530 U.S. at 689-90 (Stevens, J., dissenting) (quoting Borondy, *supra*).

⁴⁸ *Dale*, 530 U.S. at 645.

⁴⁹ *Id.* The article appeared in early July 1990, and Dale received the letter "later that month." *Id.* The letter gave Dale sixty days to request a review of his termination. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1205 (N.J. 1999), *rev'd*,

Executive of the Monmouth Council responded that the Boy Scouts “specifically forbid[s] membership to homosexuals.”⁵⁰ It seems that the notoriety Dale gained from three paragraphs in a local newspaper was sufficient to constitute Dale, in the words of the majority, as “an avowed homosexual and gay rights activist.”⁵¹

B. The New Jersey Law Against Discrimination

In 1992, Dale filed a complaint against the Boy Scouts alleging that the organization violated the New Jersey Law Against Discrimination (“LAD”),⁵² which forbids discrimination on the basis of sexual orientation in public accommodations.⁵³ Dale successfully argued to the New Jersey Superior Court and the New Jersey Supreme Court that the Boy Scouts constituted a place of public accommodation within the meaning of the LAD.⁵⁴ The courts’ willingness to find that the Boy Scouts was a place of

530 U.S. 640 (2000). Over the next several months, Dale sought clarification of the reasons for his termination. On December 21, 1990, he was informed by counsel for the Boy Scouts of America (as opposed to the regional Monmouth Council) that the organization “does not admit avowed homosexuals” and there would be no “useful purpose” served by having Dale present at a requested national level review of his membership revocation. *Id.*

⁵⁰ *Dale*, 530 U.S. at 645.

⁵¹ *Id.* at 644.

⁵² N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1993 & Supp. 2000).

⁵³ *Dale*, 530 U.S. at 645. The New Jersey Law Against Discrimination (“LAD”) had been amended in 1991 to include sexual orientation as a protected category. 1991 N.J. Sess. Law. Serv. 519 (West). Dale sought reinstatement after the amendment. *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 278 n.1 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000). The Boy Scouts did not challenge the applicability of the amended LAD, except to argue that the organization was not a place of public accommodation. *Id.* at 278. The LAD defines “affectional or sexual orientation” as “male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.” N.J. STAT. ANN. § 10:5-5(hh) (West 1993).

Dale also alleged common law right to access. *Dale*, 734 A.2d at 1219. The New Jersey Supreme Court found that this claim was “duplicative” of Dale’s statutory claim and upheld the Superior’s Court dismissal of the common law claim. *Id.*

⁵⁴ The New Jersey Supreme Court found that the Boy Scouts (i) engaged in broad public solicitation, (ii) maintained close relationships with the government or other public accommodations, and (iii) was similar to enumerated or other previously recognized public accommodations. *Dale*, 734 A.2d at 1210-13. With

public accommodation was not surprising given that New Jersey, like Minnesota and New York, does not limit the reach of its public accommodation law to those enterprises or facilities with a geographically fixed situs,⁵⁵ and that its courts have historically interpreted the law very broadly.⁵⁶

regard to the requirement that the organization engage in "broad public solicitation," the court noted the Boy Scouts' million dollar advertising campaign designed to increase membership. *Id.* at 1211. The court also discussed the inherent symbolism embodied in the Boy Scout uniform—calling the wearing of the uniform in public "the most powerful invitation of all." *Id.* The court stressed the close relation that the Boy Scouts enjoys with the federal, state, and local governments. *Id.* at 1211-13. It also noted the Boy Scouts' similarity to the enumerated category of "day camp" and a judicially determined "place of accommodation"—the Little League. *Id.* at 1213.

The court rejected the Boy Scouts' claim that it was exempt from the LAD as a "distinctly private" organization citing the nonselective nature of its broad solicitation activities. *Id.* at 1213-17; *see* N.J. STAT. ANN. § 10:5-51 (providing an express exception for distinctly private organizations). The court noted that the "Boy Scouts' large membership . . . undercuts its claim to selective membership." *Dale*, 734 A.2d at 1215.

The Boy Scouts also claimed that it was exempt from the LAD under the exceptions provided for educational facilities operated by religious institutions and individuals acting in loco parentis. *Id.* at 1217-18; *see* N.J. STAT. ANN. § 10:5-51 (providing express exceptions for educational facilities operated by religious institutions and individuals acting in loco parentis). The court dismissed the religious claim with "little discussion," noting that the Boy Scouts "repeatedly states that it is nonsectarian." *Dale*, 734 A.2d at 1217. The court also rejected that the limited period of time Scoutmasters spent with the children meant that they were acting in loco parentis. *Id.* at 1218.

⁵⁵ *See, e.g.,* *United States Jaycees v. McClure*, 305 N.W.2d 764, 773 (Minn. 1981) (de-emphasizing the question of a fixed location in favor of "whether the organization engages in activities in places to which an unselected public is given an open invitation"); *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1204 (N.Y. 1983) (holding that a "place of . . . public accommodation need not be a fixed location").

⁵⁶ A famous example of this broad construction was the 1974 decision of the New Jersey Supreme Court to uphold a lower court's determination that the Little League was a place of public accommodation, and its refusal to allow girls to join violated the LAD. *Nat'l Org. for Women, Essex County Chapter v. Little League Baseball, Inc.*, 338 A.2d 198 (N.J. 1974). The LAD's express language itself invites this type of construction and provides an illustrative list of numerous types of venues that qualify as places of public accommodation. N.J. STAT. ANN. § 10:5-5(1) (West 1993). The statute provides that "[a] place of public accommodation"

By the time Dale filed his complaint, other jurisdictions with more narrow definitions of a place of public accommodation had found that the Boy Scouts did not constitute a public accommodation.⁵⁷ In fact, almost identical litigation instituted in California by a dismissed openly gay Scoutmaster ended with a decision by the California Supreme Court that the Boy Scouts is not a public accommodation within the meaning of the California statute.⁵⁸ Under New Jersey law, however, the Boy Scouts was a place of public accommodation and, according to the LAD, the Boy Scouts could not exclude Dale from membership based on his sexual orientation.

C. Discrimination on Account of Sexual Orientation Meets the First Amendment

The compelling interest of the state to combat discrimination allows the state to safeguard employees, tenants, customers, and members from private discrimination based on certain enumerated or protected characteristics. The reach of these laws, however, is potentially limited by the First Amendment rights of the employer, landlord, merchant, or organization in question. As a result, anti-discrimination claims often present a two-tiered inquiry: first, Is the action complained of prohibited by the state or local law?; second, Is the remedy prescribed impermissible state action under the Federal Constitution? When the Boy Scouts argued that state-mandated inclusion of Dale would violate the Boy Scouts' First Amendment rights to expressive association and free speech,⁵⁹ what began as a complaint of

shall include, but not be limited to" the listed establishments and venues. *Id.*

⁵⁷ For example, the Boy Scouts is not a "place of public accommodation" under Title II of the Civil Rights Act of 1964. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1278 (7th Cir. 1993); *cf. Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352, 360 (Conn. 1987); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465, 469 (Or. 1976).

⁵⁸ *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 238 (Cal. 1998).

⁵⁹ Brief for Petitioners at 18-19, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). The Boy Scouts also claimed that the application of the LAD violated its right to intimate association. Brief for Petitioners at 20. Relying on *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the New Jersey Supreme Court held that the "Boy Scouts' practice of inviting or allowing nonmembers to attend certain troop meetings further persuades . . . [the court] that Boy Scouts cannot claim the right of intimate association." *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1222

private discrimination quickly became a question of whether the act of discrimination that is otherwise unlawful under state law is constitutionally protected.

In the case of sexual orientation, this constitutional shield may prove particularly expansive because of the ongoing debate regarding the morality of homosexuality.⁶⁰ The Boy Scouts claimed that Dale's presence was contrary to the organization's generic moral code of conduct—that homosexuality was not "morally straight" or "clean."⁶¹ Clearly, it would not be plausible to argue that such generic terms implicitly barred non-white or female members and, indeed, the U.S. Supreme Court has rejected similar arguments raised by large private associations, such as the Jaycees and the Rotary Club, to stop the state-mandated inclusion of women.⁶² Unlike explicitly racist or sexist speech, however, condemnation of homosexuality remains an accepted feature of political discourse.⁶³ This leads to the paradoxical conclusion that in the case of sexual orientation, the First

(N.J. 1999). The U.S. Supreme Court did not address the intimate association claim.

⁶⁰ For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the constitutional shield protected the organizers of the Boston St. Patrick's Day Parade from the inclusion of openly gay marchers as an identifiable group as required by the Massachusetts anti-discrimination law. *Id.* at 580-81. Until *Boy Scouts of America v. Dale*, *Hurley* was routinely distinguished from the prior line of public accommodation turned associational freedom cases on the basis that the parade itself was a form of pure speech that warranted a different level of protection than the expressive interests of a large, nonpolitical, private association. A considerable portion of Dale's argument was devoted to distinguishing *Hurley*. See Brief for Respondent at 22-23, 40-42, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Nan Hunter has criticized the unanimous decision in *Hurley* for failing to grapple with the "expressive/equality dichotomy and the conundrum presented by expressive identity cases." Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L.L. REV. 1, 20 (2000). Hunter acknowledges that "[i]f one accepts, as the Court did, that the issue was whether parade organizers could be required 'to include among the marchers a group imparting a message the organizers do not want to convey,' then the First Amendment trumping of the equality claim is almost self-evident." *Id.* at 18.

⁶¹ See *infra* notes 67-68 and accompanying text.

⁶² *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

⁶³ This is readily evidenced by statements made on the floor of the Congress, U.S. Supreme Court decisions, and the prevalence of anti-gay citizens' initiatives. See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 457.

Amendment may remove a greater number of sites from the reach of the anti-discrimination laws than it would in the case of race or gender precisely because discrimination on account of sexual orientation remains so express, pervasive, and widely practiced.

The New Jersey appellate courts rejected the Boy Scouts' First Amendment claims, but the U.S. Supreme Court proved much more receptive. As explained above, the distinguishing feature was the way each court perceived the Boy Scouts' claim that it was organized around a shared expressive message that homosexuality is morally wrong and the way each court conceptualized the expressive power of the openly gay individual.⁶⁴

1. *Do the Boy Scouts Really Disapprove of Homosexuality?*

The fact that the Boy Scouts is an expressive association is, alone, not sufficient to remove it from the reach of the LAD.⁶⁵ The Boy Scouts had to show that part of its expressive message was the disapproval of homosexuality. Otherwise, the reinstatement of Dale could not be shown to significantly burden the Boy Scouts' freedom of expression and the remedy provided by the LAD would stand.⁶⁶

The Boy Scouts claimed that homosexual conduct was inconsistent with the Scout Oath requirement that a Scout be "morally straight"⁶⁷ and

⁶⁴ The New Jersey Supreme Court held that "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral" and, therefore, Dale's inclusion would not impair the Boy Scouts' ability to disseminate its message. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223 (N.J. 1999). It further rejected the claim that Dale's presence would constitute a form of forced speech because "Dale . . . [did] not come to Boy Scout meetings 'carrying a banner.'" *Id.* at 1229. The court specifically stated that "[w]e reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality." *Id.* The U.S. Supreme Court disagreed on both points. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-55 (2000).

⁶⁵ *Dale*, 530 U.S. at 648 (stating that the freedom of expressive association could be overridden by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms" (quoting *Roberts*, 468 U.S. at 623)).

⁶⁶ *See Dale*, 530 U.S. at 648.

⁶⁷ The Scout Oath provides:

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;

the Scout Law requirement that a Scout be "clean."⁶⁸ The trial judge had no difficulty accepting "that from its inception Scouting has excluded from membership and adult leadership any person who openly declares himself a homosexual and that such policy has continued unchanged, to the present."⁶⁹ After providing a brief summary of the Judeo-Christian condemnation of sodomy⁷⁰ that was somewhat reminiscent of the "millennia of moral teaching" summarized in *Bowers v. Hardwick*,⁷¹ the trial judge concluded that "[t]o suggest that the BSA had no policy against active homosexuality is nonsense."⁷² The trial judge's reasoning did not need to rely on the organization's position statements that the New Jersey appellate courts so mistrusted.⁷³ Instead, the judge used common sense and took judicial notice of the history of the regulation of same-sex desire in the United States.⁷⁴

To keep myself physically strong,
mentally awake, and morally straight.

Id. at 649.

⁶⁸ The Scout Law provides:

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent.

Id. at 649.

⁶⁹ *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 285 (N.J. Super. Ct. App. Div. 1998) (quoting trial court decision).

⁷⁰ *Id.*

⁷¹ *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring). The majority in *Hardwick* noted that the proscriptions against sodomy have "ancient roots" and outlined the history of sodomy laws starting with English common law. *Id.* at 192. Chief Justice Burger's concurring opinion elaborated on this history and established a "millennia of moral teaching," starting with Roman law. *Id.* at 196-97. For a critique of the history recited in *Hardwick*, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1086-89 (1988).

⁷² *Dale*, 706 A.2d at 285 (quoting trial court decision).

⁷³ For a discussion of the Boy Scouts' position papers on homosexuality and Scouting, see *infra* notes 80-82 and accompanying text.

⁷⁴ *Dale*, 706 A.2d at 285 (N.J. Super. Ct. App. Div. 1998) (citing trial court decision).

[The Boy Scouts] was an organization which from its inception had a God-acknowledged, moral foundation. It required its members, youth and adult, to take the Scout Oath that they would be "morally straight." It is unthinkable that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the BSA could or would tolerate active homosexuality if discovered in any of its members.⁷⁵

The New Jersey Superior Court and the New Jersey Supreme Court took a drastically different view of the Boy Scouts' expressive message.⁷⁶ They could find no evidence that the Boy Scouts had a tradition of disapproval of homosexuality or homosexual conduct, and the Boy Scouts seemed at a loss to prove something that the trial judge had found quite obvious. The courts considered the claim that homosexuality was incompatible with the requirement that a Scout be "morally straight" and "clean" to be not only dubious, but based on "unfounded stereotypes."⁷⁷ This view was shared by Justice Stevens, who wrote in his dissent, "[i]t is plain as the light of day that neither one of these principles—'morally straight' and 'clean'—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters."⁷⁸ To convince the New Jersey appellate courts and the dissenters in the U.S. Supreme Court, the Boy Scouts would have to point to something more substantial than the generic aspirational goals of "morally straight" and "clean."

In defense of its policy, the Boy Scouts could only produce one position paper regarding the incompatibility of homosexuality with Scouting that was written prior to the revocation of Dale's membership.⁷⁹ The New Jersey Supreme Court relegated discussion of this 1978 position paper to the footnotes because it "was never distributed."⁸⁰ The court

⁷⁵ *Id.* (quoting trial court decision).

⁷⁶ The New Jersey Superior Court definitively stated that "[w]e start with the undisputed fact that the BSA's collective 'expressive purpose' is not to condemn homosexuality." *Id.* at 288.

⁷⁷ *See supra* note 37.

⁷⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 668-69 (2000) (Stevens, J., dissenting).

⁷⁹ There was no mention of homosexuality in the Scout Handbook. *Dale*, 706 A.2d at 289 n.3. The only mention of homosexuality in the Scoutmasters' Handbook referred to homosexual contact between two scouts. *Id.*

⁸⁰ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1205 n.4 (N.J. 1999). The position paper stated that "an individual who openly declares himself to be a homosexual [may not] be a volunteer scout leader [or] . . . a registered unit

considered later 1991 and 1993 position papers on the topic to be self-serving because they were issued after litigation similar to Dale's had begun in California.⁸¹ The Boy Scouts' 1991 position paper stated that "[w]e believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts."⁸²

The Boy Scouts accused the New Jersey appellate courts of "second-guessing . . . [the Boy Scouts'] statement of its own beliefs,"⁸³ and urged the U.S. Supreme Court to revisit the question of the Boy Scouts' views on homosexuality.⁸⁴ The majority acknowledged that the implications of the terms "morally straight" and "clean" might have different meanings for different people, but found that the Boy Scouts believed that those terms were inconsistent with homosexual conduct.⁸⁵ Distancing itself from the substance of the Boy Scouts' views, the majority concluded that "[w]e are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong."⁸⁶ The majority rejected the finding of the New Jersey Supreme Court⁸⁷ that the exclusion of homosexuals was based solely on outdated stereotypes and

member[.]'" *Id.* (alteration in original). The New Jersey Supreme Court opinion refers to the 1978 position paper twice, but both times in footnotes. *Id.* at 1205 n.4, 1224 n.12. The court "decline[d] . . . to view [the 1978 position paper] as representative of the members' shared views" because it was never disseminated. *Id.* at 1224 n.12.

⁸¹ *Id.* at 1205 n.4.

⁸² *Dale*, 530 U.S. at 652.

⁸³ Brief for Petitioners at 28, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

⁸⁴ The majority asserted that it was proper to "independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression." *Dale*, 530 U.S. at 648-49.

⁸⁵ *Id.* at 650.

⁸⁶ *Id.* at 661. The Court continued, "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.*

⁸⁷ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1226 (N.J. 1999) (finding significant "the contradiction between Boy Scouts' current litigation posture on homosexual members and the organization's general philosophy on open membership"). The New Jersey Supreme Court found that "[t]he exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership." *Id.*

was inconsistent with the Boy Scouts' inclusive membership policy,⁸⁸ stating that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."⁸⁹

Notably, the U.S. Supreme Court did not return to the trial judge's initial observation that it was "unthinkable" that the Boy Scouts was organized with an implied tolerance for sodomy and its adherents. Instead, it gave deference to the Boy Scouts' presentation of its own beliefs and concluded that the disapproval of homosexuality was a sincerely held belief.⁹⁰ This hands-off approach allowed the Court to recognize the belief that homosexuality is immoral without voicing its approval or disapproval of that belief and without justifying it by reference to the history of discrimination that the LAD was meant to combat.

2. *The Impact of Dale's Presence*

After the U.S. Supreme Court found that the Boy Scouts sincerely held the view that homosexuality is inconsistent with Scouting, it then addressed whether Dale's reinstatement "would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'"⁹¹ The Court stated three different times, in slightly different ways, that Dale's "presence" would not only impair the expressive rights of the Boy Scouts, but would constitute forced speech.⁹² In its most forceful iteration, the majority stated that "Dale's presence in the Boy Scouts

⁸⁸ *Dale*, 530 U.S. at 651.

⁸⁹ *Id.*

⁹⁰ *Id.* at 651-52.

⁹¹ *Id.* at 653 (quoting Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699)).

⁹² *Id.* at 653-56. The majority wrote that "Dale's presence in the Boy Scout would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as legitimate form of behavior." *Id.* at 653. Later it said in reference to the *marche* in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), that "the presence of Dale as an assistant scoutmaster would just surely interfere with the Boy Scout's [sic] choice not to propound a point of view contrary to its beliefs." *Dale*, 530 U.S. at 654. Shortly after that, the opinion continued, "[t]he presence of an avowed homosexual and gay rights activist in assistant scoutmaster's uniform sends a distinctly different message from presence of a heterosexual assistant scout master who is on record as disagreeing with Boy Scouts policy." *Id.* at 655-56.

would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."⁹³

The Court's basis for this conclusion was Dale's "own admission"⁹⁴ that he was one of several gay Scouts who choose to be "open and honest about their sexual orientation."⁹⁵ The Court further noted that "Dale was the co-president of a gay and lesbian organization at college and remains a gay rights activist."⁹⁶ It was clear that the Court considered Dale's status as an avowed homosexual inherently expressive. This was not the case of an association "asserting that mere acceptance of a member from a particular group would impair its message."⁹⁷ The acceptance of Dale would have sent a message, presumably of toleration or even promotion of homosexuality.

The Boy Scouts had argued that Dale's very "presence as an openly gay Scoutmaster would convey the message that homosexuality is consistent with Scouting ideals and values."⁹⁸ In particular, the Boy Scouts pointed to "Dale's expressions to the media of pride in being gay"⁹⁹ and noted that his public self-identification as gay, once made, "cannot be put back in the bottle."¹⁰⁰ Under this reasoning, Dale's day-to-day existence as an openly gay man was the equivalent of marching in a parade behind a placard declaring gay pride. Referring to the Court's earlier ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,¹⁰¹ the Boy Scouts argued:

Just as including the GLIB group in the St. Patrick's Day parade would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own

⁹³ *Id.* at 653.

⁹⁴ *Id.*

⁹⁵ *Id.* Of course, the requirement that a Scout "be open and honest" in his "relationships with others" comes directly from the definition of "morally straight" as set forth in the Boy Scout Handbook. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1202-03 (N.J. 1999).

⁹⁶ *Dale*, 530 U.S. at 653.

⁹⁷ *Id.*

⁹⁸ Brief for Petitioners at 28-29, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

⁹⁹ *Id.* at 29.

¹⁰⁰ *Id.*

¹⁰¹ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *see supra* note 60.

message,” . . . putting Dale in an adult leader’s uniform would interfere with Boy Scouting’s ability to control the content of *its* message. Indeed, the very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated.¹⁰²

Dale was no ordinary homosexual, the Boy Scouts explained—he was a gay activist who “wish[ed] to use the bully pulpit of the Scoutmaster’s position to communicate ‘how bad and wrong’ Boy Scouting’s policy is.”¹⁰³

Dale disputed that he intended to use Scouting as a “bully pulpit,”¹⁰⁴ but in the end the majority did not base its decision on Dale’s intended future actions or advocacy. It was sufficient that Dale was, and intended to be in the future, “open and honest about . . . [his] sexual orientation.”¹⁰⁵ The majority also was not concerned with discussing a strict chronology of those Boy Scout policies issued before the revocation of Dale’s membership and those issued after the revocation. Nor did it split hairs regarding what Dale had accomplished by way of gay activism before the revocation of his membership versus what he accomplished post-revocation.

Of course, the irony is that Dale was not a national gay rights figure until the litigation. Sure, he served as the co-president of a student group and was quoted in the *Newark Star-Ledger*, but he was not giving interviews to *The New York Times*, or appearing on *The Advocate*’s list of “Our Best and Brightest Activists.”¹⁰⁶ The fact that the Court made no distinction between Dale’s pre- dismissal and post-dismissal activism could represent an insurmountable Catch-22 for future litigants because the finding that Dale’s presence was expressive hinged on the extent of Dale’s gay activism. Given the highly politicized nature of gay rights litigation and the attendant media focus, it is possible that an openly gay, but not particularly politically active, litigant would never be able to avoid the designation of gay activist—to litigate is to agitate.

¹⁰² Brief for Petitioners at 24, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (alteration in original) (citation omitted).

¹⁰³ *Id.* at 22 (citation omitted).

¹⁰⁴ Brief for Respondent at 33, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (stating that “contrary to BSA’s representations, Dale does not wish ‘to use the bully pulpit of the Scoutmaster’s position to communicate’ anything other than Scouting’s own organizational message.”) (quoting Brief for Petitioners at 22, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699)).

¹⁰⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

¹⁰⁶ *Our Best & Brightest Activists*, *ADVOCATE*, Aug. 17, 1999, at 38, available at http://www.advocate.com/html/stories/792/792_dale.asp.

Dale argued strenuously against the Boy Scouts' claim regarding the impact of his mere presence. He rejected that the declaration "I'm gay" is expressive and "communicates more than one's sexual orientation."¹⁰⁷ Instead, Dale took the position that an avowal of homosexuality was simply self-identifying speech—necessary speech to identify an individual as within the reach of the New Jersey public accommodation law.¹⁰⁸ A statement of one's sexual orientation, Dale argued, "does not reveal a belief system, in contrast to revealing one's religion, atheism, political party, or membership in the Ku Klux Klan."¹⁰⁹ Justice Stevens agreed and suggested that if homosexuals, by virtue of their openness, are permitted to be ostracized, then the label itself "is tantamount to a constitutionally prescribed symbol of inferiority."¹¹⁰

Foreshadowing Justice Stevens' refusal to believe that "homosexuals are simply so different,"¹¹¹ Dale took issue with the expressive power the Boy Scouts attributed to openly gay individuals, asserting that "[a] human being . . . is not speech, much less a particular viewpoint."¹¹² Dale's attempts to distinguish an openly gay individual from the band of marchers in *Hurley* was ultimately unsuccessful. The majority applied *Hurley*, as the Boy Scouts had urged, and, in language strikingly similar to that included in the Boy Scouts' brief, concluded:

¹⁰⁷ Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁰⁸ *Id.* (comparing it to statements such as "I am Italian," "I am Latina," or "actually, I guess you can't tell, but my mother is African-American"). For discussions of "self-identifying speech," see Hunter, *supra* note 60; Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993); Brian C. Murchinson, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 Yale L.J. 485, 550 (1998).

¹⁰⁹ Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). This statement was in direct response to the argument in the Boy Scouts' brief that if the organization were required to accept a known member of the Ku Klux Klan as a Scoutmaster, it "would interfere with the organization's message of racial harmony even if he never uttered a word on the subject of race while in Scout leader uniform." Brief for Petitioners at 28, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting).

¹¹¹ *Id.*

¹¹² Brief for Respondent at 39, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's [sic] choice not to propound a point of view contrary to its beliefs.¹¹³

It seems, despite Dale's protestations to the contrary, that at least some human beings are indeed speech. Dale's choice to live as an openly gay man "propound[s] a particular point of view."¹¹⁴

III. THE FORCE OF HETERONORMATIVITY

As explained in Part II, the determination whether a court found for the Boy Scouts or Dale rested on the way in which it answered the questions whether the Boy Scouts' expressive message included the disapproval of homosexuality and, if so, whether Dale's inclusion would impair that message or perhaps even send a different message. This section examines both of these questions against the backdrop of heteronormativity—"the largely unstated assumption that heterosexuality is the essential and elemental ordering . . . [principle] of society."¹¹⁵ When one considers the force of heteronormativity, the Boy Scouts' contentions take on the weight of history and resonate beyond that of simple bias and animus. Dale's contentions, on the other hand, seem either naive or downright disingenuous.

A. The Default Setting is Disapproval, not Tolerance

Dale argued that the immorality of homosexuality was not part of the Boy Scouts' expressive message. The few position papers the Boy Scouts authored on the subject were too little, too late and could not overcome decades of silence on the issue. Unfortunately for Dale, no matter how

¹¹³ *Dale*, 530 U.S. at 654.

¹¹⁴ *Id.* (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 575 (1995)).

¹¹⁵ Knauer, *Heteronormativity*, *supra* note 14, at 133 (defining heteronormativity). For the seminal definition of heteronormativity, see Warner, *supra* note 24, at xxi (defining heteronormativity as the view that heterosexuality is "the elemental form of . . . association, as the very model of intergender relations, as the indivisible basis of . . . community, and as the means of reproduction without which society wouldn't exist").

tempting it may be to fix the default setting at tolerance, even by factoring in the considerable advancements made with respect to eradicating discrimination based on sexual orientation, the absence of an articulated prohibition against homosexuality on the part of an organization such as the Boy Scouts cannot realistically be interpreted as approval or tolerance. To argue otherwise ignores the decades of uniform condemnation of homosexuality that coincided with the formative years of the Boy Scouts and completely overlooks the continued public debate, often most spirited where children are involved, regarding the morality of homosexuality.

1. *Proving a Negative*

Imagine how confused the leadership of the Boy Scouts must have been when two different New Jersey appellate courts rejected the organization's expressive association claim, finding that disapproval of homosexuality was not part of the Boy Scouts' expressive message.¹¹⁶ No matter how convinced the leadership was that the organization considered avowed homosexuality to be fundamentally inconsistent with Scouting values, they were only able to produce a handful of official Boy Scouts documents dealing with homosexuality.¹¹⁷ Dale seized on this lack of proof and claimed that this "unbroken organizational silence on sexual orientation"¹¹⁸ meant that the organization did not hold the view that homosexuality is immoral.¹¹⁹ For Dale, the absence of an express anti-gay policy spelled approval, or at least tolerance.¹²⁰

¹¹⁶ The Boy Scouts explained that the organization "finds itself in the bizarre position of litigating the question whether it actually has the views it says it has." Reply Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹¹⁷ The first document was a 1978 position statement by the Boy Scouts' Executive Committee expressing the Boy Scouts' "official position" concerning "homosexuality and Scouting." *Dale*, 530 U.S. at 651-52. Based on this statement, the Court concluded that "at least as of 1978—the year James Dale entered Scouting—the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders." *Id.* at 652. A second position statement was produced in 1991 after Dale's membership was revoked, but before Dale had filed his complaint against the Boy Scouts. *Id.* That position statement was then "redrafted numerous times," although "its core message remained consistent." *Id.*

¹¹⁸ Brief for Respondent at 4, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹¹⁹ *Id.* at 25-28.

¹²⁰ *Id.* at 30 (stating that "a negative belief concededly left unexpressed in all of the voluminous written materials given to boys and leaders cannot be a critical component of the organization's effort to instill values").

Of course, if one takes into account the very strong prescriptive force of heteronormativity,¹²¹ the inference drawn from silence is just the opposite. Silence regarding homosexuality simply reinforces the totality of heterosexuality. In fact, the Boy Scouts explained the absence of explicitly anti-gay references in any Scouting materials by stating that “the handbooks for boys do not catalog immoral behavior for Boy Scouts”¹²² because “boys learn best by positive example, rather than by ‘thou shalt not.’”¹²³

As discussed above, the U.S. Supreme Court ultimately found that the Boy Scouts did “sincerely” hold the belief that homosexuality was incompatible with Scouting.¹²⁴ The Court’s conclusion was based largely on the deference it afforded the organization’s assertions of its own views.¹²⁵ In contrast, the New Jersey appellate courts refused to believe that the Boy Scouts was homophobic at its core. The New Jersey Supreme Court found that “[t]he exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts’ commitment to a diverse and ‘representative’ membership . . . and contradicts Boy Scouts’ overarching objective to reach ‘all eligible youth.’”¹²⁶ This reasoning skirts the Boy Scouts’ main contention, namely that homosexuals are not “morally straight” and “clean” and, therefore, homosexuals are not “eligible” for membership in the organization.

This disconnect arises because the Boy Scouts was asserting that its generic moral code naturally excluded those who publicly advocated immoral behavior, such as homosexuality. The New Jersey appellate courts incorrectly interpreted this as a belief that homosexuals were necessarily

¹²¹ See Chrys Ingraham, *The Heterosexual Imaginary: Feminist Sociology and Theories of Gender*, in *QUEER THEORY/SOCIOLOGY* 168, 169 (Steven Seidman ed., 1996) (defining heteronormativity as “the view that institutionalized heterosexuality constitutes the standard for legitimate and prescriptive sociosexual arrangements”).

¹²² Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹²³ *Id.* For the Boy Scouts, moral training was prescriptive in nature—not at all inconsistent with the force of heteronormativity.

¹²⁴ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

¹²⁵ *Id.* at 651.

¹²⁶ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1226 (N.J. 1999). Based on this glaring inconsistency, the New Jersey Supreme Court reasoned that the “expulsion of Dale is based on little more than prejudice and not on a unified Boy Scout position.” *Id.* The court seemed extremely reluctant to entertain the possibility that prejudice based on unfounded stereotypes was indeed the unified Boy Scout position. *See id.*

immoral people. Seemingly unfamiliar with the "hate the sin, love the sinner" approach to homosexuality, the courts declared that the assumption that homosexuals were immoral was an unfounded stereotype. Justice Handler stated that "[o]ne particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society."¹²⁷ What the years of social science research had presumably proven, however, was that the fact of one's homosexuality did not mean that one was any more likely than a heterosexual to lie, cheat, steal, or molest children. The courts confused the claim that homosexuality was per se immoral with the notion that homosexuals are bad people. All the social science evidence in the world would not disturb the sincerely held belief that homosexuality, but not necessarily the homosexual, is immoral.

2. "A Page of History"¹²⁸

On the question whether the Boy Scouts as an organization had an inclusive policy regarding homosexuals, it can be said that "a page of history is worth a volume of logic."¹²⁹ From a historical viewpoint, it is incredible to claim that when the Boy Scouts was chartered by Congress in 1915 it had a welcoming and inclusive membership policy regarding all manner of individuals, including homosexuals.¹³⁰ After all, the history of past mistreatment and the existence of continued discrimination on account of sexual orientation provided the very basis of the New Jersey LAD. Ignoring this history only undermines the rationale of anti-discrimination laws and reinforces the notion that homosexuals are not a disadvantaged minority, but instead a powerful political force campaigning for special rights.¹³¹

¹²⁷ *Id.* at 1242 (Handler, J., concurring).

¹²⁸ Before turning to a historical account of a contested law, Justice Holmes observed: "Upon this point a page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

¹²⁹ *Id.*

¹³⁰ *See Dale v. Boy Scouts of Am.*, 706 A.2d 270, 274 (N.J. Super. Ct. App. Div. 1998) (citing the purpose of the Act of Congress which chartered the Boy Scouts).

¹³¹ *See Knauer, Homosexuality as Contagion, supra* note 18, at 489-93 (discussing the pro-family tactic of characterizing anti-discrimination protections on account of sexual orientation as "special rights").

In 1915, when the Boy Scouts received its charter from Congress, the predominant medical-scientific model of same-sex desire was that of sexual inversion, which had originated with the early sexologists in the late nineteenth century.¹³² Sexual inversion or “contrary sexual feeling” was considered degenerate and very likely to have some form of a congenital basis.¹³³ The major contribution of the sexologists was to theorize a homosexual or invert as a distinct type of person for whom sexual-object choice became a defining feature of his character and personality.¹³⁴

Although some of the sexologists advocated the decriminalization of sodomy and expressed skepticism regarding the ability of medical science to exact a “cure,” inverts were clearly marked as “degenerate.”¹³⁵ The larger societal question that was presented was whether these individuals should be under the jurisdiction of medicine or the law. In the United States, the law responded to the burgeoning body of scientific research on inversion and the “degenerate classes” with increased regulation.¹³⁶ To augment sodomy laws already in force,¹³⁷ many jurisdictions enacted broad

¹³² *Id.* at 413-16 (discussing the theories of the early sexologists).

¹³³ *See id.* at 413.

¹³⁴ Michel Foucault remarked on this creation of the homosexual in his influential work, *THE HISTORY OF SEXUALITY*.

This new persecution of the peripheral sexualities entailed an *incorporation of perversions* and a new *specification of individuals*. As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood . . . Nothing that went into his total composition was unaffected by his sexuality. . . . The sodomite had been a temporary aberration; the homosexual was now a species.

1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 42-43 (Robert Hurley trans., Pantheon Books 1978) (1976).

¹³⁵ Knauer, *Homosexuality as Contagion*, *supra* note 18, at 410-18.

¹³⁶ A considerable amount of regulation was provided by private citizen groups such as the Society for the Suppression of Vice, which often worked in conjunction with the authorities. Eskridge credits the sexologists with providing the impetus for this, noting that “[m]edical and press accounts of sexual and gender deviation triggered social responses in cities all over America in the late nineteenth century.” WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 23 (1999).

¹³⁷ Traditional sodomy laws were gender neutral and covered anal sex or “buggery.” In 1885, Parliament passed the Labouchere Amendment outlawing “gross indecency” or oral sex between men. (Same-sex acts between women were not criminalized under British law.) The sodomy laws in the United States were

regulations dealing with public decency and disorderly conduct, some designed specifically to reach inverters who congregated in public places.¹³⁸ Obscenity laws on both the local and federal levels barred depictions of same-sex love, relationships, or desire.¹³⁹ The Immigration Act of 1917¹⁴⁰ added a new basis for the exclusion of immigrants—"constitutional psychopathic inferiority"—that was used to exclude homosexuals on medical grounds.¹⁴¹ In 1919, the U.S. military undertook an investigation regarding homosexual practices at the Newport Naval Training Station.¹⁴² By 1921, both the Army and the Navy had adopted procedures for excluding homosexuals from military service.¹⁴³

Influenced by Freudian theories of sexuality, the next generation of sexologists attributed sexual orientation to arrested emotional development rather than heredity.¹⁴⁴ The so-called "American Freudians" continued to describe the homosexual in terms of degeneracy, but expanded the concept of the homosexual to include a predatory psychopathic personality.¹⁴⁵ As

updated throughout the beginning of the twentieth century to include oral sex either by expanding the existing law or creating a new offense. *Id.* at 24-25. Eskridge reports that once the criminal statutes were expanded to include oral sex, "the number of arrests in . . . urban center[s] shot up." *Id.* at 25.

¹³⁸ *Id.* at 29-30.

¹³⁹ See generally Knauer, *Homosexuality as Contagion*, *supra* note 18. The prevailing obscenity standard, the Hicklin Rule, was particularly well-suited to silence expression of same-sex desire. *Id.* The Hicklin Rule focused on whether the material in question would have a "tendency to deprave." *Id.* Given the contagious nature of homosexuality, any positive expression of same-sex desire would easily exhibit just such a tendency. The standard was applied to the lesbian novel *The Well of Loneliness* in 1929. *People v. Friede*, 133 Misc. 611, 233 N.Y.S. 565 (1929). The initial finding of obscenity was later overturned. See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 438. In addition, the early homophile magazine *One* was found to be obscene under the "tendency to deprave" standard in 1957. *One, Inc. v. Olsen*, 241 F.2d 772, *rev'd per curiam*, 355 U.S. 371 (1958). It was later reversed due to the then-evolving nature of the obscenity laws.

¹⁴⁰ Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (repealed 1952).

¹⁴¹ ESKRIDGE, *supra* note 136, at 35.

¹⁴² GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 145 (1994).

¹⁴³ ESKRIDGE, *supra* note 136, at 37.

¹⁴⁴ See JENNIFER TERRY, *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 37 (1999).

¹⁴⁵ *Id.* at 272-73 (describing "the historical emergence of the sexual psychopath"); see also WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 144-45 (1997) (describing American Freudians).

described, this sexual psychopath was unable to control his sexual impulses, lived a deprived lifestyle, and preyed on children.¹⁴⁶ In response, many jurisdictions enacted new sexual psychopath laws which permitted homosexuals to be committed to mental institutions for indeterminate periods to undergo treatment for homosexuality, including pre-frontal lobotomies, castration, electroshock therapy, and aversion therapy.¹⁴⁷

The inherently dangerous nature of these sex perverts justified police surveillance of known homosexuals and homophile organizations.¹⁴⁸ The federal government began investigating and discharging suspected homosexuals from government employment in 1947 under a loyalty security program.¹⁴⁹ The investigations quickly escalated into full scale witch hunts, which continued throughout the 1950s and were replicated on the state and local levels.¹⁵⁰ A 1950 Senate report¹⁵¹ warned against the dangers of the "employment of homosexuals and other sex perverts in government," noting that "[o]ne homosexual can pollute an entire office."¹⁵² In 1953, President Eisenhower issued Executive Order 10,450,¹⁵³ expressly stating that "sexual perversion" was grounds for expulsion from government service.¹⁵⁴ The first *Diagnostic and Statistical Manual of Mental Disorders (DSM-I)* included homosexuality as among the most severe sociopathic personality disturbances, and it remained on the list until downgraded in 1968.¹⁵⁵

The American Psychiatric Association ("APA") did not vote to declassify homosexuality as a mental illness until 1973.¹⁵⁶ By that point, a number of states had decriminalized sodomy following the recommenda-

¹⁴⁶ See TERRY, *supra* note 144, at 271-75 (describing "public panic and the war on the sex offender").

¹⁴⁷ ESKRIDGE, *supra* note 136, at 42 (reporting 2000 pre-frontal lobotomies performed on sex offenders between 1938 and 1946).

¹⁴⁸ For a discussion of the FBI surveillance of individuals and organizations throughout the 1950s, see *id.* at 74-76. Eskridge reports that "[s]tarting no later than 1937, FBI Director J. Edgar Hoover maintained private files containing reports about the homosexuality of prominent people." *Id.* at 74. In addition, police practiced surveillance "[i]n cities as disparate as Memphis, Philadelphia, Atlanta, Buffalo, Tampa, Miami, and San Fransisco." *Id.* at 76.

¹⁴⁹ *Id.* at 86.

¹⁵⁰ *Id.* at 70.

¹⁵¹ S. REP. NO. 81-241 (1950).

¹⁵² ESKRIDGE & HUNTER, *supra* note 145, at 174.

¹⁵³ Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953).

¹⁵⁴ ESKRIDGE & HUNTER, *supra* note 145, at 174 n.o.

¹⁵⁵ *Id.* at 145.

¹⁵⁶ *Id.* at 186.

tions of the *Model Penal Code*.¹⁵⁷ A growing gay rights movement was focused on the passage of laws banning discrimination on the basis of sexual orientation.¹⁵⁸ Anita Bryant's 1977 "Save Our Children" campaign, however, represented the first of many organized responses to the gains achieved by gay rights activists.¹⁵⁹ In the face of this and other similar campaigns, many of the early anti-discrimination laws were repealed by referenda.¹⁶⁰

It was around this time in 1978, during one of the initial skirmishes in the Culture War, that the Boy Scouts' leadership authored its first position paper on the suitability of homosexuals to serve as Scoutmasters.¹⁶¹ In 1981, when an openly gay man attempted to volunteer as an adult member, the Boy Scouts denied his membership and embarked on a dispute that was not ultimately resolved until the California Supreme Court ruled in favor of the Boy Scouts seventeen years later.¹⁶² During this time, the U.S. Supreme Court affirmed the right of the state to criminalize consensual, noncommercial homosexual sodomy in 1986.¹⁶³ Restrictions on immigra-

¹⁵⁷ By 1973, nine states had repealed their sodomy laws: Illinois, Connecticut, Colorado, Oregon, Delaware, Hawaii, Ohio, North Dakota, and New Hampshire. ESKRIDGE, *supra* note 136, at 106 n.a. Idaho repealed its sodomy law mistakenly in 1971 when it adopted the Model Penal Code. *Id.* It reinstated the law the next year. *Id.*

¹⁵⁸ *Id.* at 130-32.

¹⁵⁹ Anita Bryant, former Miss America and orange juice spokesperson, led a successful campaign to overturn the Dade County, Florida ordinance which included sexual orientation as a protected category. See JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S* 16-17 (1996).

¹⁶⁰ Eskridge reports that immediately after the successful Dade County referendum, similar referenda succeeded in repealing anti-discrimination protections based on sexual orientation in Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon. ESKRIDGE, *supra* note 136, at 131.

¹⁶¹ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651-52 (2000). In California in 1978, John Briggs, a candidate for governor, attempted to replicate Anita Bryant's success by championing a voter initiative to ban homosexuals from teaching in the public schools. GALLAGHER & BULL, *supra* note 159, at 18 (referring to the statewide initiative as a "bitter showdown"). The initiative failed to pass, and "helped propel . . . the first stirrings of urban gay political power." *Id.*

¹⁶² *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998); see also Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁶³ *Bowers v. Hardwick*, 478 U.S. 186 (1986). When *Hardwick* was decided, twenty-four states and the District of Columbia criminalized sodomy. *Id.* at 193-94.

tion based on sexual orientation were finally removed in 1990.¹⁶⁴ Today many states retain their sodomy statutes¹⁶⁵ and the U.S. military still discharges homosexuals.¹⁶⁶ Although no state recognizes same-sex marriage, the laws of thirty-four states expressly forbid it, and a growing number of states expressly prohibit same-sex couples from adopting children.¹⁶⁷

¹⁶⁴ See Pub. L. No. 101-649, 104 Stat. 4978 (1990) (repealing 8 U.S.C. § 1182(a)(4)). Even the Boy Scouts found the relatively late date of 1990 to be significant. Brief for Petitioners at 5, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Interestingly, the Boy Scouts did not chart the history of the treatment of homosexual conduct, but instead started its time line with the repeal of the New Jersey sodomy statute in 1979. *Id.* The Boy Scouts' view of history is considerably more succinct:

For most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality. . . . Indeed, homosexual sodomy was a criminal offense in New Jersey until 1979 . . . and homosexuals were barred from immigration until 1990 After 1981, when an openly gay man sought to become a leader in a California Boy Scout Troop, . . . Boy Scouts of America promulgated a series of position statements for Scout officials who might be asked to articulate Boy Scouting's position.

Id.

¹⁶⁵ The number of states with enforceable criminal sodomy laws is currently down to fourteen. Lambda Legal Defense and Education Fund, *State-by-State Sodomy Law Update*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=275> (last modified May 11, 2001). In four of these states, Arkansas, Kansas, Oklahoma, and Texas, the sodomy laws only apply to same-sex contact. See ARK. CODE ANN. § 5-4-122 (Michie 1997) (criminalizing act with "a person of the same sex or an animal"); KAN. STAT. ANN. § 21-3505 (1995) (criminalizing acts between "members of the same sex or between a person and an animal"); OKLA. STAT. ANN. tit. 21, § 886 (West 1983) (noting that per judicial interpretation "crimes against nature" only apply to same-sex conduct); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994) (criminalizing acts "with another individual of the same sex").

¹⁶⁶ For a critique of the existing U.S. policy and its evolution, see JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999). For recent statistics on the number of homosexuals discharged by the U.S. Military, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 111 (Supp. 2000).

¹⁶⁷ Lambda Legal Defense and Education Fund closely monitors the anti-marriage bills that have been adopted or are currently pending and displays the information on an "anti-marriage map" of the United States maintained on its website. Lambda Legal Defense and Education Fund, *State-by-State Anti-Marriage Update*, at <http://www.lambdalegal.org/cgi-bin/pages/states/antimarrriage-map> (last visited Feb. 22, 2001). Currently, three states expressly ban same-sex couples from

When viewed against this historical backdrop, it is highly unlikely that, at least until the end of 1973 (when the APA voted to remove homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders*), the Boy Scouts would have been indifferent to the presence of psychopathic sexual predators in an organization committed to instilling moral values in young boys through role modeling and overnight campouts. Moreover, even though the APA vote had in effect "cured" homosexuals,¹⁶⁸ it did not eliminate the moral condemnation of homosexuality and homosexual behavior. Although homosexuals were no longer mentally ill, they remained immoral in the minds of many. To some extent, homosexual stereotypes retain many of the characteristics of the scientifically defunct sexual psychopath (i.e., homosexuals are promiscuous and depraved souls who prey on children).¹⁶⁹

The shift in public opinion regarding homosexuality from that of universal condemnation to that of growing tolerance has occurred gradually and is by no means complete.¹⁷⁰ Although individuals who are in same-sex relationships or who identify as lesbian or gay enjoy greater protections than ever before, they are also the subject of more specifically anti-gay laws than ever before.¹⁷¹ The reasons for the proliferation of expressly anti-

adopting: Florida, Mississippi, and Utah. See Greg Burton, *Couples to Challenge Utah Adoption Ban*, THE SALT LAKE TRIBUNE, Dec. 31, 2000.

Although no state recognizes same-sex marriage, Vermont does recognize "civil unions" between same-sex couples. 15 V.S.A. § 1202 *et seq.* (2000). The Human Rights Campaign reports that fifty-five states and municipalities have domestic partnership registries and 101 state and local governments offer domestic partnership benefits. See HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org> (last visited June 5, 2001); see also Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998) (explaining that the benefits available under municipal ordinances largely inure to the benefit of municipal employees).

¹⁶⁸ See *supra* note 156 and accompanying text.

¹⁶⁹ See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 462, 468 (discussing these stereotypes).

¹⁷⁰ A *Newsweek* poll conducted in 2000 reports that only forty-six percent of those surveyed considered homosexuality a sin. John Leland, *Shades of Gay*, NEWSWEEK, Mar. 20, 2000, at 46. This number is down from fifty-four percent who considered it a sin in 1998. *Id.* An overwhelming eighty-three percent, however, believe that gays and lesbians should have equal rights in employment. *Id.* Fifty-seven percent are opposed to gay marriage while fifty percent are against adoption by gay men and lesbians. *Id.* Thirty-six percent believe that homosexuals should not be permitted to teach elementary school. *Id.*

¹⁷¹ ESKRIDGE, *supra* note 136, at 205.

gay laws is obvious. Before sexual orientation was asserted as an identity category worthy of protection, there was no need to enact disabling legislation or regulations that specifically targeted sexual orientation. The force of heteronormativity was sufficient to keep homosexuals excluded and otherwise outside the protection of the law.

Against this brief page of history it is “unthinkable,” in the words of the New Jersey trial judge, “that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the . . . [Boy Scouts] could or would tolerate active homosexuality if discovered in any of its members.”¹⁷² It is only in response to claims for inclusion based on sexual orientation that society has been forced to respond with expressly anti-gay laws and regulations. The Boy Scouts’ policies regarding sexual orientation follow this pattern. The New Jersey courts and Justice Stevens’ dissent placed some significance on the fact that many of the organizations that sponsored Boy Scouts activities did not discriminate against homosexuality.¹⁷³ For each of the organizations listed, however, the acceptance of homosexuality represented a change in its policies and, in many instances, did not necessarily amount to approval.¹⁷⁴ No such change was evident on

¹⁷² Dale v. Boy Scouts of Am., 706 A.2d 270, 285 (N.J. Super. Ct. App. Div. 1998) (quoting trial judge).

¹⁷³ Dale v. Boy Scouts of Am., 734 A.2d 1196, 1224 (N.J. 1999) (noting that the “Boy Scouts’ religious sponsors differ in their views about homosexuality”). This was considered important because the *Boy Scout Handbook* provides that a Scout’s concept of morality is directly related to his “religious beliefs.” *Id.* (quoting the *Boy Scout Handbook*). The argument was that Scout values necessarily incorporated the views of the various sponsoring organizations, some of which did not condemn homosexuality. *See id.* at 1224-25. The New Jersey Supreme Court concluded that based on this diversity of views among sponsors, “no single view on this subject functions as a unifying associational goal of the organization.” *Id.* at 1225. Dale argued that “[t]he [p]luralism and [d]iversity of [v]iews that [c]haracterize [s]couting [r]efute BSA’s claim that [c]ondemnation of [h]omosexuality [c]onstitutes an [e]xpressive [g]oal.” Brief for Respondent at 28, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

Justice Stevens’ dissent concluded that “[b]ecause a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals, it is exceedingly difficult to believe that BSA nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 670-71 (2000) (Stevens, J., dissenting).

¹⁷⁴ For example, Justice Stevens’ dissent refers to the views of the United Methodist Church, the Episcopal Church, the Religion Action Center of Reform Judaism, the United Church Board of Homeland Ministries, and the Unitarian Universalist Association. *Dale*, 530 U.S. at 671 n.3 (Stevens, J., dissenting). At

the part of the leadership of the Boy Scouts.¹⁷⁵ To the contrary, the Boy Scouts' unyielding litigation strategy seems to indicate only a stiffening of resolve against any toleration of open homosexuality within its ranks.¹⁷⁶

*B. The Impact of an "Honest and Open" Avowal of Homosexuality*¹⁷⁷

In a society where the elemental ordering force is heterosexuality, the public avowal of a same-sex libidinal object choice carries significant disruptive force.¹⁷⁸ The argument that Dale's statement that he is gay is the equivalent of a bare statement of one's race, ethnicity, or religion greatly underestimates the complexity of the construction of sexual orientation in contemporary society.¹⁷⁹ Unlike other minority or identity models, sexual

least for the United Methodist Church and the Episcopal Church, the standing of homosexuals is far from settled. In 2000, the Bishops of the Episcopal Church rejected a proposal that would have led to the development of rites to bless the unions of unmarried couples. Gustav Niebuhr, *Episcopal Bishops Bar Rites Outside Marriage*, N.Y. TIMES, July 13, 2000, at A26 (noting that the "question of how far a church should go in recognizing gay relationships is highly controversial among Episcopalians and many other Protestant denominations"). Earlier that year, the United Methodist Church voted to continue to endorse an existing church doctrine that "the practice of homosexuality is incompatible with Christian teaching" and reaffirmed its ban on the ordination of gay or lesbian clergy. *Methodist Leaders Affirm Ban on Gay Clergy*, N.Y. TIMES, May 22, 2000, at A22.

¹⁷⁵ The organization Scouting for All has created a national network of former Scouts and Scout parents whose "mission is to get the Boy Scouts of America to rescind its policy of discrimination against gay youth and adults." SCOUTING FOR ALL, MISSION STATEMENT, <http://www.scoutingforall.org/news/newsviews> (last visited Feb. 24, 2001). They urge former Eagle Scouts to "send your eagle badge to us!" *Id.*

¹⁷⁶ The Court specifically found that the Boy Scouts had "publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation." *Dale*, 530 U.S. at 652. The expressive power of litigation presents a potential Catch-22 for gay litigants. *See supra* note 106 and accompanying text.

¹⁷⁷ Dale continually stated that he only wished to be honest and open about his sexual orientation. *See, e.g., Dale*, 530 U.S. at 653. The phrase "honest and open" is from the definition of "morally straight" in the Scout Handbook. Brief for Respondent at 26, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). The definition instructs Scouts that their "relationships with others should be honest and open." *Id.*

¹⁷⁸ Indeed, current U.S. military policy classifies the statement "I am gay" as homosexual conduct. *See infra* notes 224-28 and accompanying text.

¹⁷⁹ Dale specifically argued that "[t]he statement "I am gay"—like the statements, "I am Italian," "I am Latina," or "actually, I guess you can't tell, but my mother is African-American"—identifies a human being as a member of a group

orientation is framed by a morality discourse.¹⁸⁰ Implicit in Dale's "honest and open" remarks is his belief that homosexuality is not immoral—a belief that the Boy Scouts contended directly contradicted its expressive message.¹⁸¹

Beyond the implicit moral message of Dale's statement, public statements of homosexuality continue to carry predatory connotations that date back to the days of the sexual psychopath.¹⁸² Within the Boy Scouts, an avowed homosexual threatens the stability of a site that is both heterosexual and predominantly homosocial.¹⁸³ The statement that "I am gay" can be read as a solicitation, a threat, or a contagious call to arms. The fact that the statement is uttered near children is, based on the views of several amici briefs filed in *Dale*, sufficient to conflate the homosexual with the pedophile.¹⁸⁴

1. *Something More than Mere Status?*

The Boy Scouts asserted that the state-mandated inclusion of Dale would not only infringe on its expressive freedoms, but would force the Boy Scouts to send a message directly contrary to its own, namely that

protected by the LAD." Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁸⁰ See Warner, *supra* note 24, at xviii (stating that "[u]nlike other identity movements, for example, queerness has always been defined centrally by discourses of morality"). For an example of the extent to which questions of morality set any debate concerning sexual orientation apart from others regarding minority rights, see Knauer, *Heteronormativity*, *supra* note 14, at 185-97 (discussing the 1996 congressional debate on the Defense of Marriage Act).

¹⁸¹ A strong tradition within society and the law seeks to silence expressions of same-sex desire that are not accompanied by shame. See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 495-98.

¹⁸² For a discussion of the psychopathic personality, see *supra* notes 145-47 and accompanying text.

¹⁸³ For a discussion of the similarities between the Boy Scouts and the U.S. military, see *infra* notes 224-42 and accompanying text.

¹⁸⁴ Two amici briefs filed in support of the Boy Scouts conflate (male) homosexuality with pedophilia. See Brief of Amicus Curiae Family Research Council, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699); Brief of Amici Curiae, Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

homosexuality is a desirable and moral lifestyle.¹⁸⁵ Dale contended that his inclusion would not interfere with the Boy Scouts' expressive message because he only wanted to carry out the organization's message.¹⁸⁶ He had no intention of using his position as a Scoutmaster as a "bully pulpit."¹⁸⁷ If Dale were silent on the issue of the morality of homosexuality, then surely his "mere presence" could not rise to the level of speech.¹⁸⁸

Throughout this argument, Dale primarily compared himself to two different categories of Scoutmasters—the garden variety (i.e., white) heterosexual Scoutmaster and the (presumably heterosexual) Scoutmaster who was also the member of a minority group.¹⁸⁹ In each case,

¹⁸⁵ The Boy Scouts argued that Dale's "very presence as an openly gay uniformed Boy Scout leader would inevitably make . . . a point" about the morality of homosexual conduct. Brief for Petitioners at 28, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁸⁶ Dale claimed that he did "not seek to express any views within Scouting other than the Scouts' own message." Brief for Respondent at 40, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁸⁷ *Id.* at 41. In attempting to distinguish *Hurley*, Dale argued that:

[U]nlike [the gay marchers], Dale has no desire to include a new message in Scouting's teachings, carry his own expressive sign or banner along with him as he performs his Scouting duties, or use Scouting as a "bully pulpit" for some other cause than the Scouting activities in which he excelled all along.

Id.

¹⁸⁸ Justice Stevens used the terms "mere inclusion," "mere presence," and "presence alone" to convey this point. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (Stevens, J., dissenting). Dale argued directly that "[a] human being . . . is not speech." Brief for Respondent at 39, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁸⁹ In addition, Dale compared himself to the heterosexual Scoutmaster who disagreed with Scouting's ban on homosexuals, arguing that if the Boy Scouts permitted dissension within its ranks, it was unfair to single out Dale for expulsion. Brief for Respondent at 34, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). The Boy Scouts disputed the claim that heterosexual Scoutmasters who taught that homosexuality was "morally straight" would be permitted to stay in the organization. Reply Brief for Petitioner at 8, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (99-699). Even if dissenting heterosexual members were permitted to serve, the Boy Scouts claimed the right to determine "that a person who avowedly acts contrary to the Scout Oath and Law is a more objectionable role model than a person who disagrees with it in the abstract." *Id.* at 9. The Court held that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts

Dale argued that he was no different from or the same as the other Scoutmaster. Ultimately, all attempts at comparisons failed because, in the end, gay people do seem to be “simply so different from the rest of society.”¹⁹⁰

a. Dale v. the Heterosexual Scoutmaster

Dale asserted that Scoutmasters were not charged with providing any instruction or guidance regarding sexuality.¹⁹¹ To the contrary, they were directed to refer Scouts to others when questions concerning sexuality arose.¹⁹² Given this hands-off approach to sexuality, Dale reasoned that he was no different than the heterosexual Scoutmaster.¹⁹³ They were both to steer away from issues of sexuality, and they both had a sexual orientation.¹⁹⁴ Dale remained competent to “lead by example . . . during troop meetings, camping trips, community service projects, and discussions with Scouts.”¹⁹⁵

The argument that a silent, but “out,” Scoutmaster is no different than a heterosexual Scoutmaster who might refer to his wife and children misapprehends the disruptive force of a statement of homosexuality. It is, unlike an avowal of opposite-sex libidinal object choice, immediately

policy.” *Dale*, 530 U.S. at 655-56.

¹⁹⁰ *Dale*, 530 U.S. at 696 (Stevens, J., dissenting).

¹⁹¹ Brief for Respondent at 31, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (arguing that “no Scouting context calls upon . . . [Scoutmasters] to ‘role model’ sexuality, marriage, or intimate adult relationships”).

¹⁹² The Boy Scout Handbook tells Scouts that “[y]our parents or guardian or a sex education teacher should give you the facts about sex that you must know.” *Dale*, 530 U.S. at 669 (Stevens, J., dissenting) (quoting the *Boy Scout Handbook*). Scoutmasters are directed to “refer boys with sexual problems to persons better qualified than . . . [they are] to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there.” *Id.* (quoting the *Scoutmaster Handbook*).

¹⁹³ Specifically, Dale argued that “openly gay youth and adults . . . can effectively do everything that BSA expects of its members.” Brief for Respondent at 31, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

¹⁹⁴ The Scoutmaster Handbook provides: “[Scoutmasters] . . . do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting’s proper area, and that [Scoutmasters] . . . are probably not well qualified to do this.” *Dale*, 530 U.S. at 669 (Stevens, J., dissenting) (quoting the *Scoutmaster Handbook*).

¹⁹⁵ Brief for Respondent at 31, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

marked and remarkable. It breaks the "representational compact" that all relationships, thoughts, and desires are heterosexual.¹⁹⁶

If one ignores the force of heteronormativity, it is easy to assert that a statement of homosexuality is no different than a statement of heterosexuality. Indeed, they both convey information about one's sexual orientation. However, it is typically not necessary to declare one's heterosexuality because it is assumed. Comments regarding one's opposite-sex partner or opposite-sex desire, such as "my wife is picking me up after the meeting" or "my girlfriend and I are going out tonight," only serve to ratify and supplement the unspoken assumption of heterosexuality.

From the standpoint of the individual homosexual, coming out is a necessary prerequisite to claiming identity as a homosexual citizen.¹⁹⁷ Without the affirmative avowal or other display of homosexuality, the blanket assumption of heterosexuality remains in place. This is because homosexuality—the propensity for same-sex desire—is not always evident. Homosexuals can remain invisible, or at least ambiguous, thanks to the mechanism of the closet. Despite the fact that the closet may provide only a false sense of security, for many the closet remains, if not the defining feature of their lives, at least a very familiar aspect. As Sedgwick explains:

Even at an individual level, there are remarkably few of even the most openly gay people who are not deliberately in the closet with someone personally or economically or institutionally important to them. Furthermore, the deadly elasticity of heterosexist presumption means that . . . people find new walls springing up around them even as they drowse: every encounter with a new classful of students, to say nothing of a new boss, social worker, loan officer, landlord, [or] doctor, erects new closets whose fraught and characteristic laws of optics and physics exact from at least gay people new surveys, new calculations, new draughts and requisitions of secrecy or disclosure.¹⁹⁸

¹⁹⁶ See SEDGWICK, *supra* note 26, at 56-57.

¹⁹⁷ For example, Eskridge describes the importance of coming out speech in terms of "the flourishing of individuals, their nomic communities, and the polity itself." ESKRIDGE, *supra* note 136, at 307. He writes:

Self-identification as gay is also important for the formation of a *nomos*, consisting of a discernibly gay history, institutions, and mores, and is essential to political power. . . . Coming out of the closet as a gay person is an act of self-identification that is also an explicitly political act.

Id. at 306.

¹⁹⁸ SEDGWICK, *supra* note 26, at 67-68.

Both closeted and uncloseted homosexuals face a problem of information management—keeping track of who knows what. This is complicated by the fact that the closet door is not always opaque, and it is certainly not airtight. At times, events can conspire to “out” even the most secretive homosexual and for others, common knowledge of homosexuality can coexist with a stubborn closet.

The closet thrives because silent homosexuals do not disrupt the essential ordering of heteronormativity. The hidden and presumably shame-filled homosexual is the necessary other that shapes heterosexuality—the category of “[h]eterosexuality does not exist (and indeed would be meaningless) without its evil twin of homosexuality.”¹⁹⁹ It is a public claim of entitlement, such as Dale’s demand for access to a heterosexual institution, that threatens to destabilize the boundary between the natural and the unnatural—between heterosexuality and homosexuality.²⁰⁰ The Boy Scouts’ policy regarding homosexuality acknowledged this specific danger and only addressed known or open homosexuals.²⁰¹ It was the public

¹⁹⁹ Knauer, *Heteronormativity*, *supra* note 14, at 141. Diana Fuss used Jacques Derrida’s concept of the supplementarity to illustrate the importance of the hetero-homo binary and the resulting relationship of dependence. Diana Fuss, *Inside/Out*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 1, 1 (Diana Fuss ed., 1991) (equating the “philosophical opposition between ‘heterosexual’ and ‘homosexual’ with ‘other conventional binaries’”).

²⁰⁰ Fuss explains:

The language and law that regulates the establishment of heterosexuality as both an identity and an institution, both a practice and a system, is the language and law of defense and protection: heterosexuality secures its self-identity and shores up its ontological boundaries by protecting itself from what it sees as the continual predatory encroachments of its contaminated other, homosexuality.

Fuss, *supra* note 199, at 2.

²⁰¹ The following exchange at oral argument between the Court and the Boy Scouts’ counsel is instructive:

Question: [I]f homosexual conduct violates the Scout code, being straight and so forth, why is it relevant whether the man is open or not?

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

Question: But assume the Scouts find out about a person but he hasn’t—he just unwittingly let them find out, not intending to.

Mr. Davidson: If it becomes known to the Scouts, the person would not be an appropriate role model and presumably would not be permitted to continue.

Question: So the policy is not limited to open gays. It’s limited to all

knowledge, and not the private fact of homosexuality, that the organization wished to exclude.

Clearly, knowledge of homosexuality is very powerful.²⁰² Public knowledge of homosexuality is not only disruptive, but also quite resilient. Once it gets out, there is no possibility of containing it because, as the Boy Scouts argued, it "cannot be put back in the bottle."²⁰³ A single disclosure continues to speak long beyond the initial breach. It is reconstituted every time it is relayed and retold. The initial disclosure to a co-worker migrates to another co-worker and then to his acquaintances who are strangers to the original speaker. These strangers are interested, of course, because homosexuality remains remarkable.

For the silent and closeted homosexual, the consequences of coming out are irreversible. Once his name appears in the paper, or he tells a co-worker, or he fails to deny a rumor of homosexuality, he has "put a banner around his neck."²⁰⁴ The only way to erase the damage is to denounce the morality of homosexuality and refrain from engaging in homosexual acts.²⁰⁵

people—

Mr. Davidson: It's known or avowed. In practice, it has been avowed, and rather publicly avowed.

Transcript of Oral Arguments, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 U.S. Trans. LEXIS 44, at *18.

²⁰² As an example of the power regularly ascribed to this knowledge, it is worth mentioning the familiar refrain: "Whatever you do, just don't tell your father/mother. It will *kill* him/her." Sedgwick notes "[w]hen gay people in a homophobic society come out, . . . especially to parents or spouses, it is with the consciousness of a potential for serious injury that is likely to go in both directions." SEDGWICK, *supra* note 26, at 80.

²⁰³ Brief for Petitioner at 29, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

²⁰⁴ Transcript of Oral Arguments, *Dale*, (No. 99-699), 2000 U.S. Trans. LEXIS 44, at *23 (statement of George A. Davidson, counsel for the Boy Scouts).

²⁰⁵ Counsel for the Boy Scouts offered this conclusion at oral argument. *Id.* at *6-7 (statement of George A. Davidson, counsel for the Boy Scouts) (stating that an individual could serve as a Scoutmaster "if . . . [he] said . . . [homosexuality] was morally wrong, and that . . . [he] didn't engage in . . . [homosexual conduct] but did have homosexual inclinations"). As a newly minted "ex-gay," the former avowed homosexual can then talk about homosexuality (and its immorality) to his heart's content. It is not the discussion of homosexuality, per se, that is objectionable. It is the assertion that homosexuality is moral. For the last ten years, the Boy Scouts leadership has been talking about homosexuality nonstop.

This moral denunciation is similar to the opportunity service members have to disprove their sexual orientation. A service member who engages in homosexual

In fact, the Boy Scouts' counsel acknowledged at oral argument that Dale could serve as an assistant Scoutmaster provided he said that homosexuality was "morally wrong" and refrained from homosexual conduct.²⁰⁶ This type of disclosure is permitted and even encouraged because, although it does not erase the knowledge of homosexuality, it couples the expression of homosexuality with shame. Like the silent homosexual, this shameful disclosure reinforces the hetero-homo binary and helps to reinscribe heteronormativity. As explained more fully in Part IV below, it is the expression of homosexuality unaccompanied by shame that sends an implicit message of pride or approval that must be silenced or discredited.²⁰⁷

b. Dale v. the (Presumably Heterosexual) Minority Scoutmaster

Saying "I am gay," Dale claimed, is nothing more than status identification.²⁰⁸ Therefore, he was no different than any other Scoutmaster who happened to be a member of any other protected category. The comparison of gay people to members of other minority groups is a defining feature of the identity-based politics (and litigation) of the contemporary gay rights movement which is "committed to establishing gay identity as a legitimate minority group, whose official recognition would secure citizenship rights for lesbian and gay subjects."²⁰⁹ Much of the litigation in this area has had as its express goal the recognition of homosexuals as a suspect class warranting the highest level of constitutional protection.²¹⁰

Queer theory has launched a sustained and ongoing critique of this "ethnic" or identity model of gay politics.²¹¹ In addition to bolstering the

physical contact may be permitted to stay in the service if, inter alia, the contact is a "departure from the member's usual and customary behavior" and "the member does not have a propensity or intent to engage in homosexual acts." Dep't of Def. Directive Number 1332.14.E3.A1.1.8.1.2.1.1.; 1332.14.E3.A1.1.8.1.2.1.5. (1993).

²⁰⁶ See *supra* note 205.

²⁰⁷ See *infra* Part IV.B.2 (describing the counter-narrative of ex-gays).

²⁰⁸ Brief for Respondent at 31, *Dale*, (No. 99-699).

²⁰⁹ JAGOSE, *supra* note 16, at 61.

²¹⁰ *Watkins v. United States Army* is the only federal circuit decision holding that sexual orientation is a suspect category. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc). Following a rehearing en banc, the Ninth Circuit decided the case without reaching the constitutional questions raised in the earlier *Watkins* case and withdrew the earlier *Watkins* opinion. *Watkins*, 875 F.3d at 704-11.

²¹¹ JAGOSE, *supra* note 16, at 61 (referring to identity politics as an "ethnic model").

hetero-homo binary through the creation of stable gay subjects, the identity model of gay rights risks creating a separate, distinct, and yet equal identity category which glosses over the inherently multivalent and multileveled nature of identity as well as oppression.²¹² Under this identity approach, a gay Scoutmaster (who is assumed to be white) is the same as an African-American Scoutmaster (who is assumed to be heterosexual).²¹³ Not only does this approach miss the inherent complexity of identity, but it assumes a congruence of oppression between and among groups. Accordingly, the legacy of hundreds of years of racial slavery becomes the same as anti-gay oppression.

This lack of nuance thus risks not only overstating the reality of gay oppression, but also understating its singularity. Any discussion of sexual orientation as a basis for civil rights protection is inextricably bound with issues of morality. This morality discourse puts into question not simply whether the group should have certain protections, but whether the group should exist in the first place. The emergence of the ex-gay movement and renewed psychiatric claims that homosexuals can be cured have placed the very legitimacy of that identity at issue.²¹⁴ As Michael Warner explains, this sets sexual orientation apart from all other minority classifications because "[t]here have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not about whether to be one."²¹⁵

Existing minority models based on contemporary understandings of gender and race are not sufficient to address this. Claims based on formal equality do not engage the morality discourse swirling around homosexuality which remains the prime justification for anti-gay discrimination. New Jersey, along with eleven other states, the District of Columbia, and numerous municipalities, has made the determination that sexual orientation is a category deserving of anti-discrimination protection.²¹⁶ As

²¹² For a discussion of the "multivalent" nature of identity, see Knauer, *Heteronormativity*, *supra* note 14, at 230-32.

²¹³ When gender, race, and sexual orientation are left unmarked, the default setting is male, white, and heterosexual. For a discussion of the omission of race within gay and lesbian scholarship, see Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

²¹⁴ See *infra* Part IV.

²¹⁵ Warner, *supra* note 24, at xviii.

²¹⁶ Currently, twelve states and many municipalities extend protection from various forms of discrimination (employment, housing, public accommodation) on the basis of sexual orientation. Human Rights Campaign, *States Prohibiting Anti-Gay Discrimination in the Workplace*, at <http://www.hrc.org/worknet/index.asp>

explained in Part IV below, such treatment stands in the middle of a very hotly contested political debate where Congress continues to deliberate on the morality of the homosexual lifestyle, states pass anti-gay laws, and individuals in positions of power and respect, such as Senate minority leader Trent Lott, describe homosexuality as a “sin” and compare it to alcoholism.²¹⁷

The contested nature of homosexuality raises the question of where (or perhaps whether) to draw the line between a deeply debated question of morality and the unfounded stereotypes that so disturbed the New Jersey appellate courts. After finding that the Boy Scouts’ generic moral code said nothing about homosexuality, the New Jersey courts found that Dale’s exclusion was based on the very unfounded stereotypes that the LAD was designed to counter.²¹⁸ As explained above, this reasoning mistook the claim that Dale advocated an immoral lifestyle with the assumption that Dale is a bad person. Although pro-family organizations eagerly try to authenticate the enduring homosexual stereotypes with ongoing independent research,²¹⁹ the potential of Dale to molest children was not a part of the Boy Scouts’ argument.²²⁰ The Boy Scouts believed that it was sufficient to show that Dale advocated homosexuality and that the organization considered homosexuality to be inconsistent with its moral code. Thus, the right to expressive association that is designed to foster and safeguard pluralism can, in practice, protect large pockets of anti-gay animus and silence claims of equality as organizations cleave to the group animus that prompted the anti-discrimination laws in the first place.

Perhaps then, the Boy Scouts’ very belief, its very moral code, is premised on unfounded stereotypes. There are many examples of instances in our nation’s history when moral arguments were used to justify disparate

(last modified Apr. 13, 2001). The Human Rights Campaign monitors these laws and maintains a state-by-state analysis of them on its website. See Human Rights Campaign, at <http://www.hrc.org> (last visited Apr. 15, 2001).

²¹⁷ Senator Lott stated in a 1998 interview that homosexuality was a sin and should be considered comparable to alcoholism or kleptomania. Alison Mitchell, *Lott Says Homosexuality Is a Sin and Compares It to Alcoholism*, N.Y. TIMES, June 16, 1998, at A24.

²¹⁸ Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226-27 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000).

²¹⁹ See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 459-60.

²²⁰ Transcript of Oral Arguments, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699), 2000 U.S. Trans. LEXIS 44, at *10-11. For a discussion of the pedophile fear, see *infra* Part III.B.2.b.

and discriminatory treatment of women and minorities.²²¹ However, if the Boy Scouts' expressive message includes the immorality of homosexuality, it is not for the court to declare that belief unfounded. In a separate dissenting opinion, Justice Souter, joined by Justices Ginsburg and Breyer, specifically stated that the increasing societal acceptance of gays and lesbians was not a factor to be considered in the resolution of the case.²²² The majority suggested that, in fact, the more public opinion shifted toward tolerance, the more zealously the Court would protect the anti-gay expressive messages of private organizations despite their classification as places of public accommodation.²²³

2. *Coming Out as a Solicitation or Threat?*

The U.S. military's "Don't Ask, Don't Tell" policy offers some interesting parallels to the Boy Scouts' ban on open or known homosexuals.²²⁴ Like the Boy Scouts, the U.S. military purports to be unconcerned with the silent homosexual, although, unlike the Boy Scouts, it expressly states that homosexuality is not incompatible with military service.²²⁵ Both the military and the Boy Scouts ostensibly have a "don't

²²¹ Justice Stevens compared "[u]nfavorable opinions about homosexuals" to "equally atavistic opinions about certain racial groups." *Dale*, 530 U.S. 640, 699 (2000) (Stevens, J., dissenting).

²²² *Id.* at 700-01 (Souter, J., dissenting).

²²³ *Id.* at 660. Chief Justice Rehnquist wrote: "[T]he fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Id.*

²²⁴ See generally HALLEY, *supra* note 166 (explaining and critiquing the evolution of the current military policy regarding homosexual conduct). Halley states that "[t]he ultimate question posed by the 1993 revisions to the military anti-gay policy, then, is this: How long will we use the coercive powers of the state to define, construct, and populate heterosexuality as a morally endorsable human and social class of persons?" *Id.* at 17.

At oral argument, the counsel for the Boy Scouts was specifically asked by one of the Justices whether the Boy Scouts had a "Don't Ask, Don't Tell" policy. Transcript of Oral Arguments, *Dale*, (No. 99-699), 2000 U.S. Trans. LEXIS 44, at *4 (asking "[a]re you saying the policy is don't ask, don't tell, or is the policy, if you are gay you are not welcome in the Boy Scouts?").

²²⁵ One major difference between the policies is that the military's official position is that homosexual status is not inconsistent with military service, whereas homosexual conduct, including the statement that "I am gay" is inconsistent with military service. The Department of Defense regulations interpreting the policy

inquire” or “don’t pursue” policy regarding sexual orientation, in that the organization will not inquire of its members whether they are gay, unless there are clear indications the answer is yes.²²⁶ Recent scholarship regarding the military policy, therefore, can provide useful insights regarding the interpretation of an open avowal of homosexuality in a predominantly homosocial world as a sexual threat or a solicitation.²²⁷ When young boys are added to the mix, the result is a recipe for a pedophile panic.²²⁸

a. Conduct/Speech

Ever since *Bowers v. Hardwick*,²²⁹ gay rights politics and litigation have advanced a strategy which bifurcates status from conduct.²³⁰ The

provide that “[s]exual orientation is considered a personal and private matter, and [homosexual orientation] is not a bar to continued service . . . unless manifested by homosexual conduct.” Dep’t of Def. Directive Number 1332.14.E3.A1.1.8.1.1. (1993). It does not seem that the Boy Scouts would affirmatively state that homosexuality—even a very quiet and private homosexuality—is consistent with Scouting values. Rather, the organization seems to have made an administrative decision regarding whom to pursue.

²²⁶ See Transcript of Oral Arguments, *Dale*, (No. 99-699), 2000 U.S. Trans. LEXIS 44, at *4; *supra* note 201.

²²⁷ Judith Butler has written quite persuasively regarding how the act of coming out is understood as a threat or solicitation. JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 103-126 (1997). In the context of the military, Butler notes, “if men speak their homosexuality, that speaking threatens to bring into explicitness and, hence, destroy, the homosociality by which the class of men coheres.” *Id.* at 121.

²²⁸ The construction of an avowal of homosexuality as a threat or solicitation is undoubtedly informed by the now defunct category of mental illness known as psychopathic personality that was characterized by uncontrollable sexual impulses, general depravity, and predatory instinct toward children. For a discussion of the psychopathic personality and the sexual psychopath, see *supra* notes 145-47 and accompanying text. Once the best that American science had to offer, the sexual psychopath was dropped by the *Diagnostic and Statistical Manual, Mental Disorders* in 1968 as the category encompassing homosexuality. See *supra* note 155 and accompanying text. Homosexuality itself was later dropped from classification as a mental illness in 1973. See *supra* note 156 and accompanying text. The three basic symptoms mentioned above continue to have a certain amount of currency and are often deployed by pro-family organizations in their fight against gay rights.

²²⁹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²³⁰ See Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

majority in *Hardwick* refused to follow the line of cases starting with *Griswold v. Connecticut*²³¹ which dealt with the fundamental right to privacy because there is "[n]o connection between family, marriage, or procreation . . . and homosexual activity."²³² It seems that the gay rights movement spent the close of the twentieth century trying to prove the majority wrong. No longer focused on sodomy, the efforts at legal reform addressed issues such as same-sex marriage, second parent adoptions, domestic partnership benefits, and greater recognition for same-sex couples and the families they form.²³³

No matter how long or how loudly gay rights activists assert that individuals who self-identify as gay are more than the sum of their sexual acts (or tastes), the statement that "I am gay" does tell us something about the speaker's sexual behavior, whether it be practiced or simply desired.²³⁴ It explains that, at least on some level, the speaker has a predilection towards, or even enthusiasm for, certain sexual acts that commonly fall within the definition of sodomy.²³⁵ Within the frame of heteronormativity, a direct reference to homosexual desire is not only disruptive of the hetero-homo binary, but potentially implicates the erotic identity of the person who hears or learns of the disclosure.²³⁶

Under the current U.S. military policy, "sexual orientation is considered a personal and private matter, and [homosexual orientation] is not a

²³¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²³² *Hardwick*, 478 U.S. at 191.

²³³ See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 464.

²³⁴ See Steffan v. Perry, 41 F.3d 677, 689-93 (D.C. Cir. 1994) (en banc).

²³⁵ Halley is particularly critical of the status/conduct distinction as it has been presented in the context of the military cases. HALLEY, *supra* note 166, at 125. Speaking of this litigation strategy, she concludes:

They have represented their clients not as people against whom no sexual crimes have been proven, but as people who do not and would not engage in "homosexual conduct." Where a servicemember client is truly and contentedly celibate, this is fine. But . . . the argument is an insult to the personal sexual dignity of most servicemember clients, and . . . it abandons a normatively crucial project of any pro-gay movement: building a social consensus that homosexual erotic acts are good.

Id.

²³⁶ Eve Sedgwick observed that such a statement always implicates the erotic identity of the person who hears or learns of the disclosure "because erotic identity, of all things, is never to be circumscribed simply as itself, [it] can never not be relational." SEDGWICK, *supra* note 26, at 81. "[T]he incoherences and contradictions of homosexual identity in twentieth-century culture are responsive to and hence evocative of the incoherences and contradictions of compulsory heterosexuality." *Id.*

bar to continued service . . . unless manifested by homosexual conduct."²³⁷ The statement that "I'm gay" is defined as "homosexual conduct" equivalent to sodomy and is a sufficient ground for separation from service.²³⁸ Interestingly, the statement "I'm gay" can be more damning than actual homosexual conduct. A service member will be given a free pass on an errant act of sodomy and will be permitted to remain in the service, provided he can prove that, *inter alia*, the act is a "departure from the member's usual and customary behavior," and "the member does not have a propensity or intent to engage in homosexual acts."²³⁹

The stated rationale for the military ban on homosexual conduct is "unit cohesion." As Senator Sam Nunn explained, "the presence in military units of persons who, by their acts or by their statements demonstrate a propensity to engage in homosexual acts, would cause an unacceptable risk to the high standards of morale, good order, and discipline, and unit cohesion that are absolutely essential to effective combat capability."²⁴⁰ In other words, the ban is necessary to protect a (presumably heterosexual) soldier from leering homosexual eyes while he showers.²⁴¹ It also exists out of concern for the homosexual because the military could not possibly protect openly gay service members from homophobic mob violence.²⁴²

²³⁷ Dep't of Def. Directive Number 1332.14.E3.A1.1.8.1.1. (1993).

²³⁸ 10 U.S.C. § 654(b)(2) (1994).

²³⁹ Dep't of Def. Directive Number 1332.14.E3.A1.1.8.1.2.1.1.; 1332.14.E3.A1.1.8.1.2.1.5.

²⁴⁰ HALLEY, *supra* note 166, at 69 (quoting Senator Nunn).

²⁴¹ In connection with the military policy, Judith Butler has theorized how such a disclosure can be read as a solicitation or potential point of contagion. She described the military view of a statement of homosexuality as follows:

The statement, then, "I am a homosexual," is fabulously misconstrued as, "I want you sexually." A claim that is, in the first instance, reflexive, that attributes a status only to oneself, is taken to be solicitous, that is, a claim that announces availability or desire, the intention to act, the act itself: the verbal vehicle of seduction. In effect, a desirous intention is attributed to the statement *or* the statement is itself invested with the *contagious* power of the magical word, whereby to hear the utterance is to "contract" the sexuality to which it refers.

BUTLER, *supra* note 227, at 115.

²⁴² Some of the most chilling testimony before the Senate Committee on Armed Services regarding the proposed Don't Ask, Don't Tell policy was from Marine Colonel Frederick C. Peck who spoke not only of "barrack justice," but of his concern for his oldest son, Scott. *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Servs.*, 103d Cong., 599-602 (1993) (statement of Marine Colonel Frederick C. Peck). Colonel Peck stated that

Coming out speech under the military policy is conduct, not status. According to the Boy Scouts and the U.S. Supreme Court, coming out speech is uniquely expressive. It is not simply self-identifying speech, such as "I'm African-American" or "I'm Latino." In the military, the statement "I'm gay" signals a propensity to engage in further homosexual conduct and undermines fighting readiness. In the Boy Scouts, "I'm gay" sends a message about the speaker's views regarding the morality of homosexuality and contradicts the Boy Scouts' own expressive message.

These two characterizations of coming out speech are more complimentary than contradictory. In reality, a public avowal of homosexuality signals a propensity for sodomy and suggests that the speaker, in light of his openness, does not consider homosexuality to be immoral or shameful. It is also for many a statement of identity. However, it will not simply be a statement of identity until homosexuality is no more remarkable than heterosexuality and the mainstream political discourse no longer debates the legitimacy of homosexual subjects, relationships, and identities.

b. The Pedophile

Dale's situation was complicated by the fact that, even if Dale did not actually perform his disclosure before the young boys in his charge, the knowledge produced by Dale's disclosure continued to circulate around him when in the boys' presence. This close proximity to (male) children triggers the pedophile concern and raises questions about Dale's "propensities."²⁴³ To its credit, the Boy Scouts did not expressly raise the specter of pedophilia. The counsel for the Boy Scouts specifically denied at oral argument that the Boy Scouts' policy regarding known or avowed homosexuals was based on any concern for the physical welfare of the boys.²⁴⁴ Both New Jersey appellate courts addressed this issue and strongly

because his son is gay "he would be at grave risk if he were to follow in my footsteps as an infantry platoon leader or a company commander." *Id.* at 602. The concerned father explained that he "would be very fearful that his [son's] life would be in jeopardy from his own troops." *Id.*

²⁴³ In the military, the concern is over the propensity to commit sodomy. Here, the concern becomes Dale's propensity to commit child sexual abuse.

²⁴⁴ The counsel for the Boy Scouts engaged in the following exchange with the Court:

Question: I think I understand your position, but I want to be clear. I understand that the Scouts' position on this does not in any way depend on a judgment that Mr. Dale is—presents or would present an undue risk of homosexual conduct with the Scouts in his troop, is that correct? It's not a

condemned any suggestion that male homosexuals posed a unique risk to children.²⁴⁵ In his concurring opinion, Justice Handler of the New Jersey Supreme Court discussed at some length the unwarranted conflation of male homosexuality with pedophilia. Citing numerous academic articles, Justice Handler pronounced that “[t]he myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished.”²⁴⁶ To the extent the Boy Scouts relied on this claim as a basis for its policy, it must be rejected as “patently false”²⁴⁷ and an “unfounded stereotype.”²⁴⁸

Although the Boy Scouts never expressly raised the concern of pedophilia per se, it did present a number of snapshots of young boys confiding in their Scoutmasters, often on overnight campouts. Typically, these touching moments were described in connection with the Boy Scouts’ intimate association claim which was based on the notion that “[t]he relationships of the Scouts to their leaders”²⁴⁹ reflect the type of “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life” that warrant special protection from state intrusion.²⁵⁰ The Boy Scouts explained that

fear of conduct?

Mr. Davidson: Absolutely not, Your Honor. In fact, the issue of possible sexual abuse is one that’s very important to the Scouts. Every Scout handbook and Scout master handbook comes with an insert which . . . talks about sexual abuse at some length. It never mentions the word homosexual. In fact, the only thing it says about gender is that there’s a rising incidence of abuse by female adults.

Question: But that’s not at issue here. . . . It’s not alleged, and that’s not the basis of it.

Mr. Davidson:—not alleged. It’s not the basis of policy in any way.

Transcript of Oral Arguments, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 U.S. Trans. LEXIS 44, at *10-11.

²⁴⁵ For example, the New Jersey Superior Court took issue with the trial judge’s characterization of Dale as an active sodomist. *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 288-89 (N.J. Super. Ct. App. Div. 1998), *aff’d*, 734 A.2d 1196 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000). In particular, the court thought that the reference to sodomy and not status raised that “the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts.” *Id.* at 289.

²⁴⁶ *Dale*, 734 A.2d at 1243 (Handler, J., concurring).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Brief for Petitioners at 39, *Dale*, (No. 99-699).

²⁵⁰ *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)).

these "close personal relationships"²⁵¹ involved the "transmission and cultivation of shared ideals and beliefs"²⁵² that sometimes took place "far from the public gaze."²⁵³ As the Boy Scouts explained, "[w]hen an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support."²⁵⁴

Two briefs submitted by pro-family amici took off the gloves and confronted the pedophile issue head on.²⁵⁵ Justice Handler of the New Jersey Supreme Court thought that the pedophile myth had been demolished by social science, but, as described more fully in Part IV below, many pro-family organizations continue to sponsor and cite statistical studies purporting to show just the opposite.²⁵⁶ One in particular, the Family Research Council ("FRC"), has closely followed and advocated for the Boy Scouts' ban against homosexuals.²⁵⁷ It disputed Justice Handler's claims

²⁵¹ *Id.* at 41.

²⁵² *Id.* at 40.

²⁵³ *Id.*

²⁵⁴ *Id.* at 41.

²⁵⁵ The amicus brief filed by the Family Research Council focused very heavily on the pedophile issue. Brief of Amicus Curiae Family Research Council at 21-30, *Dale*, (No. 99-699). The term "pedophile" or some derivations thereof appears thirty-one times in the thirty page brief. The second brief dealing with pedophilia was filed by a consortium of pro-family organizations, including Concerned Women for America. Brief of Amici Curiae Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council, *Dale*, (No. 99-699).

²⁵⁶ For a discussion of pro-family views, see *infra* Part IV.B.

²⁵⁷ For example, FRC has prepared a set of talking points titled "Defending the Scouts." Robert H. Knight, *Defending the Scouts*, IN FOCUS, <http://www.frc.org/papers/infocus/index.cfm?> (visited Feb. 26, 2001). One of the more interesting talking points reads: "Would you rather have your daughter date a man influenced by the values of the Boy Scouts of America or by Hollywood and homosexual activists?" *Id.* The "talking points" specifically refer to the danger of pedophilia:

The Scouts have a moral duty to ignore orders to force them to accept homosexual scoutmasters. At the heart of Boy Scouting is the trust that parents place in Scout leaders to take their young, impressionable sons on overnight camping trips. Over the past two decades, the Scouts have had to root out hundreds of pedophiles. They cannot open their ranks to men or boys who are sexually attracted to males.

Id.

and attempted to reinscribe the homosexual/pedophile myth based on “significant credible evidence.”²⁵⁸

After a general description of its activities and its “family-centered philosophy of public life,”²⁵⁹ FRC described its interest in the case as follows:

The issues in this case directly affect the physical, psychological and emotional well being of more than 4 million boys throughout the United States enrolled in the Boy Scouts of America. [FRC] has particular knowledge about issues of child safety that will be helpful to the Court in this case.²⁶⁰

Of course, FRC’s particular knowledge that it wished to share with the Court was that the New Jersey Supreme Court based its decision on “misinformation regarding homosexuals and child molestation.”²⁶¹ FRC wanted to set the record straight—“homosexuals account for less than two percent of the population, [but] . . . constitute about a third of child molesters.”²⁶² After citing questionable social science research and misconstruing other research,²⁶³ FRC concludes that the Boy Scouts’ policy

²⁵⁸ Brief of Amicus Curiae Family Research Council at 25, *Dale*, (No. 99-699).

²⁵⁹ *Id.* at 1.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 22.

²⁶² *Id.* at 23.

²⁶³ For example, the FRC brief cites a 1979 study to show that “73 percent of [male] homosexuals surveyed had sex at some time with boys 16 to 19 years of age or younger.” *Id.* It does not mention how old the respondents were at the time of the contact. Similarly, the brief filed by the consortium of pro-family organizations, including Concerned Women for America, cites the 1978 Bell and Weinberg study *Homosexualities: A Study of Diversity Among Men and Women* for the proposition that “over 60 percent of the respondents identified their first homosexual partner as someone older.” Brief of Amici Curiae Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council at 25, *Dale*, (No. 99-699). However, if one consults the actual study, it is clear that the average age of the white male homosexual respondents (which is the figure the brief cites) at the time of their first homosexual experience was twenty-three and less than one-third were under the age of twenty. ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 86 (1978). The study continues that “[i]n the majority of instances they and their partners had been within five years in age, had lived together, and had been in love.” *Id.* at 87. Needless to say, this information did not find its way

is about much more than instilling beliefs and values—the Boy Scouts' policy exercises the organization's "compelling duty to . . . provide] the greatest protection to the Scouts."²⁶⁴ FRC claims that far from being "arbitrary 'invidious discrimination' . . . [the policy] is based on significant credible evidence that the intimate association that exists between Scouts and Scout leaders has been exploited by hundreds of homosexual pedophiles to sexually abuse thousands of boys."²⁶⁵

Even after the U.S. Supreme Court delivered its opinion in *Dale*, FRC continues to monitor cases of child molestation relating to Scouting as part of its effort to forge a link between homosexuality and the sexual abuse of children.²⁶⁶ FRC claims to understand the Boy Scouts' desire to "down-play"²⁶⁷ the fact that the organization "has struggled for years with the presence of homosexual pedophiles in its ranks."²⁶⁸ FRC warns, however, that "[h]omosexual advocates . . . continue to take advantage of . . . [the Boy Scouts'] reluctance to publicize the gravity of its molestation problem."²⁶⁹

IV. THE CULTURE WAR

As discussed in Part III, the statement that "I'm gay" signals a propensity to engage in sodomy and a moral judgement regarding homosexuality (i.e., that it is not shameful and need not be hidden). When the statement is made in the context of the ongoing Culture War, it takes on a distinctly political or public dimension. Thus, the judgment that homosexuality is not immoral does not simply implicate an individual's personal ethics or religious beliefs. It has direct implications for a wide number of political questions, such as second parent adoption, anti-discrimination laws, the repeal of sodomy statutes, and gays in the military. Like it or not, any individual who publicly self-identifies as gay will be seen by many on both sides as a foot soldier in the Culture War.

Since the early 1990s, pro-family organizations have charged that the United States was in the midst of a "Culture War" over the security of the

into either pro-family brief.

²⁶⁴ Brief of Amicus Curiae Family Research Council at 25, *Dale*, (No. 99-699).

²⁶⁵ *Id.* at 25-26.

²⁶⁶ See *More Scout Pedophile Cases*, CULTURE FACTS (Family Research Council, Washington, D.C.), Aug. 31, 2000, available at <http://www.frc.org/papers/culturefacts/index.cfm> (last visited Feb. 25, 2001).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

“traditional” family and the stability of traditional values.²⁷⁰ Pro-family organizations are particularly concerned with the threat posed by the homosexual agenda to normalize the homosexual lifestyle and same-sex relationships.²⁷¹ They characterize homosexuality as an immoral, freely chosen behavior that breeds disease and death—something that is certainly

²⁷⁰ DIDI HERMAN, *THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 55 (1997). Herman notes that pro-family organizations have been using the term “Culture War” as a “catch phrase” since 1992. *Id.* She defines the Culture War as “struggles over ideas and values, rights and responsibilities.” *Id.*

Justice Scalia introduced the term into Supreme Court jurisprudence when he used the German word “Kulturkampf” in his dissent in *Romer v. Evans* in 1996. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, disagreed with the majority which had assumed that “Amendment 2,” a Colorado statewide referendum, represented the voters’ animus against gay men and lesbians. *Id.* at 636–40 (Scalia, J., dissenting). Justice Scalia countered that the majority had “mistaken a Kulturkampf for a fit of spite.” *Id.* at 636 (Scalia, J., dissenting). William Eskridge believes that Justice Scalia’s use of the German term Kulturkampf was misplaced. See William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2413–14 (1997).

²⁷¹ For example, FRC publishes a weekly newsletter titled *Culture Facts*. Its primary topic, however, is homosexuality. FRC describes the publication as “[t]ransmitted every week by FRC’s cultural studies department, *Culture Facts* maintains a vigilant eye on cultural forces that threaten the traditional family, with a special focus on exposing the agenda of homosexual activists.” See, e.g., CULTURE FACTS (Family Research Council, Washington, D.C.), Aug. 24, 2000, <http://www.frc.org/papers/culturefacts/index> (visited Jan. 14, 2001).

In a mock question and answer format, the editors explained why the publication places so much emphasis on homosexuality:

Q: Why are you guys so obsessed with homosexuality?

A: Truth be told, we here in Cultural Studies dream of the day when the headline of *Culture Facts* reads “New Maestro Inaugurates Tenure at Kennedy Center!” We’d love to have nothing more pressing to deal with than covering the plethora of artistic events in one of the cultural capitals of the world, or perhaps highlighting slices of apple-pie Americana from around the country.

Unfortunately we can’t—for one reason: Our nation is under relentless assault by homosexual activists and their minions, who are themselves “obsessed” with forcing the American public not only to tolerate but to celebrate homosexuality. Evidence of that appears regularly in *Culture Facts*.

Id.

"not a civil right."²⁷² Pro-family organizations, such as the FRC, Concerned Women for America, and Focus on the Family, all pay special attention to homosexuality. These organizations are not members of the political fringe.²⁷³ Their views inform congressional debates, judicial decision-making, and the now ubiquitous anti-gay voter initiative.²⁷⁴ They took particular pleasure in the fact that the 2000 Republican Party platform contained numerous "pro-family" initiatives, including a statement of support for the Supreme Court decision in *Dale*.²⁷⁵

If the catchword for the pro-family movement is "morality," then the catchword for the pro-gay organizations is "equality." Pro-gay organizations advocate an identity-based civil rights platform designed to secure equal rights for members of the gay minority. The two sides clash regularly while meeting over lawsuits, proposed legislation, referenda, and political campaigns. However, both sides strongly agree on the expressive and

²⁷² Daniel S. Garcia & Robert E. Regier, *Homosexuality is Not a Civil Right*, INSIGHT (Family Research Council, Washington, D.C.) (Dec. 2000), <http://www.frc.org/iss/hsx>. The Garcia and Regier text provides a recent and succinct overview of the argument that homosexuals are "not a true minority." *Id.* Taking their cues directly from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), Garcia and Regier argue that homosexuals do not suffer economic deprivation, that they are not politically powerless, and that homosexuality is not an immutable characteristic. *Id.*

²⁷³ This is particularly true under the administration of George W. Bush. Robin Toner, *Conservatives Savor Their Role as Insiders at the White House*, N.Y. TIMES, Mar. 19, 2001, at A1 (quoting the president of the Family Research Council that his organization as "access to the highest senior [administration] officials").

²⁷⁴ See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 495.

²⁷⁵ Pro-family organizations were thrilled by this inclusion. *'Gay' Activists Lose on GOP Platform*, CULTUREFACTS (Family Research Council, Washington, D.C.), Aug. 4, 2000, <http://www.frc.org/papers/culturefacts/index.cfm>; see also *Matalin Becomes 'Gay' Activist*, CULTUREFACTS (Family Research Council, Washington, D.C.), Nov. 9, 2000, <http://www.frc.org/papers/culturefacts/index.cfm> (identifying the statement as one of the "traditional pro-family planks"). Pro-family organizations were also strong supporters of the Scouts Honor Act, a bill that would have prevented the Boy Scouts from being denied government facilities and assistance on the basis of the organization's "moral and religious beliefs." *Scouts Honor Act on Tap*, CULTUREFACTS (Family Research Council, Washington, D.C.), Sept. 21, 2000, <http://www.frc.org/papers/culturefacts/index.cfm>.

The "pro-family planks" of the GOP platform stand in sharp contrast to the "gay'-related planks" adopted by the Democratic Party in its official platform. *Dems Embrace Homosexual Goals*, CULTUREFACTS (Family Research Council, Washington, D.C.), Aug. 16, 2000, <http://www.frc.org/papers/culturefacts/index.cfm>.

distinctly political value of openly gay role models—an openly gay individual sends a message of gay pride, encourages others to embrace homosexuality, and puts an ordinary face on homosexuality for the non-gay majority. Not surprisingly, a central tenet of the pro-family anti-gay plank is to silence positive articulations of gay identity,²⁷⁶ whereas pro-gay organizations stress the importance of gay and lesbian visibility and foster and encourage coming out as a personal and public good.

A. The Pro-Gay Take on Openly Gay Role Models

In building an identity-based civil rights movement, the contemporary gay rights movement has outlined the contours of a rainbow minority that has a shared culture and a shared past.²⁷⁷ The desire of individual gay men and lesbians to forge connections of community and continuity is facilitated, in part, by the growing pantheon of gay role models that presents an eclectic mix of figures from history, individuals from the entertainment or sports industries, gay activists, and fictional media representations of gay men and lesbians. In the name of community pride, the gay rights movement celebrates these individuals and vigorously polices their reputations.

However, the movement also celebrates the courage of ordinary individuals who publicly avow their homosexuality. The openly gay teacher, police officer, and high school football player are all minor heroes. This is because the contemporary gay rights movement has been built on the premise that coming out and living as an openly gay individual is both a personal and a public good: it frees the individual from the false security of the closet and helps normalize homosexuality, which in turn encourages others to come out and increases societal tolerance.²⁷⁸ Sometimes community encouragement is not enough to coax individuals out of the closet, and the controversial political strategy of outing justifies disclosing an individual's sexual orientation against his wishes in the name of the greater good.

²⁷⁶ See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 495-98.

²⁷⁷ The rainbow flag gay pride mentality is evident at any national gay rights demonstration or in the pages of any of the advertising-laden national gay publications. Although contraindicated by queer theory, it is essential to sustaining an identity-based gay civil rights movement. It reinforces the belief in stable gay identities and solidifies group identification.

²⁷⁸ Recall, Dale was attending a seminar on the psychological needs of gay teens when he ended up in the *Newark Star-Ledger* and the quote he gave to the reporter had to do with the need teenagers have for positive gay role models. See *supra* notes 45-48 and accompanying text.

The centrality of coming out to both identity formation and the larger task of societal transformation has led many gay scholars, lawyers, and activists to contend that coming out speech is uniquely expressive.²⁷⁹ Dale's argument, however, asserted just the opposite.²⁸⁰ Instead of an openly gay Eagle Scout radiating a message of gay pride and encouragement to young boys struggling with their sexuality, Dale assured the court that he would be unremarkable. He was the same as the heterosexual (presumably white) Scoutmaster, and the same as the (presumably heterosexual) African-American Scoutmaster. When Dale denied the existence of the expressive nature of openly gay role models, he denied the existence of the very system that had catapulted Dale into the spotlight as a gay celebrity litigant.

1. *Come Out, Come Out . . .*

The rallying cry of the gay liberation movement of the early 1970s was "[o]ut of the closets and into the streets."²⁸¹ The message was for homosexuals, newly "cured" according to the *Diagnostic and Statistical Manual of Mental Disorders*, to exchange the secret self-loathing of the closet for direct political action dedicated to systemic social change.²⁸² With its

²⁷⁹ See Hunter, *supra* note 108; *supra* note 197 and accompanying text.

²⁸⁰ The disconnect between the view that coming out speech is uniquely expressive and Dale's position was not lost on the Boy Scouts. In its Reply Brief, the Boy Scouts noted that "[i]n other contexts, gay rights advocates (including respondent's counsel of record and many of the amici and their counsel) have consistently argued that 'coming out' is an expressive and political act." Reply Brief for Petitioners at 10, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (citing articles by Nan Hunter and William Eskridge to support this proposition). The Reply Brief compared the notion of self-identifying speech with Hunter's earlier description of coming out that envisioned a much more dynamic process. *Id.* at 11. The Reply Brief argued that "[s]elf-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out—to act on and live out that identity." *Id.* at 11 (quoting Hunter).

²⁸¹ MICHELANGELO SIGNORILE, *QUEER IN AMERICA: SEX, THE MEDIA, AND THE CLOSETS OF POWER* 63 (1993).

²⁸² Under the liberationist model, the act of coming out had a liberating effect on the individual, but it was also considered to have the much broader power to transform society. JAGOSE, *supra* note 16, at 38 (noting that "[g]ay liberationists promoted the coming-out narrative—an unambiguous and public declaration of one's homosexuality—as a potent means of social transformation"). The gay liberation model theorized that gay oppression was inextricably linked to issues of gender. *Id.* at 39 (noting that "[h]omosexual oppression was theorised [sic]

growing emphasis on inclusion and equality, the emerging identity-based civil rights movement of the 1990s asserted that “someone you know is gay” to underscore the fact that gays and lesbians were at every level of society, in every ethnic group, religion, profession, economic class, and family.²⁸³ Even the post-identity critique posed by queer theory demands an articulation and interrogation of the normal, which presupposes an articulated position of “queer” that exists against the norm.²⁸⁴

For an otherwise invisible minority, coming out is essential. On an individual level, coming out represents an assertion of gay pride by publicly claiming one’s gay identity.²⁸⁵ On a group level, however, coming out promises a variety of public relations benefits.²⁸⁶ Individuals need to come out so that politicians can count them among their gay constituents. They need to come out so corporations can count them among their consumers and employees. Most importantly, individuals need to come out so they can

overwhelmingly in terms of gender”). Thus, the normalization of homosexuality through the continued public avowal of homosexuality posed a direct challenge to existing gender roles and ultimately the very categories of heterosexuality and its evil twin homosexuality. Jagose writes:

Here the logic of coming out assumes that homosexuality is not simply a private aspect of the individual, relevant only to friends and colleagues. Instead, it is potentially a transformative identity that must be avowed publicly until it is no longer a shameful secret but a legitimately recognised [sic] way of being in the world.

Id. at 38.

²⁸³ Under the identity model, the dominant unifying characteristic was sexual orientation while other minority identifications were secondary. This left the movement with a default setting that was both white and male. *See id.* at 62-63.

²⁸⁴ As David Halperin explains: “Queer is by definition *whatever* is at odds with the normal, the legitimate, the dominant. *There is nothing in particular to which it necessarily refers.* It is an identity without an essence. ‘Queer,’ then, demarcates not a positivity but a positionality vis-a-vis the normative” DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1995).

²⁸⁵ Jagose refers to this as “proclaim[ing] homosexuality under the organising [sic] affect of ‘pride.’” JAGOSE, *supra* note 16, at 91.

²⁸⁶ Eve Sedgwick quotes the following excerpt from an article in the *New York Native* which appeared after the 1986 decision in *Bowers v. Hardwick*. The article gives the following advice regarding how the individual homosexual can help the many:

What can you do—alone? The answer is obvious. You’re *not* alone, and you can’t afford to try to be. That closet door—never very secure as protection—is even more dangerous now. You must come out, for your own sake and for the sake of all of us.

SEDGWICK, *supra* note 26, at 71.

change the minds and attitudes of Americans because individuals who actually know someone gay are more tolerant of homosexuality.²⁸⁷

Coming out, whether its ultimate goal is transformation or inclusion, is very consciously designed to encourage others to do the same. In this way, the public avowal of homosexuality is designed to have the very contagious effect that the pro-family groups fear.²⁸⁸ It is intended not only to reach closeted homosexuals, but also to illustrate to struggling or questioning teens that being gay is okay. The message is obvious and intended.

The perceived public good derived from coming out speech led some to theorize that the decision to come out, particularly for public figures, is not wholly a personal one.²⁸⁹ During the late 1980s and early 1990s, the unrelenting march of the AIDS epidemic and the continuous stream of family values rhetoric led to a spate of organized outings.²⁹⁰ Activists targeted closeted public officials whose voting records or other policy recommendations were anti-gay²⁹¹ or, as in the case of Assistant Secretary of Defense Pete Williams, targeted those who revealed the perceived hypocrisy of administration policies.²⁹²

²⁸⁷ This gives rise to the familiar refrain: if everyone would just come out, everything would be okay. For example, "[i]f every gay person came out to his or her family, . . . a hundred million Americans could be brought to our side. Employers and straight friends could mean a hundred million more." *Id.*

²⁸⁸ Judith Butler identifies this convergence when she notes:

we surely need to take seriously the contention that "coming out" is intended as a contagious example, that it is supposed to set a precedent and incite a series of similarly structured acts in public discourse What, then, is the difference between the logic that governs the military policy and the one which governs queer activism?

BUTLER, *supra* note 227, at 124.

²⁸⁹ The practice of outing as a political strategy is not new—dating at least to 1902 when the members of the German Scientific Humanitarian Committee debated its efficacy. LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 9-11 (1993). For a description of the early German homosexual emancipation movement, see JAMES D. STEAKLEY, *THE HOMOSEXUAL EMANCIPATION MOVEMENT IN GERMANY* (Ayer Co. 1993) (1975). For a general discussion of the contemporary practice of outing as a political strategy, see John P. Elwood, *Outing, Privacy, and the First Amendment*, 102 *YALE L.J.* 747 (1992).

²⁹⁰ See SIGNORILE, *supra* note 281, at 84-93 (describing the emergence of outing).

²⁹¹ These public officials included Senator Mark Hatfield of Oregon and Congressman Steven Gunderson of Wisconsin. *Id.* at 86-87.

²⁹² *Id.* at 91 (describing 1991 outing of Pete Williams).

Describing the closet as a privileged site of power, AIDS activists denounced the closet as a luxury that was no longer defensible. The direct action organization Queer Nation extended outing to closeted entertainment figures.²⁹³ Although its politics were informed by what is now referred to as queer theory rather than identity politics,²⁹⁴ Queer Nation's project of outing was based squarely on the belief that the public avowal of homosexuality will affect social change by normalizing homosexuality and providing valuable role models.²⁹⁵

2. *The Pantheon of Gay Role Models*

Some of the earliest pro-homosexual writings pointed to illustrious historic figures who experienced same-sex desire to prove that homosexuals were not doomed to lead degenerate and depraved lives.²⁹⁶ Look at all Michelangelo achieved, the argument goes. He was a homosexual, therefore, all gays cannot be bad and some may be exceptional. This "famous homosexual" argument was used in 1967 by Justice Douglas in his dissent in a case challenging certain immigration restrictions as applied to homosexuals.²⁹⁷ After noting that a number of important historical figures

²⁹³ *Id.* at 88-90 (describing Queer Nation's outing of celebrities). Signorile points to the outing of Jodie Foster in 1991 on an "Absolutely Queer" poster distributed in New York City as the beginning of a popular backlash against outing. *Id.* at 89.

²⁹⁴ JAGOSE, *supra* note 16, at 107-09.

²⁹⁵ The major difference with Queer Nation was that its goal was to destabilize the hetero-homo binary, and, therefore, it was not interested in simply reinforcing notions of gay identity. As noted above, the role model theory also is used as an argument to encourage individual decisions to come out. Signorile summarizes the role model theory as follows:

There are gay people all over television and in films, yet most gay kids don't know that. Denied seeing the members of their own community, gay teenagers are left feeling alone, like freaks. The fear and isolation sometimes lead to severe depression. Its consequences: Thirty percent of the teen suicides in America are among lesbian and gay kids.

SIGNORILE, *supra* note 281, at 81.

²⁹⁶ For a discussion of the connection that gay men and lesbians feel for history, see SCOTT BRAVMANN, *QUEER FICTIONS OF THE PAST: HISTORY, CULTURE, AND DIFFERENCE* 4 (1997) (asserting that "queer fictions of the past . . . [are] important social/cultural texts in the articulation of lesbian and gay identities and differences").

²⁹⁷ *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 125-35 (1967) (Douglas, J., dissenting).

were homosexual,²⁹⁸ Justice Douglas reasoned that the category "psychopathic personality" could not have been meant to exclude all homosexuals from the United States.²⁹⁹ Justice Douglas quoted with approval the following language from the dissent filed in the court below:

To label a group so large "excludable aliens" would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores. Indeed, so broad a definition might well comprise more than a few members of legislative bodies.³⁰⁰

Today, the mining of the past for inspiration is manifest in the innumerable books on gay history—gay lists of historic firsts, gay calendars, and compilations of famous gay quotations.³⁰¹ This popular

²⁹⁸ *Id.* at 129.

²⁹⁹ *Id.* After summarizing the results of Kinsey's research regarding the incidence of homosexuality, Justice Douglas wrote:

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society. . . . [T]he legislative history should not be read as imputing to Congress a purpose to classify under the heading "psychopathic personality" every person who had ever had a homosexual experience.

Id.

³⁰⁰ *Id.* at 130 (quoting *Boutilier v. Immigration & Naturalization Serv.*, 363 F.3d 488, 497-98 (2d Cir. 1966) (Moore, J., dissenting)).

³⁰¹ The emphasis placed on historical figures is evident in a pamphlet produced by Parents and Friends of Lesbians and Gays ("PFLAG") entitled *Be Yourself: Questions and Answers for Gay, Lesbian, and Bisexual Youth*. PARENTS AND FRIENDS OF LESBIANS AND GAYS, *BE YOURSELF: QUESTIONS AND ANSWERS FOR GAY, LESBIAN, AND BISEXUAL YOUTH*, <http://www.pflag.org/store/resource/BEYOU.html> (visited Feb. 24, 2001). Along the left-hand margin of the booklet is a list of scores of famous historical and contemporary figures who are presumed to be gay. *Id.* The booklet announces "if you're gay, lesbian or bisexual, you're in good company." The list is very diverse, including both Plato and Elton John, as well as King James I, Eleanor Roosevelt, and RuPaul. *Id.*

The home page of the National Coming Out Project, now headed by Candace Gingrich, provides six important "facts about homosexuality," the last of which is "Some of the Most Talented People Are or Were Gay or Lesbian." NATIONAL COMING OUT PROJECT, *The Facts About Homosexuality*, at <http://www.hrc.org/>

interest in history is augmented by the endless fascination with openly (or suspected) gay entertainment and sports figures, many of whom become actively involved in gay rights initiatives. In addition, gay role models include openly gay elected officials, authors, journalists, victims of anti-gay violence, full-time gay activists, and individuals, who although not full-time activists, choose to stand up publicly to some form of anti-gay discrimination.³⁰² Very often this last category is comprised of litigants such as James Dale.³⁰³

Gay rights organizations closely monitor the media to ensure that gay men and lesbians are not portrayed in stereotypical or negative terms. In particular, the Gay & Lesbian Alliance Against Defamation ("GLAAD") has been very active and lobbies networks, studios, producers, and sponsors to secure "fair, accurate, and inclusive representation . . . in all media."³⁰⁴ It has organized a grass roots Monitoring and Mobilization program and provides "how to" advice to would-be media activists³⁰⁵

GLAAD has been the lead player in the most recent media skirmish involving the controversial tough love radio talk show host Dr. Laura Schlessinger, who refers to gays as "biological errors."³⁰⁶ When Dr. Laura, as she is called, was slated to take her show to television, pro-gay organizations mobilized a massive effort to discourage sponsors and local

ncop/guide/facts.asp (last visited Feb. 24, 2001). Again, the list is eclectic, including Leonardo da Vinci, Bayard Rustin, k.d. lang, Emily Dickinson, and Greg Louganis. *Id.*

³⁰² The Gay & Lesbian Alliance Against Defamation website includes a list of "personalities and public figures." GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, PERSONALITIES AND PUBLIC FIGURES (2001), <http://www.glaad.org/org/topics/index.html?topic=83>. In the subcategory "LGBT Leaders" there are two famous litigants: Margerethe Cammermeyer and Perry Watkins. GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, LGBT LEADERS (2001), <http://www.glaad.org/org/topics/index.html?topics=479>. Meanwhile, the subcategory of "LGBT Celebrities" includes entertainment and sports figures, as well as Harvey Milk, the first openly gay elected official. GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, LGBT CELEBRITIES (2001), <http://www.glaad.org/org/topics/index.html?topic=84>.

³⁰³ For example, *The Advocate* included Dale as one of "Our Best & Brightest Activists." See *supra* note 106.

³⁰⁴ Gay & Lesbian Alliance Against Defamation, *A Brief Introduction to GLAAD*, at <http://www.glaad.org/org/about/index.html?record=65> (last visited Feb. 25, 2001).

³⁰⁵ *Id.*

³⁰⁶ Joan M. Garry, *Update: GLAAD's Work Regarding Laura Schlessinger*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, at <http://www.glaad.org/org/about/letters/index.html?record=532> (May 20, 2000).

networks from endorsing the show.³⁰⁷ Charged with sponsoring hate-speech, many sponsors, including Procter & Gamble, withdrew their support and some local stations decided not to air Dr. Laura.³⁰⁸ Dr. Laura issued a form of apology for her views, but was unable to reach any sort of rapprochement with the pro-gay organizations.³⁰⁹ With poor ratings, it is not clear whether Dr. Laura has much of a future in television.³¹⁰ Not surprisingly, pro-family organizations point to the Dr. Laura debacle as evidence of homosexual intolerance and political power.³¹¹ As discussed below, pro-family organizations have their own experience with monitoring the media and persuading sponsors who stray from their values.³¹²

B. *The Pro-Family Take on Openly Gay Role Models*

Pro-family organizations are dedicated to telling the truth, as they understand it, about homosexuality. Central to this goal is silencing and

³⁰⁷ Christian Berthelsen, *Taking Aim at Dr. Laura Schlessinger*, N.Y. TIMES, Mar. 6, 2000, at C14 (describing the advertisements GLAAD ran in *Variety* and *The Hollywood Reporter* denouncing the proposed show).

³⁰⁸ See Stuart Elliott, *Many Big Brand Names Steer Clear of the "Dr. Laura" Show*, N.Y. TIMES, Sept. 12, 2000, at C10; Press Release, Gay & Lesbian Alliance Against Defamation, Statement by the Gay & Lesbian Alliance Against Defamation (GLAAD) Regarding Procter & Gamble's Decision Not to Advertise on Laura Schlessinger's TV Program (June 19, 2000), available at <http://www.glaad.org/org/press/index.html?record=1426>. Pro-family organizations orchestrated a counter-boycott, targeting the sponsors who agreed to drop their support of the show. *Ongoing Campaign*, CULTURE FACTS (Family Research Council, Washington, D.C.), Aug. 4, 2000, <http://www.frc.org/papers/culturefacts/index.cfm?get=CU00H1&arc=yes> (describing effort against Procter & Gamble).

³⁰⁹ Jim Rutenberg, *In an Ad, Radio's "Dr. Laura" Says She Regrets Hurting Gays*, N.Y. TIMES, Oct. 11, 2000, at A14.

³¹⁰ Stuart Elliot, *"Dr. Laura" Pulls in Weak Ratings and Ads*, N.Y. TIMES, Sept. 18, 2000, at C15.

³¹¹ FRC often cites homosexual activists for their intolerance of pro-family opinions and beliefs. See, e.g., Peter LaBarbera, *Besen Shoutfest Reflects Growing "Gay" Arrogance*, CULTUREFACTS (Family Research Council, Washington, D.C.), Aug. 16, 2000, <http://www.frc.org/papers/culturefacts/index> (describing incidents of "homosexual activist intolerance"). In the case of Dr. Laura, FRC referred to homosexual activists as "thought police" in a print advertising campaign. See *infra* notes 356-57. It also highlighted the "numerous threats on her life from homosexual activists." *Threats to Dr. Laura Force Cancellations*, CULTUREFACTS (Family Research Council, Washington, D.C.), Mar. 24, 2000, <http://www.frc.org/papers/culturefacts/index>.

³¹² See *infra* notes 352-57 and accompanying text.

suppressing all positive articulations of gay identity. To this end, pro-family organizations have set their sights on a wide variety of positive government and media representations of homosexuality, including references to nontraditional families in school curricula,³¹³ federally funded homoerotic art,³¹⁴ AIDS/HIV education,³¹⁵ and the NBC hit situation comedy “Will & Grace.”³¹⁶

However, pro-family organizations do not stop at mere representations of homosexuality. They specifically target openly gay individuals. With regard to these expressive avowed homosexuals, pro-family organizations have adopted a three-part strategy. They attempt to silence the individual, advocate a counter-narrative produced by “ex-gays,” and denounce any company, organization, or association which tolerates openly gay workers, customers, volunteers, or members. According to pro-family organizations, to tolerate homosexuality on any level is to promote it. This conviction had obvious ramifications for the Boy Scouts because to tolerate Dale within its ranks would have been to promote homosexuality.

1. *The Individual*

Both pro-gay and pro-family organizations agree that the openly gay individual sends a message of gay pride.³¹⁷ When asserted within the

³¹³ Knauer, *Homosexuality as Contagion*, *supra* note 18, at 473-75.

³¹⁴ *Id.* at 495-96.

³¹⁵ *Id.* at 473.

³¹⁶ FRC refers to “Will & Grace” as a “‘gay’-affirming comedy” and charged that an episode featuring ex-gays was “vicious.” *Will & Grace Take Ex-Gay Pot Shot*, CULTURE FACTS (Family Research Council, Washington, D.C.), May 10, 2000, <http://www.frc.org/papers/culturefacts/index>. FRC also attacks representations of homosexuality in the print media and within advertising. For example, the November 16, 2000 edition of *Culture Facts* lambasted the clothing retailer Abercrombie & Fitch for going “even more gay” by including “political” images in its Christmas catalogue. *Abercrombie & Fitch Goes Even More “Gay,”* CULTURE FACTS (Family Research Council, Washington, D.C.), Nov. 16, 2000, <http://www.frc.org/papers/culturefacts/index>. Of particular note was the prominently featured interview with James Dale. *Id.*

³¹⁷ Although the U.S. Supreme Court declared that Dale’s presence would send a message, it never articulated the content of that message except to say that it was contrary to the Boy Scouts’ belief that “homosexual conduct is inconsistent with the values it seeks to instill in its youth members” and its desire not to “promote homosexual conduct as a legitimate form of behavior.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000). Accordingly, Dale’s presence must illustrate that homosexual behavior is a legitimate form of behavior.

context of the Culture War, this message is politically charged. At a minimum it implies that homosexuality is not immoral and is not something that one must hide. Pro-family organizations are well aware that openly gay individuals help to normalize homosexuality and, therefore, increase societal toleration. The concern that society might come to view "homosexuality as normative," is a recurrent theme in pro-family literature.³¹⁸ The greater fear, however, is that openly gay individuals will entice or encourage others, particularly children and young adults, to embrace homosexuality.

The pro-family view of homosexuality takes a page directly from the dossier of the old sexual psychopath: homosexuals are promiscuous, they lead depraved lifestyles, and they prey on children.³¹⁹ Not surprisingly, pro-family organizations dedicate a considerable portion of their activities to erasing the impact of the 1973 decision of the APA to declassify homosexuality as a mental illness.³²⁰ They sponsor research on "reparative therapy" to prove that homosexuality can be cured, and they amass data to prove that homosexuality is a depraved and disease-ridden lifestyle.³²¹ Because pro-family organizations view homosexuality as contagious, their efforts are designed to silence, contain, and cure.

The traditional point of contagion was the lone sexual predator or pedophile.³²² According to pro-family organizations, however, the danger

³¹⁸ For pro-family organizations, this is one of the greatest threats posed by militant gay activists. If gay activists succeed in establishing "homosexuality as normative," then the Culture War is lost. The threat is particularly serious in the nation's schools where children are being indoctrinated with pro-gay beliefs and values. For example, a FRC position paper warns parents that "[o]f all the advances of the homosexual agenda, perhaps none is more disturbing than the penetration of the nation's schools with messages and programs designed to teach homosexuality as normative." Peter LaBarbera, *Top 10 Strategies Used by Homosexual Activists in Schools*, at <http://www.frc.org/papers/insight/index.cfm?get=IS99F4&arc=yes> (last visited Feb. 25, 2001).

³¹⁹ For a description of the sexual psychopath, see *supra* notes 144-46 and accompanying text.

³²⁰ See Jan LaRue, *Statement on the APA's Condemnation of Reparative Therapy for Gays*, at <http://www.frc.org/misc/lh99elhs.html> (May 1999); *supra* note 136 and accompanying text.

³²¹ Knauer, *Homosexuality as Contagion*, *supra* note 18, at 459-60.

³²² Pedophilia plays a central role in the discrediting of gay men. Brief for Amicus Curiae, Family Research Council, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). See *supra* note 255 (noting that the term "pedophile" or some derivation thereof appears thirty-one times in the thirty page brief filed by the FRC).

posed by the sexual predator has been eclipsed by a new breed of homosexual recruiter—the militant gay activist. This new type of recruiter pays special attention to children and young adults. Gay activists have infiltrated the nation's schools, bringing with them diversity training, safe-sex education, gay-affirming curricula, and gay student clubs.³²³ And, they even attempted to infiltrate the Boy Scouts.

By pro-family standards, it does not take much to be considered a “gay activist.” As is evident from the three paragraphs about Dale in the *Newark Star-Ledger*, simply refusing to hide one's sexual orientation may be sufficient to exhibit militant pride. There is no requirement of affirmative advocacy or even any action that would be considered more traditionally political, such as joining a pro-gay organization or marching in a gay pride parade.³²⁴ Openly gay individuals are political activists because of the message sent by their chosen lifestyle. Certainly, anyone who files a complaint of discrimination and claims “special rights” on the basis of sexual orientation has stepped over the line and is a full-fledged activist. Accordingly, pro-family organizations target openly gay individuals in an attempt to silence them, contain their message, or discredit them.

A new form of teacher harassment provides an excellent example of how pro-family forces target openly gay individuals. The general lack of anti-discrimination laws across the country makes it relatively easy to keep gay teachers out of the classroom.³²⁵ Even in jurisdictions where sexual orientation is a protected category, however, parents have begun to subject gay teachers to a new form of harassment by demanding that school officials transfer their children out of the classrooms of openly gay teachers.³²⁶ In these cases, the parents were not alarmed because the

³²³ Knauer, *Homosexuality as Contagion*, *supra* note 18, at 471.

³²⁴ *Id.* at 483-84.

³²⁵ For a discussion of the legal rights of teachers in the absence of anti-discrimination protection for sexual orientation, see Mary L. Bonauto, *Overview of the Rights of Gay, Lesbian, and Bisexual Teachers*, at http://www.glsen.org/binary-data/GLSEN_ARTICLES/pdf_file/323.pdf (Jan. 1, 1999).

³²⁶ See Myron Dean Quon, *Teachers Under Fire*, LAMBDA LEGAL DEF. & EDUC. FUND NEWS & VIEWS, Oct. 1, 2000, <http://www.lambdalegal.org/cgi-bin/documents/record?record=113>. Lambda Legal Defense Fund first reported this form of harassment in 1998. See Myron Dean Quon, *Teacher Harassment—the New Focus of the Radical Right?*, LAMBDA LEGAL DEF. & EDUC. FUND NEWS & VIEWS, Oct. 1, 1998, <http://www.lambdalegal.org/cgi-bin/documents/record?record=339>.

It is interesting to note that these cases arose in California, which not only has a state non-discrimination law including sexual orientation, but had extended

teachers in question were affirmatively teaching the students anything about homosexuality. The parents were alarmed by the simple fact that the teachers refused to hide their sexual orientation.³²⁷

Likewise, the U.S. Supreme Court found that whether Dale was going to use his position of Scoutmaster as a "bully pulpit" was irrelevant.³²⁸ Dale would impair the expressive message of the Boy Scouts and send a contrary message without ever uttering a word about homosexuality. It was the simple fact of Dale in the Scoutmaster's uniform, just as it was the simple fact of the openly gay teacher in the classroom, that was the cause for alarm.

Under this construction, openly gay individuals send a gay-affirming message when they are silent or even when they are plainly talking about other things. Thus, were Dale to talk to his troop about tying knots or building a fire, he would also be broadcasting a loud and unambiguous message of gay pride. The gay teacher presumably broadcasts just such a message when she is instructing her class about igneous rock formations or calculating the square root of 289. The fact of their homosexuality precedes both Dale and the teacher into any room or into any conversation. In the view of pro-family organizations, homosexuality overshadows any other message they might have to convey.

The pro-family response to the speech given by openly gay Republican Congressman Jim Kolbe at the 2000 Republican Party convention in Philadelphia is a case in point.³²⁹ The topic of his speech was globalization, but some observers saw only homosexuality.³³⁰ The following is an excerpt

protection to gay and lesbian employees in 1979, years before the state-wide law was passed. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

³²⁷ For a description of these cases, see Knauer, *Homosexuality as Contagion*, *supra* note 18, at 478-79.

³²⁸ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000).

³²⁹ Richard L. Berke, *For the Republicans, A Night to Bolster Bush*, N.Y. TIMES, Aug. 2, 2000, at A1 (noting that "Mr. Kolbe spoke about international trade and made no mention of his sexual orientation").

³³⁰ While Representative Kolbe spoke, "12 members of the Texas delegation removed their straw cowboy hats, closed their eyes and bowed their heads." Alex Kuczynski & Matthew Purdy, *Outside the Hall, Fund-Raising and Unmuffled Yawns*, N.Y. TIMES, Aug. 2, 2000, at A15. One member of the delegation held up a sign that read "There is a way out." *Id.* When asked by a reporter as to the meaning of the protest, a delegate explained that they were "praying for 'biblical guidance.'" *Id.*

from a letter reprinted by FRC from “a former homosexual and Republican.”³³¹ It nicely summarizes the pro-family position.

The decision to place openly homosexual Rep. Kolbe as a primetime speaker at the convention is a disgrace to the party and our nation. . . . I doubt that you would want Rep. Kolbe to talk about the promiscuity, addictions, pornography, sexual diseases (AIDS, HPV, Genital Warts, Anal Fissures), emotional abuse, early death, stress, and anxiety that homosexuality causes. However, this is the unavoidable reality of homosexuality. . . . Where is the truth in the GOP when we would allow men and women to rationalize this sinful sexual behavior knowing full well that it leads to physical and spiritual death?³³²

Representative Kolbe does not begin his public appearances with an avowal of homosexuality. Nor, in all likelihood, was Dale going to start his troop meetings by revisiting his public avowal of homosexuality. Once spoken, the knowledge of homosexuality circulates around the individual, revealing perhaps the “constitutionally prescribed symbol of inferiority”³³³ suggested by Justice Stevens or perhaps simply the consequence of being openly gay in the midst of a Culture War. Dale and Representative Kolbe carry a placard with them wherever they go that they do not believe that homosexuality is immoral, thus placing them firmly on one side in the Culture War. Contrary to what Dale argued, it seems that a public statement of sexual orientation does “reveal a belief system”³³⁴ similar to “revealing one’s religion, atheism, political party, or membership in the Ku Klux Klan.”³³⁵

³³¹ *On Kolbe’s Speech*, CULTURE FACTS (Family Research Council, Washington, D.C.), Aug. 4, 2000, <http://www.frc.org/papers/culturefacts/index> (quoting a letter from James F. Hanes of Americans for Truth, an ex-gay organization).

³³² *Id.* (quoting a letter from James F. Hanes of Americans for Truth, an ex-gay organization).

³³³ *Dale*, 530 U.S. at 696 (Stevens, J., dissenting).

³³⁴ Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

³³⁵ *Id.* This was in direct response to the argument in the Boy Scouts’ brief that if the organization were required to accept a “known” member of the Ku Klux Klan as a Scoutmaster, it would “interfere with the organization’s message of racial harmony even if he never uttered a word on the subject of race while in Scout leader uniform.” Brief for Petitioners at 28, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (No. 99-699).

Petitioners’ Reply Brief also noted several cases where the courts have held that

2. The Ex-gay Counter-narrative

Pro-family organizations attempt to counter the belief system expressed by avowed homosexuals and militant gay activists with a counter-narrative. In many instances, it is spoken by ex-gays who testify about homosexuality from their first-hand knowledge of the lifestyle. In order to make sure that their counter-narrative is heard, pro-family organizations repeatedly refer to the "homosexuality debate."³³⁶ It is essential to make it seem like an open question, still contested. When gay activists denounce pro-family views on homosexuality, they are charged with attempting to silence free speech and imposing their own brand of orthodoxy.³³⁷ It is not fair, pro-family

coming out speech was political in nature, including the 1979 California Supreme court case holding that an employer which discriminates against "manifest" homosexuals violates the state labor code's prohibition against employers interfering with the political activities of employees. Reply Brief for Petitioners at 11-12, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (citing *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979)).

³³⁶ *Q&A*, CULTUREFACTS (Family Research Council, Washington, D.C.), June 28, 2000, <http://www.frc.org/papers/culturefacts/index>.

³³⁷ See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 489-94 (discussing the charge of homosexual orthodoxy). In particular, pro-family organizations resent being labeled bigots on account of their anti-gay views. See, e.g., C.H. Freedman, "20/20" *Race-Gay Analogy Slanders Basic Faiths*, CULTUREFACTS (Family Research Council, Washington, D.C.), Mar. 1, 2000 (explaining the difference between "those who rightly denounce such sexual practices and . . . those ignoramuses who despise people solely on the basis of their race"), <http://www.frc.org/papers/culturefacts/index>. Justice Scalia also voiced this concern in his dissent in *Romer v. Evans*: "This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality . . . is evil." *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

Pro-family organizations believe the fundamental unfairness of this is exacerbated by the fact that the media is hopelessly biased in favor of homosexuality. See Freedman, *supra* (explaining that "[i]t is unlikely that any mainstream paper would dare print such vital truths [about homosexuality] today for fear of being boycotted or, conceivably, even shut down—as effectively as any opposition paper in Iran, Iraq, or communist China"). Media bias supposedly is in part due to the infiltration of the media by homosexuals and in part due to the disproportionate political power exercised by homosexuals.

According to pro-family organizations, militant homosexuals further their agenda by co-opting the entertainment media, infiltrating the nation's public schools, and claiming minority status. For a discussion of the homosexual influence

organizations argue, for the media and corporations only to present or listen to one side of the debate.³³⁸

According to this counter-narrative, the openly gay individual is nothing more than the equivalent of a walking billboard for a lifestyle of disease and death.³³⁹ In the case of gay men, pro-family organizations stress promiscuity, sexually transmitted diseases, and the risk of HIV infection.³⁴⁰ Lesbians are linked with domestic abuse, alcoholism, depression, and suicide.³⁴¹ Thus, individuals who by their example illustrate that homosexuality is not immoral are potentially very dangerous not only from a moral standpoint, but also from a public health standpoint.

The public health spin was evident in FRC's criticism of an ABC television program about Corey Johnson, a high school football player who told his teammates that he was gay.³⁴² FRC objected to the program because ABC did not bother to tell the pro-family side of the debate and did not provide "any warning[] about the many health risks related to homosexuality that could threaten this young man."³⁴³ The pro-family advice to the parents of gay children also emphasizes these health concerns. Although they should love their gay child, parents should never accept their child's homosexuality because "[t]he life you save may be your child's."³⁴⁴

in Hollywood, see *Hollywood 'Outed' at Oscar Fete*, CULTURE FACTS (Family Research Council, Washington, D.C.), Mar. 29, 2000, <http://www.frc.org/papers/culturefacts/index.cfm>.

³³⁸ When companies institute diversity training that includes a sexual orientation component, employees are urged to insist that the "training sessions also include 'ex-gay' representation to serve the needs of those employees who might desire to leave the lifestyle [because] . . . it is unfair for the company to endorse just one side of the homosexuality debate." *Q&A, supra* note 336 (giving advice to employees of companies who plan to adopt domestic partnership policies or non-discrimination policies).

³³⁹ Despite all the current talk of "compassionate conservatism," FRC is very clear that "[i]t is not compassionate to encourage and celebrate a lifestyle that leads to disease and early death." *Q&A, CULTURE FACTS* (Family Research Council, Washington, D.C.), May 17, 2000 (describing what constitutes a "compassionate" policy towards homosexuality), <http://www.frc.org/papers/culturefacts/index>.

³⁴⁰ Knauer, *Homosexuality as Contagion, supra* note 18, at 462.

³⁴¹ *Id.* at 469-70.

³⁴² *More Bias at ABC, CULTURE FACTS* (Family Research Council, Washington, D.C.), June 28, 2000, <http://www.frc.org/papers/culturefacts/index>.

³⁴³ *Id.*

³⁴⁴ FOCUS ON THE FAMILY, FROM INNOCENCE TO AIDS (1998), <http://www.family.org/cforum/research/papers/a0002802.html>. This quote is from one of a series of ex-gay statements that a consortium of pro-family organizations sponsored

In addition to lending authenticity to the pro-family counter-narrative, the testimonials of ex-gays challenge pro-gay claims of immutability. In conjunction with independent research debunking any biological or genetic basis for homosexuality, pro-family organizations use ex-gay claims about "coming out" of homosexuality to undermine the contention that gay people are "born that way."³⁴⁵ When combined with the discussion of the disproportionate political power wielded by homosexuals and their high disposable incomes, the pro-family counter-narrative addresses all of the arguments advanced in favor of classifying sexual orientation as a suspect category.³⁴⁶ Moreover, if homosexuals can really change, and the lifestyle is immoral and unhealthy, then society should offer them help rather than leave them "mired in an unhealthy, unnatural behavior."³⁴⁷ Thus, the counter-narrative provides a strong incentive to encourage homosexuals to come out and embrace heterosexuality (or at least renounce homosexuality). According to the Boy Scouts, if Dale became an ex-gay, he could serve as an assistant Scoutmaster. As explained in Part III, this is because there is no attempt to silence the coming out (of homosexuality) speech of ex-gays. To the contrary, the articulation of homosexuality coupled with shame is encouraged.

3. *The Supporters*

Pro-family organizations claim that it is particularly difficult for them to advance their counter-narrative because the forces of homosexuality have infiltrated so many institutions and have "become perhaps the most

in a national advertising campaign in 1998. See Knauer, *Homosexuality as Contagion*, *supra* note 18, at 460-61. The ad in question featured a picture of a little boy leaning forward to blow out the candles on his birthday cake. The text of the ad was billed as "[o]ne mother's plea to the parents of homosexuals." FOCUS ON THE FAMILY, *supra*.

³⁴⁵ Knauer, *Homosexuality as Contagion*, *supra* note 18, at 461-62. Focus on the Family has filed a lawsuit against a county transit authority in Florida alleging that the authority's refusal to post an ex-gay public service announcement was a violation of the organization's First Amendment right to free speech. *Lawsuit Filed Over "Censored" Ex-Gay Speech*, EXODUS NEWS, <http://www.exodusnorthamerica.org/news/pressrel/a0000725.html> (last visited Feb. 22, 2001).

³⁴⁶ *Id.*

³⁴⁷ Robert H. Knight, *Answers to Questions About the Defense of Marriage*, INSIGHT, <http://www.frc.org/insight/is96c2hs.html>. Knight explains that "[t]he more that homosexuality is encouraged, the more damage will be wreaked among individuals, families, and society." *Id.*

powerful political and social force *per capita* in the United States.³⁴⁸ Homosexual influence on the media is pervasive.³⁴⁹ The high incomes that homosexuals have at their disposal make them a favored consumer group with corporations who willingly take their “pink money.”³⁵⁰ Accordingly, pro-family organizations target not just gay activists, but also the organizations, corporations, and institutions that support homosexuality.

Determining which entity is actually supporting homosexuality is simplified by the fact that there is no neutral position in the homosexuality debate.³⁵¹ At issue is a freely chosen immoral and unhealthy lifestyle that individuals can successfully leave. There is no room for indifference. Any entity that allows or tolerates, much less welcomes, openly gay customers, employees, or members is promoting homosexuality.

FRC regularly monitors corporate America’s family friendly policies and exposes those corporations which “have abandoned the family as a social model in favor of homosexuality.”³⁵² For example, corporations with non-discrimination policies are taking sides in the homosexuality debate.³⁵³ An employer who includes a sexual orientation unit in a diversity training program is being insensitive to its employees who might wish to leave the

³⁴⁸ Robert H. Knight, *A Progress Report on Homosexual Activism*, FRC ARTICLES, <http://www.frc.org/articles/ar97e4hs.html>.

³⁴⁹ *Id.* (stating that there are openly gay writers on every major television show). See David Kirby, *The Boys in the Writers’ Room*, N.Y. TIMES, June 27, 2001, sec. 2, at 23.

³⁵⁰ FRC refers to monetary support from gay individuals or pro-gay organizations or for pro-gay causes as “pink money.” See, e.g., *Pink Money*, CULTURE FACTS (Family Research Council, Washington, D.C.), Aug. 31, 2000, <http://www.frc.org/papers/culturefacts/index> (describing presidential campaign contributions to the Democratic National Committee). Once FRC made the connection between homosexuals and the Democratic National Committee, any money from the Committee was considered “pink money.” See *Vermont’s Citizens Battle Pink Money Influx*, CULTURE FACTS (Family Research Council, Washington, D.C.), Oct. 6, 2000 (describing financial assistance from Democratic National Committee to Democratic governor of Vermont who signed civil union bill as “pink money”), <http://www.frc.org/papers/culturefacts/index>.

³⁵¹ “The term ‘sexual orientation’ really means ‘sexual immorality.’ It is not merely a neutral term applicable to everyone.” *Q&A*, CULTURE FACTS (Family Research Council, Washington, D.C.), July 6, 2000 (demonstrating what’s wrong with Procter & Gamble’s non-discrimination policy), <http://www.frc.org/papers/culturefacts/index>.

³⁵² Family Research Council, *Stewardship and Corporate Responsibility*, at <http://www.frc.org/iss/hsx/content.cfm?get=family> (last visited June 15, 2001).

³⁵³ See *Q&A*, *supra* note 336.

lifestyle.³⁵⁴ Businesses which tailor their advertising for their gay customers are "tak[ing] advantage of homosexual affluence."³⁵⁵ FRC had particularly harsh words for Procter & Gamble when it withdrew its support for the Dr. Laura show.³⁵⁶ Procter & Gamble's other pro-family transgressions included "sponsoring 'gay' internet portal PlanetOut, . . . the company's homosexual activist group in the Cincinnati Gay Pride Parade . . . [and] pro-homosexuality episodes of 'Ally McBeal,' 'Family Law,' 'Judging Amy,' and 'Law & Order.'"³⁵⁷

Although corporations such as Procter & Gamble may have voluntarily fallen from grace and acceded to homosexual demands, the growing number of anti-discrimination laws which now include sexual orientation as a protected category threaten to force many more employers, landlords, and even private charitable organizations to accept openly gay employers, tenants, and members. It was this realization that made *Boy Scouts of America v. Dale* a rallying point for pro-family organizations because "[i]t's one thing if an individual chooses to participate in the gay agenda, but it's quite another when the state forces an individual to aid and abet immoral lifestyles."³⁵⁸ Because there is no neutral ground in the homosexuality debate, if the Boy Scouts had to admit Dale, the organization would be forced to send a message that promoted homosexuality. Under this reasoning, the contention that the only message that Dale's presence would send was that the Boy Scouts complied with the law grossly underestimates the expressive power of the openly gay individual.

³⁵⁴ *Id.*

³⁵⁵ Family Research Council, *supra* note 352.

³⁵⁶ To familiarize its readers with Procter & Gamble products, *Culture Facts* developed a mind teaser. *Playing Games With Procter & Gamble*, CULTUREFACTS (Family Research Council, Washington, D.C.), July 13, 2000, <http://www.frc.org/papers/culturefacts/index>. It offered a prize for the first three readers who could correctly identify the twelve Procter & Gamble products imbedded in a carefully worded paragraph. *Id.*

In a burst of ecumenicalism, FRC was a very strong supporter of Dr. Laura. *FRC Defends Dr. Laura, Launches Ad Campaign*, CULTUREFACTS (Family Research Council, Washington D.C.), Apr. 13, 2000, <http://www.frc.org/papers/culturefacts/index>. Presenting the issue as a question of free speech, FRC organized a "Free Speech for Dr. Laura" advertising campaign and sponsored a full page ad titled "The Thought Police Are Out to Silence Dr. Laura." *Id.*

³⁵⁷ *Action Alert!*, CULTUREFACTS (Family Research Council, Washington, D.C.), July 6, 2000, <http://www.frc.org/papers/culturefacts/index>.

³⁵⁸ Knauer, *Homosexuality as Contagion*, *supra* note 18, at 487.

V. CONCLUSION

Returning to the central questions concerning the Boy Scouts' expressive message and the impact of Dale's mere presence, it seems like the majority was right on both points.³⁵⁹ When viewed against the backdrop of heteronormativity and the history of the regulation of same-sex desire in the United States, the Boy Scouts' unbroken organizational silence on sexual orientation does not prove by negative implication a policy of acceptance, tolerance, or even indifference.³⁶⁰ The Boy Scouts' express statements that homosexuality was not compatible with Scouting occurred at the point when such statements became necessary and, understandably, not before.³⁶¹

Dale's mere presence as an openly gay man is remarkable in a way that the mere presence of a heterosexual Scoutmaster or a Scoutmaster who is a member of a minority group is not.³⁶² Not only does it disrupt the hetero-homo binary, but it sends a message that Dale, at a minimum, is not ashamed by his sexual orientation and does not consider homosexuality to be immoral.³⁶³ In the midst of the Culture War, Dale's message clearly signals where he stands in the homosexuality debate³⁶⁴ and, according to

³⁵⁹ As explained in Part II.C, the way in which the U.S. Supreme Court resolved the questions of whether the Boy Scouts' expressive message included the immorality of homosexuality and, if so, whether Dale's presence would disrupt that message determined whether or not the Court would find for the Boy Scouts or Dale. Affirmative responses supported a finding in favor of the Boy Scouts. *See supra* notes 59-114 and accompanying text.

³⁶⁰ The majority deferred to the Boy Scouts' characterization of the organization's expressive message, finding that it was sincerely held. *See supra* notes 66-89 and accompanying text.

³⁶¹ As explained in Part III.A.2, until the 1970s, a combination of criminal laws, psychiatric labels, and societal stigma was probably sufficient to forestall open homosexuals from attempting to join the Boy Scouts. *See infra* notes 128-70 and accompanying text.

³⁶² For a discussion of the difference between the homosexual Scoutmaster and the heterosexual Scoutmaster, *see supra* Part III.B.1.a. For a discussion of the difference between the homosexual Scoutmaster and the Scoutmaster who is a member of another minority group, *see supra* Part III.B.1.b and accompanying text.

³⁶³ *See supra* notes 177-81 and accompanying text (discussing the implicit message that homosexuality is not immoral).

³⁶⁴ For a discussion of the efforts of pro-family groups to characterize the controversy over gay rights as the homosexuality debate, *see supra* notes 313-16 and accompanying text.

the Boy Scouts, where Dale stands is not consistent with the mandate that a Scout be "morally straight" and "clean."³⁶⁵

Justice Stevens' refusal to believe that openly gay individuals are "simply so different from the rest of society"³⁶⁶ overlooks, as did Dale's argument, the present political reality of what it means to be an openly gay individual. It certainly seems unfair that Dale's mere presence in a Scoutmaster's uniform sends a message, but, at least for now, it does. Attempts to deny this reality and ignore the past regulation of same-sex desire in the United States negate the very reasons for anti-discrimination protection based on sexual orientation—individuals who identify as gay/lesbian/bisexual/queer or who are in same-sex relationships historically have been the subject of numerous legal, medical, and societal restrictions and remain the subject of widespread discrimination.³⁶⁷

To some extent, the majority decision in *Boy Scouts of America v. Dale* does appear to be a "setback for gay rights."³⁶⁸ Clearly, on an individual level, Dale was denied the opportunity to continue his involvement with an organization which he had served admirably. On a group level, the decision illustrates the inability of anti-discrimination laws to reach bias on account of sexual orientation in large, unselective, private organizations with generic moral codes, such as the Boy Scouts.³⁶⁹ When the majority, however, rejected Dale's assertion that his avowal of homosexuality was simply self-identifying speech that was a necessary prerequisite to claiming protection under the New Jersey LAD,³⁷⁰ it recognized that coming out

³⁶⁵ For a discussion of the Scout Oath requirement that a Scout be "morally straight" and the Scout Law requirement that a Scout be "clean," see *supra* notes 67-68 and accompanying text.

³⁶⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting).

³⁶⁷ For a discussion of the history of the regulation of same-sex desire in the United States, see *supra* notes 128-76 and accompanying text.

³⁶⁸ See *supra* note 2 (noting commentators who characterized the decision as a "setback for gay rights").

³⁶⁹ For a discussion of how the ongoing debate regarding the morality of homosexuality limits the reach of public accommodation laws, see *supra* notes 55-56 and accompanying text.

³⁷⁰ See *supra* note 177 and accompanying text. When anti-discrimination laws include sexual orientation as a protected class, they presuppose a degree of openness on the part of the protected individual because the propensity for same-sex desire is not always (or even often) apparent. The silent hidden homosexual is of no concern to anti-discrimination laws, because if no one truly knows about his orientation, then it is not possible for him to be discriminated against on account

speech sends a message that goes beyond simple self-identification and necessarily involves the speaker in the ongoing and highly politicized homosexuality debate.³⁷¹

This recognition of the expressive value of the openly gay individual potentially offers a new level of constitutional protection for coming out speech, particularly in the majority of jurisdictions where sexual orientation is not a protected class for purposes of state or local anti-discrimination laws. For public employment purposes, an avowal of homosexuality should now clearly be recognized as a matter of public concern, thereby granting openly gay public employees everywhere enhanced First Amendment protection.³⁷² Even the military's "Don't Ask, Don't Tell" policy could be subject to renewed First Amendment challenges.³⁷³

Over the years, a handful of courts have recognized the inherently political or public nature of an avowal of homosexuality.³⁷⁴ As Justice Brennan stated, "once spoken," an acknowledgment of homosexuality "necessarily and ineluctably involve[s] [the individual] in [the] debate

of it. The laws are designed to protect an individual from discrimination based on third party knowledge of his homosexuality.

³⁷¹ The majority, without much elaboration, repeatedly said that Dale's presence as an openly gay Scoutmaster would send a message, specifically it would "send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Dale*, 530 U.S. at 653.

³⁷² See *supra* note 21.

³⁷³ See, e.g., *Abel v. United States*, 88 F.3d 1280 (2d Cir. 1996) (holding that although the policy did implicate First Amendment values, it was narrowly tailored to further a compelling state interest in that the statement "I'm gay" is evidence of a propensity to engage in illegal conduct). Dale had argued that a statement of one's sexual orientation "does not reveal a belief system, in contrast to revealing one's religion, atheism, political party, or membership in the Ku Klux Klan." Brief for Respondent at 32, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Indeed, if a statement of homosexuality reveals a belief system and is analogous to a statement of membership in the Ku Klux Klan, then shouldn't the gay service member be extended the same protection as the white supremacist service member?

³⁷⁴ For example, in 1979, the California Supreme Court acknowledged the inherently political content of coming out speech when it held that coming out was a political activity protected by the California Labor Code. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458 (1979). On the Federal level, a recent district court decision from the District of Utah held "that a voluntary 'coming out' or an involuntary 'outing' of a gay, lesbian, or bisexual teacher would always be a matter of public concern" for purposes of the *Pickering* balancing test. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1284 (D.C. Utah 1998).

[that] . . . is currently ongoing regarding the rights of homosexuals."³⁷⁵ The Boy Scouts, the U.S. military, and even the New Jersey LAD are not concerned with an individual's secret status as a homosexual.³⁷⁶ It is the public knowledge of homosexuality that triggers dismissal from the Boy Scouts, separation from the military, or, conversely, protection by the LAD. It is the public knowledge of homosexuality that pro-family organizations vigorously contest and seek to silence, and it is the public knowledge of homosexuality that the majority in *Boy Scouts of America v. Dale* found inherently expressive.

For the openly gay individual, this means that a single avowal of homosexuality or a three paragraph story in the local newspaper can imbue an individual with a uniquely expressive character. Wherever he goes, and without one further affirmative act of advocacy, he will broadcast the message that, at a minimum, he is not ashamed of his homosexuality and he does not believe that it is immoral. This message will continue to circulate around the individual as it migrates from friend to co-worker to neighbor until he recants because "once spoken," knowledge of homosexuality "cannot be put back in the bottle."³⁷⁷ Justice Stevens suggests that this construction smacks of a "constitutionally prescribed symbol of inferiority,"³⁷⁸ but it remains, at least for now, the political reality of the openly gay individual. As long as the Culture War persists and as long as same-sex desire remains marked and remarkable, the existence of openly gay individuals will continue to speak volumes.

³⁷⁵ *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting).

³⁷⁶ *See supra* notes 224-60 and accompanying text (comparing the U.S. military policy with the Boy Scouts' policy).

³⁷⁷ The Boy Scouts urged in its brief that "Dale's expressions to the media of pride in being gay cannot be put back in the bottle." Brief for Petitioners at 29, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

³⁷⁸ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting).

