

Scouting for Intolerance: The *Dale* Court’s Resurrection of the Medieval Leper

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I. INTRODUCTION

In Lillian Hellman’s *The Children’s Hour*, the mere rumor that the proprietors of a girl’s boarding school are lesbians excites a swift evacuation of the pupils, turning the place into a “madhouse” with “[p]eople rushing in and out, the children being pushed into cars.”¹ As one character described it:

I’ll tell you, I’ll tell you. You see if you can make any sense out of it. At dinner-time Mrs. Munn’s chauffeur said that Evelyn must be sent home right away. At half past seven Mrs. Burton arrived to tell us that she wanted Helen’s things packed and that she’d wait outside because she didn’t want to enter a place like ours. Five minutes later the Wells’s butler came for Rosalie.²

There is an unsettling affinity between Hellman’s *tour de force* and the irrational laws mandating the isolation of lepers in the Middle Ages:

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1. LILLIAN HELLMAN, *The Children’s Hour*, in *FOUR PLAYS BY LILLIAN HELLMAN* 52 (Modern Library 1942).

2. *Id.* at 51-52.

I command you when you are on a journey not to return an answer to any one who questions you, till you have gone off the road to leeward, so that he may take no harm from you; and that you never go through a narrow lane lest you should meet some one.

I charge you if need require you to pass some too-way through rough ground, or elsewhere, that you touch no posts of things whereby your cross, till you have first put on your gloves.

I forbid you to touch infants or young folk, whosoever they may be, or to give to them or to others any of your possessions.

I forbid you henceforth to eat or drink in any company except that of lepers.³

One common denominator between the homophobic exodus in Hellman's play and the medieval restrictions on lepers is the notion that homosexuals, like lepers, will infect children.⁴ By evoking hysteria and an irrational fear of contagion,⁵ homosexuals and lepers share not only a history of discrimination but also societal exclusion.

The recent decision in *Boy Scouts of America v. Dale*⁶ is the worst kind of homophobic opinion, both stemming from and promoting the most damaging stereotypes about gay sexual orientation.⁷ It is this author's thesis that courts create mythical images of homosexuals and use them to justify discrimination.⁸ This Article explores the way courts have

3. PETER RICHARDS, THE MEDIEVAL LEPER AND HIS NORTHERN HEIRS 124 (1995) (quoting *Manuale ad Usum Insignis Ecclesiae Sarum* from R.M. Clay, *The Mediaeval Hospitals of England* (1909)).

4. See *infra* notes 38-50 and accompanying text.

5. See *infra* Part I.

6. 530 U.S. 640 (2000).

7. Homophobia has been defined as "an irrationally negative attitude toward [homosexuals]." Richard C. Friedman, M.D. & Jennifer I. Downey, M.D., *Homosexuality*, 333 NEW ENG. J. MED. 923, 924 (1994); see also Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 195-96 (1999) ("The more extreme manifestations of homophobia include verbal abuse, harassment, and physical violence. Although negative attitudes toward gay people can be connected to religious beliefs, their connection is fluid and complex."); Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 929 (1986) (suggesting homophobic attitudes give people a way of "avoid[ing] anxiety associated with unacceptable parts of themselves"); Amy D. Ronner, Bottoms v. Bottoms: *The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341, 342 (1995) ("When courts face cases involving the rights of lesbians and gay men, they too frequently experience anxiety and react by portraying the homosexual as a symbol of something they believe is comfortingly antithetical to themselves.").

8. See generally Ronner, *supra* note 7 (discussing how the judicial approach to homosexuality in parental or custodial matters tends to breed homophobic stereotypes). See also Amy D. Ronner, *Amathia and Denial of "In the Home" in Bowers v. Hardwick and Shaha v. Bowers: Objective Correlatives and the Bacchae As Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263 (1996) (discussing how courts create homophobic stereotypes that annihilate the rights of privacy and free association).

treated homosexuals as the “unclean” lepers who can infect youth and endanger the community.

Part I briefly discusses the pattern of discrimination against homosexuals and the underlying stereotypes. While not designed to be exhaustive, this Part explores the connection between homophobia and the archaic image of the contagious leper. That connection is this Article’s unifying thread, which Part III of the Article picks up and develops.

Because the *Dale* decision dealt with the tension between the right of association and public accommodation laws, Part II contains a synopsis of the seminal decisions in that area. The *Dale* Court purported to distinguish and apply *Roberts v. United States Jaycees*,⁹ *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹⁰ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,¹¹ all of which suggest that public accommodation laws will usually trump the right of association when an organization has a discriminatory member policy. However, these cases also illustrate that antidiscrimination policies yield when they burden the right of free speech. Such bedrock cases are important here not just because they deal with what is an omnipresent conflict between communitarianism and egalitarianism, but also because, as developed in Part III, the homophobic *Dale* Court misread and distorted such precedent.

Part III commences with a brief review of the *Dale* decision and culminates in an analysis of the Supreme Court’s misreading of the appellate record and misapplication of its own right of association cases. The Article attributes the flawed reasoning to homophobia and the Court’s unconscious association of gay sexual orientation with infectious disease. The Article further suggests that the Court has implicitly resurrected the image of the medieval leper, treating a gay male as an immoral sinner, inflicted (or perhaps even punished) with a communicable disease.

This Article concludes where it began—with medieval lepers and Lillian Hellman’s dramatic depiction of the effect that an irrational bias has on a community. Here, the Article advances that real progress in the area of gay rights must include a judicial effort to not only understand and eradicate the underlying anxiety that activates homophobia, but also to avoid the proliferation of damaging myths.

9. 468 U.S. 609 (1984).

10. 481 U.S. 537 (1987).

11. 515 U.S. 557 (1995).

II. HOMOPHOBIA AND THE MEDIEVAL LEPER

Leprosy is an infectious disease. While the true culprit is *Mycobacterium leprae*, a bacterium akin to the one that causes tuberculosis, the two diseases are radically different.¹² While leprosy, like tuberculosis, can be transmitted from person to person, it is actually not as threatening because the leprosy bacteria is less virulent and many people have a natural resistance to the disease.¹³ When the disease does spread unchecked, large lumps or patches can appear on the skin, which later often become discharging sores.¹⁴ The invasion of the bacteria can demolish nerves, which in turn can numb fingers and toes and make them prone to infection and mutilation.¹⁵ This is why lepers often have stumps for appendages.¹⁶ Sometimes, the disease damages the throat, making the voice hoarse, and savages the eyes, causing blindness.¹⁷

While the actual physical symptoms of the disease can now be managed and cured if promptly treated, the disgust and contempt that has traditionally surrounded the disease continues to have serious consequences.¹⁸ In the past, the disease became lepers' whole identities because this disfiguring death consumed their entire lives. On top of that, leprosy was an irrational metaphor for profligacy.

In medieval society, the leper personified sin, as one scholar has pointed out, "[m]edieval sermon and literature, in harmony with the contemporary image of the disease, portrayed leprosy as punishment

12. See RICHARDS, *supra* note 3, at xv; see also GAVAN DAWS, HOLY MAN: FATHER DAMIEN OF MOLOKAI 6-7 (1973) (discussing the Norwegian scientist, Gerhard Henrik Armauer Hansen, who identified the leprosy bacillus).

13. See RICHARDS, *supra* note 3, at xv.

14. See *id.* Richards explains:

No bacterial disease is longer in its gestation, more variable in its expression, or more mutilating in its fullness. Leprosy has many disguises. So variable are its features that it could reasonably be thought to be not one disease but many: its extremes range from a disfiguring skin disease to a mutilating disease of hands and feet.

Id.

15. See *id.* at xvi.

16. See *id.*

17. See *id.*

18. See *id.* at 5-6 (discussing attitudes toward lepers in medieval Europe through the sixteenth to nineteenth centuries); see also S.N. BRODY, THE DISEASE OF THE SOUL: LEPROSY IN MEDIEVAL LITERATURE 146 (1974). Brody states:

[T]he medieval poets inherited an ancient and pervasive tradition that branded the leper as a pariah. It accused him of being immoral, separated him from society, took him as a figure of sin, feared him for the disease he spread and for the terror he inspired. It is this background that shapes the literary representation of the leper as a man who is morally depraved, whose body bears the stain of his spiritual corruption.

Id.

meted out for moral failing, especially for loose, wanton, and lustful living.”¹⁹ For centuries the leper was considered morally unclean, pronounced a sinner, and banned from ordinary facets of community life.²⁰ As mentioned above, a typical restriction on lepers was barring contact with children.²¹ Such treatment was essentially rooted in the fear that the disease itself, along with its intrinsic sinfulness, would spread to the fledgling generation.²²

The leprosy experience has likewise historically been shrouded in secrecy: those afflicted with the disease frequently went into hiding. For example, in Hawaii, the situs of the renowned Father Damien of Molokai, lepers apparently took great pains to “evade the authorities” and remain in the “closet.”²³ “Hawaiians, with nowhere to go in the outside world, continued to hide for months or years in remote valleys, caves, and lava tubes; or—more riskily—to take to the canefields when the government physician and the sheriff, the instruments of examination and exile, made their rounds.”²⁴ For lepers, the “closet” was a blessing and a curse. While it could “spare them the horror of life and death . . . at [the leper colony],” it also hampered researchers in their campaign to track and study the incidents of outbreak and effectuate a cure.²⁵

There is a definite parallel between the treatment of homosexuals and the medieval leper. On a literal level, bias against gays has been justified on the basis of a real disease: AIDS and HIV. Society has linked the AIDS epidemic to what is perceived to be the gay lifestyle.²⁶ But even before the emergence of AIDS and HIV, homophobia already unleashed hysteria, which frequently expressed itself in outright violence.²⁷ As Professor Thomas has pointed out, “violence against

19. RICHARDS, *supra* note 3, at 6; *see also* BRODY, *supra* note 18, at 146.

20. *See* RICHARDS, *supra* note 3, at 5-6, 48-61 (discussing the separation of the leper); BRODY, *supra* note 18, at 147-97.

21. *See* BRODY, *supra* note 18, at 195-97.

22. *See* RICHARDS, *supra* note 3, at 5-6, 48-61; BRODY, *supra* note 18, at 147-97.

23. DAWS, *supra* note 12, at 132.

24. *Id.*

25. *Id.*

26. *See* Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1013, 1019 n.35 (1989) (quoting definition of Acquired Immune Deficiency Syndrome in WEBSTER’S NEW COLLEGIATE DICTIONARY 66 (9th ed. 1986) as a “[c]ondition . . . associated especially with male homosexuality and intravenous drug abuse”); *see also* Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1540 (1995); Ronner, *supra* note 7, at 343-44.

27. *See* Guzman, *supra* note 26, at 1539-40 (“Over half of socially active lesbians and gay men experience violence; the rate of anti-gay and lesbian violence is disproportionately (possibly 400%) higher than the rate of criminal violence experienced by the general population.”) (footnotes omitted).

[individual] gay men and lesbians—on the streets, in the workplace, at home—is a structural feature of life in American society.”²⁸

It is clear that homosexuals have been the victims of discrimination in employment, housing and public accommodations.²⁹ They, like medieval lepers, have been excluded from various facets of community life. While there are homosexual unions that have the attributes of traditional marriage, the law nevertheless deprives same-sex partners of the rights and privileges attendant to the marital union.³⁰ For example, same-sex partners can neither obtain a forced share in a decedent’s estate nor inherit under intestacy laws.³¹ The law also excludes such partners from social security benefits, public pensions, income tax and estate benefits, and often deems them improper beneficiaries under a will.³² Moreover, lesbian and gay “spouses” can neither recover for the wrongful death of partners, serve as conservators or guardians of partners, nor participate in the health-care decisions of such partners.³³ There are also favorable employee benefits, like health care and group insurance, that are typically unavailable to same-sex partners.³⁴

In addition, immigration law has frowned upon gay men and lesbians, sometimes denying such individuals the right to immigrate to or

28. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1464 (1992).

29. See generally Battaglia, *supra* note 7; see also Todd Brower, “A Stranger to Its Laws:” *Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 SANTA CLARA L. REV. 65 (1997) (explaining the connection between schemas and discrimination); Guzman, *supra* note 26, at 1540-44; Harris M. Miller, II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 798 (1984) (arguing “that courts should apply equal protection heightened scrutiny to classifications based on homosexuality”).

30. See Battaglia, *supra* note 7, at 215 (stating that the “failure to accord full legal recognition to same-sex relationships contributes to the stigmatization of gay people” and that “same-sex relationships function in much the same way as opposite-sex marriages and, with legal recognition, can similarly serve society”); see also Brower, *supra* note 29, at 78 (discussing how difficult it is to persuade a judge that lesbian and gay couples can have committed relationships that are not “mere[] sexual encounters,” but rather real families); Guzman, *supra* note 26, at 1541-42 (“Although homosexual couples invest in emotional ties identical to those formed by heterosexual unions, they enjoy none of the benefits of that union.”); Miller, *supra* note 29, at 807 (explaining how states fail to recognize “a marital relationship between members of the same sex or make[] provisions for comparable legal relationships for homosexual couples”).

31. See Guzman, *supra* note 26, at 1542.

32. See *id.*

33. See *id.* at 1542-43.

34. See *id.* at 1543; see also Battaglia, *supra* note 7, at 212-16 (discussing the “social condemnation . . . in laws refusing to recognize same-sex relationships”). Brower, *supra* note 29, at 78-79 (discussing the law’s refusal to treat gay men and lesbians as families); Miller, *supra* note 29, at 807 (discussing bias against gays in family law).

seek asylum in the United States.³⁵ Furthermore, there has been, and continues to be, unfair treatment of homosexuals in the military³⁶ and even in the legal profession.³⁷ Homosexuals also experience problems in legal proceedings and the criminal justice system. One commentator, referring to state laws that classify a homosexual advance as something that could justify the loss of self control and cause a reasonable person to “kill in the heat of passion,” thus lowering the charge from murder to manslaughter, pointed out that “[n]ot only do homosexuals face problems as witnesses and defendants, but they may also encounter difficulties when they are victims of crimes.”³⁸

The discrimination, however, is most pronounced in any sphere which can conceivably be construed as one that involves contact with children. Homosexuals face obstacles when they seek to obtain or retain teaching positions.³⁹ Family law terrain is also full of land mines for

35. See Miller, *supra* note 29, at 804-05 (discussing the Immigration and Naturalization Service’s policies against and harassment of gay aliens).

36. Battaglia discusses the original military exclusionary policy “and the 1993 Clinton Administration’s modification of it, the new” ‘don’t ask, don’t tell, don’t pursue,’ policy, summarized in *Able v. United States*, 880 F. Supp 968 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996) and concludes:

The military’s exclusionary policies, old and new, contribute to the stigmatization of gay people. The elusive distinction between status and conduct presents a questionable basis for establishing both policy and constitutional doctrine. Acknowledgment of one’s gay or lesbian identity has draconian consequences under the military’s policy that seriously implicate First Amendment concerns.

Battaglia, *supra* note 7, at 223 (footnotes omitted); see also William N. Eskridge, Jr., *GayLegal Narratives*, 46 STAN. L. REV. 607, 614 (1994) (arguing that “gaylegal narratives have important informational value” and stating that “[n]arratives emphasize that we are here, there, and everywhere, a fact that the military once tried to deny”); Miller, *supra* note 29, at 803 (“The most acute area of federal employment discrimination against gays is in the military, which routinely discriminates in selection and dismissal on the basis of both sexual orientation and sexual activity.”).

37. See generally Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN’S L.J. 343 (1998); William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA WOMEN’S L.J. 379 (1998). Apparently, the legal profession does not have a monopoly on such bias against gays and lesbians. Some studies suggest that “[h]omophobic attitudes have been reported among physicians, medical students, nurses, social workers, and mental health practitioners.” Friedman & Downey, *supra* note 7, at 925.

38. Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201, 203 (2000) (quoting Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133, 133 (1992)).

39. “Although state practices vary widely, the teaching profession provides the area of greatest governmental employment discrimination against gays in nearly every state. The articulated basis for the hostility include fears that gay teachers will molest or ‘convert’ school children, and that gays and their ‘lifestyles’ are immoral.” Miller, *supra* note 29, at 804; see also

those gay or lesbian parents seeking to adopt children or claim custody or visitation rights with respect to their own children.⁴⁰ Such contemporary laws effectually severing the homosexual from interaction with young people are indeed reminiscent of the medieval restrictions on lepers.⁴¹

Most courts base parental or custodial matters on what is in the best interests of the child.⁴² Because this “best interests” test is malleable, affords broad discretion, and subsumes multiple factors, it invites judges’ personal moral standards, misconceptions, and prejudices into the calculus.⁴³ Such courts, considering what is in the best interests of the child with a lesbian or gay parent, have viewed the homosexual as dangerous.⁴⁴ Underlying this is the idea that homosexuality is a disease,

Guzman, *supra* note 26, at 1544 (discussing how the “law allows gay or lesbian teachers . . . to be fired or never hired”).

40. See generally Ronner, *supra* note 7 (discussing how homosexual preconceptions especially surface in family law cases and those in which homosexuals assert the right to custody of their own children); see also Battaglia, *supra* note 7, at 212-16 (explaining how “[s]odomy laws are often used to deny gay and lesbian parents custody or to restrict their visitation rights” and how “[s]uch adverse actions occur despite evidence that lesbians and gay men are good parents”); Miller, *supra* note 29, at 807 (“[C]ourts usually deny gays both custody of their children in divorce proceedings, and the right to adopt children.”).

41. See *supra* note 3 and accompanying text.

42. See Ronner, *supra* note 7, at 343-44; Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN’S L.J. 173, 185 (2000) (discussing how in the mid-1970s, the best interests of the child standard became the controlling standard for custody disputes in most jurisdictions).

43. See Ali, *supra* note 26, at 1012 (stating that the best interests standard, “sometimes encompasses the court’s personal morality standard,” especially in cases involving homosexuals); Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 3 (1984) (“[F]or judges, custody cases bring forth more of their emotion and personal background than almost any other type of case they deal with.”); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 56 (1994) (“The ‘best interest’ standard is peculiarly malleable to diverse political agendas precisely because it reflects no individual’s interest. Instead, the standard is a vessel which judges and legislatures may fill with their own changing definitions.”); Ronner, *Women Who Dance*, *supra* note 42, at 185 (faulting the best interests standard for “its supposed virtue—its flexibility—in that this could create opportunities for judicial bias”); David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 35 (1993) (“Discrimination against homosexuals is prevalent in the family law context where judges and agencies are able to exercise broad discretion.”); Myra G. Sencer, Note, *Adoption in the Non-Traditional Family—A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 193 (1987) (“The best interest standard is often undefined and lacks definition. This leaves the choice and application of factors in deciding best interests to the judiciary.”); Nancy B. Shernow, Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677, 684 (1988) (explaining that the critics of the best interests standard believe it means that the “custodial parent is . . . at the mercy of the trial judge’s moral values and prejudices”).

44. Ronner explains:

Courts [in custody disputes] create a mythic image of the homosexual. That mythic image constitutes an amalgam of all of the preconceptions that underlie the usual justifications that courts give for denying custody to a lesbian or gay parent. The image

making the “sufferer” somehow unstable, and augmenting the potential deleterious impact on the child.⁴⁵ Some courts vindicate such notions, at least on an unconscious level, by suggesting that homosexuals are more apt to molest children than heterosexuals.⁴⁶ That misperception, combined with the equation of homosexuality with sodomy,⁴⁷ conjures up images of anal intercourse, rape and the presumed consequences—namely the dreaded AIDS affliction and the ultimate transmittal of a latent proclivity to embrace a homosexual lifestyle.⁴⁸

Similarly, some courts simply adhere to the irrational belief that sexual preference is contagious, or that gay or lesbian parents are prone to convert children to homosexuality.⁴⁹ In fact, one commentator,

that materializes in judicial decisions is a composite of two separate stereotypes of homosexuals: the first, as an emblem of dangerous *malum in se* criminality, and the second, as someone with a life-style devoid of any marital or familial attributes.

Ronner, *supra* note 7, at 345 (footnotes omitted); *see also* Steve Susoeff, Comment, *Assessing Children’s Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 859 (1985) (suggesting that in denying “custody solely on the basis of a parent’s sexual orientation[,] [j]udges take ‘tacit judicial notice’ of their personal beliefs about gay and lesbian parents and the purported effect of those parents’ sexual orientation on their children,” a view which “[w]hen articulated . . . [is] founded on social stereotypes and unsupported assumptions”).

45. *See* Ali, *supra* note 26, at 1013; Ronner, *supra* note 7, at 343; Susoeff, *supra* note 44, at 870-76. Miller, states:

Another ground for some discriminatory governmental policies is the stereotype that gays are mentally ill. The premise of this stereotype is an idea that homosexuality is a mental disease and that therefore gays are inferior or unstable. The truth is that “homosexual adults who have come to terms with their homosexuality . . . are no more distressed psychologically than are heterosexual men and women.” Homosexuality is not an indicator of psychopathology.

Miller, *supra* note 29, at 823-24.

46. *See* Ali, *supra* note 26, at 1013, 1018; Miller, *supra* note 29, at 822-23; Ronner, *supra* note 7, at 343; Russman, *supra* note 43, at 37, 59.

47. *See infra* notes 53-70 and accompanying text.

48. *See* Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 915 (2001) (“Drawing on themes of disease and seduction, Christian fundamentalists have portrayed gay men and lesbians as predators who target children, hoping to ‘seduce them into a life of depravity and disease.’”) (footnotes omitted); *see also* David S. Dooley, Comment, *Immoral Because They’re Bad, Bad Because They’re Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 422-23 (1990); Ronner, *supra* note 7, at 343-44; Russman, *supra* note 43, at 37, 60.

49. *See* Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 353 (1991) (discussing how “statutory restrictions on the provision of foster or adoptive homes by gay men and lesbians may reflect a legislative belief that . . . the presence of a gay parent poses a ‘risk’ to the child’s development, e.g., the child will ‘become’ gay”); Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent Is Homosexual or Lesbian—An Empirical Study*, 23 SUFFOLK U. L. REV. 711, 724 (1989) (“The position that homosexual and lesbian parents will influence their children to develop same[-]sex orientations is prevalent in custody cases and is a view that society at large accepts.”); *see also* Ronner, *supra* note 7, at 343-44.

advocating an equal protection classification of heightened scrutiny for homosexuality, coined the phrase “homosexuals as ‘pied pipers,’” and aptly protested that such a “notion has no basis in fact,” and that “[a] gay can no more ‘convert’ heterosexual children than a heterosexual can ‘convert’ homosexual children.”⁵⁰

Sodomy helps perpetuate discrimination because it is at the core of homophobia and is an act which many states still criminalize.⁵¹ The Georgia sodomy statute, at issue in the abominable *Bowers v. Hardwick*⁵² decision, was gender-neutral, proscribing both homosexual and heterosexual sodomy.⁵³ In upholding the constitutionality of that statute, the United States Supreme Court characterized the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”⁵⁴ The *Bowers* Court, reading the Georgia law as somehow singling out only homosexual conduct, effectively excised heterosexuals from the act of sodomy.⁵⁵ In so doing, the Court engrafted this criminalized conduct onto what it perceived as a homogenous

50. Miller, *supra* note 29, at 821-22; *see also* Robson, *supra* note 48, at 920. Robson, discussing the different approaches in a custody dispute to a parent’s sexual preference, states that “[i]n all of these approaches, except for the irrelevance approach, the courts construe the sexual minority parent as a potential cause of harm to the child. In fact, much greater harm is caused by judicial decisions that deprive a child of the care and companionship of his or her parent.” Robson, *supra* note 48, at 920.

51. *See* Battaglia, *supra* note 7, at 208-12; Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and the State Courts on Issues of Sexuality*, 33 IND. L. REV. 863, 885-86 (2000) (finding that there are currently sixteen states that still have “sodomy or deviate sexual conduct laws”). Miller states:

Sodomy statutes discriminate against gays so severely and disproportionately that these statutes are virtually forms of de jure discrimination. First, they deny gays *all* sexual contact, but, for heterosexuals, at worst only limit the forms of sex in which they may legally participate. Second, the obvious antigay orientation of the statutes stigmatizes homosexuals and perpetuates the “sexual deviant” stereotype of gays. Finally, police, governmental employers, the Immigration and Naturalization Service, university officials, and others defend policies that discriminate against gays on the basis of the criminal status sodomy statutes impose upon gays.

Miller, *supra* note 29, at 802-03 (footnotes omitted).

52. 478 U.S. 186 (1986).

53. The Georgia criminal statute at issue in *Bowers* provided:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)). *See also* Ronner, *Amathia and Denial*, *supra* note 8, at 288-89.

54. *Bowers*, 478 U.S. at 190.

55. *See* Ronner, *Amathia and Denial*, *supra* note 8, at 289; Cynthia J. Frost, Shahar v. Bowers: *That Girl Just Didn’t Have Good Sense*, 17 LAW & INEQ. 57, 62 (1999) (“Equating sodomy with homosexuality has the effect of exonerating heterosexuals.”).

group—gays—a group the Court treated as antipodal to all that is healthy and welcome in society.⁵⁶

Judicial homophobia is wedded to repression. For Freud, “the *essence of repression lies simply in the function of rejecting and keeping something out of consciousness.*”⁵⁷ It cooperates with negation, which is a process by which “[t]he subject-matter of a repressed image or thought can make its way into consciousness on condition that it is *denied.*”⁵⁸ Freud explained:

Expressed in the language of the oldest, that is, of the oral, instinctual impulses, the alternative runs thus: ‘I should like to eat that, or I should like to spit it out’; or, carried a stage further: ‘I should like to take this into me and keep that out of me.’ That is to say: it is to be either *inside me* or *outside me* [T]he original pleasure-ego tries to introject into itself everything that is good and to reject from itself everything that is bad. From its point of view what is bad, what is alien to the other ego, and what is external are, to begin with, identical.⁵⁹

By pinning “sodomy” on some other group, one divorced from the self and perceived as “outside” of the self, the *Bowers* Court could grapple with some alien image that it could then send to a deep, repressive burial.⁶⁰ However, the effect of such repression on judicial reasoning is that it can spawn tragically unfair decisions.

Significantly, part of the *Bowers* Court’s repression was its omission of a definition of sodomy, the very conduct that was the focal point of the case.⁶¹ As something unspecified, the term sodomy could then malleably yield to any identity the Court forced on it. It is partly this lack of definition that has engendered numerous theories about what sodomy really represented to the *Bowers* Court. For example, Professor Kendall Thomas suggested that “[i]n [*Bowers*], the claimed right to commit ‘homosexual sodomy’ [was] thought (or not so much thought as

56. See *Bowers*, 478 U.S. at 191; see also Ronner, *Amathia and Denial*, *supra* note 8, at 289; Frost, *supra* note 55, at 62.

57. SIGMUND FREUD, *Repression*, in A GENERAL SELECTION FROM THE WORKS OF SIGMUND FREUD 89 (John Rickman ed., Doubleday 1957) [hereinafter GENERAL SELECTION].

58. SIGMUND FREUD, *Negation*, in GENERAL SELECTION, *supra* note 57, at 54-55.

59. *Id.* at 55-56.

60. See Ronner, *Amathia and Denial*, *supra* note 8, at 293-94.

61. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1760 (1993) (stating that the *Bowers* Court “refused to specify what it steadfastly termed ‘sodomy’” and “treated [homosexual sodomy] as its equivalent, and no specification of bodily contacts [was] offered”); see also Larry Catá Backer, *Raping Sodomy and Sodomying Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37, 39 (1993) (discussing the crime of sodomy “as a catch-all proscription of violations of religious sexual conduct taboos”).

phantasmagorically represented) to be a threatening attack on patriarchal power.”⁶² Professor Janet Halley suggested that sodomy was linked with emasculation and associated with “receptive anality.”⁶³ Similarly, Professor Sylvia Law attributed the antihomosexual attitude with a fear of the disruption of the safe traditional concepts of masculine and feminine.⁶⁴ All of these theories are equally valid; for the *Bowers* Court, the nebulous term “sodomy” becomes a conglomerate of fears, replete with images of mutilation and a ruptured societal fabric in which age-old precepts about the male and female are turned upside down. But more significantly, as suggested before, in *Bowers* sodomy represents sexual energy completely estranged from procreation.⁶⁵ For the *Bowers* Court, sodomy is “thanatotic nonreproductive sex,” somehow synonymous with sin and death.⁶⁶

Sodomy statutes are institutionalized discrimination against gays, denying them the right to engage in sexual intimacy, and more subtly, legitimizing unfair policies directed at homosexuals as a group.⁶⁷ Furthermore, they perpetuate the notion of a gay person as a transmitter of disease, a sinner, a lawbreaker, and a sexual deviant that should be excluded, or at least kept away, from susceptible youth.⁶⁸ In essence, the sodomy statutes and the judicial approach to them tends to foster the association between the homosexual and the contagious, morally infirm, medieval leper.

62. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1818 (1993).

63. Halley, *supra* note 61, at 1724.

64. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988). Dr. Gregory Herek similarly explained:

Sometimes the conflict involves feelings that one is not measuring up to one's gender role; that a man does not feel like he is a “real man” or a woman that she is a “real woman.” These conflicts cause anxiety, a very unpleasant feeling that people try to avoid. One strategy for avoiding anxiety is to deny that the unacceptable feeling or characteristic is part of oneself, and to project it outward onto some convenient person or object in the environment. The person can then hate or fear that external object (which symbolizes some part of the self) without hating or fearing herself. Most importantly, all of this occurs at an unconscious level.

Herek, *supra* note 7, at 931-32. According to Herek, for homophobes, gay people are “primarily symbols for something else.” *Id.* at 929.

65. See Ronner, *Amathia and Denial*, *supra* note 8, at 298 (discussing how the *Bowers* Court's “denial of a right to engage in homosexual sodomy in the home became the objective correlative for the fear and loathing of thanatotic nonreproductive sex.”); *cf.* Brower, *supra* note 29, at 69 (“Homosexuality, according to the schema, is omni-present, uncontrollable, and predatory. Sex is completely divorced from love, long-term relationships and family structures, all of which form part of the schema for heterosexuality.”).

66. See Ronner, *Amathia and Denial*, *supra* note 8, at 298.

67. See generally Miller, *supra* note 29.

68. Miller, *supra* note 29, at 802; see also *supra* note 50.

Given the numerous common denominators between the treatment of homosexuals and lepers, it is not surprising that gays and lesbians, like those infected with the dreaded disease, sometimes respond by hiding.⁶⁹ As one scholar has explained, “the ‘closet’ has become the prevailing cultural metaphor to symbolize the invisibility of gay, lesbian, bisexual, and transgendered individuals.”⁷⁰ But the closet can be both a benefit and a detriment. While it can insulate gay men and lesbians from discrimination and physical and emotional violence, it can also have a debilitating effect, causing “internalized homophobia.”⁷¹ Furthermore, it can impair the ability of homosexuals to bond together politically to achieve equality.⁷²

III. THE PUBLIC ACCOMMODATION TRILOGY

It is an American tradition to associate in political, religious, and professional groups. Alexis de Tocqueville’s early nineteenth century observation that “Americans of all ages, all stations in life, and all types

69. Guzman states that “sodomy statutes reinforce self-doubt, solitude and anxiety about remaining closet-bound lest one be branded a criminal. It appears that gay men and lesbian women are forced to peer out from this closet because the law has backed them into it.” Guzman, *supra* note 26, at 1545; *see also* Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 120 (1998) (“Due to societal homophobia and heterosexism, which act in tandem with patriarchy, white supremacy, and class stratification, gay and lesbian experience is often shrouded in secrecy.”)

70. Hutchinson, *supra* note 69, at 120.

71. *Id.* at 120-21. Hutchinson points out that

[a] plethora of psychological data has documented the debilitating impact that “internalized homophobia”—or the acceptance of societal homophobia by gay and lesbian people—has upon an individual’s self-esteem, personal development, and emotional adjustment.

Id. at 121.

72. *See id.* Hutchinson explains that

[t]he closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality. Furthermore, . . . homophobia and gay and lesbian invisibility also divide communities of color and feminist communities, erecting barriers to social and political action in these social groups as well.

Id.; *see also* Eskridge, *supra* note 36, at 614 (asserting that speaking out in the form of “gaylegal narratives” has the effect of “emphasiz[ing] that we are here, there, and everywhere”); Bryan H. Wildenthal, *To Say “I Do”*: *Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 454 (1998) (“It is through ‘coming out’—a quintessential speech act—that gay people identify themselves” and “[f]or gay people, speech has been, if anything, an even more important device for social change than it has been for other minority groups who have taken advantage of American liberty to press America toward greater justice.”).

of disposition are forever forming associations,” applies today.⁷³ While an in-depth analysis of what underlies this impulse to form groups is beyond the scope of this Article, it is surely rooted in the “fundamental [human] need for a feeling of community” and the fact that “[o]rganizations fill this need by giving people a place where they can feel important, needed, and accepted.”⁷⁴

There are, however, groups that define their members on the basis of age, race, sex, national origin, or religion. Some theorists attribute this phenomenon to urbanization and the increasing diversity of an American culture in which individuals have abandoned extended families and have joined neighborhoods with an ethnic mix.⁷⁵ It thus follows that such a departure from a once relatively homogenous environment could cause people to experience vulnerability and a loss of identity. This may fuel the need to seek strength and self-definition through associations composed of members with common backgrounds. Such an impulse to try to find one’s identity in a group is basic communitarianism.⁷⁶ If, however, the group has an exclusionary membership policy,

73. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 485 (J. Mayer & M. Lerner eds., 1966). De Tocqueville also commented that “[b]etter use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.” *Id.* at 174.

74. Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Antidiscrimination Laws to Quasi-Private Clubs*, 2 MICH. J. GENDER & L. 27, 31 (1994). Frank explains that “people may turn to organizations such as exclusionary clubs to find individuals with whom they have more in common, such as religion, ethnic heritage, or gender” and that “[o]utside such associations, people often feel highly vulnerable.” *Id.* at 32; *see also* Marissa L. Goodman, Note, *A Scout Is Morally Straight, Brave, Clean, Trustworthy . . . And Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA L. REV. 825, 833 (1999) (suggesting that an “individual’s family used to fulfill [the need for community], but with each new generation, people have been moving further away from their extended families into ethnically diverse neighborhoods and, as a result, have lost that feeling of community” and thus, people join organizations to “reestablish that lost sense of community”); Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 109-10 (1986) (explaining that “[w]ith the erosion of kinship, community, and religious ties, other social networks generally are thought to have grown more prominent”).

75. Frank explains that “people have . . . been moving away from their extended families and into more ethnically mixed neighborhoods” and that “[a]s people move to new places, they want to reestablish a sense of community by associating with people who share common interests and backgrounds.” Frank, *supra* note 74, at 32. She also states that “[a]fter the Fair Housing Act of 1968, the geographic division between different ethnic and religious groups began to break down” and caused people to turn to organizations. *Id.*; *see also* Goodman, *supra* note 74, at 833; Rhode, *supra* note 74, at 109-10.

76. *See* Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1882 (1984) (discussing the tension between communitarianism and egalitarianism). Linder explains that “[t]o the communitarian, an individual’s source of identity comes not so much from individual choices as from the communities of which the individual is a part—family, church, trade union, social club, political party, city or nation.” *Id.*

communitarianism can oppugn egalitarianism, which rests on the notion that identity derives not from associations, but from individual choice, and fosters the notion that individuals must be free from discrimination to have equal opportunity to pursue their interests and goals.⁷⁷

Groups that exclude members on the basis of age, race, sex, national origin, or religion can engender a conflict between the right to associate selectively and the need to be free from discrimination.⁷⁸ The *Dale* decision involved just such a tension between selective association and a public accommodation law.⁷⁹ Because the excluded members were homosexuals, however, the case, with its underlying homophobia, fails to abide by the reasoning in the seminal public accommodation decisions.⁸⁰

Public accommodation laws, designed to combat discrimination, derive from the common law doctrine that treated innkeepers, smiths and others as public servants and prohibited them from refusing to serve a customer without a good reason.⁸¹ In the latter half of the nineteenth century, states began to codify such principles as a means of protecting historically disadvantaged groups in society.⁸² Over time, states

77. See *id.* at 1881-82. Linder explains that “[egalitarian r]ights-oriented liberalism assumes that each individual has a personal set of interests and goals. It seeks a neutral legal framework which assures each individual an equal opportunity to pursue interests and goals as free moral agents.” *Id.* According to Linder, however, “[t]he rights-oriented liberal is likely to respond that the communitarian view, with its emphasis on preserving the traditions and obligations of intermediate communities, is a virtual invitation to prejudice.” *Id.* at 1882.

78. See Frank, *supra* note 74, at 79 (discussing the conflict between the need to associate selectively and the need to be free from discrimination); Goodman, *supra* note 74, at 834 (discussing how “[a] state’s goal of promoting equality and eradicating discrimination comes into direct conflict with the individual’s need to maintain a sense of community and to associate with other similar individuals”); Linder, *supra* note 76, at 1880-84 (describing the conflict as one between communitarian and egalitarian values).

79. See *infra* Part IV.B (analyzing *Dale*).

80. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657-58 (2000).

81. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557, 571 (1995). The *Hurley* Court explained:

As one of the 19th-century English judges put it, the rule was that ‘[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants.’

Id. at 571 (quoting *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835); M. KONVITZ & T. LESKES, *A CENTURY OF CIVIL RIGHTS* 160 (1961)); see also *Romer v. Evans*, 517 U.S. 620, 627-28 (1996) (describing the evolution of public accommodation laws). For a discussion of public accommodation laws, see Frank, *supra* note 74, at 41-45; Goodman, *supra* note 74, at 828-33; Daniel Schwartz, Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CAL. L. REV. 2117, 2124-31 (1987).

82. See *Hurley*, 515 U.S. at 571-72; *Romer*, 517 U.S. at 627-28; Goodman, *supra* note 74, at 41-48.

expanded the scope of such laws to reach more entities and protect more individuals.⁸³

On many occasions, the United States Supreme Court has grappled with the conflict between the right to associate and public accommodation laws and had to decide the extent to which the Constitution protects a private club's right to discriminate. Three of the main cases, *Roberts v. United States Jaycees*,⁸⁴ *Board of Directors of Rotary International v. Rotary Club of Duarte*,⁸⁵ and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,⁸⁶ are important here because the *Dale* Court was forced to confront them. It is, as discussed below, the Supreme Court's misreading and distortion of these cases that make the *Dale* decision especially disturbing.

Roberts involved the Minnesota Human Rights Act, which forbade discrimination on the basis of sex in places of public accommodation.⁸⁷ The United States Jaycees, a nonprofit national membership corporation designed for educational and charitable purposes, promoted young men's civic organizations.⁸⁸ Those ineligible for regular Jaycees membership, which was limited to young men, could be associate members.⁸⁹ Such associate members, however, could not vote or hold office in the organization.⁹⁰ When two local chapters of the Jaycees disobeyed the bylaws by admitting women as regular members, the organization sanctioned them and told them that their charters could be revoked.⁹¹

83. See *Hurley*, 515 U.S. at 571-72; Goodman, *supra* note 74, at 828-29. Schwartz divides state public accommodation statutes into two categories. Schwartz, *supra* note 81, at 2125-31. The "first type contain a specific list of those establishments considered to be places of public accommodation," which is supposed to be "illustrative rather than exhaustive." *Id.* at 2125-26. "The second type of public accommodation statute does not contain an illustrative list" but rather defines its scope "through broad, descriptive phrases." *Id.* at 2126. New Jersey's Law Against Discrimination is an example of the former and California's Unruh Civil Rights Act is an example of the latter. *Id.* at 2125-26.

84. 468 U.S. 609 (1984).

85. 481 U.S. 537 (1987).

86. 515 U.S. 557 (1995).

87. See *Roberts*, 468 U.S. at 614-15. The Act makes it a discriminatory practice "to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex." *Id.* at 615 (quoting MINN. STAT. § 363.03, subd. 3 (1982)). The Act further defines a "place of public accommodation" as a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." *Id.* (quoting MINN. STAT. § 363.01, subd. 18).

88. See *id.* at 612-13.

89. See *id.* at 613.

90. See *id.*

91. See *id.* at 614.

Consequently, these chapters filed discrimination charges with the Minnesota Department of Human Rights, claiming that the exclusion of women from full membership violated the Minnesota Human Rights Act.⁹²

Before there was a hearing on the state charges, the Jaycees sued state officials to prevent enforcement of the Act.⁹³ They alleged that by requiring the Jaycees to accept women as regular members, the Act violated “the male members’ constitutional rights of free speech and association.”⁹⁴ After the state hearing examiner ruled against the Jaycees, the district court certified to the Minnesota Supreme Court the question of whether the Jaycees is a “place of public accommodation” within the meaning of the Act.⁹⁵ The state supreme court answered that question in the affirmative.⁹⁶ The Jaycees then amended its federal complaint, claiming that the Minnesota Supreme Court’s interpretation of the Act rendered it unconstitutionally vague and overbroad.⁹⁷ After trial, the district court entered judgment in favor of the Department of Human Rights. The Eighth Circuit Court of Appeals reversed, concluding that the application of the Act to Jaycees membership policies would directly and substantially interfere with the organization’s freedom of association guaranteed by the First Amendment.⁹⁸ Alternatively, the Eighth Circuit determined that the Act was vague as construed and applied, and therefore did not comport with Due Process.⁹⁹

The United States Supreme Court reversed and found that the application of the Act to compel the Jaycees to accept women as regular members did not abridge the male members’ freedom of intimate association or their freedom of expressive association.¹⁰⁰ In making this

92. *See id.* at 614-15.

93. *See id.* at 615.

94. *Id.*

95. *Id.* at 616.

96. *See id.*

97. *See id.*

98. *See id.* at 616-17. The Court of Appeals concluded that because “the advocacy of political and public causes, selected by the membership, is a not insubstantial part of what [the Jaycees] does,” the group had First Amendment protection. *United States Jaycees v. McClure*, 709 F.2d 1560, 1570 (8th Cir. 1983), *rev’d sub nom. Roberts v. United States Jaycees*, 468 U.S. 609 (1984). It also concluded that applying the Minnesota antidiscrimination law to the Jaycees’ membership policies would produce a “direct and substantial” interference with the freedom of association because it would require “some change in the Jaycees’ philosophical cast.” *Id.* at 1572. The appellate court thus concluded that the state’s interest in eliminating discrimination was not sufficiently compelling to outweigh the interference with the organization’s constitutional rights. *Id.* at 1576.

99. *See McClure*, 709 F.2d at 1576-78.

100. *See Roberts*, 468 U.S. at 610.

decision, the Court focused on several features of the Jaycees that placed it outside the category of relationships that enjoy “a substantial measure of sanctuary from unjustified interference by the State.”¹⁰¹ According to the Court, the Jaycees were large and unselective: apart from age and sex, the organization did not use any criteria for judging applicants for membership.¹⁰² In fact, the Jaycees had a pattern of routinely recruiting and admitting members without conducting an investigation of their backgrounds.¹⁰³ Furthermore, while women could not vote, hold office or receive certain awards, they could attend various meetings and participate in some projects and events.¹⁰⁴ As a result, both genders regularly participated in a substantial portion of associational activities.¹⁰⁵

After concluding that the Jaycees lacked the “distinctive characteristics” that might give them the constitutional protection to exclude women from membership, the Court considered whether compelling the Jaycees to accept women under the Minnesota Human Rights Act infringed on the group’s freedom of expressive association.¹⁰⁶ The Court stressed that the right to associate for expressive purposes is not absolute and that regulations serving compelling state interests may justifiably infringe on that right.¹⁰⁷ According to the Court, the Act’s compelling interest in counteracting discrimination against female citizens justified any impact on the male members’ associational freedom.¹⁰⁸

The Court noted that the Act did not aim at the suppression of speech and did not distinguish between prohibited and permitted activity on the basis of viewpoint.¹⁰⁹ Describing the salutary purposes behind the Act, the Court stated:

[T]he Minnesota Act protects the State’s citizenry from a number of serious social and personal harms. In the context of reviewing state actions under the Equal Protection Clause, this Court has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies

101. *Id.* at 618.

102. *Id.* at 621.

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.* at 621-22.

107. *See id.* at 623.

108. *See id.*

109. *See id.*

society the benefits of wide participation in political, economic and cultural life.¹¹⁰

The Court concluded that through the Act the State had advanced its interests through the least restrictive means and that the Jaycees did not show that the Act imposed any serious burdens on the male members' freedom of expressive association.¹¹¹ Specifically, the Act did not require any adjustment in the Jaycees' aim to promote the interests of young men and it did not curtail the organization's ability to exclude individuals with ideologies incompatible with existing members.¹¹² The Court, also rejecting the Jaycees' contention that women might have a different attitude about certain core issues, said that it "decline[d] to indulge in [such] sexual stereotyping."¹¹³ Finally, the Court rejected the Jaycees' contention that the Minnesota Human Rights Act, as the state's highest court interpreted it, was unconstitutionally vague and overbroad.¹¹⁴

The next Supreme Court case addressing the conflict between the right to associate and public accommodation laws was *Board of Directors of Rotary International v. Rotary Club of Duarte*. *Duarte* involved California's Unruh Civil Rights Act, which entitles all persons, regardless of sex, to full and equal accommodations, advantages, facilities, privileges, and services in all business establishments within the state.¹¹⁵ The defendant, nonprofit corporation Rotary International,

110. *Id.* at 625.

111. *See id.* at 626.

112. *See id.* at 627.

113. *Id.* at 628.

114. *See id.* at 629. Justice O'Connor authored a concurring opinion. *Id.* at 631-40. While Justice O'Connor agreed with the Court that the application of the Act to the Jaycees did not violate the First Amendment, she did not endorse the Court's test. *Id.* at 632 (O'Connor, J., concurring). She believed that the constitutional protection for the selection of membership did not depend on what the association says or why its members say it. *Id.* at 633 (O'Connor, J., concurring). Also, Justice O'Connor faulted the Court for its "readiness to inquire into the connection between membership and message." *Id.* (O'Connor, J., concurring). In her view, an association should be treated as commercial when its membership and associational activities are not predominantly of the sort that the First Amendment protects, and thus state regulation of those activities need only be rationally related to the state's interest. *Id.* at 634 (O'Connor, J., concurring). According to Justice O'Connor, it is only when the association is predominantly engaged in protected expression that such regulation of membership would "necessarily affect, change, dilute or silence one collective voice that would otherwise be heard." *Id.* at 635-36 (O'Connor, J., concurring). Basically, "[a]n association must choose its market." *Id.* at 636. With respect to the Jaycees, both the Minnesota Supreme Court and the United States District Court adopted the state court's findings of fact that the Jaycees' activities were of a commercial nature. *Id.* at 638-39. Consequently, Justice O'Connor would hold that the Jaycees had no constitutional immunity from the Act by seeking to exercise their First Amendment rights through a commercial organization. *Id.* at 640.

115. *See Duarte*, 481 U.S. at 541-42 n.2. The Unruh Civil Rights Act provides in part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex,

aimed to foster humanitarian service, ethical standards in vocations, world peace, and good will.¹¹⁶ Local Rotary Clubs used a “classification system” for the admission of its members, which was based on business, professional, and institutional activity in the community.¹¹⁷ While women were permitted to attend meetings, give speeches, receive awards, and form auxiliary organizations, the Rotary Club constitution excluded them from membership.¹¹⁸ When a local Rotary Club gave women active membership, however, Rotary International ended its participation in the organization.¹¹⁹

Consequently, the sanctioned club and two of its female members filed suit alleging that such termination violated the Act.¹²⁰ The state trial court ruled for Rotary International, concluding that neither the international organization nor the local club fit the definition of “business establishment” within the meaning of the Act.¹²¹ The state appellate court, however, reversed and found that the First Amendment did not protect Rotary’s policy of excluding women.¹²²

In affirming the California Court of Appeal, the United States Supreme Court abided by its reasoning in *Roberts* and found that the relationship among Rotary Club members was not the kind of intimate or private relation that necessitates constitutional protection.¹²³ Specifically, the local Rotary Club had no upper limit on membership, and in fact, a certain percentage of the members of a typical club tended to move away or drop out during a typical year.¹²⁴ Consequently, the clubs were constantly recruiting new members.¹²⁵ Also, Rotary had an express purpose of producing “an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community.”¹²⁶ In addition, many of the Rotary Club’s central activities were carried on in the presence of strangers and the organization

race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” *Id.* at 541 n.2 (quoting CAL. CIV. CODE ANN. § 51 (West 1982)); *see also* Schwartz, *supra* note 81, at 2126.

116. *See Duarte*, 481 U.S. at 539.

117. *Id.* at 540.

118. *See id.* at 541.

119. *See id.*

120. *See id.*

121. *Id.* at 542.

122. *See id.* at 537, 542-43.

123. *See id.* at 537, 545-47.

124. *See id.* at 546.

125. *See id.* at 546-57.

126. *Id.* at 546 (citations omitted) (internal quotations omitted).

encouraged local clubs to seek coverage of their meetings and activities in local newspapers.¹²⁷

The Court also found that the organization “fail[ed] to demonstrate that admitting women to Rotary Clubs [would] affect in any significant way the existing members’ ability to carry out their various purposes.”¹²⁸ The organization did not take positions on public questions nor political and international questions, and the Act did not require the clubs to abandon or change any of its existing activities.¹²⁹ Furthermore, the Act did not force the organization to depart from their classification system of admitting members from a cross section of the community.¹³⁰ In fact, admitting women would actually advance its objective of obtaining a broader spectrum of community leaders with an expanded capacity for service.¹³¹

In *Duarte*, as in *Roberts*, the Supreme Court acknowledged that the public accommodation law infringed slightly on the Rotary members’ right of expressive association, but found such infringement to be justified because it served the state’s compelling interest in eradicating discrimination against women.¹³² Like the Act in *Roberts*, the California Act did not make distinctions on the basis of the organization’s viewpoint.¹³³

In both *Roberts* and *Duarte*, the Court employed a balancing approach, finding that equality principles trumped the organizations’ expressive interests.¹³⁴ The cases, taken together, suggest that

127. *See id.* at 547.

128. *Id.* at 548.

129. *See id.*

130. *See id.*

131. *See id.* at 548-49.

132. *See id.*

133. *See id.* at 549.

134. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Duarte*, 481 U.S. at 537. In *New York State Club Ass’n v. City of New York*, a consortium of private clubs sought a judgment declaring a New York City ordinance that prohibited discrimination by such clubs unconstitutional. 487 U.S. 1, 7 (1988). The law governed clubs that provided benefits to business entities and to persons other than their own members, deeming them sufficiently public to forfeit the “distinctly private” exemption under the law. *Id.* at 4-6. In finding the law to be constitutional, the United States Supreme Court, abiding by the approach in *Roberts* and *Duarte*, opined:

It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. In the case before us, however, it seems sensible enough to believe that many of the large clubs covered by the Law are not of this kind.

antidiscrimination laws will likely prevail in such a contest with public accommodation laws. The statutory goal of eliminating discrimination is quite weighty, “serv[ing] compelling state interests of the highest order,”¹³⁵ while on the other side of the scale sits an organization that simply cannot show how its political advocacy would change without its exclusionary membership policy.¹³⁶ The same sort of balance will most likely exist in almost any situation in which a group’s attempt to exclude certain types of members runs awry of such an antidiscrimination statute.¹³⁷

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, although the state courts followed the *Roberts* and *Duarte* doctrine, the United States Supreme Court essentially eschewed these cases and predicated its decision on free speech rather than expressive association grounds.¹³⁸ In *Hurley*, the South Boston Allied War Veterans Council, authorized by the City of Boston to organize and conduct the St. Patrick’s Day-Evacuation Day Parade, refused to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to participate in the event.¹³⁹ GLIB, an organization whose purpose it was to

Id. at 13. For discussions of the balancing approach in this public accommodation area, see Neal E. Devins, Commentary, *The Trouble with Jaycees*, 34 CATH. U. L. REV. 901, 904-05 (1985) (discussing how the balancing test is “troublesome” and that the “[p]rior Court rulings clearly require state infringements on protected speech to be the least restrictive means available to satisfy some compelling state interest”); Frank, *supra* note 74, at 79-81 (discussing the reconciliation of “associational interests with limiting discrimination in quasi-private clubs”); Goodman, *supra* note 74, at 833-47 (discussing how the Court struck the requisite balance in *Roberts*, *Duarte* and *New York State Club Ass’n*).

135. *Roberts*, 468 U.S. at 624; *see also Duarte*, 481 U.S. at 549.

136. *See generally Roberts*, 468 U.S. at 609; *Duarte*, 481 U.S. at 537. *See also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 679 (2000) (Stevens, J., dissenting) (“[W]e have never once found a claimed right to associate in the selection of members to prevail in the face of a State’s antidiscrimination law.”). *But see N.Y. State Club Ass’n*, 487 U.S. at 13 (“It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership.”).

137. *See Roberts*, 468 U.S. at 609.

138. *See* 515 U.S. 557 (1995). The *Hurley* Court, however, indicated that if it had decided the case by following *Roberts* and *New York State Club Ass’n*, it would have reached the same result. *Id.* at 580-81; *see also* Hutchinson, *supra* note 69, at 98. Hutchinson correctly states:

Although the *Roberts* trilogy played a central role in shaping the state court rulings in *Hurley*, these cases had virtually no significance in the Supreme Court proceeding. *Roberts* was absent from the Supreme Court’s decision because the Court decided the case on free speech rather than expressive association grounds. Yet, because the state courts decided that the parade was a place of public accommodation *under state law*, the Court was bound by this conclusion, and should have applied the *Roberts* decisional law.

Id. (footnotes omitted).

139. *See Hurley*, 515 U.S. at 560-61.

express gay, lesbian, and bisexual pride, sued the Council, alleging that the denial of their application to march violated the Massachusetts law prohibiting discrimination on account of sexual orientation in places of public accommodation.¹⁴⁰ The trial court found a violation, ordered the Council to include GLIB in the parade, and the Supreme Judicial Court of Massachusetts affirmed.¹⁴¹

In reversing, the United States Supreme Court concluded that the Massachusetts courts' application of the state public accommodation law to require the Council to include GLIB altered the expressive content of the parade, and thus violated the First Amendment.¹⁴² Central to the *Hurley* analysis was the Court's definition of parades as a "form of expression" entitled to First Amendment protection.¹⁴³ The Court explained:

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (*e.g.* "England get out of Ireland," "Say no to drugs"); marching bands and pipers play; floats are pulled along; and the whole show is broadcast over Boston television.¹⁴⁴

The Court further stressed that although the Council tended to be somewhat lenient in admitting participants, that did not mean that it had relinquished its First Amendment protection.¹⁴⁵

The Court then criticized the state courts for supposedly applying the public accommodation law in "a peculiar way."¹⁴⁶ The Court explained that the case did not involve the Council attempting to exclude gay, lesbian, or bisexual individuals in the various units admitted to the parade, but rather was concerned with a refusal to admit GLIB as its own parade unit carrying its own banner.¹⁴⁷ When the state courts issued the order requiring the inclusion of GLIB, they effectively forced the Council to change the parade's expressive content.¹⁴⁸ According to the Court, this

140. *See id.* at 561. The law "prohibits 'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.'" *Id.* (quoting MASS. GEN. LAWS § 272.98 (1992)).

141. *See id.* at 561-64.

142. *See id.* at 557.

143. *Id.* at 568.

144. *Id.* at 569.

145. *See id.* at 569-70.

146. *Id.* at 572.

147. *See id.*

148. *See id.* at 572-73.

undermines a speaker's "autonomy" to choose the content of his [or her] own message," which is something beyond the control of government.¹⁴⁹

The Court, alluding to its history, explained the real purpose behind the state's protective legislation:

On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference.¹⁵⁰

Contrasting the public accommodation law's goal with the trial court's application of it in the *Hurley* case, the Court found that the decisions below went beyond coercion of the Council to allow access to protected individuals and actually had the effect of altering the content of the speaker's (i.e. the Council's) expression.¹⁵¹

The reasoning of *Hurley* is both homophobic¹⁵² and questionable. It is a transparent attempt on the part of the Court to circumvent the balancing process of *Roberts* and *Duarte*.¹⁵³ In fact, the *Hurley* Court failed to examine the record in its entirety and avoided those portions supporting the conclusion that the parade should be treated as a place of public accommodation.¹⁵⁴ As the Court acknowledged in *Roberts* and *Duarte*, places of public accommodation often do have speech interests, and it therefore would have been just as comfortable to relegate the parade to the genre of expressive association cases.¹⁵⁵ Also, the *Hurley* Court's treatment of parades as a homogenous per se category¹⁵⁶ contradicts what the Court itself essentially acknowledges—namely, that there are all kinds of parades and that since the Boston parade was not a

149. *Id.* at 573.

150. *Id.* at 578.

151. *See id.* at 578-79.

152. *See* Hutchinson, *supra* note 69, at 116 (stating the "exclusion of GLIB's *message* subordinated nonheterosexual status" and "relegated 'outness' back into its metaphorical closet"); *see also supra* notes 69-72 and accompanying text (discussing the significance of "coming out of the closet" for gays and lesbians).

153. *See* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

154. *See* Hutchinson, *supra* note 69, at 99-100 (criticizing the Court for its failure "to engage in an adequate and comprehensive review of the entire factual record" and for "rac[ing] through or ignor[ing] portions of the state court record which strongly suggested the parade should be considered a place of public accommodation—albeit one with possible speech interests—rather than speech alone").

155. *See id.* at 98-99.

156. *See id.* Hutchinson properly faults the Court for "creat[ing] an almost per se rule, which deems parades 'speech' as a matter of law." *Id.* at 100.

“demonstration” or “protest” designed to transmit a particular message, it indeed differed from other forms of public assembly.¹⁵⁷

Putting aside what appears to be the Court’s disingenuous insistence that the circumstances in *Hurley* should be treated differently from those in *Roberts* and *Duarte*, it is apparent that after *Hurley* there are two putatively distinct classes of cases—those involving expressive association and those involving free speech. Furthermore, in a competition with public accommodation laws, organizations engaging in mere expressive activity will likely lose¹⁵⁸ while those engaging in speech actively will likely win. *Hurley* created a legal (and artificial) demarcation between organizations with expressive interests that literally bar certain protected individuals from membership and organizations acting as speakers, supposedly asserting their autonomy by excluding certain voices from their collective composition. In *Hurley*, the parade organizers were relegated to the second category—the free speakers—and the only real reason why they were not deemed to be an organization with mere expressive interests is that the group that sought inclusion was nonheterosexual.

IV. *BOY SCOUTS OF AMERICA V. DALE*: THE RESURRECTION OF THE MEDIEVAL LEPER

A. *Background*

The Boy Scouts is a private, nonprofit organization with an expressed “mission . . . to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.”¹⁵⁹ The Boy Scout Oath and the Scout Law espouse such values: specifically, the Oath states, “[o]n 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; To keep myself physically strong, mentally awake, and morally straight;”¹⁶⁰

157. *Id.* Hutchinson points out that

[t]he Court also ignored important distinctions between the Boston parade and the examples of expressive conduct in the precedents it discussed. For example, one could easily distinguish a “protest march,” the name of which signifies an expressive purpose, from the Boston parade, which the state courts found did not have any particular message.

Id. (footnotes omitted).

158. See *Roberts*, 468 U.S. at 624; *Duarte*, 481 U.S. at 549.

159. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000) (quoting the Boy Scouts’ mission statement).

160. *Id.* at 649.

the Scout Law states, “[a] Scout is Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent.”¹⁶¹

The Boy Scouts’ mission, oath and law had been part of James Dale’s life since 1978 when he joined the Cub Scouts at the age of eight.¹⁶² He then became, and remained, a Boy Scout until the age of eighteen.¹⁶³ In 1988, he attained one of Scouting’s highest honors by graduating to Eagle Scout, and a year later the organization approved his application for the position of Assistant Scoutmaster.¹⁶⁴

At that same time, Dale left home to attend Rutgers University.¹⁶⁵ Dale first admitted to himself and others that he is gay when he got to college.¹⁶⁶ He involved himself in the Rutgers University Lesbian/Gay Alliance and served as its co-president.¹⁶⁷ In 1990, Dale attended a seminar dealing with gay and lesbian teenage psychological issues.¹⁶⁸ A newspaper covered this event and interviewed him about a homosexual teenager’s need for gay role models.¹⁶⁹ In July of that year, the newspaper published the interview and displayed Dale’s picture, identifying him as the co-president of the Rutgers Lesbian/Gay Alliance.¹⁷⁰

Later that same month, the Monmouth Chapter of the Boy Scouts of America sent Dale a letter revoking his adult membership.¹⁷¹ When Dale requested an explanation, the Monmouth Council Executive sent him a letter stating that the Boy Scouts forbids membership to homosexuals.¹⁷² It was this action that prompted Dale to sue the Boy Scouts.

In his complaint against the Boy Scouts, filed in the New Jersey Superior Court, Dale alleged that the organization “had violated New Jersey’s public accommodation statute and its common law by revoking Dale’s membership based solely on his sexual orientation.”¹⁷³ The court

161. *Id.*

162. *Id.* at 644.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 644-45.

167. *Id.* at 645.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* The New Jersey public accommodation statute defined public accommodation and provided in part:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age,

granted summary judgment in favor of the Boy Scouts, holding that “New Jersey’s public accommodation law was inapplicable because the Boy Scouts was not a place of public accommodation.”¹⁷⁴ The court also determined that the Boy Scouts was a private group and thus exempt from the New Jersey law.¹⁷⁵ Moreover, the court denied Dale’s common law claim, finding that the state policy was embodied in the public accommodation law.¹⁷⁶ The court concluded that the Boy Scouts had a clear position with respect to active homosexuality and that the First Amendment right of expressive association prevented the state from forcing the Boy Scouts to accept Dale as a member.¹⁷⁷

The New Jersey Superior Court Appellate Division affirmed the dismissal of Dale’s common law claim, but reversed and remanded for further proceedings, holding that the Boy Scouts violated the public accommodation law, which was indeed applicable.¹⁷⁸ It also rejected the Boy Scouts’ federal constitutional claims.¹⁷⁹ The New Jersey Supreme Court affirmed that decision, specifically rejecting the Boy Scouts’ freedom of intimate association claim, stating that since the Boy Scouts is a large, nonselective, inclusive organization with a practice of allowing nonmembers to attend meetings, it is not sufficiently personal or private to trigger such constitutional protection.¹⁸⁰ The court expressed the view that Dale’s membership did not violate the Boy Scouts’ right of expressive association because his inclusion did not “affect in any significant way [the organization’s] existing members’ ability to carry out their various purposes.”¹⁸¹ In addition, the court determined that New Jersey has a compelling interest in combating discrimination and that the public accommodation law accomplished that purpose with a minimal infringement on the freedom of speech.¹⁸²

marital status, affectional or sexual orientation, familial status or sex. . . This opportunity is recognized as and declared to be a civil right.

Id. at 661-62 (quoting N.J. STAT. ANN. § 10:5-5 (West Supp. 2000)).

174. *Id.* at 645.

175. *Id.*

176. *Id.*

177. *Id.* at 645-46.

178. *Id.* at 646.

179. *Id.*

180. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1221 (N.J. 1999).

181. *Id.* at 1225 (quoting *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)).

182. *See id.* at 1227-28.

B. The United States Supreme Court Decision

Justice Rehnquist, delivering the Court's opinion in which Justices O'Connor, Scalia, Kennedy, and Thomas joined, began with the basic requirement that a group claiming the First Amendment's expressive associational right must engage in some form of expression.¹⁸³ The Court examined the Boy Scouts' mission statement and determined that the association indeed seeks to transmit a system of values and thus engages in expressive activity.¹⁸⁴

The Court, in five unsteady steps, then dealt with the question of "whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints."¹⁸⁵ First, the Court analyzed the nature of the Boy Scouts' view of homosexuality and the assertion that homosexual conduct is inconsistent with the values expressed in the Scout Oath and Law.¹⁸⁶ Specifically, the Court focused on the terms "morally straight" and "clean," acknowledging that those terms are not "self-defining."¹⁸⁷ It put the Boy Scouts in the category of those who believed that homosexuality was not "morally straight" and "clean."¹⁸⁸

The Court was troubled by how the New Jersey Supreme Court approached the analysis. The state supreme court found that excluding members solely on the basis of their sexual orientation was actually a contradiction of the Boy Scouts' expressed "commit[ment] to a diverse and 'representative membership'" and at odds with the association's "overarching objective to reach 'all eligible youth.'"¹⁸⁹ The Supreme Court, however, said 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."¹⁹⁰ Rather, the Court looked solely at the Boy Scouts' official position on the incompatibility of homosexuality and scouting, and discerned a common thread in several position statements and in allegations that the Boy Scouts made in prior litigation reflecting the association's "sincerely" held view that homosexuals could not be role models in the organization.¹⁹¹

183. See *Dale*, 530 U.S. at 648.

184. See *id.* at 649-50.

185. *Id.* at 650.

186. See *id.* at 650-52.

187. *Id.* at 650.

188. *Id.*

189. *Id.* at 650-51 (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1226 (N.J. 1999)).

190. *Id.* at 651.

191. *Id.* at 651-52.

Second, the Court considered whether Dale's presence as an assistant scoutmaster would significantly hamper the Boy Scouts' goal of not condoning homosexual conduct as a legitimate way of life.¹⁹² While the Court deferred to the association's view of what would impair its own expression, it said that "an expressive association can [not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."¹⁹³ The problem though, as the Court viewed it, was that Dale himself played an active role in the gay community and disclosed his homosexuality.¹⁹⁴ In addition, Dale served as a leader of the gay and lesbian organization at college and worked as a gay rights activist.¹⁹⁵ According to the Court, Dale's presence in the organization would transmit a message to the "youth members and the world" that the Boy Scouts approves of homosexual conduct.¹⁹⁶

The Court relied on its decision in *Hurley* in determining whether the Boy Scouts had a First Amendment right to exclude certain individuals.¹⁹⁷ The *Hurley* Court had held that the application of the Massachusetts public accommodation law requiring the organizers of a private St. Patrick's Day Parade to include a gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights.¹⁹⁸ According to the Court, GLIB's presence in Boston's St. Patrick's Day Parade would have interfered with the parade organizers' choice not to advocate a particular point of view in the same way that Dale's service as an assistant scoutmaster would interfere with the Boy Scouts' choice not to endorse a position contrary to its antigay philosophy.¹⁹⁹

In further faulting the New Jersey Supreme Court for its analysis, the *Dale* Court enlisted the *Hurley* decision as an ally. The New Jersey Supreme Court had determined that "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues, and Boy Scouts includes sponsors and members who subscribe to different views in respect to homosexuality."²⁰⁰ The

192. *See id.* at 653.

193. *Id.*

194. *See id.*

195. *Id.*

196. *Id.*

197. *Id.* (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557 (1995)).

198. *See Hurley*, 515 U.S. at 557.

199. *See Dale*, 530 U.S. at 655.

200. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223 (N.J. 1999).

state supreme court concluded that the inclusion of Dale as an Assistant Scoutmaster did not impair the Boy Scouts' ability to convey its message.²⁰¹ Consequently, the United States Supreme Court explained that organizations are not required to associate for the "purpose" of spreading its message in order to claim First Amendment protection.²⁰² The *Dale* Court took the view that the purpose of the parade in *Hurley* was not to express particular views on sexual orientation, and yet the parade organizers were entitled to exclude certain participants.²⁰³ Also, contrary to the New Jersey court's reasoning, the Supreme Court felt that the fact that the Boy Scouts urged Scout leaders to avoid questions of sexuality did not undermine the sincerity of their basic belief that homosexuality was incompatible with scouting.²⁰⁴

In addition, the Court, responding to Dale's claim that the Scouts did not revoke the membership of heterosexual leaders that had opposed the policy on sexual orientation, reasoned that the First Amendment does not mandate that every member of an organization agree on every issue for there to be an expressive association.²⁰⁵ The Court said that it was enough that the Scouts took "an official position with respect to homosexual conduct" such that the actual "presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."²⁰⁶

Third, the Court addressed the question of whether the application of New Jersey's public accommodation law to require the Boy Scouts to accept Dale as an assistant scoutmaster violated the Boy Scouts' freedom of expressive association.²⁰⁷ In answering this question in the affirmative, the Court looked to the origin of public accommodation laws, which initially aimed to prevent discrimination in public places like inns and trains, and the expansion of their scope to cover more places.²⁰⁸ The Court believed that because these public accommodation laws had evolved to reach membership in organizations, such expansion increased the likelihood of conflict between such laws and the First Amendment.²⁰⁹

201. *See id.*

202. *Dale*, 530 U.S. at 655.

203. *See id.*

204. *See id.*

205. *See id.*

206. *Id.* at 655-56.

207. *See id.* at 656.

208. *See id.*; *see also supra* notes 81-83 and accompanying text.

209. *See Dale*, 530 U.S. at 657.

In this context, the Court purported to distinguish *Roberts* and *Duarte*, cases that involved states' compelling interest in eliminating discrimination against women.²¹⁰ As explained above, in those cases the Court decided that the application of the public accommodation laws did not violate the organizations' First Amendment rights.²¹¹ The Court stressed that in both *Roberts* and *Duarte* it had emphasized that the admission of women to the Jaycees and the Rotary Club would not seriously burden the male members' freedom of expressive association.²¹² According to the Court, the situation in *Roberts* and *Duarte*, in which there was no violation of the First Amendment, was somehow different from that in *Dale*.²¹³

Fourth, the Court dealt with Dale's invitation to use the intermediate standard of review set forth in *United States v. O'Brien*²¹⁴ to evaluate the competing interests.²¹⁵ In *O'Brien*, which involved the symbolic act of burning a draft card, the Court set forth a four-part test for reviewing a governmental regulation that has an incidental effect on the freedom of speech.²¹⁶ Once again the Court distinguished Dale's case by finding that, unlike the law in *O'Brien*, which entailed only an "incidental effect" on free speech rights, New Jersey's law "directly and immediately" affected associational rights.²¹⁷

Fifth, the Court attacked the observations Justice Stevens made in his dissenting opinion that the public view of homosexuality in this country has changed and that it has gained greater acceptance.²¹⁸ For the *Dale* majority, shifting views on sexual orientation had no place in First Amendment analysis and in fact bolstered their opinion.²¹⁹ As the Court put it, "the 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."²²⁰

210. See *id.* at 657-68 (discussing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988)); see also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

211. See *Dale*, 530 U.S. at 658.

212. See *id.*; see also *supra* Part III (discussing public accommodation laws and the seminal cases in that area.).

213. See *Dale*, 530 U.S. at 657-58; see also *supra* Part III (discussing public accommodation laws and the seminal cases in that area).

214. 391 U.S. 367 (1968).

215. See *Dale*, 530 U.S. at 659.

216. See *id.* (discussing *O'Brien*).

217. *Id.*

218. See *id.* at 660.

219. See *id.*

220. *Id.*

C. The Dissent

Justice Stevens authored a dissenting opinion, in which Justices Souter, Ginsberg, and Breyer joined.²²¹ The dissent employed a three-tiered approach to conclude that New Jersey's law did not abridge any of the Boy Scouts' constitutional rights.²²²

First, Justice Stevens examined the organization's own literature and statements.²²³ After a close reading of the Scout Oath and Law, and the Boy Scout and Scoutmaster Handbooks, Justice Stevens concluded that the central principles, "morally straight" and "clean," said nothing about homosexuality nor articulated any position whatsoever on sexual matters.²²⁴ Furthermore, the Boy Scouts, which is sponsored by diverse religious organizations, has a "self-proclaimed ecumenism" and directs its members to receive sex education at home, in school, or from religious leaders—not from the organization.²²⁵ As Justice Stevens pointed out, some of these proposed sources of sexual guidance, particularly certain religious leaders, do not believe that homosexuality is wrong.²²⁶

Justice Stevens faulted the majority for its myopic focus on a portion of the Boy Scouts' 1978 "statement of 'policies and procedures relating to homosexuality and Scouting.'"²²⁷ While that document, addressed to the organization's Executive Committee, stated that homosexuality and leadership in scouting are not appropriate, the document as a whole is generally noncommittal on the issue.²²⁸ According to Justice Stevens, the document at most expressed an exclusionary membership policy, which alone had never been enough to win on a right to associate claim.²²⁹ The statement proclaiming homosexuality inappropriate has no nexus to a "shared goal or expressive activity of the Boy Scouts."²³⁰ Also, as Justice Stevens explained, the organization never publicly expressed the putative policy that was contained in this internal document, and it was disseminated to only select members of the Executive Committee.²³¹ In addition, the policy statement itself contemplated the possibility that one day employment

221. *See id.* at 663-700 (Stevens, J., dissenting).

222. *See id.*

223. *See id.* at 665-78.

224. *Id.* at 668-69.

225. *Id.* at 669-70.

226. *See id.* at 670-71.

227. *Id.* at 671.

228. *See id.*

229. *See id.* at 672.

230. *Id.* at 673.

231. *See id.* at 672.

discrimination laws might change to protect homosexuals and noted that the Scouts are duty-bound to abide by the laws, even ones with which they disagree.²³²

Noting that the majority relied on four other policy statements, Justice Stevens stressed that since these were all written and issued after the Boy Scouts revoked Dale's membership, they had no bearing on the legal issue before the Court.²³³ Even if they were relevant, Justice Stevens pointed out that they did not even bolster the Boy Scouts' position.²³⁴ Although three statements issued in 1991 and 1992 attempted to connect the organization's exclusionary policy with the Scout Oath and Law, a 1993 statement abandoned that attempt and instead tried to justify the policy on the basis that members expected preferred to exclude homosexuals.²³⁵ As such, the final statement did not constitute an expressive activity and was simply a policy of bare exclusion, something which the Court found inadequate in the past.²³⁶ Also, these four policy statements had no effect on the Boy Scouts' mission statement or official membership policy and did not infiltrate the Boy Scout or Scoutmaster Handbooks.²³⁷ In fact, the Boy Scouts did not alter its policy of avoiding discussion of sexual matters in any way and did not attempt to restrict its affiliations to only those religious organizations that condemn gays.²³⁸ Furthermore, Justice Stevens noted that the 1991 and 1992 statements literally targeted "homosexual conduct" as anti-Scouting and that the Boy Scouts did not expel Dale for his conduct, but instead for his sexual orientation.²³⁹

Justice Stevens was also troubled by the Boy Scouts' failure to make its position clear and connect its supposed policy to its expressive activities.²⁴⁰ By the time the organization expelled Dale, it was already participating in litigation that challenged aspects of its membership policy.²⁴¹ The Boy Scouts also submitted amicus briefs before the Court in other right of association cases²⁴² and thus, it should have known that it

232. *See id.* at 672-73.

233. *See id.* at 673-74.

234. *See id.* at 676.

235. *See id.* at 674-75.

236. *Id.* at 675.

237. *See id.*

238. *See id.*

239. *See id.* at 676.

240. *See id.* at 676-77.

241. *See id.* at 677.

242. *See id.* The Boy Scouts filed amicus briefs in both *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*,

was vulnerable to being deemed subject to state public accommodation antidiscrimination laws.²⁴³ Despite that, the Boy Scouts took no action—even after Dale’s expulsion—to connect the necessity of excluding homosexual members to its expressive activities.²⁴⁴ The organization had ample time and opportunity to build itself a record and yet failed to do so.²⁴⁵

Second, Justice Stevens rejected the majority’s reading of the case law and, in contrast, found that precedent did not support the Boy Scouts’ position.²⁴⁶ For Justice Stevens, the *Dale* decision was the first to find that a state’s antidiscrimination law violated a group’s right to associate “simply because the law conflicts with that group’s exclusionary membership policy.”²⁴⁷

In *Roberts*, the Court rejected the Jaycees’ argument that applying the law making it unlawful to “deny any person the full and equal enjoyment of . . . a place of accommodation because of . . . sex” violated its right to preserve its selective membership policy.²⁴⁸ Similarly, in *Duarte*, the Court rejected Rotary International’s claimed right to associate by refusing membership to women.²⁴⁹ For Justice Stevens, *Roberts* and *Duarte* clarified that it was insufficient to simply engage in some form of expressive activity in order to successfully trump a state’s antidiscrimination law.²⁵⁰ Both the Jaycees and the Rotary Club engaged in expressive activity, thus implicating the First Amendment, and yet that activity did not tip the scales in their favor.²⁵¹ Also, as Justice Stevens pointed out, it is not enough to openly endorse an exclusionary membership policy, which both the Jaycees and the Rotary Club had also done.²⁵² Further, it was insufficient to suggest the existence of some

481 U.S. 537 (1987). See also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

243. See *Dale*, 530 U.S. at 677 (Stevens, J., dissenting).

244. See *id.* at 677-78.

245. See *id.*

246. See *id.* at 678-84.

247. *Id.* at 679.

248. *Roberts v. United States Jaycees*, 468 U.S. 609, 615 (1984); see also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

249. See *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 537 (1987); see also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

250. *Dale*, 530 U.S. at 682 (Stevens, J., dissenting); see also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

251. *Dale*, 530 U.S. at 688 (Stevens, J., dissenting); see also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

252. *Dale*, 530 U.S. at 682 (Stevens, J., dissenting); see also *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

nexus between the organization's expressive activities and its exclusionary policy.²⁵³ The relevant question in both *Roberts* and *Duarte* was whether the mere inclusion of the individual seeking membership would "burden," "affect in any significant way," or constitute a "substantial restraint upon" the organization's "shared" or "basic" goals or "collective effort to foster beliefs."²⁵⁴

Justice Stevens asserted that the Boy Scouts' claim basically mirrored those of the Jaycees and the Rotary Club.²⁵⁵ Similar to the situation in *Roberts*, no conclusion could be derived from the record before the Court that the admission of homosexuals would impede the Boy Scouts' ability to "engage in [its] protected activity" or "disseminate its preferred views."²⁵⁶ As was similar to the situation in *Duarte*, the New Jersey law did not force the Boy Scouts to "abandon or alter any of its activities."²⁵⁷ With respect to the statements that the Boy Scouts made after the revocation of Dale's membership, they simply adopted a policy of discrimination, which is no more dispositive than the openly discriminatory policies that the *Jaycees* and *Rotary Club* Courts declared to be insufficient.²⁵⁸

Justice Stevens especially disapproved of the majority's eschewing of a significant fact—namely, the Boy Scouts' failure to set forth any unequivocal position on homosexuality.²⁵⁹ Despite the "solitary sentences" in the 1991 and 1992 policies, the organization did not adhere to any particular religious and moral position and did not teach its members any lessons on sexuality.²⁶⁰ In fact, it persisted in defining the buzz words "morally straight" and "clean" without reference to homosexuality.²⁶¹ According to Justice Stevens, there is nothing in the cases to suggest that "a group can prevail on a right to expressive

253. *Dale*, 530 U.S. at 682 (Stevens, J., dissenting).

254. *Id.* at 683; *see also* *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (explaining that in order to prevail on a right to associate claim, the group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."); *supra* note 134 (discussing decision in *N.Y. State Club Ass'n*).

255. *See Dale*, 530 U.S. at 684-85.

256. *Id.* at 684 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984)).

257. *Id.* (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)).

258. *See id.* at 684-85; *see also supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

259. *See Dale*, 530 U.S. at 685 (Stevens, J., dissenting).

260. *Id.*

261. *Id.*

association if it, effectively, speaks out of both sides of its mouth.”²⁶² The majority neglected to undertake an independent analysis of the record in this case; it instead deferred to the group’s “litigating posture” and gave credibility to the allegations put forth in the briefs.²⁶³ Such an approach, according to Justice Stevens, eradicates the demarcation between “genuine exercises of the right to associate” and “sham claims,” which transforms an “important constitutional right into a farce.”²⁶⁴

Third, Justice Stevens directed his attention to the Boy Scouts’ implicit argument that Dale would use his position as Assistant Scoutmaster to transmit immoral messages to his constituency.²⁶⁵ Although conceding that the majority did not acquiesce in that argument, Justice Stevens explained why such a position was without merit.²⁶⁶ At the time the Boy Scouts revoked Dale’s membership, the only evidence of Dale’s homosexuality the organization had was a newspaper article describing a seminar on homosexual teenagers that Dale had attended.²⁶⁷ There was nothing whatsoever in that article to suggest that Dale would foist his views of homosexuality on the troop.²⁶⁸ Further, there was no evidence that Dale planned to violate the mandate in the Scoutmaster Handbook instructing Scoutmasters to avoid counseling on sexual matters.²⁶⁹

Justice Stevens additionally pointed out that it was of no real significance that Dale was a leader of the Rutgers Lesbian/Gay Alliance because many scouts engage in expressive activities outside of their troop.²⁷⁰ Specifically, scoutmasters were members of religious groups that sought conversion to their own faith and were involved in political parties that disseminated their position.²⁷¹ While the Boy Scouts did not believe in scoutmasters preaching their own faith or bringing politics into the troop, it did not discourage or forbid such outside expressive activity, but rather trusted its scouts and scoutmasters to comply with the policies.²⁷² Consequently, it was inconsistent for the Boy Scouts to presume that a gay member would be unable to comply with the governing policies any more than a member who was involved in a

262. *Id.*

263. *Id.* at 685-86.

264. *Id.* at 687.

265. *See id.* at 689.

266. *See id.*

267. *Id.*

268. *Id.* at 690.

269. *Id.*

270. *See id.*

271. *Id.*

272. *Id.* at 690-91.

religious or political activity.²⁷³ It was, to Justice Stevens, even more absurd to assume that Dale's mere presence in the Boy Scouts would coerce the group to convey a message about homosexuality.²⁷⁴

In this context, Justice Stevens criticized the majority's reliance on the *Hurley* Court's agreement with the organizers of a privately operated St. Patrick's Day parade that forcing them to include a gay, lesbian, and bisexual group in the parade would violate their free speech rights.²⁷⁵ Although, as Stevens pointed out, there was a "superficial similarity" between the *Hurley* case and the *Dale* case, the two situations were really quite disparate.²⁷⁶ In *Hurley*, the gay, lesbian, and bisexual organization was literally conveying a message by participating in the parade such that its own message "would likely be perceived" as a part of the parade organizers' overall speech.²⁷⁷ In contrast, however, Dale was not participating in the Boy Scouts to transmit a message on homosexuality and his participation did not send out such a message.²⁷⁸ For Justice Stevens, the "only apparent explanation for the majority's holding . . . is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment."²⁷⁹

In addition, Justice Stevens pointed out that *Hurley* involved the parade organizers' claim that they had the power to decide the content of the message they wished to spread at a particular time and place.²⁸⁰ The standards that apply to such a claim are different from those that apply to the Boy Scouts' claim of a right of expressive association.²⁸¹ A private entity has a right to refuse to broadcast a message with which it disagrees and a right to refuse to undermine itself by including the contradictory messages of others.²⁸² But, as Justice Stevens explained, because the underpinnings of an expressive association claim is adherence to a consistent position on a particular issue for a period of time, such a claim requires a different kind of scrutiny.²⁸³

273. *See id.* at 691.

274. *See id.* at 693.

275. *See id.*; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557 (1995); *see also supra* notes 138-158 and accompanying text (discussing *Hurley*).

276. *Dale*, 530 U.S. at 693 (Stevens, J., dissenting).

277. *See id.* at 694.

278. *See id.* at 694-95.

279. *Id.* at 696.

280. *Id.*

281. *See id.*

282. *Id.*

283. *See id.*

In closing his dissent, Justice Stevens noted that prejudice against homosexuals is still prevalent and that it causes “serious and tangible harm” which “can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers.”²⁸⁴

D. The Resurrection of the Medieval Leper

The *Dale* decision tightens the discriminatory ligature between the homosexual and the medieval leper. This is apparent in the Court’s misreading of the record and misapplication of its own precedent.

The image of the medieval leper surfaces in the *Dale* Court’s distortion of the record. Specifically, the Court said that it would “independently review the factual record” and “explore . . . the nature of the Boy Scouts’ view of homosexuality.”²⁸⁵ However, the Court actually ended up “independently” creating a record and fabricating a position on homosexuality for the organization. While examining the Scout Oath and Law, the Court acknowledged what should have been fatal to the organization’s case—namely that this “positive moral code for living” did not mention sexual orientation at all.²⁸⁶ The Oath states: “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; To keep myself physically strong, mentally awake, and morally straight.”²⁸⁷ The Law defines a Scout as “Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent.”²⁸⁸

After expressly finding that the Oath and Law did not supply definitions for the terms “morally straight” and “clean,” and that these terms were not “self-defining,” the Court nevertheless accorded them to the Boy Scouts’ supposed condemnation of homosexuality.²⁸⁹ While there is nothing to suggest that these buzz words have any tie to matters of sexual orientation, there is evidence in the *Dale* record to suggest quite the opposite—that in fact they are not tied to sexual orientation at all.²⁹⁰

284. *Id.* at 700. Justice Souter, joined by Justices Ginsburg and Breyer, authored a separate dissenting opinion in which he stated that the Court’s awareness of the “laudable decline in stereotypical thinking on homosexuality should not . . . be taken to control the resolution of [the] case” and that the right of expressive association should not “turn on the popularity of the views advanced by a group that claims protection.” *Id.* at 701 (Souter, J., dissenting).

285. *Id.* at 649-50.

286. *Id.* at 650 (quoting Brief for Petitioners at 3).

287. *Id.* at 649.

288. *Id.*

289. *Id.* at 650-51.

290. *See id.* at 666-71 (Stevens, J., dissenting).

The Court's finding that the terms in the Scout Oath and Law are undefined is clearly wrong. The Boy Scout Handbook and the Scoutmaster Handbook actually contain definitions, which although quite extensive, say nothing that can even be remotely construed as disapproving of homosexuality.²⁹¹ What is even more significant is the asexual lexicon contained in the Handbooks, which essentially amounts to applause for Dale's actual behavior with respect to the defense of his beliefs.

For example, the Boy Scout Handbook explains that while an "obedient" scout follows the laws, "[i]f he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them."²⁹² According to that Handbook, a "morally straight" scout is someone with "strong character," who "[r]espect[s] and defend[s] the rights of all people" and has "relationships with others [that are] honest and open."²⁹³ The Scoutmaster Handbook elaborates on the meaning of moral straightness as follows:

[A] key word has to be 'courage.' A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster.²⁹⁴

The facts of the case, the ones that precipitated the Boy Scouts' revocation of Dale's membership, comprise a parable about "obedience," "moral straightness," and "courage." Dale joined the Cub Scouts when he was eight years old, and became a Boy Scout three years later.²⁹⁵ By the time Dale turned eighteen, he had earned about twenty-five merit badges and attained admission into the prestigious Order of the Arrow.²⁹⁶ He also reached the rank of Eagle Scout, something bestowed upon only about three percent of all scouts.²⁹⁷ Later, the organization granted Dale's application to be an Assistant Scoutmaster.²⁹⁸ Considering all of these achievements, Dale's work with the Boy Scouts was unequivocally beyond reproach. Based on the text of the Scout Oath and Law, the organization did not and could not find one thing in Dale's tenure with the Boy Scouts that was repugnant to the Scout Oath and Law.²⁹⁹

291. *See id.* at 667-68.

292. *Id.* at 666.

293. *Id.* at 667.

294. *Id.* (quoting from the Scoutmaster Handbook).

295. *See id.* at 665 (Stevens, J., dissenting).

296. *See id.*

297. *See id.*

298. *See id.*

299. *See id.* at 690.

What triggered Dale's revocation of membership after more than twelve years of such participation was his "coming out," something that occurred not in the context of his work with the Boy Scouts, but in an entirely different arena.³⁰⁰ This process took place at college, where Dale decided to no longer conceal his sexual orientation.³⁰¹ But Dale went beyond the mere refusal to hide—he actually assumed a leadership role, becoming co-president of the Rutgers University Lesbian/Gay Alliance.³⁰² On top of that, Dale took part in a seminar that dealt with the psychological and health needs of lesbian and gay teenagers, after which the press interviewed him.³⁰³ Dale's sexual orientation was further publicized when the newspaper printed the interview along with his picture, identifying him as a gay leader at the college.³⁰⁴ Dale's emergence from the closet went beyond a mere passive disinclination to hide, but took the form of vocal leadership displayed to the outside world.³⁰⁵

Dale's conduct, however, was precisely the sort that the Boy Scout Code deems commendable: like the "obedient" scout, Dale, finding that the "rules and laws" pertaining to homosexuals were "unfair," sought to "have them changed."³⁰⁶ He did this in an "orderly manner," through education in a seminar and through dialogue with the media.³⁰⁷ Dale was, at least in the language of the Scouts, being "morally straight" by advocating "the [r]espect and . . . rights of all people."³⁰⁸ Furthermore, by coming out Dale ensured that his "relationships with others [were] honest and open."³⁰⁹ Dale manifested what the Boy Scouts itself says is "key"—namely exhibiting "courage"—he did "what his head and heart [told] him [was] right."³¹⁰

While the *Dale* Court ignored the actual definitions in the Handbooks—ones that say nothing about homosexuality—it also blinded itself to what should have been apparent: the similarity between the very behavior that made the Boy Scouts expel Dale as a member and the Boy

300. See *supra* notes 69-72 and accompanying text (discussing the significance of "coming out of the closet" for homosexuals).

301. See *Dale*, 530 U.S. at 644-45.

302. See *id.* at 645.

303. See *id.*

304. See *id.*

305. See *id.*

306. See *id.* at 666-68 (Stevens, J., dissenting).

307. See *id.*

308. See *id.* at 667.

309. See *id.*; see also *supra* notes 69-72 (discussing the significance of "coming out" for the gay community).

310. See *Dale*, 530 U.S. at 667 (Stevens, J., dissenting).

Scouts' own description of the ideal "obedient" and "morally straight" scout.³¹¹ The Court thus was not willing to engraft homosexuality onto the meaning of asexual terms in the Scout Oath and Law, and in essence took an individual that epitomized the commendable behavior set forth in the Scout Code and portrayed that person as a deplorable outcast. The Court deemed his conduct as a human being irrelevant, and treated Dale's sexual orientation as a dangerous condition, one that threatens the moral health of the youth organization.³¹²

From medieval times through to the seventeenth and eighteenth centuries, someone suspected of being a leper, even a model citizen, had to submit to a tribunal to obtain a certificate of cleanliness.³¹³ One scholar has described "the normal procedure for accusing and assessing lepers" as follows:

Neighbours accused, and responsible and worthy citizens examined. In Scotland in the late sixteenth and early seventeenth centuries two different practices existed. In some places, as in Glasgow, the magistrates were responsible for searching for, assessing, and consigning lepers to hospital: they ordered in 1573 that people suspected to have leprosy were "to be viseit and gif they be found so, to be secludit of the town to the hospital at Brigend." Further north, as in Aberdeen, the parish meeting assumed this mantle: for example, on May 13th, 1604, the Kirk session ordered "Helene Smythe, ane puir woman infectit with Leprosie to be put in the hospital appoyntit for keeping and handling lipper folkis betweixt the townis."³¹⁴

Rumors, sometimes triggered by an individual's suspicious and "evasive" behavior, instigated such a "trial," which was essentially a public inspection interspersed with interrogation.³¹⁵ The suspect's conduct, however, was deemed entirely irrelevant and all that mattered was

311. *Id.* at 666-68 (discussing the Boy Scout Handbook, Law, and Oath).

312. *See* Goodman, *supra* note 74, at 862 (discussing the Superior Court decision, *Dale v. Boy Scouts of Am.*, 706 A.2d 270, 288 (N.J. Super. Ct. App. Div. 1998) and its rejection of the trial court's conclusion that an "active sodomist is . . . incompatible with scouting"). Goodman states:

[T]he court dug deeper and observed that such a statement illustrates "the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts, or will instill in them ideas about the homosexual lifestyle." While the BSA has never publicly admitted such fears, the court was fully aware that homophobia and stereotypical notions of homosexuality exist today and, to a certain degree, may underlie the BSA's anti-gay position.

Id. (quoting *Dale*, 706 A.2d at 289); *see also* Hutchinson, *supra* note 69, at 109 (discussing the trial court decision in *Dale*, and stating that the court there "failed to see the Boy Scouts' policy as one of invidious discrimination").

313. *See* RICHARDS, *supra* note 3, at 40-47.

314. *Id.* at 41.

315. *Id.* at 42.

whether he or she appeared to be diseased.³¹⁶ The end result of this “trial” could be the damning issuance of a declaration of “uncleanness” followed by the individual’s swift ejection from the community.³¹⁷ Stated differently, the community outed the leper and then expelled him.

Such a process resembles the Court’s approach to the situation in *Dale*. Dale, who was no longer secretive about his own sexual identity, had “come out” and submitted himself to public inspection. The Boy Scouts and ultimately the Supreme Court rendered their diagnosis of uncleanness and issued the sentence of expulsion. Dale’s actual conduct was deemed irrelevant and he, like the loathsome leper, was judicially branded infectious and cast out.

Another word that figures prominently in the Scout Law is “clean.”³¹⁸ Although neither the Boy Scout nor Scoutmaster Handbooks connects cleanliness with issues of sexuality, the *Dale* Court treated clean as a synonym of heterosexuality. The Boy Scout Handbook explains:

A Scout keeps his body and mind fit and clean. . . . You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can’t help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

There’s another kind of dirt that won’t come off by washing. It is the kind that shows up in foul language and harmful thoughts.³¹⁹

While the aspiration here is both external and internal cleanliness, the pure mind reigns at the top of the hierarchy. The Scoutmaster Handbook even provides a lesson plan on cleanliness that leaders can give their scouts built on an analogy between people and two cooking pots: “one shiny bright on the inside but sooty outside, the other shiny outside but dirty inside.”³²⁰ The gist of all this is that if we have to choose between the two pots, we would, of course, prefer the one with the pristine interior.³²¹ The Handbook suggests that the scoutmaster lecture the boys on how pots are like people.³²²

In equating cleanliness with heterosexuality, the Court intimates that only the heterosexual is, like the good pot, “shiny bright on the inside.”³²³ For the Court, the homosexual is sullied with the “kind of dirt

316. *See id.* at 41-47.

317. *Id.*

318. *See Dale*, 530 U.S. at 650.

319. *Id.* at 667-68 (Stevens, J., dissenting) (quoting the Boy Scout Handbook).

320. *Id.* at 668 n.2.

321. *See id.*

322. *See id.*

323. *See id.*

that won't come off by washing."³²⁴ The homophobic image that the Court implicitly adopts is one of the gay male as morally besmirched, an attitude that reflects what Professor Brower has described as the "schema" imposed on homosexuality which is supposedly "omni-present, uncontrollable and predatory."³²⁵ Specifically, it is the notion that, for the homosexual, "[s]ex is completely divorced from love, long-term relationships and family structures, all of which form part of the schema for heterosexuality."³²⁶ Such an offensive stereotype personifies the gay male as raw libidinous energy, as the sodomite sinner.³²⁷ What is most disturbing, however, about this allegorical fabrication—this judge-made symbol of iniquity—is that sexual orientation is treated as possessing the whole person. There is nothing more to Dale than his gayness.

The approach here is reminiscent of the traditional treatment of lepers, who have also been depicted as cloaked in the kind of filth that repels soap and water. For the Court, the homosexual, like the leper, has a "vile and loathsome crust" supposedly derived from sinful living.³²⁸ Historically, communities feared and isolated lepers not just because they adhered to what we now know is the fallacious belief that the disease is readily communicable, but also because the disease, replete with its hideous deformities, represented deific punishment for an immoral life.³²⁹ The lepers' whole identity was their disease and as such, they symbolized the sinner sentenced to hell on Earth. In the *Dale* Supreme Court decision, Dale himself was similarly viewed as inextricable from his "affliction," and like the leper, wears his dirt on the outside.

The image of the medieval leper also underlies the Court's conclusion that the forced inclusion of Dale would significantly affect the Boy Scouts' expression. In reaching this conclusion, the Court downplays the fact that the Boy Scout Handbook advises the organization to avoid sex education and relegate such matters to others,

324. *Id.* at 668.

325. Brower, *supra* note 29, at 69.

326. *Id.*

327. *See supra* notes 60-68 and accompanying text (discussing how sodomy laws and the judicial construction and interpretation of them engenders damaging stereotypical notions about lesbian and gay sexual orientation).

328. RICHARDS, *supra* note 3, at 6 (quoting Shakespeare's description of the poison prepared for Hamlet's father as a "leprous distillment" which made his body "most lazar-like with vile and loathsome crust").

329. *Id.* at 6 ("Medieval sermon and literature, in harmony with the contemporary image of the disease, portrayed leprosy as punishment meted out for moral failing, especially for loose, wanton, and lustful living."); *see also supra* notes 18 & 22 and accompanying text (discussing leprosy as a metaphor for sin).

such as home, church, or school.³³⁰ Similarly, the Court overlooks the Scoutmaster Handbook directive to leaders to refer scouts with questions of a sexual nature to family members, doctors, religious leaders, or other professionals. Specifically, the official Boy Scout position is that the subject of sex is not “construed to be Scouting’s proper area.”³³¹

Despite the fact that there was evidence in the record that the organization expressly eschews embroilment in sexual issues, and despite the fact that there was no evidence in the record to even suggest that Dale would disobey such directives, the Court nevertheless found that Dale’s presence as an Assistant Scoutmaster would “significantly burden” the Boy Scouts’ desire not to promote homosexual conduct.³³² The Court explained:

But here Dale, by his own admission, is one of a group of gay Scouts who have “become leaders in their community and are open and honest about their sexual orientation.” Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.³³³

It is Dale’s identity as an “out” gay male that is, unto itself, a message that can potentially befoul the organization. It is as if his condition is contagious, something that can, and will, infect the young constituents.³³⁴ The Court here simply re-echoes the popular misconception that a child’s mere exposure to a gay person will influence his sexual orientation.³³⁵ This is related to the disturbing stereotype of the gay male as someone with a proclivity to either convert children to homosexuality outright or to glorify the gay life style in such a way that makes children naturally gravitate toward it.³³⁶ A kindred stereotype—one that is just as obnoxious—is that homosexuals are inclined to molest children, harming them psychologically and making them more disposed to engage in homosexual conduct in the future.³³⁷

330. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 669 (2000) (Stevens, J., dissenting).

331. *Id.* (quoting the Scoutmaster Handbook).

332. See *id.* at 654-55.

333. *Id.* at 653.

334. See generally Robson, *supra* note 48; see also *supra* notes 39-50 and accompanying text (discussing how homophobic courts assume that contact between homosexuals and children is toxic).

335. See Robson, *supra* note 48, at 917.

336. See *id.*

337. See generally Brower, *supra* note 29, at 81-82; see also *supra* notes 39-50 and accompanying text (discussing the damaging assumption that lesbians and gays are unhealthy for children).

In addition, there are cruel notions, particularly in the family law area, that gays corrupt children by making them social pariahs.³³⁸ Courts sometimes view a family with a gay or lesbian parent as a disgrace, reminiscent of the way communities used to treat families with a leper member. For example, in the much publicized *Bottoms v. Bottoms* decision, the Virginia Supreme Court, awarding custody of a three-year old to his maternal grandmother instead of his lesbian mother, stated that “living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict [sic] the child’s relationships with its ‘peers and with the community at large.’”³³⁹ The *Dale* Court’s approach to the Boy Scouts’ exclusion of Dale amalgamates the multiple offensive notions about the incompatibility between homosexuality and youth: the Court views Dale as apt to convert the boys to homosexuality, as someone who will proselytize, and at least, make his lifestyle seem enticing.³⁴⁰ Implicit in the Court’s decision is the sense (or rather nonsense) that Dale’s very penetration into the organization constitutes a form of molestation, which will spread the epidemic of same-sex orientation. As explained above, the law forbade lepers contact with “infants or young folk,”³⁴¹ and here the Boy Scouts, with the Supreme Court’s stamp of approval, does the same thing to Dale.

The unconscious association between homosexuality and leprosy also comes out in the Court’s misapplication of precedent. As dissenting Justice Stevens aptly pointed out, the *Dale* decision is an anomaly because the Court has never before found that a claimed right to

338. See *supra* notes 39-50 and accompanying text.

339. 457 S.E.2d 102, 108 (Va. 1995); see also Battaglia, *supra* note 7, at 212-13 (discussing the *Bottoms* decision and how “sodomy laws are often used to deny gay and lesbian parents custody or to restrict their visitation rights”); Ronner, *supra* note 7, at 372 (“According to the [*Bottoms*] court, the lesbian mother is a diseased felon—the *malum in se* criminal—who having sinned, must lose her baby.”). Robson also makes a good point:

In the context of the *Bottoms* litigation, any underlying belief that the harm to the toddler in being raised by his mother would be his eventual homosexuality is especially ironic: he is not in the custody of the one person in litigation with the proven track record of raising a sexual minority, Sharon Bottoms’ mother, Kay Bottoms.

Robson, *supra* note 48, at 928.

340. See *supra* notes 39-50 and accompanying text (discussing all of the offensive preconceptions that come into play in cases involving homosexuals and children).

341. See *supra* note 3 and accompanying text (discussing the medieval law restricting lepers).

associate by excluding members trumps a state antidiscrimination law.³⁴² As discussed above, the sort of balancing approach the Court undertook in *Roberts* and *Duarte* indicates that when a group has an exclusionary membership policy, a state's public accommodation law would be a virtually insurmountable hurdle.³⁴³ Also, the Court stressed in both of those seminal decisions that a group's mere engagement in some kind of expressive activity does not constitute a license to discriminate.³⁴⁴ If the Court had decided *Roberts* and *Duarte* differently, any group would have, in effect, immunity from the public accommodation laws because all groups arguably engage in some form of expressive activity.³⁴⁵

Roberts and *Duarte* stand for the unequivocal proposition that having an open exclusionary membership policy is not an adequate basis for prevailing on a claim of expressive association.³⁴⁶ In both *Roberts* and *Duarte*, the Court rejected the organizations' arguments that their restricted membership was determinative, finding that such policies did not justify the Jaycees' and Rotary Club's exclusion of women.³⁴⁷ Also, the Court refused to abide by the organizations' contention that the existence of some nexus between their expressive activities and their exclusionary policies substantiated their claim.³⁴⁸ This also makes sense because one can always finesse an arguable link between what is being said and who is being shut out; and if that were enough, then exclusion would automatically legitimate exclusion.

Although the situations in *Roberts* and *Duarte* are practically indistinguishable from that in *Dale*, the Court simply brushed those cases aside without serious analysis.³⁴⁹ It did not acknowledge that the Boy Scouts, like the organizations in *Roberts* and *Duarte*, pointed to an exclusionary membership policy and contended that there was a bridge between such policy and the Boy Scouts' expressive activities.³⁵⁰ In essence, the Court simply ignored the fact that the Boy Scouts made the identical hollow noises that were unavailing to the excluding organizations in *Roberts* and *Duarte*.

342. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 679 (2000) (Stevens, J., dissenting) (stating that "[U]ntil today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law").

343. See *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

344. See *Dale*, 530 U.S. at 682 (Stevens, J., dissenting).

345. See *id.*

346. See *id.*

347. See *id.*

348. See *id.*

349. See *id.* at 657-58.

350. See *id.* at 647-52.

Also, as the *Dale* Court refused to recognize, the Boy Scouts failed to pass the test set forth in *Roberts* and *Duarte*. The organization simply could not make the requisite showing that it had a shared goal of disapproving homosexuality and that the inclusion of homosexuals would thereby significantly affect such a goal or burden expressive activities.³⁵¹ The record in *Dale* reflected the nonexistence of any such goal; the Boy Scouts' mission statement and federal charter say absolutely nothing about homosexuality.³⁵² The Scout Oath and Law are also silent.³⁵³ As explained above, the organization did not define "morally straight" and "clean" by referring to sexuality.³⁵⁴ Furthermore, there was no showing that the Boy Scouts did any proselytizing in matters of sexuality at all. Rather, what is interesting in the *Dale* case is not the fact that the organization failed to demonstrate the articulation of a shared goal of condemning homosexuality, but that it had actually shown something contrary—a concerted effort on the part of the organization to avoid either condemnation or approval of all sexual controversy. As discussed above, the Boy Scout policy was that sexual matters reside outside the province of scouting and instead, were properly left to the schools, parents, doctors, and religious leaders.³⁵⁵

Because not all parents and religious leaders uniformly disapprove of homosexuality and some actually condone it,³⁵⁶ the Boy Scouts' express delegation of such issues is tantamount to *not* necessarily being

351. See *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

352. See *Dale*, 530 U.S. at 668-69 (Stevens, J., dissenting).

353. See *id.*

354. *Id.*

355. See *id.* at 669-70.

356. See *id.* at 670 & n.3 (citing Brief of Deans of Divinity Schools and Rabbinical Institutions as Amici Curiae at 7, *Dale*, No. 99-699). The amici point out that "[t]he Boy Scouts are not the first group to attempt to rationalize historic discrimination by an appeal to 'morality'" and explain that "*The Dred Scott* decision, holding that slaves could not be deemed citizens under the Constitution, relied on the fact that the Declaration of Independence and Constitution had both been written at a time when slavery was almost universally considered a moral practice." Brief of Deans of Divinity Schools and Rabbinical Institutions as Amici Curiae at 7, *Dale*, No. 99-699. The amici further state:

The diverse religions(sic) traditions of this country present no coherent moral message that excludes gays and lesbians from participating as full and equal members of those institutions. Indeed, the movement among a number of the nation's major religious institutions for many decades has been toward public recognition of gays and lesbians as full members of moral communities, and acceptance of gays and lesbians as religious leaders, elders and clergy. A growing body of scholarship in the areas of religious ethics, biblical studies, and theology asserts that gay and lesbian believers must be recognized as full and equal members in religious communities.

Id. at 8.

antihomosexual.³⁵⁷ The Boy Scouts made no showing that they excluded boys whose parents and churches supported gay rights. It could thus be said that in expressly relegating matters of sexual orientation to others, some of whom might themselves be gay or gay advocates, the Boy Scouts themselves tacitly acquiesced to the gay sexual orientation. In short, while the organization failed to satisfy the requisite showing of a shared goal of homosexual disapproval, the record in the case showed what alone should have defeated the organization's asserted defense—namely, a neutrality with respect to sexual orientation.

In *Roberts*, the record failed to show that admitting women would impede the organization's "ability to engage in [its] protected activities or to disseminate its preferred views,"³⁵⁸ and in *Duarte*, the law "[did] not require Rotary Club to abandon or alter any of" its activities.³⁵⁹ While the same sort of conclusions should have been drawn from the situation in *Dale*, the Court summarily glossed over the common denominators.

Although there was a 1978 policy statement declaring homosexuality as not "appropriate," that statement alone should have been deemed insufficient to bolster the Boy Scouts' claim for multiple reasons.³⁶⁰ For example, in *Duarte*, even though Rotary had a more elaborate statement which asserted that the exclusion of women fostered the organization's "fellowship" and that it was the only means of "operat[ing] effectively," the Court accorded such assertions little weight.³⁶¹ The 1978 policy statement, like those in *Roberts* and *Duarte*, was nothing more than the mere adoption of an exclusionary policy. While it branded homosexuality as not "appropriate," it did not try to weave that stance into a shared goal or expressive activity.³⁶² Moreover, the organization was incorporated in 1910 and, unlike its longstanding emphasis on the significance of excluding women and atheists, it said

357. See *Dale*, 530 U.S. at 670-71 (Stevens, J., dissenting).

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

359. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

360. *Dale*, 530 U.S. at 651-52 (discussing the 1978 Position Statement). The 1978 Position Statement to the Boy Scouts' Executive Committee was signed by the Boy Scouts President and the Chief Scout Executive. It provided:

Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

A. No. The Boy Scouts of America is a private membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.

Id.

361. *Duarte*, 481 U.S. at 541-42.

362. See *Dale*, 530 U.S. at 671-74 (Stevens, J., dissenting).

nothing about homosexuality until 1978.³⁶³ This too implies that antihomosexuality was not really part of the Boy Scouts' fundament. The *Dale* Court, however, treated the 1978 words as determinative.³⁶⁴ In doing so, the Court espoused the silly circular precept that it adamantly rejected in *Roberts* and *Duarte*—namely, that exclusion automatically legitimates exclusion.

Also, the 1978 policy hailed by the Court was only an internal memorandum, for the eyes of only select members of the organization's Executive Committee.³⁶⁵ In fact, the record reveals a Boy Scouts that treated the statement not as an open expression but as a secret, and a Boy Scouts that opted to present itself to the outside world as welcoming a variety of members.³⁶⁶ A portion of the statement that the Court omits provides: "At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it."³⁶⁷

Although, as Justice Stevens pointed out, the above language suggests that the organization did not predict that the state would one day enact a public accommodation law that could conceivably be at odds with its exclusionary policy, what is truly conveyed is an overall understanding that the organization's "discrimination . . . on the basis of homosexuality" must capitulate if such exclusion ever becomes unlawful.³⁶⁸ In essence, the statement as a whole constitutes a somewhat contained policy, one without real longevity, and one that contemplates its own expiration in the wake of changed laws. Specifically, it embraces the prospect of one day including, not expelling, homosexuals.

There were two additional statements made by the Boy Scouts in the record. The 1991 Position Statement provides: "We 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

363. See Goodman, *supra* note 74, at 881 ("[T]he complete absence of [the antigay] policy from 1910 through 1978 creates some doubt as to its fundamental nature. Comparatively, the emphasis on the importance of an all male organization and a belief in God are documented back to the incorporation of the [Boy Scouts].").

364. See *Dale*, 530 U.S. at 651-52.

365. See *id.* at 672 (Stevens, J., dissenting).

366. See *id.*

367. *Id.*

368. See *id.* at 673.

desirable role model for Scouts.”³⁶⁹ The organization redrafted this position in 1993, stating:

The [Boy Scouts] does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts.

The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day. Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law. . . .

The [Boy Scouts] has always reflected the expectations that Scouting families have had for the organization.

We do not believe that homosexuals provide a role model consistent with these expectations.

Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the [Boy Scouts].³⁷⁰

The Court quoted portions of these two statements, labeled them “consistent . . . core message[s]” and without elaboration, glued them to antihomosexual positions that the Boy Scouts had taken in prior litigation.³⁷¹

While the 1991 and 1993 statements should have been treated as null and void solely because the organization issued them after jettisoning Dale, they were also inadequate for other independent reasons. As Justice Stevens explained, while the 1991 version tried to tie the exclusion of gays to the Scout Oath and Law, the 1993 revision did not follow that approach.³⁷² Rather, the more recent statement said that it could not include homosexuals because it would contravene the “expectations that Scouting families have had for the organization.”³⁷³ The organization’s failure to even attempt to link the challenged policy and its core code reveal what should have been fatal—the absence of any real expressive activity based on antihomosexuality.

In addition, as Justice Stevens pointed out, during the interim period between 1991 and the redrafted 1993 statement, when the Boy Scouts operated under the putative aegis of connecting its exclusion of gays to its Oath and Law, the organization did not reach out and try to teach members anything about homosexuality and its supposed incompatibility

369. *Id.* at 652 (quoting the 1991 Position Statement).

370. Goodman, *supra* note 74, at 855 (quoting the 1993 statement).

371. *Dale*, 530 U.S. at 652.

372. *See id.* at 675 (Stevens, J., dissenting).

373. *Id.*

with scouting.³⁷⁴ Instead, the organization, particularly in its Handbooks, imparted lessons about tolerance and the importance of leaders refraining from tutelage of a sexual nature, which was decidedly not the “proper area” of scouting.³⁷⁵

Furthermore, both the 1991 and 1993 Statements refer to “homosexual conduct.”³⁷⁶ The New Jersey law, however, forbids discrimination on the basis of sexual orientation and the organization expelled Dale for his sexual orientation, not for his sexual conduct.³⁷⁷ In finding that the post-revocation statements apply to Dale, the Court formed a fallacious parity between conduct and orientation. What emerges once again is that “schema,” portraying gay sexuality as “uncontrollable,”³⁷⁸ as something that does not merely exist as identity but, more like disease, is pandemic, unleashing itself and infecting others at all times.

The *Dale* Court, ignoring the record before it and what should have been deemed binding precedent, reached the baseless conclusion that the Boy Scouts had a shared goal of disapproving homosexuality and that the forced inclusion of gays would unduly burden its expressive activities. In essence, the Court concocted a goal and then strained to create a nexus between it and the Boy Scout creed. In doing so, the Court drafted its own policy statement for the organization—one condemning homosexuality—and proclaimed the inclusion of gays to be inappropriate in a youth organization. What happened in this case is tantamount to the Court taking judicial notice of the farce that homosexuality, like the scourge of leprosy, is infectious and thus, gay exclusion is necessary.³⁷⁹

While the Court skirts the indistinguishable *Roberts* and *Duarte* cases, and even twists them, it relies predominantly on the inapposite *Hurley* case. As discussed above, the *Hurley* Court found that forcing the operators of the St. Patrick’s Day parade to include GLIB would violate their free speech rights.³⁸⁰ The decision, however, hinged on the fact that the Court saw GLIB as actually transmitting a message through

374. See *id.* at 677-78.

375. See *id.* at 669, 676.

376. See *id.* at 676.

377. See *id.*; see also *supra* note 173 (citing New Jersey’s public accommodation statute).

378. See *supra* notes 325-327 and accompanying text.

379. See *supra* notes 39-50 and accompanying text (describing the bias against allowing homosexuals to have contact with children).

380. See *supra* notes 138-159 (discussing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557 (1995)).

marching.³⁸¹ GLIB was in fact formed to spread gay pride.³⁸² Also, the record in the *Hurley* case reflected the fact that in a previous parade, the group disseminated a fact sheet with its intentions and made its objectives known while marching.³⁸³ Moreover, the *Hurley* Court feared that GLIB's message could become confused with the parade organizers' own speech as the organizers are responsible for making the "customary determination about a unit admitted to a parade."³⁸⁴

The problem is that none of the factors deemed determinative in *Hurley* existed in *Dale*.³⁸⁵ Dale, as a participant or even leader in the Boy Scouts, did not purport to transmit a message to anyone. He was not participating in what is an "inherent[ly] expressive" activity.³⁸⁶ Nor, as a Boy Scout member or leader, was he carrying banners and distributing fact sheets. The Court, however, in reflexively citing *Hurley*, suggested that Dale's mere act of membership in the Boy Scouts constitutes a message, one that would require the organization to alter its own expressive composition.³⁸⁷ In essence, the Court saw Dale's homosexual identity as so menacing that it warranted some special First Amendment vaccine for the excluding organization.³⁸⁸ The Court implied that gay sexual orientation, like disease, is something that by its very nature speaks out and spreads its own catechism.

As discussed above, several scholars have noted that for homosexuals, the "coming out process has tremendous cultural and political significance."³⁸⁹ Because nonheterosexual activity is and has been stigmatized, that step of emerging from the closet is an extremely courageous and meaningful event.³⁹⁰ It is a way of disavowing invisibility and fostering collective political action to safeguard civil rights.³⁹¹ Being in the closet has obvious psychological effects, such as an internalization of societal homophobia or an acceptance that one's sexual orientation is

381. *See id.*

382. *See Hurley*, 515 U.S. at 561.

383. *See id.* at 570.

384. *Id.* at 575.

385. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 693 (2000) (Stevens, J., dissenting).

386. *See Hurley*, 515 U.S. at 568 (characterizing behavior as "inherently expressive").

387. *See Dale*, 530 U.S. at 658-59.

388. *See id.* at 696 (Stevens, J., dissenting). ("The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment.")

389. Hutchinson, *supra* note 69, at 89.

390. *See id.*

391. *See id.* at 89-90.

something shameful, which can imperil self-esteem.³⁹² Coming out, however, can be cathartic and self-affirming—a means of divesting oneself of societal scorn and figuratively marching into the world chanting “I am proud of who I am.” Beyond that, coming out is not just a choice to make public one’s true identity, it can also be the very process of becoming gay or lesbian for the homosexual.³⁹³ In short, the process of coming out *is* identity.³⁹⁴

Hurley was detrimental to the incidence of coming out. Justice Souter, to his credit, recognized that marching in the parade was a form of “coming out,” a way for individuals to “celebrate . . . [their] identity as openly gay, lesbian, and bisexual . . . [and] to show that there are such individuals in the community.”³⁹⁵ The Court, however, deemed the parade organizers entitled to prevent GLIB from such open celebration and thus, not only silenced the group, “relegat[ing] ‘outness’ back into its metaphorical closet,”³⁹⁶ but also condemned nonheterosexual identity. The Court put its imprimatur on extinguishing the very process by which certain people self-actualize.

The problem with *Dale* is that it extends the damage that *Hurley* already inflicted on outing by negating the existence of the self-defining process itself. Specifically, if coming out is not foisted on an individual, it is a *choice*, and the choice itself is what is crucial. When an individual voluntarily decides to emerge from the closet and come out of hiding, it is not the status of being out that matters as much as that moment of conscious revelation that inaugurates the resultant outness. Also, the choice to come out is not black and white, or all or nothing. It is as multi-faceted as life itself. It is apodictic that human beings, who have many aspects and live in multiple worlds, tend to view their sexual preference as only one component of who they are. Consequently, as human beings, homosexuals can choose to be open and even militant about their sexuality in certain arenas and not in others. For example, a

392. See *id.* at 121 (“A plethora of psychological data has documented the debilitating impact and “internalized homophobia”—or the acceptance of societal homophobia by gay and lesbian people—has upon an individual’s self-esteem, personal development, and emotional adjustment.”); see also *supra* notes 68-71 and accompanying text.

393. See Hutchinson, *supra* note 69, at 123 (“Because coming out serves as a crucial instrument in the development of gay, lesbian, bisexual, and transgendered identities, ‘outness’ has become an inseparable part of gay identity.”).

394. See *id.*

395. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557, 570 (1995); see also Wildenthal, *supra* note 72, at 453 (“Justice Souter’s opinion validated, as lying at the core of First Amendment protection, speech that—even though sometimes ‘not wholly articulate’—proclaims the innermost identity of the speaker.”) (footnotes omitted).

396. Hutchinson, *supra* note 69, at 116.

gay lawyer might choose to help mobilize people to promote equality for gays and lesbians, and might even choose to become a prominent leader in various gay rights organizations, and yet while in the workplace (perhaps the more stodgy law firm) he might choose to simply not make an issue of his sexuality or even participate in discussions about sexual preference.

While the *Hurley* Court implicitly transmitted a message to GLIB that says “you are making a choice, the results of which we will not allow,” the *Dale* decision constitutes an absolute nullification of the opportunity to have a choice at all. While Dale himself had “come out” in his separate life, he was not a member in, nor seeking leadership status in, the Boy Scouts as part of his coming out.³⁹⁷ There was nothing in the *Dale* record to substantiate a claim that participation in the Boy Scouts was Dale’s outness march.³⁹⁸ There was no allegation that Dale, as member or leader in the Boy Scouts, was scheming to advocate gay rights or seeking to recruit that organization for his self-identifying process. For the *Dale* Court, however, Dale had no choice, no process. The Court had, in essence, chosen for Dale. The majority justices themselves had outed Dale with respect to the Boy Scouts and then ousted him from its constituency. While the *Hurley* Court seemed to say to GLIB, “You are making a choice to march out, the results of which we do not allow,” the *Dale* Court said to Dale, “We do not even allow you a choice.” For Dale, his identity is already out in all spheres of his life (even in his Boy Scout activities), and for the Court, such outness, like sodomy, is threatening.³⁹⁹ For the Court, Dale’s sexual identity is akin to disease, one with bacilli that are perilously air-borne and transmitted wherever Dale goes.

V. CONCLUSION

If courts are to help eradicate discrimination based on sexual orientation, they must confront their own homophobia and underlying repression, which is the “function of rejecting and keeping something out

397. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 689 (2000) (Stevens, J., dissenting) (“[The Boy Scouts] has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked.”).

398. See *id.* Justice Stevens states that the Boy Scouts’ ostensible contention “that Dale would use his Scoutmaster position as a ‘bully pulpit’ to convey immoral messages to his troop . . . lacks merit.” *Id.* (quoting Brief for Petitioners at 21-22, *Dale*, (No. 99-699)). While Stevens states that the majority does not accept such an argument, the majority silently acquiesces in it and indulges in the fear that Dale’s sexual orientation makes him a message spreader.

399. See *supra* notes 60-68 and accompanying text (discussing the damaging connection between sodomy and homosexuality).

of consciousness.”⁴⁰⁰ Judicial decisions based on stereotypes ensue from a completely irrational notion that something is “bad,” which causes judges to concoct a scapegoat, something they can safely feel is “external” or “alien to the other ego.”⁴⁰¹ The *Dale* decision is one of the most homophobic Supreme Court decisions because its reasoning stems from multiple offensive stereotypes about homosexuality which intermingle and amount to a portrayal of the homosexual as an infectious medieval leper.⁴⁰²

The *Dale* Court, ignoring the fact that Dale’s conduct was consistent with commendable key ingredients in the Scout Oath and Law, treated the gay male as antithetical to the “morally straight” and “clean” scout.⁴⁰³ The Court viewed Dale’s sexual orientation as a leprous condition, one that could blight the moral health of the youth organization.⁴⁰⁴ For the Court, Dale’s identity as an “out” gay male made him menacing and contagious.⁴⁰⁵ Implicit in the Court’s approach is the notion that a child’s mere exposure to Dale would affect (or rather infect) his sexual orientation.⁴⁰⁶ The unspoken fear is that Dale, as a gay man, can spread homosexuality to children and transform the organization into a colony of leprous sodomites. Consequently, the Supreme Court bans Dale, like the medieval leper, from contact with “infants or young folk.”⁴⁰⁷

In equating cleanliness with heterosexuality, the Court also implies that the gay male has what the Boy Scout Handbook calls the “kind of dirt that won’t come off by washing.”⁴⁰⁸ What surfaces in the Court’s reasoning is the damaging notion of the homosexual as being innately out of control sexually and as personifying the predatory sinner. Dale, like the archaic leper, is viewed as prone to immoral living and symbolizes for the Court the rightly punished and exiled malfeasant.⁴⁰⁹

The *Dale* Court augments the damage that *Hurley* did to the self-identifying process of outing. As explained above, the choice to “come

400. SIGMUND FREUD, *Repression*, in GENERAL SELECTION, *supra* note 57, at 89.

401. SIGMUND FREUD, *Negation*, in GENERAL SELECTION, *supra* note 57, at 55-56.

402. *See supra* Part II (describing the status of and hysteria that surrounded the medieval leper).

403. *See Dale*, 530 U.S. at 651.

404. *See supra* Part IV.D (analyzing the *Dale* Court’s homophobia).

405. *See supra* Part IV.D.

406. *See supra* Part IV.D; *see also supra* notes 39-50 (describing the fear of contact between homosexuals and children).

407. *See supra* note 3 and accompanying text (discussing the various restrictions on medieval lepers).

408. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 668 (2000) (Stevens, J., dissenting), (quoting the Boy Scout Handbook).

409. *See supra* Part II (correlating homophobia with irrational beliefs about lepers).

out of the closet” has significant psychological, cultural, and political ramifications for the homosexual.⁴¹⁰ While the *Hurley* Court acknowledged that GLIB was making a choice to come out through marching in the parade, it disallowed that outing process by legitimating GLIB’s exclusion. The *Dale* Court, however, eliminated both the choice and the outing process for Dale. As discussed above, the Court made the choice for Dale, outing him with respect to the Boy Scouts and then ousting him as a member. The judicial approach here is reminiscent of the cruel savage ritual of “accusing and assessing lepers,” that forced outing with its resultant exile from the healthy, moral and clean community.

One broad effect of the *Dale* decision is to chill the homosexual process of outing. While the record did not reflect that Dale chose to be “out” in the context of his work with the Boy Scouts or that he planned to use the organization as his soap box for gay proselytization, the Court presumed that his gay activism in one context spelled gay activism in all contexts. As such, Dale’s decision to “come out” and assume a gay leadership role in college resultingly truncated what was for him a near lifetime contribution to a separate community, a youth organization. The *Dale* decision potentially deters gay males and lesbians from being open and honest about their own identity because emergence could mean expulsion and exile.

While being in the closet does literally hinder gay and lesbian collective political activity, there is also something more subtly damaging to society about invisibility: the concealment of same-sex orientation from community awareness retards progress for lesbians and gay individuals.⁴¹¹ It is, of course, elementary that people who are familiar with and interact with homosexuals are less inclined to harbor homophobic beliefs.⁴¹²

As discussed above, in the past, lepers also went into hiding.⁴¹³ If they could stay in the closet and evade the authorities, they could avoid the harsh fate of banishment, which ensued from irrational fear and discrimination.⁴¹⁴ Such self-imposed concealment, however, turned out to be not just psychologically and physically harmful to the individuals

410. See *supra* Part IV.D; see also *supra* notes 69-72 and accompanying text.

411. See Eskridge, *supra* note 36, at 614 (“Psychological studies suggest that people who actually know an openly lesbian or gay person are less likely to be homophobic or to accept homophobic stereotypes.”); see also *supra* notes 69-72 (discussing the benefits that inure to society when a gay or lesbian individual comes out of the closet).

412. See generally Eskridge, *supra* note 36.

413. See *supra* notes 23-25 and accompanying text.

414. See *supra* notes 23-25 and accompanying text.

involved, but it also inured to the detriment of society.⁴¹⁵ It hampered efforts to study the disease and strive for a cure.⁴¹⁶ As such, lepers, like other victims of discrimination, were propelled into a destructive cycle—one in which the disease engendered hiding and the hiding in turn prolonged the lifespan of the disease.

Professor Rachel A. Van Cleave suggests that “the law’s approval or allowance of [discriminatory] exclusion may lead individuals in the groups to conclude that they are justified in excluding those people they perceive as different and perhaps even justified in their hatred of people who are different.”⁴¹⁷ Decisions like *Dale* that exclude minorities and abet hiding serve to incubate homophobia and breed discrimination. The shunned individual is more prone to internalize society’s negative attitudes and feel debilitated by bias. Such an individual is less likely to participate in the bonding experience with other minorities, but is also less likely to become involved in the collective advocating of positive change. The *Dale* decision shoves the James Dales of this world back into the psychologically and politically suffocating closet by admonishing them that their steps of courage come with a serious price—that of effectual banishment. Decisions like *Dale* can thus have the effect of propelling such victims of homophobia into their own destructive cycle—one in which discrimination engenders hiding and that hiding prolongs discrimination.⁴¹⁸

415. See *supra* notes 23-25 and accompanying text.

416. See *supra* notes 23-25 and accompanying text.

417. Rachel A. Van Cleave, *Advancing Tolerance and Equality Using State Constitutions: Are the Boy Scouts Prepared?*, 29 STETSON L. REV. 237, 241 (1999). Van Cleave also acknowledges the theory that using the law by requiring organizations to include people could create a “backlash,” making individuals “more angry and full of hate” and thus, halting “any initial advances in equality.” *Id.* at 240-41.

418. Because the *Dale* Court refused to do its job—protect minorities and promote equality—other organizations took over and lodged their own protest. Specifically, religious and charitable organizations have stopped sponsoring the Boy Scouts and have withdrawn financial support. See, e.g., Eleanor Chute, *Cub Pack Faces Loss of Sponsor Over Anti-Gay Policy*, PITTSBURGH POST-GAZETTE, Jan. 12, 2001, at C-4 (explaining that St. Edmonds, a private non-denominational school, plans to stop sponsoring the Scouts unless Boy Scouts of America changes its antigay policies); ‘*Morally Straight’ Boy Scout Hypocrisy*, CHARLESTON GAZETTE, Nov. 16, 2000, at P4A (stating that “[a]cross America, two dozen United Way chapters ended or reduced their Boy Scout contributions”). Other organizations, corporations and local governments have similarly withdrawn support. See, e.g., Anthony Pignataro, *Sailor Suit*, OC WKLY., Jan. 5, 2001, at 10 (stating that the ACLU has threatened to sue New Port Harbor County if a lease allowing the Boy Scouts to use county property is not broken); Scott Wyman, *Pro-Scout Group Weighs Challenge to Broward Ban*, SUN-SENTINEL, Jan. 6, 2001, at 1A (stating that the Boy Scouts have lost over \$90,000 in aid and have been evicted from county public schools); David V. Hawpe, *Anti-Gay Policy Having Little Effect on Scouts in Most Places*, COURIER-JOURNAL, Dec. 17, 2000, at O4d (stating that Textron Inc., Chase Manhattan Bank, Levi Strauss & Co., and Wells Fargo have turned against the Boy Scouts).

In other contexts, the United States Supreme Court has recognized that public accommodation laws serve salutary purposes.⁴¹⁹ For example, in *Roberts*, the Court recognized that “discrimination based on archaic and overbroad assumptions” was noxious because it “force[d] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities.”⁴²⁰ The Court felt that laws that familiarize people with individuals whom they perceive as different or threatening can quash fear and bring about acceptance.⁴²¹ Exclusion, however, begets intolerance, “depriving persons of their dignity,” and “denying society the benefits of [their] wide participation in political, economic and cultural life.”⁴²² Surely such language in the *Roberts* decision has an affinity with that portion of the Boy Scout Handbook that censures “racial slurs and jokes making fun of ethnic groups,” brands such hate words as “mean-spirited behavior” and instructs scouts to not only avoid such discrimination in “words and deeds,” but to “defend[] those who are targets of insults.”⁴²³ In one sense, both the Boy Scout Handbook, with its message of tolerance and acceptance, and the *Roberts* decision, deferring to antidiscrimination laws, are similar beneficial attempts to reconcile forces that are potentially combative—that of communitarianism and egalitarianism.⁴²⁴

The *Dale* Court, treating communitarianism and egalitarianism as irreconcilable,⁴²⁵ thwarts the salutary goals of the New Jersey public accommodation law and ironically tramples upon what are the actual antidiscriminatory Boy Scout policies. Specifically, in the language of *Roberts*, the *Dale* Court promotes “discrimination based on archaic and overbroad assumptions” and forces homosexuals “to labor under stereotypical notions that . . . bear no relationship to their actual abilities.”⁴²⁶ The Court has also fostered intolerance, depriving gay men of their “dignity” and “denying society of the benefits of [their] wide participation in political, economic and cultural life.”⁴²⁷ And in the language of the Boy Scout Handbook, the *Dale* decision, which fails to

419. See *supra* Part III (discussing public accommodation laws and the seminal decisions in that area).

420. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

421. See *id.*

422. *Id.*

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

424. See *supra* notes 76-77 and accompanying text (discussing how communitarianism and egalitarianism can come into conflict).

425. See *supra* notes 76-77 and accompanying text.

426. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

427. *Id.*

defend “those who are targets of insults,” is itself “unclean.”⁴²⁸ The Court, in its own words, has created a mean-spirited homophobic insult.⁴²⁹

This Article began with two seemingly disparate texts, a segment from Lillian Hellman’s *The Children’s Hour*⁴³⁰ and a redaction of medieval law restricting lepers.⁴³¹ The leper law that, among other things, separated such individuals from “infants or young folks,” derived from an irrational fear and gave rise to tragic isolation and protracted ignorance.⁴³² In Hellman’s play, an irrational fear of homosexuality similarly severed talented educators from children and likewise brought about tragic isolation and protracted ignorance. The effects of judicial homophobia and bad decisions, like *Dale*, surely fall within this genre.

428. 530 U.S. at 668 (Stevens, J., dissenting).

429. *See id.*(quoting the Boy Scout Handbook: “Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes. . . A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.”).

430. *See supra* notes 1 & 3 and accompanying text.

431. *See supra* note 2 and accompanying text.

432. *See* Part II (discussing the historical treatment of lepers).