

ARE THE BOY SCOUTS BEING AS BAD AS RACISTS?

Judging the Scouts' Antigay Policy

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The Boy Scouts' recent Supreme Court victory, which gave them a constitutional right to keep gay people out, may turn out to be pyrrhic.¹ Their policy of discriminating against gays was not widely known until the litigation publicized it. In the fairly short time since then, membership has fallen by ten percent.² Some corporate donors, such as CVS, American Airlines, J.P. Morgan, IBM, and Levi Strauss, and many United Way chapters have cut off funding.³ So many public schools have denied the Scouts the right to meet on their property that the Scouts had to seek an act of Congress for relief.⁴ Opposition has also arisen within the Scouts. In February 2001, the New York City board of the Scouts declared that the national organization's ban on gays was "repugnant" and "stupid."⁵ New York's council later joined with those of Chicago, Los Angeles, San Francisco, Philadelphia, Minneapolis, and Orange County, California, in proposing that the ban be discarded.⁶ Philadelphia's council tried to adopt a nondiscrimination policy in May 2003, but quickly reversed itself after pressure from the national organization.⁷ The opposition to the Scouts' antigay policy has grown to become a social movement.⁸

The stakes are high. The Scouts are a major American institution. The organization is old, rich, and huge. It was founded in 1910 and chartered by Congress in 1916. It has an endowment of \$2.2 billion.⁹ In 1998, it had \$155 million in revenues and an operating surplus of \$17.1 million.¹⁰ It has had more than 110 million members, including more than three million today. Fifty percent of all American boys between the ages of seven and ten are Cub Scouts, and 20 percent between 11 and 18 are Boy Scouts.¹¹

Is there a moral principle that condemns the Scouts' policy? The most damaging charge against the exclusion is that it is morally equivalent to racial discrimination.¹² This analogy is ambiguous, because it may rest on either of two moral claims.

Some readers will be troubled by this stipulation, even for the sake of argument. Perhaps it is possible to hate the sin and love the sinner, but if I am the object of this kind of love, I am likely to notice primarily that you hate everything *about* me, including the things that I most care about, and that the object of your Procrustean hospitality is some invisible essence with no discernible connection to my particular self.¹⁷ But this objection presupposes that my choices are morally permissible ones. Some unchosen desires should never be fulfilled: think of the longings of a pedophile who is only aroused by prepubescent children. The idea of human rights does not, without more, entail the view that homosexual acts are morally permissible. In a world in which the idea of human rights has a much larger constituency than the idea that homosexual conduct is legitimate, it is important to show that some gay rights claims do not depend on the latter idea. The case against the Boy Scouts' policy, for example, does not depend on that idea, and this makes that case even stronger than it is generally thought to be.

The traditional moralists' distinction between homosexual status and homosexual conduct is rife with difficulties. It promises gay people a respected status in the community, but at a heavy price: they must hide their desires, never act upon them, and abstain from sex for the rest of their lives. This is a poor bargain, and increasing numbers of gay people refuse it. Nonetheless, traditionalists' insistence on the distinction imposes obligations upon them. The distinction is what separates them from the lowest order of bigots, the racists and Nazis. For this reason, they should be held to their promised bargain. Much is revealed when they stop paying attention to it.

This essay attempts to extend the reach of practical philosophy to a neglected set of issues. Practical philosophy tends to focus either on individual ethics or on politics. Critical evaluation of social movements that seek anything other than state action is rare. The state is not, however, the only means by which people act collectively, and ethical standards apply to other forms of collective action as well.

I. RACISM AND AGENCY

What is wrong with racism and racially discriminatory practices? I begin with a syllogism:

Major premise: It is unjust to stigmatize a person for reasons that have nothing to do with that person's choices. Moral blameworthiness intelligibly attaches only to a person who has behaved differently than she should have and could have. George Sher has argued persuasively that the idea of desert is inextricably linked to the idea of free agency: if we deserve anything, this is because our free choices typically encompass the expected consequences of those choices as well as our immediate doings, so that the value of any choice carries over to its expected

One familiar way of understanding the charge is that racism wrongfully hurts people who do not deserve it, and that the exclusion of gays does this, too. In the same way that black people found themselves the object of false ideas of racial inferiority, gay people find themselves the object of false ideas of homosexual inferiority.

This claim has persuaded many. I have propounded it myself.¹³ It depends, however, on the acceptance of a controversial prior claim, that homosexual sex is in no way inferior to heterosexual sex. This dependence weakens the power of the racism analogy. Many Americans think that homosexual sex is morally unacceptable,¹⁴ and for them the analogy can have no power. The Scouts have stated that they are "committed to the concept that sexual intimacy is the sole providence [sic] of a man and a woman within the bonds of marriage."¹⁵ This moral view is held by a number of the major American religious denominations, and in a pluralistic society, there should be room for people to hold such views. If the criticism of the Scouts rests entirely upon disagreement with their moral beliefs about sexuality, then their response is a fair one: "We respect other people's rights to hold differing opinions and ask that they respect ours."¹⁶

There is, however, another way of understanding the racism analogy, one that is not contingent on judgments about its impact. This second and stronger account of the analogy is, if it is sustainable, far more damaging to the Scouts. It begins by observing that racism contradicts the foundations of human rights, because racism holds that some persons are intrinsically inferior in worth. Suppose that it could be shown that the Scouts' policy similarly treated gay people as intrinsically inferior. This showing would provide a reason to condemn the Scouts' policy that would not be contingent on any view of the morality of homosexual conduct. It would imply that there is something categorically immoral about the policy, in the same way that racism is categorically immoral. It would mean that even those who agree with the Scouts' views on sexual morality should condemn their policy of excluding gays.

In this essay, I will argue that the second racism analogy is a valid one. My argument has three steps. First, I will identify what is essentially morally malign about racism: the stigmatizing of persons as intrinsically inferior. Next, I will demonstrate that some, but not all, objections to homosexuality do the same thing and are similarly malign. Finally, I will show that the policy falls within this malign category of anti-gay positions.

This paper deliberately takes no position on the morality of homosexual conduct, because it is addressed to an audience that is deeply divided on that question. Even those who condemn homosexual conduct almost always concede the unfairness of stigmatizing persons for their homosexual status. Thus, even if it were stipulated that homosexual conduct is *per se* immoral, the Scouts' policy would be wrong for the same reasons that racism is wrong.

systematic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements.¹²⁴ Pollution rules thus are only comprehensible in light of their cultural context. "For the only way in which pollution ideas make sense is in reference to a total structure of thought whose key-stone, boundaries, margins, and internal lines are held in relation by rituals of separation."¹²⁵

The inappropriate things sought to be eliminated are sometimes human beings. "Thus in some West African tribes the rule that twins should be killed at birth eliminates a social anomaly, if it is held that two humans could not be born from the same womb at the same time."¹²⁶ Whether individuals are understood as polluting would seem to depend on whether the total structure of thought deems them anomalous.

A problem that pollution ideas entail for contemporary society is that such ideas may contradict the modern idea that blameworthiness can only arise from one's will. Douglas notes that the early Christian church had to struggle against the idea that a blameless person, such as a leper or a cripple, could become ritually unclean.¹²⁷ Yet the culture continues to entertain organizing ideas in light of which some persons are seen as unclean and polluting. Racism is the obvious example. Chief Justice Roger Taney of the U.S. Supreme Court wrote in the 1857 *Dred Scott* case that the pre-Civil War U.S. Constitution enshrined the view that blacks were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or [in] political relations; and so far inferior, that they had no rights [that] the white man was bound to respect."¹²⁸ Charles Black observes that the entire structure of racial segregation in the post-Civil War south was predicated on the idea of blacks as contaminating: "It is actionable defamation in the South to call a white man a Negro. A small proportion of Negro 'blood' puts one in the inferior race for segregation purposes; this is the way in which one deals with a taint, such as a carcinogene in cranberries."¹²⁹ Richard Wasserstrom noted that the system of segregation treated blacks as "the sorts of creatures who could and would contaminate white persons if they came into certain kinds of contact with them—in the bathroom, at the dinner table, or in bed, although it was appropriate for blacks to prepare or handle food, and even to nurse white infants."¹³⁰ Douglas's explanation of pollution ideas makes sense of these puzzling distinctions. The point was the maintenance of certain valued social categories, which were threatened when blacks left their appropriate place. And the trouble with all this was that the system of segregation was massively unjust. At the heart of the system of segregation is a set of beliefs that label some persons as intrinsically inferior, as contaminated, for reasons that have nothing to do with their own choices.

The conclusion that a racist system is unjust has ethical implications. Prejudices cannot persist in a society unless there are practices that maintain them. They depend on habitualized actions that pass on the prejudices to the next generalization. Loci of official power may play an important role in reproducing these prejudices,

consequences.¹⁸ It follows that one cannot deserve something that is completely unrelated to one's agency.

Two clarifications may be helpful. First, the point is not that one should never *differentiate* on the basis of immutable characteristics. We do that all the time when, for example, we deny pilot licenses to blind people. But that denial does not *stigmatize* or *blame* the blind people. It does not treat them as pariahs or as objects of disgust.¹⁹

Second, the moral objection to the unjust ascription of blame is not a categorical one. Sometimes such unjust ascription is an unavoidable effect of an otherwise justified policy, as when a mildly retarded student who could not have done better is left back in grade school. In such cases, some overriding social benefit must be present to excuse the injustice that has been done. The injustice remains an injustice.

Minor premise: Racially discriminatory beliefs and practices stigmatize black people as objects of stigma and blame without reference to any willed acts of theirs. This can happen in several ways. Anthony Appiah distinguishes between two different kinds of racist ideas. One, which he calls "extrinsic racism," claims that race entails morally relevant qualities, such as honesty or courage (or the lack thereof), which are uncontroversially proper bases for treating people differently. "Intrinsic racism," on the other hand, holds "that each race has a different moral status, quite independent of the moral characteristics entailed by its racial essence."²⁰ Intrinsic racism, unlike extrinsic racism, is not rebuttable by evidence. It holds some persons inferior regardless of what they think or do. It thereby directly contradicts the major premise of the syllogism stated above. The issue is a bit more complex with extrinsic racism, which relies on claims that would be relevant if true. What is remarkable about extrinsic racism, Appiah observes, is that it is typically the product of a cognitive incapacity: "extrinsic racists, however intelligent or otherwise well informed, often fail to treat evidence against the theoretical propositions of extrinsic racism dispassionately."²¹ Their conflict with the major premise is this: they wrongly stigmatize persons who in fact do not have the negative moral traits that are attributed to them. The two typically are psychologically linked (though Appiah does not explore this link in any detail). Absent intrinsic racism, it is doubtful that people would so easily accept the stereotypes that are the basis of extrinsic racism.

Conclusion: these beliefs and practices are morally wrong. They assign stigma where stigma does not belong.

There are powerful tendencies in many, perhaps all, cultures to attach stigma inappropriately, to conditions that do not arise from one's will. Anthropologist Mary Douglas's classic study of pollution offers one explanation for this phenomenon. Douglas observes that the idea of pollution exists in all cultures. Everywhere, she argues, "dirt is essentially disorder. There is no such thing as absolute dirt: it exists in the eye of the beholder."²² Eliminating it "is not a negative movement, but a positive effort to organize the environment."²³ "Dirt is the by-product of a

but this need not be the case; the work may be done entirely by private actors.³¹ If you accept the syllogism with which I began, then if your culture assigns blame in ways that are unrelated to the will, you will disagree with those aspects of the culture and want to change them. And that will require you to do what you can to change the practices that maintain the prejudice.

This conclusion is, I believe, widely, though unreflectively, understood. An anti-racist ethic has emerged in American society. Almost no one any longer is overtly racist.³² Yet most Americans understand that racism persists and regard it as a problem.³³ There is an emerging social norm of signals, whereby one is expected to avoid speech and conduct that signifies racism.³⁴ This norm has become one of the most potent cultural weapons against racism.

In the absence of overt racism, judgments must be made as to whether any particular actor is promulgating racism despite its avowals to the contrary. The judgments involve both intentions and effects, but their primary focus is on social meaning: does an actor's conduct have a conventional meaning that signifies prejudice against blacks?³⁵

For an example of the kind of reasoning that is required, consider the case of Bob Jones University. As the Supreme Court noted, "the sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race."³⁶ After the law forbade discrimination in admissions, the school continued to prohibit interracial dating and marriage. The Internal Revenue Service then decided that the University was not entitled to federal tax exemption because of this racially discriminatory policy, and the Supreme Court upheld that decision.

The idea that interracial dating and marriage are immoral is not itself necessarily malign. It does not *logically* imply the inferiority of blacks. But it has a powerful cultural association with that idea. Historically, the miscegenation taboo is close to the psychological core of American racism. It notoriously connotes a narrative in which black men represent a dangerous, predatory, uncontrollable sexuality, and white women represent a fragile, asexual purity, the protection of which is the special duty of white men.³⁷ Chief Justice Taney recognized the miscegenation prohibition as a "stigma, of the deepest degradation . . . fixed upon the whole [black] race."³⁸ The power of that cultural association was enough to justify condemnation of the University for perpetuating racism.

Thus, when the university reentered the public eye after presidential candidate George W. Bush held a rally there, the national reaction against the policy became overwhelming. Even the most conservative politicians denounced the policy.³⁹ Bob Jones University insisted that its views had nothing to do with racism, but no one was convinced. In March 2000, the pressure of public opinion induced the school to abandon the prohibition.⁴⁰

II. THE VARIETY OF ANTI-GAY ATTITUDES

This public pressure was not unfair. The university's policy breached the social norm just described. Disregard of that norm may reasonably be perceived as endorsing a racist message and revealing one's own racism. Racism is now itself treated as a kind of pollution, and social norms operate to expel it. Unlike racist pollution ideas, this anti-racism norm does not blame anyone for anything beyond their control, but it does have costs. It uses social pressure to enforce a kind of social conformity. The costs are justified. The transformation of racial attitudes, to the point where overt racism has been almost universally repudiated, is a great social good.

It is sometimes alleged that antigay attitudes are morally equivalent to racism. As I noted at the beginning, this charge may simply mean that these attitudes unjustifiably harm gay people. This charge is a serious one. It is not a light thing to damage people's lives, even if one does so on the basis of negligence or erroneous moral views. But the racism analogy may mean something deeper: that these attitudes contradict foundational ideas of human rights. This latter category of equivalence, I will now argue, does hold with respect to some antigay attitudes. The terms "gay" and "homosexual" are ambiguous. When used to describe persons, each word can have at least two different meanings. These words may refer to a person who habitually engages in sexual activity with persons of the same sex. A person who performs same-sex acts is "gay" in the same way that a person who performs acts of carpentry is a carpenter. Or the term may refer to a person's desires. Gay people, according to this second meaning, are those who "have a predominant erotic attraction to others of the same sex. Their sexual fantasies are either entirely or almost entirely directed toward other [persons of the same sex], and have been so since childhood. Because sexual behavior may be inhibited by societal pressure or by internal conflict, a [person] need not engage in sexual activity to be homosexual."⁴¹

When a speaker states that she condemns homosexuals, therefore, she may be saying either of two things. She may be saying that she thinks that sex acts with persons of the same sex are wrong. Or she may be saying that she regards persons who experience homosexual desire as inferior, degraded persons. Some persons do regard gay people as beings of an inferior order, unfit to associate with others, who have no rights that others are bound to respect.

The latter attitude is not hard to find in contemporary American culture. It is perhaps best exemplified by those who violently attack strangers whom they believe to be gay. Attacks on gays bespeak an astonishing rage, often involving torture and mutilation. Such attacks are common and constantly occur throughout the United States.⁴² Gordon Allport's classic study of prejudice notes that when hate-motivated violence takes place, its perpetrators tend to be acting on

attitudes that are held in milder form throughout the culture in which they have been socialized.⁴³

While few Americans actually engage in violence against gays, many more dislike them intensely. Gays are among the least liked groups in the United States, according to Kenneth Shertliff's analysis of the Feeling Thermometers (FT) of the American National Election Study. Respondents were asked to rate their feelings toward a variety of groups on a scale of 0 to 100. In four surveys spanning a ten-year period, the lowest score, zero, was consistently assigned to gays and lesbians by more respondents than any other group; next in order were illegal immigrants, people on welfare, and Christian fundamentalists. (In 1994, the most recent year, 28.2 percent assigned gays a zero ranking, as compared with 24.2 percent for the next most unpopular group, illegal immigrants, and 9.1 percent for the third most unpopular group, people on welfare. The figure for blacks was 2.0 percent.) Shertliff concludes that "such hostility does not face any other group in the electorate."⁴⁴ The hostility is not only intense, but widespread. Gays and lesbians also have consistently received one of the lowest mean FT scores, though in recent years they have escaped the lowest average rating by being 2 to 4 points above illegal immigrants. "Among American citizens included in these studies only lesbians and gay men were the objects of cold feelings from a majority of Americans."⁴⁵

The idea that gays are inferior human beings is not the only reason they are discriminated against, but it is plainly one of the reasons. Perhaps the most direct window into American culture is its ordinary language. Richard Mohr notes that the English language does not treat gay people merely as persons who engage in certain sexual activities.

With the apparent exception of "cock sucker," no widespread anti-gay slur gives any indication that its censure is directed at sex acts rather than despised social status. Group-directed slurs (dyke, queer, fag) place gays in a significant social category along with blacks (nigger, shine, shitkin), other racial groups (chink), women (cumt, gash), various ethnic groups (wop, dago, gook, jap, JAP, mick, kike), . . . They do not place gays in the same category as liars, hypocrites, murderers, and thieves—those who commit immoral and criminal actions and yet for whom culture in no case has coined group-based invectives. This schema of slurs strongly suggests that gays are held to be immoral because they are hated, rather than hated because they are immoral.⁴⁶

Even homosexuals who do not act on, or even who openly repudiate, their inclinations, still bear the stigma of their status, if it is known. In 1976, presidential candidate Jimmy Carter told an interviewer, "I've looked on a lot of women with lust. I've committed adultery in my heart many times. This is something God recognizes I will do—and I have done it—and God forgives me for it."⁴⁷ The statement caused a minor flap at the time, but Carter went on to win the election. Imagine the reaction if he had said that he had looked on a lot of men with lust.

The idea of gay people as contaminants who need to be rooted out of society was once conventional wisdom. Ostracism for being gay is a central signifier of the stigmatized status of gays—at least as central as the interracial marriage taboo is for the stigmatized status of blacks. In 1953, President Eisenhower issued an executive order barring homosexuals from all federal jobs, and the FBI initiated a broad system of surveillance to keep homosexuals off the federal payroll. Corporations under government contract applied the administration's security provisions to their own employees, and many states and municipalities followed the federal government's lead, while also enforcing similar standards in the licensing of many professions. One study in the mid-1950s estimated that over 12.6 million workers, more than 20 percent of the labor force, faced loyalty-security investigations as a condition of employment.⁴⁸

The closest thing to a canonical rationale for this pervasive discrimination was set forth in 1950 by a Senate committee that investigated the employment of "homosexuals and other moral perverts" in government. Homosexuals, the committee concluded, lacked "emotional stability," because "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility." Even one "sex pervert in a Government agency," the committee warned,

tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. . . . One homosexual can pollute a Government office.⁴⁹

The bizarre fantasies in the Senate report are analogous to what Appiah calls extrinsic racism—empirical investigation is necessary in order to reveal that they are false—but as in the race case, something analogous to intrinsic racism, a hostility to gays as such, is probably a necessary cause of their being so readily accepted by otherwise reasonable people.

The language of pollution is revealing. In light of the narrative of inevitable and universal heterosexuality that is integral to many people's gender identity, gay people appear as anomalous as those West African twins who, Douglas observed, were so disturbing that they had to be killed at birth.

The stigma against gay people is today most profound among adolescents. A study of harassment in American high schools found that the most upsetting type of harassment was to be called gay.⁵⁰ One national survey of males aged 15 to 19 found that 89 percent thought that the idea of homosexual sexual activity was "disturbing," and only 12 percent were sure that they could befriend an openly gay male.⁵¹ Students are often consciously cruel to their peers whom they perceive as gay. Students thought to be gay are often publicly humiliated, threatened with harm, spit at, pushed, and physically attacked. Adults in authority often do nothing at all about the harassment, and sometimes they blame the victims.⁵²

Gay adolescents often are rejected, not only by their peers, but by their parents as well.⁵³ This extreme rejection and isolation produces a disproportionately high incidence of suicide attempts.⁵⁴ One study found that suicide attempts were associated with "reliance on social support from people who rejected them because of their sexual orientation."⁵⁵

Gay youth have the option of keeping their sexuality secret from everyone, but this secrecy has psychic costs of its own. The fear of discovery becomes an integral part of their lives, and the constant feeling of isolation often leads to clinical depression.⁵⁶ Suicide attempts "occurred most often before they acknowledged or disclosed their sexual identities to others."⁵⁷

The prejudice against gays regards them as in some ways even more polluting than racism regarded blacks. Gays are traditionally entitled to no legitimized place at all in society.⁵⁸ Martha Nussbaum observes that the judge's famous speech at Oscar Wilde's sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, "treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people."⁵⁹ From this it is not very far to Heinrich Himmler's speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs "was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and burn them."⁶⁰

All this is, however, only part of the story. Many people hold the traditional view that homosexual acts are per se worthless and harmful, and that "a life involving homosexual conduct is bad even for anyone unfortunate enough to have inmate or quasi-inmate homosexual inclinations."⁶¹ As I noted at the outset, many (myself among them) think that this view is mistaken and destructive. It does not, however, contradict the syllogism stated at the beginning of this paper. The value of homosexual conduct is not deducible from the idea that desert arises from the will, and the condemnation of that conduct does not contradict the idea that desert arises from the will in the way that intrinsic racism does.

It is therefore unfair to suggest that the traditionalist view is morally equivalent to racism. Many traditionalists have even recognized the existence of prejudices against gay status and have repudiated it. The Catholic Church, for example, has condemned anti-gay prejudice while maintaining its condemnation of homosexual activity.⁶² The Church's doctrine does not entail that a person is morally defective and unclear merely because of homosexual desire. Quite the contrary; "the particular inclination of the homosexual person is not a sin."⁶³ Many other defenders of the traditional prohibition of homosexual conduct have gone to considerable lengths to disavow and condemn prejudice against gays.⁶⁴

Implicit in these pronouncements is a norm analogous to the anti-racist norm considered earlier. One ought to avoid speech and conduct that stigmatizes prejudice against gay people. The case for such a norm is as strong in this context as in

This conclusion should provide some badly needed common ground in the culture wars.⁶⁶ Americans are divided about the acceptability of homosexual conduct, but they are united around the idea that desert is based on one's will. The condemnation of racism is no longer controversial. Similarly, the rejection of hateful anti-gay ideology is a cause that even the traditionalists should unhesitatingly join.

III. GAY PEOPLE AND THE BOY SCOUTS

We now return to the question with which we began. Is there any evidence to support the charge that the Scouts' exclusion of gays is morally equivalent to racism? Do the Scouts stigmatize the status of being gay?

The dispute that led to the Supreme Court decision began when the Scouts revoked James Dale's membership after a newspaper story (which did not mention his affiliation with the Scouts) identified him as an officer of his college's lesbian and gay student organization. When Dale, who had been a member since he was eight years old, wrote to inquire why he was expelled, he was told that the Boy Scouts "specifically forbid membership to homosexuals."⁶⁷ Dale sued under the New Jersey human rights law, but ultimately lost in the U.S. Supreme Court. The soundness of the Court's decision is not relevant here.⁶⁸ The litigation is of interest because of what it reveals about the Scouts' policies.

The Scouts claimed that Dale's continued membership would contradict their moral teachings, because he disagreed with those teachings. But the Scouts' decision to terminate Dale was not, and could not have been, based on his beliefs. When they threw him out, they did not know anything about his beliefs.⁶⁹ All they knew was that he had identified himself as gay.

The Scouts also said that they believed 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."⁷⁰ But the Scouts didn't know anything about Dale's conduct, either. They terminated him without making any effort to find out about either his beliefs or his behavior. The letter that told him the reason for his expulsion stated simply that the Boy Scouts "specifically forbid membership to homosexuals."⁷¹ They threw him out for *being* gay.⁷²

The basis of the Scouts' exclusionary policy was later starkly clear by the case of Leonard Lanzl, who was for many years executive director of the Los Padres, California, Council of the BSA. At a meeting of the Santa Barbara Board of Supervisors, where the Board was considering whether to revoke the Scouts'

lease at a municipal meeting house, he defended the Scouts: "I am a private person, and I am gay. I uphold the Boy Scouts' policies. I would not work for the Boy Scouts if I did not know that they save lives." The Scouts promptly fired him.⁷³ The fact that he came out as gay while defending the organization was not enough, evidently, to purge the stain of homosexuality. Once more, Lanzl's beliefs and conduct were irrelevant.⁷⁴

The Scouts' declarations of policy make clear that the exclusion is not based on belief or conduct, but simply on the status of being gay. As one of the earliest position statements put it:

The Boy Scouts of America 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 BSA.⁷⁵

The present position is that "an avowed homosexual cannot serve as a role model for the values of the Oath and Law."⁷⁶

Discrimination against gay people as such, without reference to their conduct or beliefs, is, as a matter of cultural fact, closely associated with the idea of involuntary pollution. The association is at least as strong as that between the miscegenation taboo that Bob Jones University enforced and the prejudice against blacks.

The Scouts would doubtless respond that I have misinterpreted them. They have never overtly endorsed the view that gay people are intrinsically inferior. But this fact alone cannot dispel the concern that they are promoting the view that gay people are polluted. Bob Jones University did not overtly endorse racism, either. The question is not whether the leadership is pure in heart, but whether it is using its enormous cultural power in a way that reinforces a pollution-based prejudice. The answer depends on whether the interpretation of the policy that I have suggested is the most accurate description of its cultural meaning.⁷⁷

The Scouts' reticence about explaining their identity-based discrimination appears to be the result of two considerations. The first is that they do not want to teach anything about sexuality. Their stated position is that "boys should learn about sex and family life from their parents, consistent with their spiritual beliefs."⁷⁸ The second is that, as the statements already quoted indicate, they do not consider gay men to be suitable role models for boys.

The second policy raises the question why men who simply identify as gay, without indicating anything about their beliefs or conduct, are excluded. The Scouts might respond that identity, belief, and conduct here merge, as a matter of cultural fact, so that one can exclude persons on the basis of their gay identity without regarding them as intrinsically inferior. The Scouts might think that gay people who agree with their moral views will remain closeted.⁷⁹ When charged with identity-based discrimination, the BSA's counsel shrewdly replied that "in

other contexts, gay rights advocates (including respondent's counsel of record and many of the amici and their counsel) have consistently argued that "coming out" is an expressive and political act.⁸⁰ and quoted Nan Hunter's claim that "'identity' is a multilayered concept" and that "[s]elf-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out—to act on and live out that identity."⁸¹

The Scouts might also imagine that identity overlaps completely with belief, because gay people can become heterosexual by a sheer act of will. This notion has increasingly captured the imagination of the Protestant religious right in America, which now sponsors a substantial "ex-gay" submovement.⁸² The idea that sexual preference is easily changed is a delusion,⁸³ but it does not contradict the idea that desert arises from the will.

Finally, the Scouts might say that they are simply responding to the demands of their members, who will not tolerate gay people in the organization. This is a weaker justification than the others. It does not explain all the pertinent facts, notably the willingness of the national organization to do battle with local branches over the issue.⁸⁴ A local-option rule would be a better way to make sure that parents' preferences were honored.⁸⁵ Even if it is accepted, this justification for the Scouts' policy proves too much. The Scouts once used a similar rationale for the segregation and even exclusion of black troops.⁸⁶

Perhaps the Scouts could tell a story that would dissociate them from antigay prejudice. But they have not made even a token effort to do so. They do not appear to care much whether they are implying that gays are intrinsically inferior. This insouciance conveys its own message.

The Boy Scouts are now the single largest entity in the United States that excludes gay people on the basis of their identity, and justifies this exclusion on the basis of gays' own purported moral failings.⁸⁷ It is a statistical certainty that tens of thousands of the boys in the Scouts will grow up to be gay.⁸⁸ We have already reviewed the devastating consequences when gay youth are forced to lie and hide their identities, which is precisely what the Scouts' policy requires of the gay adolescents who discover their sexuality when they are already members. Defenders of the Scouts emphasize (what this paper does not deny) the good that Scouting does, the valuable experiences and skills that members acquire. But these very virtues can make the program poisonous for some. The pressure on gay teenagers to hide, and the sense that their secret makes them intrinsically worthless, is more intense the more they already value and trust the adults who, they discover, reject and ostracize gay people.

It is possible to address the needs and vulnerabilities of these children without holding that homosexual conduct is morally licit. The National Conference of Catholic Bishops, for example, has urged parents not to break off contact with gay children, and has declared that "God does not love someone any less simply because he or she is homosexual."⁸⁹

young members in particular the idea that gay people are defective, unclear, and contaminating. The Scouts' indifference to the well-being of their own members, children in whose upbringing they participate, suggests that their hearts may not be so pure after all.

The Scouts are being, in important respects, the moral equivalent of racists. This state of affairs should stop. Different people are doing different things to try to bring it to an end. As I noted at the outset, some are cutting ties with the organization, while others are trying to work within the organization to change it.

Albert Hirschman's classic study of responses to organizational failure notes that there are two complementary responses to such failure: one can exit from the organization, as consumers characteristically do when a product in a market declines in quality, or one can remain within the association and dissent, as characteristically happens within political units.⁹⁷ Hirschman concludes that there is no single optimal mix of exit and voice, because both strategies can be coopted by management, which will "strain to strip the members-customers of the weapons which they can wield, be they exit or voice, and to convert, as it were, what should be a feedback into a safety valve."⁹⁸ Voice can become ineffective blowing off of steam which placates dissenters. Exit can rid management of troublemakers. Both phenomena are observable in the Scout case.

It is commonly said that those who disagree with the Scouts' policies need not be members. Exit is a common method of dissent, and the characteristic means of control in free markets. But as Hirschman observes, when an organization provides a public good, it is not really possible to exit.⁹⁹ One can resign from the Scouts, but one must still live in a regime in which the only boys' organization with quasi-official status publicly stands for the proposition that gay people are inherently defective and contaminating.

The Scouts are feeling pressure both from within and from without. This pressure ought to continue. Now that the Supreme Court has disabled the state from intervening, the only hope for significant change is a self-conscious social movement.

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NOTES

1. Thanks to Ron Allen, Rick Brooks, Peter de Marneffe, Shari Diamond, Rick Duncan, Dan Farber, Ruby Koppelman, Tim Lytton, Joe Miller, David McGowan, Adam Mossoff, Steve Presser, Steven D. Smith, Samuel C. Wheeler III, Tobias Wolff, Kim Yuracko, the Albany Law School faculty workshop, and members of the Conference on the Study of Political Thought, Chicago chapter, for comments on earlier drafts, to Marcia Lehr, Sarah Lively, and Jack Schlicht for research assistance, and to Charles Lamore, Tony Sebok, and Gordon Wood for helpful conversations. This research was supported by the Northwestern

The contrast between the Catholics and the Scouts is striking. At the beginning of this paper, I conceded that the unjust ascription of stigma might be justifiable by some overriding benefit. The overriding benefit that defenders of the Scouts are most likely to invoke is the reinforcement of the moral position (which they take to be correct) that homosexual conduct is morally unacceptable. But the Catholics show that one can maintain that position while scrupulously following the norm against reinforcing anti-gay prejudice. The Scouts, on the other hand, cannot be bothered. After the Rhode Island Medical Society unanimously approved a resolution saying that the Scouts' ban on gays would increase the risk of teen suicide, a spokesman for the Scouts would say only that gay youths had other options.

⁹⁰There are other organizations that these kids can be a member of.

The trouble, of course, is that a seven-year-old boy does not know whether he is gay when he decides to join the Cub Scouts. James Dale, thrown out of the Scouts when he was a college student, is an example. He joined the organization when he was eight. He had wanted to join when he was even younger, since his older brother and his father were members.⁹¹ He was an enthusiastic Scout, rising to the rank of Eagle, the highest honor the Scouts could bestow. "Boy Scouts was community," he later explained. "It was a place where I felt I belonged. I did other things. I was in soccer and basketball. But nothing fit as well as the Boy Scouts. I felt I didn't have to be the best football player or run the fastest. In the Boy Scouts, I could be who I was. They valued me for who I was."⁹² When he was expelled, "it was like a kidney punch. I felt betrayed. This was the organization that taught me how to be me."⁹³

The Scouts are a far more potent and malign cultural force than Bob Jones University. BJU has made some effort to disavow racism.⁹⁴ A black student who enrolls there knows what he is getting into. And BJU is a marginal institution in American life, with only about 3000 students.⁹⁵ The social norm against promoting prejudices is largely justified by its consequences: the norm will help to prevent the destructive dissemination of those prejudices. The norm is, therefore, stronger when brought to bear on large, powerful entities that play a major role in shaping American culture. If it was worthwhile for public pressure to induce BJU to change its policy, then, a fortiori, similar pressure should be brought to bear on the Scouts.⁹⁶

Have the Scouts violated an anti-homophobia norm that is as valid as the widely recognized anti-racist norm? I have argued that there is an affirmative obligation, widely understood, to avoid endorsing racist ideas, and that conspicuous disregard of that obligation sends a racist message and is generally taken to reveal one's own racism. There should be, I have argued, a similar obligation to dissociate oneself from antigay prejudice. This obligation is particularly strong for those who work with children, who are both the principal enforcers and the principal victims of that prejudice. The Scout leadership does not seem to be concerned at all that their policies communicate to society in general and to their

University School of Law Summer Faculty Research Program and the Kathleen M. Haight Fund. Comments are very welcome: contact.akoppelman@northwestern.edu.

2. The 2000 Annual Report of the Boy Scouts of America reported a total membership of 3,351,969. The 2001 Annual Report (reflecting, perhaps, negative publicity in the wake of *Dale*) does not state the total membership, but provides figures on Cub Scouts and Boy Scouts that add up to 3,049,070, while the 2002 report's total is 3,011,269 and the 2003 report's total is 2,911,823. See <http://www.scouting.org> (visited September 28, 2004).

3. BSA National Membership/Participation Report for February 2001, "Membership Continues on a Downward Trend," <http://www.scoutingforall.org/aaic/041702.shtml> (visited November 14, 2002). For a list of companies that have withdrawn funding, see <http://www.scoutingforall.org/aaic/corplist.shtml> (visited November 14, 2002).

4. See the Boy Scouts of America Equal Access Act of 2002, Pub. L. 107-110, 115 Stat. 1981, 20 U.S.C.A. § 7905.

5. The New York board acted, in part, in response to a threat by the New York City government to prohibit its agencies from sponsoring Scout activities. Eric Lipson, "A Challenge to Gay Ban by Scouts: 'Stupid' Policy, Say Local Scout Leaders," *New York Times* (February 27, 2001), p. A21.

6. See "Nine Scout Councils Request BSA National to Stop Discrimination Against Gays," <http://www.scoutingforall.org/aaic/100101.shtml>. Thus far, however, this movement has not succeeded in getting any modification of the national policy. The reformers seem unlikely to succeed, because conservative religious organizations are so strong within the BSA. "[R]eligious bodies now sponsor 65 percent of all troops, compared with just over 40 percent 15 years ago," Benjamin Soskis, "Big Tent: Saving the Boy Scouts from Its Supporters," *New Republic* (September 17, 2001). Of these, two-thirds are sponsored by the Catholic Church, the United Methodist Church, the Church of Jesus Christ of Latter-Day Saints (the Mormons), the Lutherans, and the National Council of Young Israel. Brief of Amicus National Catholic Committee on Scouting et al. in Support of Petitioners, *Boy Scouts of America v. Dale*, 2000 WL 235234, at 1. Of these, the Mormons "sponsor more Scout troops and packs than any other religious or civic group in the country," Lesley Stahl, "The Boy Scouts: Policy of the Boy Scouts to Disallow Homosexuals Into Their Ranks," *60 Minutes* (April 1, 2001), CBS News Transcripts. The Mormons are less than two percent of the American population, but more than 12 percent of all Scouts and 23 percent of all Scout troops, Chuck Sudetic, "The Struggle for the Soul of the Boy Scouts," *Rolling Stone* (July 6-20, 2000), at p. 105; Tracy Thompson, "Scouting and the New Terrain," *Washington Post Magazine*, August 2, 1998. "Almost all of the church's top leaders achieved the rank of Eagle Scout as young men, and Mormon elders use the Boy Scout program as an integral part of its youth ministry," Sudetic, "The Struggle for the Soul of the Boy Scouts," p. 109. On the other hand, if the argument of this paper is correct, these religious denominations should not be supporting the present policy as uncritically as they now do.

7. See Sara Rimer, "Boy Scouts Under Fire: Ban on Gays Is at Issue," *New York Times* (July 3, 2003), p. A19.

8. Voluminous anecdotal evidence of defections from the Boy Scouts may be found in recent issues of *Lesbian/Gay Law Notes*, available at www.grd.org/www/usa/legal/igln/. This includes both cash and deferred gifts. See www.scouting.org/excomm/99annual/endorment.html.

10. Chuck Sudetic, "The Struggle for the Soul of the Boy Scouts," pp. 101, 106. WL 340276, at 1.
11. Brief for Respondent, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), 2000 WL 340276, at 1.
12. Thus, for example, the Scouting for All Alliance for Human Rights, an organization that seeks to induce the BSA to change their policy, writes on its web page: "would we as a society tolerate the BSA discriminating against people of color? What if the Boy Scouts of America said, African American youth and adults were not allowed in Scouting? How would the American people respond?" See <http://www.scoutingforall.org/alliance.shtml>. "Those in Scouting have an ethical and moral obligation to stand against the bigotry of their current leadership." See <http://www.scoutingforall.org/aaic/positionncn.shtml>.
13. See Andrew Koppelman, "The Gay Rights Question in Contemporary American Law (Chicago: University of Chicago Press, 2002), pp. 72-93; Andrew Koppelman, "Is Marriage Inherently Heterosexual?" *American Journal of Jurisprudence*, vol. 42 (1997), pp. 51-95.
14. Exactly half of Americans think that "homosexuality should be considered an acceptable lifestyle." See Gallup News Service, "Some Change Over Time in American Attitudes towards Homosexuality, but Negativity Remains" (March 1, 1999), available at <http://www.gallup.com/poll/releases/pr990301b.asp>.
15. "Boy Scouts of America, Traditional Values and Standards" (provided to 60 Minutes), www.scouting.org/excomm/60minutes/60minutes.html (visited May 15, 2002).
16. *Ibid*.
17. Another objection is that the distinction between status and conduct, though theoretically coherent, is not consistently relied upon by those who seek to police "homosexual conduct," and that these policings in application disrupt the distinction that I have been relying on here. Thus, for example, Janet Halley has shown that the military's prohibition on "homosexual conduct" goes far beyond specified sex acts; it now makes members vulnerable to discharge for "[d]oing things that make your commander think you are gay—like making pro-gay statements, or cutting your hair a certain way, or not fitting the gender stereotype of the sex you belong to." Janet E. Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Durham, N.C.: Duke University Press, 1999), p. 2. Evidently, what makes conduct homosexual is that it is a homosexual who is engaging in the conduct. See Halley, *Don't, idem*, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity," *UCLA Law Review*, vol. 36 (1989), pp. 915-976; *idem*, "Misreading Sodomy: A Critique of the Classification of 'Homosexuals' in Federal Equal Protection Law," in *Body Guards: The Cultural Politics of Gender Ambiguity*, ed. Julia Epstein and Kristina Straub (New York: Routledge, 1991), pp. 351-378. These difficulties are not, however, necessarily present in all discriminations against persons who engage in homosexual conduct. Halley's critique is devastating precisely because it exposes the status-based character of discrimination that is usually defended as conduct-based. Halley's investigations thus show the military and vulnerable to the kind of syllogism with which this paper begins. But this kind of sophisticated analysis is unnecessary with respect to the Boy Scouts' policy, which is overtly and unapologetically status-based.
18. See George Sher, *Desert* (Princeton, N.J.: Princeton University Press, 1987), esp. pp. 37-40.

19. For a similar argument grounded in American constitutional law, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven, Conn.: Yale University Press, 1996), p. 65.
20. Kwame Anthony Appiah, *In My Father's House: Africa in the Philosophy of Culture* (New York: Oxford University Press, 1992), p. 14.
21. *Ibid.*, p. 15.
22. Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* (London: Routledge, 1966), p. 2.
23. *Ibid.*
24. *Ibid.*, p. 36.
25. *Ibid.*, p. 42.
26. *Ibid.*, p. 40.
27. *Ibid.*, pp. 61-62.
28. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).
29. Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," *Yale Law Journal*, vol. 69 (1960), pp. 421-430, at p. 426.
30. Richard A. Wassersstrom, "Racism, Sexism, and Preferential Treatment: An Approach to the Topics," *UCLA Law Review*, vol. 24 (1977), pp. 581-622, at p. 592.
31. See Andrew Koppelman, *Antidiscrimination Law and Social Equality*, pp. 92-99.
32. Racial attitudes have been transformed dramatically in the past half-century. "At least until the 1940s, segregation, discrimination, and openly verbalized prejudice toward minorities of all kinds were entirely acceptable throughout much of the United States." Howard Schuman, Charlotte Steeh, Lawrence Bobo, and Maria Krysan, *Racial Attitudes in America: Trends and Interpretations*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1997), p. 3. Today, nearly all white Americans endorse principles of equal treatment. Schuman et al., *Racial Attitudes in America*, pp. 103-121. For example, only 32 percent of white respondents endorsed racially integrated schools in 1942, while 96 percent did in 1995. Schuman et al., *Racial Attitudes in America*, pp. 104-105.
33. A 1996 *Washington Post* poll found that 53 percent of respondents nationwide thought that racism is "a big problem" in our society, and 35 percent thought it was "somewhat of a problem." Eugene Robinson, "Black and White Getting By," *Washington Post* (July 15, 1996), p. A1.
34. "[I]t is possible to bring societal pressure, indeed public shame, on any white American who clearly discriminates against blacks, provided that the discrimination can be brought to light, as in videotapes of police beatings, audiotapes of corporate obstruction of equal opportunity laws, or public remarks that impugn African Americans. The application of the term 'racist' to a person or organization is itself a severe sanction in most parts of the country." Schuman et al., *Racial Attitudes*, pp. 326-327.
35. Of course, effects are evidence of intentions, and vice versa; and social meaning is evidence of both. See Shari Seidman Diamond and Andrew Koppelman, "Measured Endorsement," *Maryland Law Review*, vol. 60 (2001), pp. 713-760, at p. 732; Andrew Koppelman, "On the Moral Foundations of Legal Expressivism," *Maryland Law Review*, vol. 60 (2001), p. 777-784.
36. *Bob Jones University v. United States*, 461 U.S. 574, 580 (1984), footnote omitted.
37. See Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," *New York University Law Review*, vol. 60 (1994), pp. 197-287, at pp. 220-234.
38. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 409 (1857).
39. Hendrik Hertzberg, "Comment: Bad News for Bigots," *New Yorker* (March 13, 2000), pp. 29-30.
40. When the university's leader, Bob Jones III, announced the change, he acknowledged the role of public opinion in the decision: "This thing is of such insignificance to us; it is so significant to the world at large, the media particularly, why should we have this here as an obstacle? It hurts our graduates. . . . It hurts maybe the church as well. I don't want to hurt the church of Jesus Christ." Editorial, "Bob Jones Rules," *Christianity Today* (April 24, 2000), p. 41.
41. Richard Isay, *Being Homosexual: Gay Men and Their Development* (New York: Avon, 1989), p. 11. Isay is referring only to gay men, but his definition is transferable to lesbians, and I have so modified it.
42. In a survey of anti-gay violence and harassment in eight major cities, 86.2% of the gay men and women surveyed stated that they had been attacked verbally; 44.2% reported that they had been threatened with violence; 27.3% had had objects thrown at them; 34.9% had been chased or followed; 13.9% had been spit at; 19.2% had been punched, hit, kicked, or beaten; 9.3% had been assaulted with a weapon; 18.5% had been the victims of property vandalism or arson; 30.9% reported sexual harassment, many by members of their own families or by the police.
43. National Gay Task Force, *Anti-Gay/Lesbian Victimization* (June 1984), p. 24. These results have been replicated in other studies. See Kevin T. Berrill, "Anti-Gay Violence and Victimization in the United States: An Overview," in *Hate Crime: Confronting Violence Against Lesbians and Gay Men*, ed. Gregory M. Herek and Kevin Berrill (Newbury Park: Sage, 1992), pp. 19-45; Gary David Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991). A study commissioned by the National Institute of Justice, the research arm of the U.S. Department of Justice, found that gays "are probably the most frequent victims [of hate violence today]." Peter Finn and Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review* (Cambridge, Mass.: Abt Associates, 1987), p. 2.
44. See Andrew Koppelman, "Komer v. Evans and Invidious Intent," *William & Mary Bill of Rights Journal*, vol. 6 (1997), pp. 89-146, at p. 125 (quoting Gordon W. Allport, *The Nature of Prejudice* (Reading, Mass.: Addison-Wesley, 1954), pp. 14, 49, 57, 59).
45. Kenneth Sherrill, "The Political Power of Lesbians, Gays, and Bisexuals," *PS: Political Science and Politics* (1996), pp. 469-473, at p. 470.
45. *Ibid.*

46. Richard Mohr, *A More Perfect Union: Why Straight America Must Stand Up for Gay Rights* (Boston: Beacon Press, 1994), pp. 61-62.
47. Quoted in Jules Witcover, *Marathon: The Pursuit of the Presidency, 1972-1976* (New York: Viking, 1978), p. 603.
48. John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (New York: Harper & Row, 1988), p. 293; John D'Emilio, "The Homosexual Menace: The Politics of Sexuality in Cold War America," in John D'Emilio, *Making Trouble: Essays on Gay History, Politics, and the University* (New York: Routledge, 1992), pp. 57-73. The most thorough study to date of the legal status of gays during the antigay hysteria that prevailed in the decade and a half after World War II is William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, Mass.: Harvard University Press, 1999).
49. Committee on Expenditures in Executive Departments, Employment of Homosexuals and Other Sex Perverts in Government, U.S. Senate, 81st Cong., 2nd Sess., S. Doc. 81-241, at 4 (1950).
50. American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (1993), pp. 20, 23. See also Deborah Brake, "The Cruelest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX," *Georgetown Journal of Gender and the Law*, vol. 1 (1999), p. 37-108.
51. William Marsiglio, "Attitudes Toward Homosexual Activity and Gays as Friends: A National Survey of Heterosexual 15- to 19-Year-Old Males," *Journal of Sex Research*, vol. 30 (1993), pp. 12-17.
52. See Safe Schools Coalition of Washington State, *They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in the Schools* (1999), available at <http://www.safeschools-wa.org/theydon'tevenknowme.pdf>. See also Gay, Lesbian, and Straight Educational Network, *The 2001 National School Climate Survey*, http://www.glsen.org/binary-data/GLSEN_ARTICLES/pdf_glsn_029.pdf; Human Rights Watch, *Hated in the Hallways: Discrimination and Violence Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Public Schools*, <http://www.hrw.org/reports/2001/uslgbt/PrideandPrejudice:WorkingWithLesbian,GayandBisexualYouth> (ed. Margaret Massey v. *Banning Unified School District*, 256 F. Supp. 2d 1090 (C.D. Cal. 2003)).
53. Anthony R. D'Augelli, "Lesbian, Gay, and Bisexual Development During Adolescence and Young Adulthood," in *Textbook of Homosexuality and Mental Health*, ed. Robert F. Cabaaj and Terry S. Stein (Washington, D.C.: American Psychiatric Press, 1996), pp. 267-288, at p. 275.
54. One well-known study found that "gay youth are 2 to 3 times more likely to attempt suicide than other young people. They may comprise up to 30 percent of completed youth suicides annually," Paul Gibson, "Gay Male and Lesbian Youth Suicide," in *Report of the Secretary's Task Force on Youth Suicide*, vol. 3 (U.S. Dept. of Health and Human Services, 1989), pp. 3-110. Some recent studies have confirmed this finding, while others suggest that the disparity is far lower. See Ritch C. Savin-Williams, "Suicide Attempts Among Sexual-Minority Youths: Population and Measurement Issues," *Journal of Consulting and Clinical Psychology*, vol. 69 (2001), pp. 983-981.
55. D'Augelli, "Lesbian, Gay, and Bisexual Development," p. 280.
56. See A. Damien Martin and Emery S. Hetrick, "The Stigmatization of the Gay and Lesbian Adolescent," *15 Journal of Homosexuality*, vol. 15 (1988), pp. 163-183. "These youth suffer from chronic depression and are at high risk of attempting suicide when the pressure becomes too much to bear. They may run away from home with no one as a 'last straw' to the youth. A low grade may confirm for the youth that life is a failure, understanding why. A suicidal crisis may be precipitated by a minor event which serves An unwitting homophobic remark by parents may be taken to mean that the youth is no longer loved by them." Gibson, "Gay Male and Lesbian Youth Suicide," pp. 3-120.
57. D'Augelli, "Lesbian, Gay, and Bisexual Development," p. 280.
58. See Cheshire Calhoun, "Sexuality Injustice," *Notre Dame Journal of Law, Ethics, and Public Policy*, vol. 9 (1995), p. 241-274.
59. Martha C. Nussbaum, "Secret Sewers of Vice: Disgust, Bodies, and the Law," in *The Passions of Law*, ed. Susan A. Bandes (New York: New York University Press, 1999), pp. 19-62, at p. 46.
60. Quoted in Mohr, *A More Perfect Union*, p. 69.
61. John M. Finnis, "Law, Morality, and 'Sexual Orientation,'" *Notre Dame Law Review*, vol. 69 (1994), pp. 1049-1076, at p. 1052.
62. See, e.g., "Congregation for the Doctrine of the Faith, Letter to Bishops on the Pastoral Care of Homosexual Persons" (October 1, 1985), *The Pope Speaks*, vol. 32 (1987), p. 62-68.
63. *Ibid.* A similar view can be found in "Statement of Gordon B. Hinckley," *Ensign* (November 1998), p. 71, reproduced at <http://www.mormon.org/question/faq/category/answer/0,9777,1601-1-60-1,00.html> (visited November 21, 2002).
64. For examples from the writings of the Christian Right, which is the central agent of antigay political activity in the United States, see Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago Press, 1997), pp. 25-59. For other illustrations, see Koppelman, "Romner v. Evans and Invidious Intent," p. 144, n. 262.
65. One may object that the distinction between kinds of antigay attitude that I am offering here is incoherent. Any condemnation of conduct will stigmatize those who are inclined to engage in that conduct. Pedophiles, for example, may be stigmatized even if they repress their desires. Can that be wrong? And if it is not, how can the stigmatization of homosexuality be different?
- Yet not all potential wrongdoers are stigmatized as inferior. Even violent criminals are not despised in the way that gays are. Judge Richard Posner, no gay rights advocate, has acknowledged that homosexuals "are despised more for what they are than for what they do." Richard Posner, *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1992), p. 346. Try making sense of that statement as applied to murderers or robbers. Rape is a massive problem, but no derogatory epithet exists for (the very large number of) men who are sexually aroused by the thought of rape. The Catholic Church understands that when dealing with antigay prejudice it is dealing with something distinctively malign, not assimilable into its own condemnation of homosexual conduct.
- Even with pedophiles, there is no familiar set of slurs that condemn members of the group as inferior. If they are despised for their mere desires, however, this is categorically

wrong. Pedophiles who do not act on their desires are not inferior human beings, and it would be unjust to treat them as if they were. In any case, the existence of hard cases does not make the distinction incoherent. No bright line divides the bald from the nonbald, but baldness is a coherent concept.

A still deeper problem, raised in conversation by Mary Anne Case, is whether the argument does not also apply to the Scouts' exclusion of atheists. A person does not choose what to believe or disbelieve; a person might regret being an atheist. Yet atheists are a severely stigmatized group, who have no hope of elective office and until a few decades ago were even barred from giving testimony in court.

Case is right that one should not stigmatize a person for her unchosen beliefs, but if this is a sufficient reason for opposing the Scouts' exclusion, then it would never be permissible for people to form organizations on the basis of shared beliefs. The absurdity of that result shows that the extension of the argument from status to belief would be a mistake. What is special about belief (and distinguishes belief from other unchosen aspects of the self) is that it is transparent for the proposition that is believed. I cannot coherently assert both that I believe X and that X is not the case. Exclusion from organizations on the basis of rejected propositions, then, is not separable from exclusion on the basis of beliefs, even if beliefs are unchosen. But desires are not transparent in the same way. I can coherently say that I have a desire to do X, but that I think that X ought not to be done and that I will refrain from doing X.

66. See James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991).

67. Quoted in *Boy Scouts of America v. Dale*, 530 U.S. 640, 643 (2000).

68. I discuss that issue in "Signs of the Times: *Dale v. Boy Scouts of America* and the Changing Meaning of Nondiscrimination," *Cardozo Law Review*, vol. 23 (2002), pp. 1819-1838; and "Should Noncommercial Associations Have an Absolute Right to Discriminate?" *Law and Contemporary Problems* (forthcoming 2004).

69. The relevant passage from the news article that was the basis of his expulsion reads:

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

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

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

70. Position statement promulgated by the Boy Scouts in 1991, quoted in *Dale*, 530 U.S. at 652 (majority opinion).

71. Quoted in *Dale*, 530 U.S. at 643.

72. Another possible justification for the policy, ignored by the Court, is the canon that gay men are unusually likely to sexually molest their charges. The organization disavows any

73. John Johnson, "Ballot Initiative Praising Scouts Is Latest Salvo in Heated Debate," *Los Angeles Times* (October 8, 2001), p. B6; Peter Hong, "Scout Official Is Fired After Saying He Is Gay," *Los Angeles Times* (November 6, 2000), p. A3; California Scout Leader Comes Out, www.advocate.com/html/news/102000/102000news02.asp.

74. As with Dale, the Scouts expelled Lanzi without further inquiry. Telephone interview with Scott R. Ames, attorney for Mr. Lanzi, November 26, 2001.

75. Quoted in *Dale*, 530 U.S. at 652.

76. Boy Scouts of America, Resolution of February 6, 2002, www.scouting.org (visited November 14, 2002).

77. One might use surveys to determine how the policy is interpreted by the American population (see Diamond and Koppelman, "Measured Endorsement," [see note 35], p. 713), but the policy's meaning is clear enough to make this unnecessary.

78. Quoted in Brief for Respondent, *Boy Scouts of America v. Dale*, 2000 WL 340276, at 3.

79. The Catholic Church's Congregation on the Doctrine of the Faith thus declares: An individual's sexual orientation is generally not known to others unless he publicly identifies himself as having this orientation or unless some overt behavior manifests it. As a rule, the majority of homosexually oriented persons who seek to lead chaste lives do not publicize their sexual orientation. Hence the problem of discrimination in terms of employment, housing, etc., does not usually arise.

80. Reply Brief for Petitioner, *Boy Scouts of America v. Dale*, 2000 WL 432367, at 10.

81. *Ibid.*, p. 11, quoting Nan D. Hunter, "Identity, Speech and Equality," *Virginia Law Review*, vol. 79 (1993), pp. 1695-1719, at p. 1696.

82. See Herman, *The Antigay Agenda*, pp. 49-52, 96-97. Religious conservatives are split on this question. The Catholic Church has for years acknowledged the existence of "homosexuals who are definitively such because of some kind of innate instinct." Congregation for the Doctrine of the Faith, "Declaration on Certain Questions Concerning Sexual Ethics" (1975), *The Pope Speaks*, vol. 21 (1976), pp. 60-73, at p. 60, n. 8.

83. See David B. Cruz, "Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law," *Southern California Law Review*, vol. 72 (1999), pp. 1297-1400.

84. The Scouts have revoked the charters of some local branches that refused to follow the national anti-gay policy. See, e.g., Lisa Black and Courtney Challoo, "Charters of 7 Cub Packs Not Renewed by Boy Scouts, Oak Park Anti-Bias Code Conflicts With National Policy," *Chicago Tribune* (January 26, 2001), p. 3.

85. See David McGowan, "Making Sense of Dale," *Constitutional Commentary*, vol. 18 (2001), pp. 121-175, at pp. 172-174.

86. See David I. Macleod, *Building Character in the American Boy: The Boy Scouts, YMCA, and their Forerunners, 1870-1920* (Madison: University of Wisconsin Press, 1983), pp. 212-214.
87. Even the United States military no longer does this, but rather justifies its policies on the basis of the anticipated reactions of non-gay troops to the presence of gay soldiers. See Andrew Koppelman, "Gaze in the Military: A Response to Professor Woodruff," *University of Missouri-Kansas City Law Review*, vol. 64 (1995), pp. 179-193.
88. Between 2 and 5 percent of the male population is gay. See Fosner, *Sex and Reason* (see note 65), pp. 294-295. Calculating from three million boys presently in the Scouts, the number of gay youth would range from 60,000 to 150,000. There is some evidence that the percentage is even higher among adolescents. See D'Augelli, "Lesbian, Gay, and Bisexual Development," pp. 267-268.
89. Bishops Committee on Marriage and Family, National Conference of Catholic Bishops, *Always Our Children: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers* (1997), available at <http://www.usao.edu/~facshter/catholic/always.htm>.
90. Doctors say the Boy Scout ban will increase the rate of suicide among gay youth, *The Advocate* (June 19, 2001).
91. Sudetic, "The Struggle for the Soul of the Boy Scouts," p. 105.
92. *Ibid.*
93. *Ibid.*
94. In 1960, Bob Jones, Sr., the founder of the university, wrote (in a pamphlet defending racial segregation) that "no race is inferior in the will of God." Quoted in Mark Taylor Dalhousie, *An Island in the Lake of Fire: Bob Jones University, Fundamentalism, and the Separatist Movement* (Athens: University of Georgia Press, 1996), p. 155.
95. *Ibid.*, p. 5.
96. Although this paper is not about law and makes no legal claims, the conclusion in the text does have legal implications. It indicates that the state may have a powerful interest in preventing a socializing agent as the Scouts from discriminating against gay people. Legal intervention, most notably the Civil Rights Act of 1964, appears to have played a powerful role in changing racist social norms. See Richard McAdams, "Cooperation and Conflict: The Economics of Group Status Production and Race Dis-crimination," *Harvard Law Review*, vol. 108 (1995), pp. 1003-1084, at pp. 1074-1082. The Supreme Court in *Boy Scouts of America v. Dale* declares that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of association," 530 U.S. at 659, but it never discusses what these interests are.
97. Albert O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge, Mass.: Harvard University Press, 1970).
98. *Ibid.*, p. 124.
99. *Ibid.*, pp. 98-105.