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OBSTACLE COURTS: RESULTS OF TWO STUDIES ON SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS

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INTRODUCTION

On January 31, 2001, the Judicial Council of California accepted the report of its Advisory Committee on Access and Fairness entitled, *Sexual Orientation Fairness in the California Courts* (“*SOF Report*”).¹ This report was among the first comprehensive, empirical studies of sexual orientation bias in an American court system.² The other surveys of

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1. JUDICIAL COUNCIL OF THE STATE OF CAL., *SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL’S ACCESS AND FAIRNESS ADVISORY COMMITTEE* (2001) [hereinafter *SOF REPORT*].

2. In 1994, two local bar associations released publications addressing biased treatment and discrimination directed at gay and lesbian attorneys by legal employers. See BAR ASSOC. OF S.F., *MANUAL OF MODEL POLICIES AND PROGRAMS TO ACHIEVE EQUALITY OF OPPORTUNITY IN THE LEGAL PROFESSION* (1994); L.A. COUNTY BAR ASSOC. COMM. ON SEXUAL ORIENTATION BIAS, *REPORT* (1994) [hereinafter *LA BAR REPORT*]. The *LA Bar Report* found that sexual orientation bias was widespread and virulent in legal employment in Los Angeles County. See *LA BAR REPORT* at 1. Among Los Angeles legal professionals surveyed, more than 50% believed that the work environment is less hospitable for gay and lesbian attorneys than for non-gay attorneys. *Id.* at (i). Specifically, respondents perceived that sexual orientation discrimination negatively affected performance evaluations, promotions, career advancement, benefits and salary. *Id.* at (i)-(ii), 13-24.

In 1999, a report by a task force of the Arizona Bar found that lesbians and gay men are substantially disadvantaged as employees or participants in the justice system

lesbians or gay men³ and the law focused mainly on attorneys and

because of sexual orientation bias. STATE BAR OF ARIZ. GAY AND LESBIAN TASK FORCE, REPORT TO THE BOARD OF GOVERNORS 18 (1999) [hereinafter ARIZ. BAR REPORT]. Almost one-half, about 47%, of the judges and lawyers surveyed had heard disparaging remarks about lesbians or gay men in the public areas of the courthouse. *Id.* at 18. Thirteen percent observed negative treatment by judges in open court towards those perceived to be lesbians or gay men. *Id.* at 20. Further, employment opportunities for lesbian or gay attorneys are reduced based on sexual orientation. *Id.* Judges and lawyers reported that some court personnel and court participants preferred not to work with lesbian or gay lawyers. *Id.* at 20 (showing that 8% of court personnel and 4% of litigants, jurors and witnesses indicated such a preference).

The community-based survey also showed that the more contact lesbians or gay men had with the Arizona justice system, the more likely they were to witness discrimination or experience a hostile environment based on sexual orientation. *Id.* at 27-28. We must cautiously evaluate that statement, however. First, the Arizona Report broadly defined "justice system" to include attorneys, police, probation and parole officers, as well as other contacts with those persons not limited to the court or judicial context. *See id.* at app. Gay Community Survey 1-2 (referring to questions seven through sixteen on the survey which asked about contacts with the legal/justice system). Second, the more contact an individual had with the justice system, the more opportunity he or she had to observe negative treatment based on sexual orientation. *Id.* at 22-23. The study did not attempt to control for the number of contacts an individual might have had with that system. *Id.* Finally, many of the responses reported incidents of police harassment, seemingly unrelated to respondents' experiences with the courts. *See, e.g., id.* at 23-24 (quoting survey respondents' comments regarding instances of police harassment).

3. I have chosen "lesbians and gay men" to refer to women and men whose sexual orientation is same-sex and "gay" when referring to same-sex persons generally. By doing so, I wish to illustrate that gender often, but not exclusively, mediates the experience of same-sex orientation. *See* Todd Brower, "A Stranger to Its Laws": Homosexuality, Schemas, and the Lessons and Limits of Reasoning By Analogy, 38 SANTA CLARA L. REV. 65, 65 n.2 (1997). *Accord* Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians And Gay Men*, 46 U. MIAMI L. REV. 511, 535-36 (1992). *See, e.g.,* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (discussing how race influences sexual orientation identity).

Some commentators and segments of the gay community employ "queer" while others have suggested that "homosexual," "gay," and "queer" have very different connotations. *See, e.g.,* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 347-49 n.2 (1995); Dan Levy, *A New Generation Bending the Rules: Young Gays, Lesbians Shed the Old Labels*, S.F. CHRON., Apr. 28, 1994, at A1. *Cf.* Martha M. Ertman, *Oscar Wilde: Paradoxical Poster-Child for Both Identity and Post-Identity*, 25 L. & SOC. INQUIRY 153, 156 (2000) (employing neither "queer" nor offering different connotations to similar expressions).

Studies have shown that it is probably more accurate to refer to "homosexualities," as there is a diverse continuum of same-sex orientations. *See, e.g.,* ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 53-61 (1978); ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 636-55 (1948); *see also* Janet Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1723 (1993). Nevertheless, for simplicity, this article uses the singular. Finally, I have avoided using "straight" to characterize heterosexuals or heterosexuality, as that term implies that lesbians and gay men are crooked or deviant. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000) (discussing the phrase "morally straight" within Boy Scout oath as excluding gay people); *see also* Fajer, *supra* note 3, at 536 n.119 (avoiding use of the word "straight" because it implies that if a person is not "straight" then they must be

legal employment,⁴ suffered from a relatively small response sample, and primarily reported on survey respondents' perceptions rather than their experiences.⁵

As part of its mandate to ensure that all court users receive equal and fair treatment, the Access and Fairness Advisory Committee monitored sexual orientation fairness and access to the California courts.⁶ The Subcommittee drafted and disseminated two surveys, one for gay and lesbian court users, and another for all court employees.

The Subcommittee designed the court user survey to discover: if lesbians or gay men experienced or observed bias, discrimination, ridicule or discomfort because of sexual orientation while using the courts; if they had positive experiences based on sexual orientation; and if they believed they were shown the same treatment and respect as others. The survey requested information on respondents' most recent contact with California courts, as well as one other significant contact since 1990.⁷

"bent").

4. Other bar association surveys studied gay and lesbian attorneys' employment experiences. See generally BAR ASSOC. OF S.F., CREATING AN ENVIRONMENT CONDUCIVE TO DIVERSITY: A GUIDE FOR LEGAL EMPLOYERS ON ELIMINATING SEXUAL ORIENTATION DISCRIMINATION (1991); COMM. ON LESBIANS AND GAY MEN IN THE PROFESSION, REPORT ON THE EXPERIENCE OF LESBIANS AND GAY MEN IN THE LEGAL PROFESSION 48, in THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 843 (7d ed. 1993). Both of these reports contained findings and conclusions consistent with the *LA Bar Report*. Accord LA BAR REPORT, *supra* note 2, at 3 n.17. See also MASS. LESBIAN AND GAY BAR ASSOC., SURVEY (1994) (surveying the employment experiences of sixty-four lesbian or gay attorneys).

5. See, e.g., ARIZ. BAR REPORT, *supra* note 2, at 8-10 (showing results of eighty seven judges surveyed, 29% response rate; 173 lawyers surveyed, 27% response rate; eleven law professors surveyed, 15% response rate; 158 law students surveyed, 17% response rate; 384 members of the general community surveyed, not necessarily court users, 48% response rate); LA BAR REPORT, *supra* note 2, at 4 (noting that of approximately 400 gay and non-gay attorneys in LA County there was a 20% response rate and out of approximately sixty LA County legal employers there was a 17% response rate).

6. See SOF REPORT, *supra* note 1, at 12. The Subcommittee and consultants designed the surveys to focus on the California court system, to obtain data from every part of the state, and, primarily, to emphasize the respondents' direct experiences and observations as opposed to solely their attitudes or beliefs. *Id.* at 13. Both surveys were anonymous, an important precaution given the sensitivity of sexual orientation bias. *Id.*

7. With the assistance of various national and local lesbian and gay advocacy and service organizations, the Subcommittee identified 2100 lesbian or gay court users. SOF REPORT, *supra* note 1, at 13. Fifty-eight percent completed the survey for a total response of 1225 court users. *Id.* The large number of survey recipients and responses are statistically remarkable. *Id.* at 14.

Ninety percent of court user survey respondents were white men. *Id.* at 15. Sixty-nine percent were gay. *Id.* Sixty-six percent lived in an urban area. *Id.* Eighty-three percent had an undergraduate or graduate degree. *Id.* Forty-eight percent had an income of at least \$60,000 a year. *Id.* Sixty-one percent were selectively open about

In contrast to the lesbian or gay court user study, the Subcommittee designed and distributed the second survey to court employees of all sexual orientations.⁸ The Subcommittee designed the survey to determine: whether employees observed negative behaviors toward gay men or lesbians, either in open court or other work settings; whether employees personally experienced discrimination, negative actions, or heard negative comments based on their actual or perceived sexual orientation; and whether employees believed that gay men and lesbians were shown equal treatment and respect in the courts.⁹ The survey asked court employees to base their responses¹⁰ on their experiences over the past

their sexual orientation, primarily with family, friends, and at work. *Id.* Most gay or lesbian court users had relatively few contacts with the court system. *Id.* Seventy percent had only two to three contacts since 1990. *Id.* Those contacts tended to be with a criminal or civil court (73%). *Id.* Further, nearly twice as many contacts were as a juror or potential juror (60%), than as a participant, either a litigant or attorney (32%). *Id.* The Subcommittee analyzed survey results by demographics (i.e., sex, race, age, income, education, and urbanicity of the court, urban, suburban or rural) and by the nature of the court experience itself (i.e., reason for using the court, type of court, in-court or out of courtroom contact). DOMINIC J. BREWER & MARYANN JACOBI GRAY, SEXUAL ORIENTATION FAIRNESS IN CALIFORNIA COURTS: RESULTS FROM TWO SURVEYS 8 (1999) [hereinafter BREWER & GRAY, REPORT]. No significant differences appeared based on demographics, socio-economic level or urbanicity. *Id.* at 8-9. Major distinctions were a function of the court users' experiences. *Id.* at 9.

8. The Subcommittee sent questionnaires to about 5500 of the approximately 17,000 California court employees around the state, including court clerks, reporters, administrators and attorneys. BREWER & GRAY, REPORT, *supra* note 7, at 9. Of those who received a survey, 1525 responded. SOF REPORT, *supra* note 1, at 12.

Ninety-three percent of court employee respondents were white, heterosexual, married women. SOF REPORT, *supra* note 1, at 15. Sixty-six percent earned less than \$50,000 a year and had no college degree. *Id.* Ninety-eight percent were fulltime, permanent court employees. *Id.* The typical respondent had worked for the courts for twelve years, seven in her current position, and was employed as court clerk, clerical staff or mediator. *Id.* Most respondents participated in court proceedings at least once a month, with almost 50% participating daily. *Id.* at 15. Unlike previous Judicial Council surveys, this one reached a broader range of personnel, especially clerical and support staff. BREWER & GRAY, REPORT, *supra* note 7, at 9. The Subcommittee analyzed court employee responses by sexual orientation, sex, education, urbanicity of court, type of court, type of court appointment, and whether respondents observed court daily or less than daily. *Id.* at 10, 69. Except for sexual orientation, the survey found relatively few differences in responses based on the other characteristics. *Id.* Out of 1525 court employee respondents, sixty-four identified themselves as lesbians, gay men or bisexuals. *Id.* at 9. Of those lesbian or gay court employees, over one-third were totally "out" at work; over one-third were selectively "out" at work; over one-quarter were not "out" at work at all. SOF REPORT, *supra* note 1, at 15. Court employee survey respondents were considerably less likely to openly identify as lesbian or gay at work as compared to court users, where 93% were totally out or selectively out in their respective workplaces (although significantly, not in the court setting). *Id.* at 16.

9. See SOF REPORT, *supra* note 1, at 14.

10. The court employee survey generated an unusually high number of negative responses to the survey itself—more than other Judicial Council employee surveys. *Id.* at 13. For example, one person responded, "I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I

2002]

OBSTACLE COURTS

43

year only.¹¹

I. THE JUDICIAL COUNCIL REPORT

A. *Results of the Court User Study*

While most lesbian and gay court users believed they were treated the same as everyone else and treated with respect by those who knew their sexual orientation,¹² several contrary patterns emerged from the survey data. The data demonstrated in a variety of contexts that a significant number of lesbian and gay court users and employees had less favorable experiences and perceptions of fairness.

The dominant pattern shows degradation in lesbian and gay court users' experiences when sexual orientation became visible, either as a topic in the court proceeding, or as a characteristic of the court users themselves. We can see this deterioration in respondents' experiences when we compare their most recent court contact to another, significant, recent experience with the courts.

The survey results for respondents' most recent court contact provide a typical experience or a baseline for lesbian and gay court users' treatment and perceptions of fairness in the California courts.¹³ By focusing on the most recent experience, the survey drew on a random sample of lesbian and gay court users' experiences, rather than have respondents describe a court contact that they deemed negatively or positively noteworthy.¹⁴ Moreover, sexual orientation

can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians." *Id.* Another individual responded, "I have received your survey on sexual orientation and found it to be degrading and offensive. I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel." *Id.* A third individual replied, "I decline to answer your survey as I feel it covers a matter that is not appropriate to talk about in the work place." *Id.* at 13. These negative responses underscore the survey results, which indicate that court employees are unconcerned, and sometimes hostile, to sexual orientation issues in the courts. *Id.*

11. See BREWER & GRAY, REPORT, *supra* note 7, at 9. The year observed was between the fall of 1997 and the fall of 1998. *Id.*

12. In their most recent contact, 89.2% of respondents agreed somewhat or very strongly with the statement, "As far as I could tell, I was treated the same as everyone else," and 80.4% of respondents agreed somewhat or very strongly with the statement, "I was treated with respect by those who knew my sexual orientation." *Id.* at 24, 25 tbl.10. In another recent, significant contact with the courts, 74.5% of the same pool of respondents agreed somewhat or very strongly with the statement, "As far as I could tell, I was treated the same as everyone else," and 70.4% of respondents agreed somewhat or very strongly with the statement, "I was treated with respect by those who knew my sexual orientation." *Id.* at 37 tbl.18.

13. See *id.* at 7.

14. *Id.* at 7.

44 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:1

was overwhelmingly not pertinent to that latest contact¹⁵ and so was not likely to be unusual in that regard. Finally, 60% of lesbian and gay court users' most recent experiences concerned some manner of jury service, rather than as a party, lawyer or witness in the proceedings (44.2%).¹⁶

In contrast, the other, significant court contact predominantly involved sexual orientation issues.¹⁷ Further, lesbian and gay court users more actively participated in that court contact as a party, witness or lawyer (55.1%), as opposed to some form of jury service (22%).¹⁸ While still favorable, survey respondents' agreement with the statement, "As far as I could tell, I was treated the same as everyone else." dropped from 89.2% in the most recent contact to 74.5% in other contact.¹⁹ Similarly, respondents' perception that people treated them respectfully fell from 80.4% to 70.4% during those two contacts.²⁰ Because the survey asked identical questions in both contexts, the difference is a function of the nature and duration of these court experiences.²¹ Visibility of sexual orientation, either as a topic within the court proceeding or as a characteristic of the court users themselves, significantly affected lesbian and gay respondents'

15. At least 81.4% of those court contacts did not involve sexual orientation issues. DOMINIC J. BREWER & MARYANN JACOBI GRAY, SURVEY DATA, PRELIMINARY REPORT DRAFT 3/31/99, reported in 4/9/99 MATERIALS OF THE SUBCOMMITTEE ON SEXUAL ORIENTATION FAIRNESS 8 (1999) [hereinafter BREWER & GRAY, SURVEY DATA] (indicating responses to question 19).

16. See BREWER & GRAY, REPORT, *supra* note 7, at 16 tbl.5.

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

18. See *id.* at 28 tbl.13. Additionally, the rank order of percentages of lesbian and gay respondents' involvement in the two court contacts is very different. Lesbian and gay court users' active participation ranks significantly higher in the other contact than in the more recent one. Compare *id.* at 16 tbl.5, with *id.* at 28 tbl.13.

19. *Id.* at 24 tbl.10, 37 tbl.18.

20. *Id.*

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

An alternative explanation is that the quality of lesbian and gay court users' experiences has improved over time. While this explanation initially appears plausible, it ignores the uncertainty of the actual timing of all respondents' court contacts. The most recent court contact necessarily occurred after the other contact, and both contacts must have taken place between January 1, 1990 and May 1998. BREWER & GRAY, SURVEY DATA, *supra* note 15, at 2-3, 9. Among the total court user respondents, however, we cannot generalize about the timing of the court contacts. Some respondents' most recent experiences might have occurred before another respondent's "other, significant contact," and vice versa. See generally BREWER & GRAY, REPORT, *supra* note 7, at 6-7.

treatment and perceptions of fairness.²²

Accordingly, individuals who have merely casual court contacts, for example paying a traffic ticket or being called for a jury panel, may understandably have more favorable impressions than those with more extended contacts or personal involvement.²³ Those limited contacts often end up being sexual orientation neutral events,²⁴ a quality often missing when lesbian and gay court users' became more personally involved.²⁵ Further, the more limited the court contact, the less likely others learned of respondents' sexual orientation. For example, "I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up."²⁶ Consequently, lesbian or gay identity was not manifest and could not affect treatment.

However, when sexual orientation became an issue in the court contact, 30% believed those who knew their sexual orientation did not treat them with respect, and 39% believed their sexual orientation was used to devalue their credibility.²⁷ Survey responses illustrate this connection: "Defendant's lawyer . . . used my relationship and my partner as object of focus to denigrate my loss

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

23. For many respondents these contacts were sexual orientation-neutral events. See, e.g., BREWER & GRAY, REPORT, *supra* note 7, at 19 (indicating respondents comments such as, "My most recent contact involved paying a traffic ticket. Everyone was very nice. No one noticed/asked my sexual orientation. It did not and should not come up," or "My jury service seemed to be a gay-neutral event.").

24. "My last contact with the courts was to report for jury duty, where I sat for two hours then we were all released. I never spoke to anyone." BREWER & GRAY, SURVEY DATA, *supra* note 15, at 6 (indicating responses to question 16). In the most recent contact, at least 81.4% did not involve sexual orientation issues. *Id.* at 8 (listing respondents comments to question nineteen).

25. In the more actively participatory contact, 74.3% of those contacts involved sexual orientation issues. BREWER & GRAY, REPORT, *supra* note 7, at 29 tbl.14.

26. See BREWER & GRAY, SURVEY DATA, *supra* note 15, at 6 (conveying respondents' replies to question 16).

27. Seventy-four and three-tenths percent of respondents' other recent, significant contact with the courts involved certain sexual orientation issues. BREWER & GRAY, REPORT, *supra* note 7, at 29 tbl.14. In that contact, 25.5% of lesbian and gay court users believed they were treated differently from everyone else, and 29.6% of lesbian and gay respondents felt those who knew their sexual orientation did not treat them with respect. *Id.* at 37 tbl.18. In that same contact, 39% of lesbian and gay court users believed that their sexual orientation was used to devalue their credibility. *Id.* See generally *id.* at 38 tbl.19. Compare the data for these same questions in respondents' most recent contact: 10.8%, 19.6%, and 13.6% respectively. *Id.* at 25 tbl.10.

and income claim and create smoke and mirrors. That would not have been used in non-gay situation;"²⁸ "One defendant was a gay man suing an ex-lover—snickers and comments from jury members;"²⁹ "Jury member suggested that witness was gay and therefore his testimony could not be trusted;"³⁰ and "I was discredited as a witness because they said I was probably 'out at a club or something' before I witnessed the accident."³¹

Similarly, when more lesbian and gay court users participated actively in their court contact, as a witness, party or attorney,³² they also perceived the California courts as less fair.³³ Direct participants in a case reported more negative incidents than did all respondents.³⁴ Their extended contact and more active roles may have provided others with the opportunity to learn their sexual orientation.³⁵ Thus,

28. See BREWER & GRAY, SURVEY DATA, *supra* note 15, at 4.

29. *Id.* at 9.

30. *Id.* at 2.

31. *Id.* at 12.

32. Compare lesbian and gay court user survey respondents' most recent contact with the California courts, which contact tended to be through jury service (60%), with a different, recent contact with the courts, which contact tended to be when they were a party, witness, or lawyer in the proceedings (55.1%, as compared with jury service during that contact, 22.2%). Compare BREWER & GRAY, REPORT, *supra* note 7, at 17 tbl.5, with BREWER & GRAY, REPORT, *supra* note 7, at 28 tbl.13.

33. When more of them participated actively in a court contact, 25.5% of lesbian and gay court users believed that they were treated differently from everyone else as far as they could tell, whereas 10.8% of them believed they were treated differently in their primarily jury service contact. Compare *id.* at 37 tbl.18, with *id.* at 25 tbl.10; compare *id.* at 38 tbl.19, with *id.* at 26 tbl.11. "In a domestic abuse case, the judge did not ask me the same questions she asked potential jurors regarding my relationship with my companion or my experience with domestic abuse." *Id.* at 19. Similarly, in a court contact in which they participated more actively, 29.6% of lesbian and gay court users felt those who knew their sexual orientation did not treat them with respect; however in their primarily jury service contact, 19.6 % of respondents felt that those who knew their sexual orientation treated them disrespectfully. *Id.*; compare *id.* at 37 tbl.18, with *id.* at 25 tbl.10; compare *id.* at 38 tbl.19, with *id.* at 26 tbl.11. Finally, when more respondents participated actively in a court contact, 37.7% of lesbian and gay court users agreed somewhat or very strongly with the statement, "My sexual orientation was used to devalue my credibility." SOF REPORT, *supra* note 1, at 32. In contrast, 13.6% of these respondents agreed somewhat or very strongly with the statement, "My sexual orientation was used to devalue my credibility," in their primarily jury service contact. BREWER & GRAY, REPORT, *supra* note 7, at 25. Compare *id.* at 26 tbl.11 (rating respondents' recent contact), with *id.* at 38 tbl.19 (listing the mean agreement rating for statements with another recent contact with the court system).

34. Fourteen percent of direct participants in a case reported ridicule compared to 12% for the entire sample of lesbian or gay respondents; 5.3% reported negative comments about themselves versus 4.2% for the overall sample, and 8% of direct participants reported negative actions compared to 6.4% overall. BREWER & GRAY, REPORT, *supra* note 7, at 18.

35. In that contact, 28.7% of lesbian and gay court users reported that someone else disclosed their sexual orientation without respondents' approval, and 24.5% felt compelled to state their sexual orientation against their will. *Id.* at 37 tbl.18. See, e.g.,

their added visibility as lesbians or gay men increased their negative experiences and perceptions, which could potentially be attributed to the cognitive phenomenon where once people perceive court users to be lesbian or gay, that trait overshadows other aspects of their identity.³⁶

If true, then lesbian and gay sexual orientation becomes a marker for unequal treatment and sexual orientation may possibly color even those proceedings in which it would otherwise not appear. The *SOF Report* findings appear to corroborate this hypothesis.³⁷ For example, lesbian and gay court users reported that their sexual orientation was raised as an issue almost as often when it did not pertain to the proceedings as when it played a relevant role in their case or in their reason for using the courts.³⁸ Once known, lesbian and gay identity appears to shade all other aspects of the court experience, even when it is irrelevant. This conclusion is a corollary to the phenomenon that visibility as lesbian or gay often transforms the way others perceive gay people.³⁹

Survey respondents' demographic profile reinforces this inference. Because lesbian and gay survey respondents were predominantly

BREWER & GRAY, SURVEY DATA, *supra* note 15, at 6 (responding to question 16). Survey responses were calculated according to the following statements: "I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up," or, "[m]y last contact with the courts was to report for jury duty, where I sat for two hours then we were all released. I never spoke to anyone." *Id.*

36. *See id.*

37. *See generally* SOF REPORT, *supra* note 1, at 17 (expressing concern with the finding that lesbians and gay men, when their sexual orientation is known in a court proceeding, experience bias more frequently based on their sexual orientation).

38. In their most recent contact, 15.3% of lesbian and gay court users agreed somewhat or very strongly with the statement, "[m]y sexual orientation was pertinent to the court proceedings," and 11.2% of those same respondents agreed somewhat or very strongly with the statement, "[m]y sexual orientation was raised as an issue even though it did not pertain to the case." BREWER & GRAY, REPORT, *supra* note 7, at 25 tbl.10. In another, recent, significant contact with the courts, 38.2% of lesbian and gay court users agreed somewhat or very strongly with the statement, "[m]y sexual orientation was pertinent to the court proceedings," and 35% of those same respondents agreed somewhat or very strongly with the statement "[m]y sexual orientation was raised as an issue even though it did not pertain to the case." *Id.* at 37 tbl.18.

39. *See, e.g.,* Boy Scouts of Am. v. Dale, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting) ("Upon the majority's reasoning . . . [the] label [homosexual] . . . communicates the message that permits his exclusion whenever he goes."); LA BAR REPORT, *supra* note 2, at 32; Louis Sahagun, *Lesbian Coach Sues Utah School in Court: Woman Says she Lost Volleyball Team Post and was Warned not to Discuss her Sexual Orientation on or off Campus*, L.A. TIMES, Oct. 22, 1997, at A3 (reporting that once a lesbian teacher told a student she was gay, the school principal removed her as coach because "his perception of [her] had changed" after having worked with her for eight years).

educated, relatively affluent, white males,⁴⁰ we might assume that those respondents would have the sophistication and ability to navigate through the judicial system. Consequently, we would expect them to have the most positive experiences and perceptions of the court system. Additionally, since most lesbian and gay court users' sexual orientation is not easily identifiable, we would expect more negative experiences and unfairness when they become visible as non-heterosexual. The survey data illustrate this correlation as well.

Unsurprisingly, any anti-gay comments, actions or prejudices present in the judicial system might surface when sexual orientation issues become more important in the court proceeding. Although the same level of anti-gay feeling might exist in other court experiences, it may not manifest itself unless sexual orientation becomes apparent.

Readers familiar with sexual orientation bias in modern American society should find this connection neither unexpected nor aberrant. Some have called anti-gay animus the last socially acceptable form of prejudice existing today.⁴¹ Annual nationwide juror polls routinely find that lesbians and gay men are among the groups to whom jurors report they cannot be fair—three times more likely for gay litigants than for African-Americans, Asians, Hispanics or Whites.⁴²

The survey data also demonstrate that fear of the negative consequences of being openly gay or lesbian is one reason many persons remain closeted. As one court user respondent commented, “. . . many homosexuals, unless self-identified as homosexuals, are assumed to be heterosexuals Why do I prefer to pass as

40. See BREWER & GRAY, REPORT, *supra* note 7, at 11-12; SOF REPORT, *supra* note 1, at 15.

41. See, e.g., E.A. Harvey, *The Last 'Acceptable' Prejudice; In an Increasingly Tolerant World, Gay Teens Still Face Harassment and Social Isolation: Two who Survived High School Remember*, SUNDAY NEWS (Lancaster, Pa.), May 21, 2000, at G1 (quoting a psychologist who specializes in gay and lesbian issues). “The last acceptable form of overt prejudice is against gays. It's still extremely bad in the public school systems.” *Id.*; Richard Williamson, *Gay Exec Talks about 'Glass Ceiling'*, ROCKY MOUNTAIN NEWS (Denver), Nov. 11, 1999, at 4B (reporting that it has been written that this is the last acceptable prejudice because whether someone is stridently anti-gay or quietly anti-gay, it is still acceptable).

42. See Peter Aronson et al., *Jurors: A Biased Independent Lot*, NAT'L L.J., Nov. 2, 1998, at A1 (reporting results of annual National Law Journal-Decision Quest 1998 Juror Outlook Survey); Ben Schmitt, *Poll: Jurors Would Buck Laws to Achieve Justice*, FULTON COUNTY DAILY REP. (Fulton County, Ga.), Nov. 16, 1998 (reporting results of 1998 National Law Journal-Decision Quest 1998 Juror Outlook Survey: less than 5% of respondents said they could not be fair to a Black or Hispanic litigant, 17% could not be fair to a lesbian or gay litigant); Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, NAT'L L.J., Nov. 1, 1999, at A1 (1999 Juror Outlook Survey results: 3% of respondents said could not be fair if a litigant were Black, Asian, American Indian or White, 4% for Hispanic litigants, 12% if the party were a lesbian or gay man).

heterosexual? To avoid mistreatment.”⁴³ Similarly, the Arizona Bar Report found that judges and lawyers reported some court participants and personnel preferred not to work with openly gay or lesbian attorneys.⁴⁴ A significant number of gay and non-gay lawyers in Los Angeles County believed that an attorney’s openness regarding his or her gay or lesbian status would be harmful to that attorney’s career.⁴⁵ Nearly one-half of all Los Angeles survey respondents, regardless of sexual orientation or sex, believed that simply discussing one’s personal or family life in a manner that revealed the sex of one’s partner—an inconsequential matter for a non-gay lawyer—would harm a gay attorney’s career.⁴⁶

Beyond perceptions of fairness or equality, lesbian and gay court users felt unsafe within the California courts. This finding also exhibits the visibility pattern: gay persons’ more active court participation and/or increased sexual orientation visibility in the proceedings corresponds to an increased perception of threat.

Despite the relative neutrality of their most recent court contact,⁴⁷ over one-fifth of all lesbian and gay court users felt threatened based on their sexual orientation.⁴⁸ However, the number of respondents who reported feeling threatened nearly doubled once sexual orientation became more significant or more of them participated actively in the court contact.⁴⁹ One respondent said, “I felt intimidated—didn’t want them [two clerks and a police officer observed by Respondent while in line] to talk about me the way they

43. See BREWER & GRAY, SURVEY DATA, *supra* note 15, at 8 (responding to question 19).

44. See ARIZ. BAR REPORT, *supra* note 2, at 20-21 (reporting that of the judges and attorneys surveyed, 8% heard court personnel indicate a preference not to work with gay or lesbian lawyers and 4% heard litigants, jurors, or witnesses indicate a preference not to work with gay or lesbian lawyers).

45. See LA BAR REPORT, *supra* note 2, at 29-31. Some employers have been quite obvious about discriminatory hiring motives, stating blatantly that “I would not knowingly hire any gay attorney.” *Id.* at 6.

46. See *id.* at 31.

47. Because the most recent court contact tended to be one in which sexual orientation was not pertinent to the contact (at least 81.4% of those court contacts did not involve sexual orientation issues), that response may be used as a relatively neutral baseline for a comparison with the other, significant court contact. BREWER & GREY, SURVEY DATA, *supra* note 15, at 8.

48. In their most recent contact with the California courts, 21.5% of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” BREWER & GRAY, REPORT, *supra* note 7, at 25 tbl.10.

49. Thirty-seven point seven percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” *Id.* at 37 tbl.18.

50 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:1

were talking about other gays—kept my mouth shut.”⁵⁰ Another respondent reported “death threats and name calling. Not of me but of the lesbians directly involved in the case.”⁵¹

Lesbian and gay court users’ personal experiences and treatment in the courts appear to be consonant with their perceptions. In a contact where sexual orientation became significant, 56% of gay and lesbian court users overall reported observing or experiencing a range of negative experiences directed toward themselves or other gays and lesbians.⁵² Specifically, 36% reported having heard negative comments about someone else, and 23% reported having heard negative comments about themselves.⁵³ Twenty-nine percent reported hearing negative remarks arising from a case; 26% claimed to have experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men, 25% reported having heard other negative remarks.⁵⁴ The open-ended responses illustrate these findings. “A jury member suggested that witness was gay and therefore his testimony could not be trusted.”⁵⁵ “Two attorneys were in the hall outside of the courtroom talking. One said, ‘did you see *that?*’ This was followed by a joke, then laughing. Bailiff joined attorneys briefly — all laughed.”⁵⁶

The court employee survey supports and corroborates court users’ experiences, particularly for ridicule, snickering or jokes. One out of every five court employee respondents heard derogatory terms, ridicule, snickering or jokes about gay men or lesbians in open court with judges, lawyers or court employees most frequently making those comments.⁵⁷

In the baseline contact, lesbian and gay court users who had an in-court experience saw and heard significantly more negative comments and actions than did those with non-courtroom experiences.⁵⁸ Court employees, however, observed more negative

50. BREWER & GRAY, SURVEY DATA, *supra* note 15, at 12.

51. *Id.* at 12.

52. BREWER & GRAY, REPORT, *supra* note 7, at 31-33, 33 tbl.16.

53. *Id.* (adding that of the 23% who heard negative comments about themselves, between one-third and one-half of those experiencing the negative incident reported that a lawyer was involved).

54. *Id.*

55. *Id.* at 19.

56. *Id.* at 18.

57. *See id.* at 52. The *Ariz. Bar Report* contains similar findings about disparaging comments in the courthouse. *See* ARIZ. BAR REPORT, *supra* note 2, at 18. The *Ariz. Bar Report* also contains negative treatment of lesbians or gay men in court. *Id.* at 20.

58. *See* BREWER & GRAY, REPORT, *supra* note 7, at 22 tbl.8. For example, 12% of gay men and lesbian court users observed or experienced ridicule, snickering, or

comments or actions against lesbians or gay men outside the courtroom.⁵⁹ Court employees' greater access to the non-public, non-courtroom areas may explain the difference between court employees' and court users' observations.⁶⁰

These experiences are more striking because the California Canons of Judicial Ethics not only require judges to refrain from negative behavior towards lesbian or gay court users, but also mandates that they address others' behaviors and comments within their courtrooms.⁶¹ Despite these legal protections, lesbians and gay men still experienced a significant amount of negative actions and

jokes about lesbians and/or gay men; 8% heard negative comments about someone else; 4% heard negative comments about themselves, 5% heard negative remarks arising from a case; 8% heard other negative remarks, and 6% had a negative action taken against them. *See id.* at 21 tbl.7.

59. *See id.* at 55 tbl.34. Thirty percent of court employees heard ridicule, snickering or jokes about lesbians and gay men in settings other than open court; 28% reported hearing negative comments; and, 23% heard derogatory terms about gay men or lesbians. *Id.* A significant number of court employees observed negative actions or comments by judges, lawyers or court employees in work settings other than open court in the year before the survey. Over 17% reported hearing ridicule, snickering or jokes, one to three times, 6% heard ridicule, snickering or jokes four to six times, and 9% of respondents heard or observed ridicule, snickering or jokes about lesbians or gay men more than six times. *Id.* This frequency was similar with respect to negative comments with 16% of employees hearing negative comments about gay men or lesbians one to three times. *Id.* Six percent heard such comments four to six times, and 6% heard negative comments more than six times. *Id.*

60. *See id.* (indicating that the percentage of court employees observing negative actions or comments by judges, lawyers, or court employees in work settings other than open court within the past year).

61. CAL. CODE JUDICIAL ETHICS Canon 3(B) (6) (West 2002):

A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, religion, national origin, disability, age, sexual orientation, socioeconomic status or other similar factors are issues in the proceeding.

Id.; *see also* CAL. JUDICIAL ADMIN., STANDARDS § 1(a) (requiring judges to "ensure fairness," and to "refrain from and prohibit biased conduct," and to "ensure unbiased decisions."). California has legal protections for sexual orientation fairness within its judicial system. *See, e.g., id.* § 1(b) (stating that a local court should establish a committee to assist and maintain a bias-free courtroom environment and include court sponsored or supported educational programs designed to eliminate sexual orientation bias in the courts and legal community, and develop and maintain bias complaint procedures for sexual orientation incidents); *id.* § 1.5(a)-(c) (noting that the appointment, recruitment and selection of attorneys, arbitrators, mediators, referees, masters, receivers, and other persons should ensure equal access and diversity including sexual orientation.); *id.* § 1.6 (selection of members of court-related committees: same); *id.* § 25.1(g) (judicial officer training should include sexual orientation fairness); *id.* § 25.6(f)(g) (court employee training: same). In addition, attorneys and legal employers are prohibited from discrimination based on sexual orientation in employment or in accepting or ending representation of a client. CAL. LAB. CODE §§ 1101, 1102, 1102.1 (West 2002); RULES OF PROF'L CONDUCT OF THE STATE BAR OF CAL., R. 2-400 (West 2002).

52 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:1

comments. One respondent noted, "I was a jury prospect but it was evident that the defense lawyer didn't want gays on the jury. One of his questions to me during selection was Mr. X, would you say you have more straight friends or gay friends? I was discharged."⁶²

Lesbian and gay court users also reported a small number of positive comments and actions.⁶³ The Subcommittee inquired about positive events to elicit a more accurate picture of their court contacts and in order not to slant or color respondents' answers towards only negative court experiences.⁶⁴ In the most recent contact, fewer than 3% of all respondents answered affirmatively to any of the questions about positive comments or actions.⁶⁵ Negative comments outweighed positive ones in the courtroom by almost four-to-one.⁶⁶ The imbalance between negative and positive experiences may explain some of the bias gay and lesbian court users perceived when participating in court.

Arguably as interesting as the few reported positive comments and actions is the Report's use of "positive" to refer to those particular court users' experiences. What respondents labeled "positive" is not truly the opposite of negative comments. No lesbian or gay court user reported better treatment because of having identified their sexual orientation.⁶⁷ Rather, the open-ended survey responses show that positive comments or actions tended to be those in which people

62. See BREWER & GRAY, REPORT, *supra* note 7, at 18.

63. In the more active contact, 14% of gay and lesbian court users heard or observed positive comments or actions about themselves, and 9% heard comments about other lesbians or gay men, 7% saw positive actions toward someone else. *Id.* at 31. That percentage dropped to 3% for positive comments and 2% for positive actions towards themselves outside the courtroom, and 2% for positive comments and 1% for positive actions towards others. *Id.* at 23 tbl.9. Although the occurrences of positive comments or actions are relatively small, when occurring in the courtroom, 52% of the time, lawyers made those positive comments and 30% of the time, judges *did*. *Id.* at 31. Outside the courtroom, 40% of the time, judges made those positive comments and lawyers 40% of the time. Court employees made positive comments about 17% of the time both inside and outside the courtroom. *Id.* at 23 tbl.9.

64. Author's recollection of survey drafting discussions in 1997 meetings of the Sexual Orientation Subcommittee. See also SOF REPORT, *supra* note 1, at 17 (discussing the definition of "positive comments and actions").

65. See BREWER & GRAY, REPORT, *supra* note 7, at 18, 23 tbl.9. Compare these numbers to the other, significant contact, in which fewer than 15% of lesbian and gay court users had positive actions or comments. *Id.* at 39.

66. See *id.* at 18, 22 tbl.8 (stating that negative incidents toward lesbians and gay men were much higher among those with an in-courtroom contact versus those who an out-of courtroom contact).

67. See *generally id.* at 33 tbl.16 (discussing in detail the percentage of lesbian and gay court users who saw or heard negative comments or actions toward gay men or lesbians in a California Court).

treated gay and lesbian court users with equal respect and fairness.⁶⁸ Positive experiences included situations where a judge expressed support during a second parent adoption⁶⁹ or, in another instance, a survey respondent noted that “[t]he judge and lawyer made a point of notifying my ex that sexual orientation is not an issue in family law.”⁷⁰ Lesbian and gay court users must have expected hostility or disrespect from the court system in order to label equal or respectful treatment as “positive.” The data demonstrate that those low expectations were often accurate.

The most direct evidence of the stigmatizing effects in the courts of open lesbian or gay identity appears in the *SOF Report’s* specific findings on disclosure of sexual orientation and responses to requests for personal information. The metaphor of coming out of the closet is a misnomer; one steps out of a closet into a room all at one time. One is either in one place or another, in the closet or out. Unlike that literal decision to leave the closet, publicly acknowledging one’s identity as lesbian or gay is a series of continuing choices as to how and how much to disclose, and when and to whom.⁷¹ Thus, one can be open about one’s sexual orientation to friends or family, but not at work,⁷² or open to other lesbians or gay men, but not to non-gay people.⁷³ Alternatively, one may decide to answer a direct question, but not volunteer information about sexual orientation.⁷⁴

If a lesbian or gay man remains silent, other people will most likely assume that he or she is not gay, which only serves to complicate these decisions.⁷⁵ This allows some gay people to hide their sexual

68. *Id.*

69. *See id.* at 32.

70. *Id.* at 20.

71. *See generally* BOYS LIKE US: GAY WRITERS TELL THEIR “COMING OUT” STORIES (Patrick Merla ed., 1996) (describing numerous “coming out” stories and the choices such individuals made at that time).

72. *See* Dave Cullen, *A Heartbreaking Decision*, SALON (June 7, 2000) (describing a Marine captain who originally created a separate gay life in Denver, seventy miles away from the ‘gay-free zone’ of Colorado Springs where he was stationed), available at www.dir.salon.com/news/feature/2000/06/07/relationships/index.html.

73. *Cf.* William Eskridge, Jr., *A Jurisprudence of “Coming Out.” Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2439 (1997) (stating that by 1960, some lesbians and gay men equated coming out with talking to non-gays about one’s sexual orientation). In addition, coming out means talking to people who do not share one’s sexual orientation, not just those who do. *Id.* at 2440.

74. *E.g.*, *Debate Over Grade School Teacher Divulging He’s Gay*, S.F. EXAMINER, June 11, 2000, at A3.

75. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983) (describing the consequences of a lesbian’s or gay man’s non-disclosure of their sexual

54 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:1

identity and avoid the negative consequences of being open.⁷⁶ Nevertheless, the closet is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality.⁷⁷ As one gay or lesbian respondent to the 1994 survey by the Los Angeles County Bar Association reported:

I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say “we” and risk someone asking who “we” is [I]f someone asks, “What happened this weekend?” and I slip and [say] “we” instead of “I,” then I go through a kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance.⁷⁸

Denying a part of one’s life is neither easy nor comfortable; neither legal doctrine, nor societal pressures coerce non-gay persons into such denial.

Further, open self-identity is more significant for lesbians and gay men than it is for non-gay persons.⁷⁹ A non-gay person may not feel any pressure to voice her sexual orientation explicitly.⁸⁰ She may do so in any of the numerous ways in which this fact is normally communicated, by pictures of a spouse or children at work,⁸¹ by using the pronoun “we” to describe daily activities,⁸² or simply by allowing

orientation leading most other people to assume they are straight, as “compulsory heterosexuality”).

76. See, e.g., BREWER & GRAY, SURVEY DATA, *supra* note 15, at 21 (reporting comments such as: “I did not tell the truth about having a partner because I was not comfortable being ‘out’ in that setting. I pretended I was single – then ‘passed’ for heterosexual.”).

77. See Jane Schacter, *Romer v. Evans and Democracy’s Domain*, 50 VAND. L. REV. 361, 371 (1997) (asserting that, “[f]ar from being a benign safety net, the closet reflects the particular way in which gay men and lesbians are coerced to live in conditions not imposed on heterosexuals and to participate in maintaining the circumstances that sustain their own inequality.”).

78. See LA BAR REPORT, *supra* note 2, at 28 n.181.

79. See Eskridge, *supra* note 73, at 2442 (noting that lesbians and gay men face the particular hardship of being ostracized from the majority if they choose to disclose their sexual identity).

80. See *id.* at 2442-44 (discussing the fact that non-gay people are open about their sexual orientation in a myriad of ways that go undetected). Indeed, the awkwardness of the expression “openly non-gay” to describe the sexual orientation identity of heterosexuals illustrates how little we consider the public nature of heterosexuality. *Id.*

81. Do not underestimate the significance of this distinction. See LA BAR REPORT, *supra* note 2, at 31 (stating that nearly one-half of all respondents, regardless of sexual orientation and sex, believed that simply discussing one’s personal or family life in a manner that revealed the sex of one’s partner—a matter of no consequence for non-gay attorneys—would harm a gay or lesbian attorney’s career).

82. See, e.g., BREWER & GRAY, SURVEY DATA, *supra* note 15, at 21 (illustrating a response from a gay or lesbian attorney surveyed); see also John Biewen & Robert Siegel, *All Things Considered: Gay Teacher Files First Amendment Lawsuit in Utah* (Nat’l Pub. Radio radio broadcast, Oct. 21, 1997) (discussing a lesbian coach and a teacher

people to presume that she is non-gay.⁸³ For the gay person, each of these situations calls for a conscious decision as to what to say or do, how much to disclose or to remain unspoken.⁸⁴

Remaining silent causes some lesbians and gay men to feel deceptive.⁸⁵ The closet reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between them and non-gay persons.⁸⁶ Gays cannot share in everyday

threatened by a school district with termination from their tenured positions if either talked about her sexual orientation or life with students, staff, or parents). John Biewen commented: "Weaver says in Spanish Fork, a town of 12,000, the order meant she couldn't have ordinary conversation with most people in or out of school. *Id.* To which the teacher noted:

If I was in a classroom and said something about, oh, Rachel and I went somewhere for the weekend, and—that that could be in violation. I went in and asked them actually that if I was at the ball park, and was talking to somebody, and I didn't know whether they had a student in the school or not, if that could be part of what this memo was saying, and they said yes.

Id.

83. *E.g.*, *Singer v. U.S. Civ. Serv. Comm'n*, 530 F.2d 247, 249 (9th Cir. 1976). Indeed, gay people must affirmatively break the assumption of heterosexuality to disclose their sexual orientation publicly. When a non-gay couple kisses in public, it is not viewed as a statement about sexual orientation. *Id.* at 249. Conversely, when gay people engage in those same activities, it is often perceived as "flaunting" one's sexual orientation. *Id.* This "fear of flaunting" has often justified negative employment consequences for lesbians or gay men. *See, e.g.*, *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc). *See also* LA BAR REPORT, *supra* note 2, at 5-40 (describing the consequences of being an openly lesbian or gay attorney in Los Angeles County).

84. *See* Cullen, *supra* note 72.

He loosened those ties [with non-gay friends] by convincing his work friends that he found Colorado Springs stifling, and shifted all his free time to Denver, routinely spending three to five nights a week up there. But the constant questions of his juggling strategy still dog him – 'What you been up to? What did you do this weekend?'— requiring an elaborate fictional life. 'I have to be careful,' Alex says. 'I have to be guarded when I come back from a weekend and start talking about where I've been or what I've done.' He has spent enough time in Denver's straight clubs to swap them with the gay bars; dates and tricks are converted to feminine counterparts. 'I try to keep it as close to the truth as possible, because if I have to retell the story, I'm not going to stumble over things,' he says. 'If some guy has a broad chest, she's got a rack. A guy named Clay becomes Claire. Everything else pretty much stays the same.'

LA BAR REPORT, *supra* note 2, at 28 n.181.

85. *See, e.g.*, BREWER & GRAY, REPORT, *supra*, note 7, at 20.

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

Id.

86. *See* Eskridge, *supra* note 73, at 2442-43 (pointing out the missed opportunities "closeted" gays face, like psychological, social and political opportunities associated with gay mores and traditions and the possibility of forging deeper connections and relationships with other members of the minority).

56 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:1

social interactions because they must mask certain aspects of their lives.⁸⁷ In the specific context of the court system, some lesbians or gay men do not fit neatly into the standard *voir dire* categories of married or single.⁸⁸

Because being an open lesbian or gay man involves a continuing series of choices about disclosure, even otherwise openly gay people may be inhibited about revealing their sexual orientation in the courts.⁸⁹ For example, “[o]ne man in particular made gestures and anti-gay comments. Others would nod in agreement it was very scary to come out in that environment. The judge did dismiss this man after a while.”⁹⁰ In addition, one court user noted that an attorney, a witness and the court audience stated that a gay man “asked for it” by being out.⁹¹ At least one court user respondent specifically reported that he or she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian.⁹²

87. See, e.g., LA BAR REPORT, *supra* note 2, at 31-34 (quoting a response from a gay or lesbian attorney respondent: “[At social events] gay and lesbian attorneys are most likely to feel and be perceived as ‘different’—usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often received by other attorneys as antisocial or mysterious . . . not fitting in.”).

88. See *infra* notes 113-118 and accompanying text.

89. See BREWER & GRAY, REPORT, *supra* note 7, at 19-20 (stating that gay people are inhibited about revealing their sexual orientation due to the risk of encountering negative experiences that are hurtful, embarrassing, or potentially discriminatory).

90. *Id.*

91. See BREWER & GRAY, SURVEY DATA, *supra* note 15, at 9. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996) (illustrating the effect of the commonly shared idea that openly gay people deserve negative treatment). For example, after a mock rape by male students, a gay middle school boy fled to his principal’s office for help. *Id.* The principal’s response was “that ‘boys will be boys’ and told [the complaining student] that if he was ‘going to be so openly gay,’ he should ‘expect’ such behavior from his fellow students.” *Id.*; *60 Minutes: Don’t Ask, Don’t Tell: Law Regarding Homosexuals in the Military*, (CBS television broadcast, Dec. 12, 1999) (detailing a discussion between Mr. Javier Torres and Ed Bradley about the murder of a gay soldier, Barry Winchell);

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

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

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

Id.

92. See BREWER & GRAY, SURVEY DATA, *supra* note 15, at 8. *Accord* LA BAR REPORT, *supra* note 2, at 27 (noting that “most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear

Therefore, we might expect some disparity between their openness in court and in other settings. Fifty-six percent of gay and lesbian court users did not want to state their sexual orientation during their court contact,⁹³ although most of these court users were openly gay or lesbian in other contexts. Over 90% were totally or selectively open at work, to family, to friends, and within the community.⁹⁴ The size of the disparity in openness between the judicial system and other settings may reflect that lesbian and gay court users' experiences are far from ideal, despite their legal protections in the courts.

Further, choosing whether and how to reveal one's sexual orientation is very different from being forced to disclose it or having someone else do so.⁹⁵ Given the increased likelihood of negative consequences that attach to being an open lesbian or gay court user, the loss of control over that identity decision can produce a significant amount of anxiety.⁹⁶ Thus, it is important that almost one in four lesbian or gay court users believed that someone else disclosed their sexual orientation without their approval in a court contact involving sexual orientation issues.⁹⁷ Further, in that same setting, nearly an equal number felt forced to state their sexual orientation against their will.⁹⁸ Even in the most recent contact with

mainstream.”). One lesbian lawyer reported having married in order to make partner. *Id.* at 27 n.179.

93. Fifty-nine and seven-tenths percent of lesbian and gay court users did not want to state their sexual orientation during their most recent contact with the California courts. BREWER & GRAY, REPORT, *supra* note 7, at 25 tbl.10. Fifty-five and six-tenths percent of lesbian and gay court users did not want to state their sexual orientation during another significant recent contact with the California courts. *Id.* at 37 tbl.18.

94. Ninety-two and eight-tenths percent at work, 94.6% to family, 99.4% to friends, 91.5% within their community respectively. *Id.* at 13.

95. Commentators have extensively discussed the controversial practice of “outing” or disclosing the sexual orientation of closeted lesbian or gay politicians or celebrities without their permission, particularly those who have taken anti-gay actions. See, e.g., Mathieu J. Shapiro, Note, *When Is a Conflict Really a Conflict? Outing and the Law*, 36 B.C. L. REV. 587, 587-88 (1995); Jon E. Grant, Note, “Outing” and Freedom of the Press: Sexual Orientation’s Challenge to the Supreme Court’s Categorical Jurisprudence, 77 CORNELL L. REV. 103, 104 (1991).

96. For an extreme example of the stress that forced disclosure brings, see Robert Sallady, *Davis, Lawmakers Fight Over Parole for Model Inmate*, SAN DIEGO UNION-TRIB., May 3, 2000, at A3 (discussing parole in the case of Robert Rosenkrantz, who was so distraught over the disclosure of his homosexuality without his consent that he killed the person who revealed the information).

97. Twenty-eight and seven-tenths percent of lesbian and gay court users reported someone else stated their sexual orientation without their approval. BREWER & GRAY, REPORT, *supra* note 7, at 37 tbl.18; see also *id.* at 25 tbl.10 (indicating that 8.6% of respondents reported their sexual orientation without approval during their most recent contact with the California courts).

98. Twenty-four and one-half percent of lesbian and gay court users reported they felt compelled to state their sexual orientation against their will. *Id.* at 37 tbl.18;

58 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:1

the California courts, twice as many persons observed at least one negative incident when sexual orientation became an issue.⁹⁹ Moreover in that context, nearly three times as many respondents reported at least one negative incident when respondents' sexual orientation was revealed than when their lesbian or gay identity was not uncovered.¹⁰⁰

In their baseline contact, a few lesbian and gay court users were asked direct questions about their sexual orientation.¹⁰¹ Lawyers predominantly asked that question and always in court.¹⁰² However, when the contact involved more active court participation, over one-in-five lesbian and gay court users were asked to indicate their sexual orientation.¹⁰³ Once again, three-quarters of respondents reported that a lawyer asked that question.¹⁰⁴

The significance of these findings increases because lesbian and gay court users reported that sexual orientation became an issue in court when it was not pertinent almost as often as when it was pertinent.¹⁰⁵ Apparently, lawyers sometimes used lesbian or gay identity as a litigation strategy. An open response from one respondent illustrates the tactical use of identity: "[A lawyer] questioned potential jurors about whether they would accept unbiased testimony from gay witnesses. The manner of question implied gays were unreliable witnesses, thus placing a bias in the minds of potential jurors."¹⁰⁶ Accordingly, even otherwise openly gay or lesbian court users might be reluctant to disclose their sexual orientation in the California courts.

see also id. at 25 tbl.10 (reporting that 10.5% of respondents felt compelled to state their sexual orientation during their most recent contact with the California courts).

99. In their most recent contact with the California courts a little under 25% of the contacts involved sexual orientation issues. BREWER & GRAY, REPORT, *supra* note 7, at 17 tbl.5. Of those contacts, almost 30% observed at least one negative incident versus 14% in the remaining cases. *Id.* at 18.

100. In the 15% of contacts in which respondents' sexual orientation was revealed, 42% reported at least one negative incident compared to 14% reporting any negative incident where sexual orientation identity was not disclosed. *Id.* at 18-19.

101. Three percent of respondents were asked directly about their sexual orientation. *Id.* at 17 tbl.6.

102. *Id.* at 15.

103. Twenty point four percent of respondents were asked their sexual orientation directly. *Id.* at 29.

104. *See id.* at 17.

105. *See* SOF REPORT, *supra* note 1, at 20.

106. BREWER & GRAY, REPORT, *supra* note 7, at 31. Other respondents reported that lawyers dismissed gay or lesbian persons from the jury by after those individuals' disclosed their sexual orientation. BREWER & GRAY, SURVEY DATA, *supra* note 15, at 8-9.

The closeting effects felt by lesbian and gay court users may also stem from the courts' inattention to the diversity of their lives¹⁰⁷ in addition to negative treatment or hostile court environment. In their most recent court experience, 44% of gay men and lesbians were jurors or venire panelists.¹⁰⁸ In that contact, 48.3% were asked if they were married.¹⁰⁹ Overall, 26% of all lesbian or gay court users were asked if they were married.¹¹⁰ The California Judicial Council recommends that judges request marital status during standard voir dire questioning.¹¹¹ Many respondents felt they could only reply incompletely or inadequately to that query.

107. The Standards of Judicial Administration attempt to address the diverse lives of lesbians or gay men in the standard jury questions for judges. CAL. JUDICIAL ADMIN. STANDARDS, § 8(c)(16) (West 2000). "It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a lifestyle different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?" *Id.* § 8.5(b)(18).

Although the Standards do not specifically mention lesbians or gay men, the use of "lifestyles" rather than "lives" when referring to gay people is problematic. The term connotes a conscious and socially unacceptable choice, and not merely another manner of living. Tellingly, before the Supreme Court's decision in *Palmore v. Sidotti*, 466 U.S. 429 (1984), courts had once described interracial marriages as a "lifestyle" to create the same marginalizing effect. *Id.* at 431 (citing a lower court, which changed custody from a mother because "the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society."). The strangeness to modern ears of the word "lifestyle" as applied to interracial marriage shows how the view of marriage has changed in a quarter century. See Todd Brower, *A Stranger to Its Laws: Homosexuality, Schemas, Lessons and Limits of Reasoning By Analogy*, 38 SANTA CLARA L. REV. 65, 79-82 (1997) (discussing *Palmore* and same-sex relationships). That it does not sound equally strange when applied to lesbians and gay men illustrates the ingrained nature of the view that lesbians or gay men are so different from the rest of society that they do not share a common life and goals with non-gay people, albeit with variations in the sex of their life and sex partners. This segregationist view is an error. In short, like their non-gay counterparts, lesbians and gay men have lives, not lifestyles.

108. Forty-four percent of gay men and lesbians participated either as a juror or in jury voir dire. BREWER & GRAY, REPORT, *supra* note 7, at 15.

109. See *id.* Twenty-six and one-tenth percent of all lesbian or gay court users were asked if they were married. *Id.* at 16 tbl.6. In contrast, only 6.8% were asked if they had a domestic partner. *Id.* Some respondents were uncomfortable with that question as well. "I did not tell the truth about having a partner because I was not comfortable being 'out' in that setting. I pretended I was single—then 'passed' for heterosexual. I did not want my partner 'outed'—they asked name and profession of spouse or significant other." BREWER & GRAY, SURVEY DATA, *supra* note 15, at 21.

110. See BREWER & GRAY, REPORT, *supra* note 7, at 15.

111. *E.g., id.* "Each of you should now state your name, where you live, your marital status (whether married, single, widowed or divorced). If you are married, you should also briefly describe your spouse's occupational history and present employer, if any." CAL. JUDICIAL ADMIN. STANDARDS § 8(c)(20) (West 2000). "Have you, or your spouse, ever been engaged in any phase of the real estate business including . . ." *Id.* § 8(d)(9). Proposals to change these questions are currently under review by the Judicial Council as a result of work by its Subcommittee on Sexual Orientation Fairness. JUDICIAL COUNCIL, 102D CONG., ADVISORY COMMITTEE ON ACCESS AND FAIRNESS, MINUTES (Feb. 2002).

The judge asked all prospective jurors to state marital status and what their spouse's occupation was. I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner's occupation even though legally my marital status is single. Stating 'single' would have felt like lying.¹¹²

The marital status question reinforces the assumption that individuals are heterosexual and either married¹¹³ or single. Thus, the question may create the perception of bias or foster a feeling of invisibility in anyone whom those categories cannot describe. Marital status, unless it is specifically relevant to a case, may undermine the credibility of the judicial process in several ways. First, it deprives the court and the lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process. One respondent stated, "In a domestic abuse case, the judge did not ask me the same questions she asked the other potential jurors regarding my relationship with my companion or domestic abuse."¹¹⁴

Second, it forces gay or lesbian jurors or witnesses either to disclose their sexual orientation or narrowly answer the specific question, leaving them to deny or be incomplete about their lives. As one survey respondent noted: "All prospective jurors were asked about marital status. I have been in a monogamous relationship thirty-three years and consider myself married. It would have been wrong to deny my relationship but it would have been legal to do so. It would have been a very public 'outing'!"¹¹⁵

Third, it may foster a perception among gay and lesbian court users that their subsequent judicial experience may not be fully informed or fair. "I feel the court does not take sexual orientation seriously and excludes it as an issue, which may be a mistake under certain circumstances—assuming everyone is either single or married."¹¹⁶ "Lawyers questioned jurors about relevant medical conditions of spouses and family with disregard for other relationships of gays, lesbians, and domestic partners. Judge did not

112. See BREWER & GRAY, REPORT, *supra* note 7, at 20.

113. *Viz.*, in the traditional heterosexual sense; even Vermont uses the term "civil union" for same-sex couples, and not marriage. See, e.g., Carey Goldberg, *Gay and Lesbian Couples Head for Vermont to Make it Legal, but How Legal is it?*, N.Y. TIMES, July 23, 2000, at A1.

114. See BREWER & GRAY, REPORT, *supra* note 7, at 20; see also BREWER & GRAY, SURVEY DATA, *supra* note 15, at 14 (quoting a respondent, "I was serving jury duty. Questions asked of straight jurors were not asked of me. Things that excluded 'married' people were not applied to gay/lesbian even with long time partners.").

115. See BREWER & GRAY, SURVEY DATA, *supra* note 15, at 14. See also *id.* at 3.

116. See *id.* at 16.

2002]

OBSTACLE COURTS

61

clarify the lawyer's intent. The net effect: our relationships don't count."¹¹⁷

B. Results from the Court Employee Study

The correlation between lesbian and gay visibility and negative experiences applies to court employees as well as court users. The *SOF Report* found a significant disparity in the personal work experiences of gay and lesbian versus heterosexual employees. Lesbian and gay employees were over five times more likely to experience negative actions, discrimination, or hear comments based on sexual orientation than were heterosexual employees.¹¹⁸ Further, if only 36.1% of the self-identified gay or lesbian employees were completely out to their co-workers,¹¹⁹ logically this more visible group should have experienced more discrimination than the 63.9% of lesbian or gay employees who hid their sexual orientation to some degree or who were heterosexual.¹²⁰

One court employee stated, "There were quite a few gay men who worked at our court and were openly harassed because of it."¹²¹ One gay court employee noted, "I've heard derisive references such as 'faggot' from judges, co-workers, and bailiffs. Questions have been asked of me regarding flowers/gardening and other areas where gay men are stereotyped."¹²² Another court employee reported, "When helping lesbians or gays some of the clerks handle their paperwork touching only the tips or edges of the paper. Yet another court employee stated, 'You never know what they did or touched.'"¹²³

117. See BREWER & GRAY, REPORT, *supra* note 7, at 20.

118. While 3.4% of non-gay court employees reported hearing negative comments based on their sexual orientation in the last year, 20.4% of lesbian and gay court employees reported hearing such comments. *Id.* at 60-62. Just 3.2% of non-gay employees reported their sexual orientation being the subject of jokes or ridicule, while 16.2% of lesbian and gay employees reported such incidents; only 2% of non-gay employees reported verbal abuse based on their own sexual orientation, while 12.5% of lesbian and gay court employees reported such abuse. *Id.* at 62. Similarly, 2.5% of non-gay employees reported experiencing negative actions based on sexual orientation, compared with almost 15.7% of lesbian and gay male employees. *Id.* Finally, 12.9% of lesbian and gay employees report being called derogatory names based on their own sexual orientation, compared with 1.7% of non-gay employees. *Id.* Finally, one-in-five lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their work place based on their sexual orientation. *Id.* Merely 2% of the non-gay employees reported being discriminated against based on sexual orientation. *Id.*

119. See *id.* at 44 tbl.24.

120. See *id.*

121. *Id.* at 48.

122. *Id.* at 49.

123. *Id.*

The distinctiveness of lesbian and gay identity in modern American society helps explain these findings. More specifically, we do not have a separate schema for non-gay people; they are just “people” and not a group viewed as characterized by their sexual behavior.¹²⁴ Accordingly, we rarely perceive the sexual orientation of non-gay persons because we measure differences against the baseline of heterosexuality.¹²⁵ For example, sexual orientation protections apply to gay and non-gay persons alike, but, as heterosexuals, we often do not notice that symmetry.¹²⁶ Non-gay people appear not to need that protection¹²⁷ because they do not appear different enough to provoke a negative reaction.¹²⁸ Accordingly, few non-gay court employees suffered negative treatment because of their sexual orientation.

The *SOF Report* demonstrates the strong incentives for a lesbian or gay court employee to remain closeted. Specifically, 57.9% of all court employees believe it is better if gay men and lesbians are not open about their sexual orientation, and 29.5% of employees believe

124. Some segments of the gay community use the term “breeder” to refer to all non-gay persons, and the rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity. *Id.*; E.g., Rob Morse, *We’re Here, We’re Having a Beer . . .*, S.F. EXAMINER, June 29, 1997, at A2; Rich Kane, *AOHELL, Can a Gay Man find Love Online?*, OC WEEKLY (Orange County, Calif.), Apr. 4, 1997, at 8; Michael J. Ybarra, *Odd Man in: Businessman Gavin Newsom is the Latest Addition to S.F.’s Board of Supervisors. His Biggest Selling Point? The Fact that He’s a Straight White Male – A Relatively Rare Commodity in that City*, L.A. TIMES, Mar. 31, 1997, at E1; Barbara Brotman, *Gay or Straight, Readers Lust for ‘Savage Love’*, CHI. TRIB., Nov. 21, 1996, at 1.

125. Indeed, the word “heterosexual” did not come into the language until preceded by, and perhaps, in contradistinction to, “homosexual.” David Halperin, *Sex Before Sexuality: Pederasty, Politics and Power in Classical Athens*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 37-39 (Martin Duberman et al. eds., 1989).

126. Justice Scalia’s dissent in *Romer v. Evans*, 517 U.S. 617 (1994), provides a striking example of this inattention in his description of the Second Amendment as merely banning special rights for gay people and returning Colorado law to neutrality. *Romer*, 517 U.S. at 638-39 (Scalia, J., dissenting). On a purely descriptive level, he misstates the effect of the Colorado law. *Id.* Each of the ordinances affected by the amendment, e.g., those enacted in Aspen, Boulder, Denver, and the state Executive Order, barred discrimination on the basis of sexual orientation. *Id.* at 623-24, 626-27 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993)). The Second Amendment prohibited anti-discrimination provisions based on homosexual, lesbian, or bisexual orientation only. COLO. CONST. art. II, § 30b; *Romer*, 517 U.S. at 624. Thus, heterosexuals, as heterosexuals, would have remained protected against discrimination under these ordinances; gay people were not. *Id.*

127. See *Romer*, 517 U.S. at 631 (claiming that sexual protection laws are taken for granted by most people because they do not need them).

128. *Id.* But see Susan Ferriss & Erin McCormick, *When a Kiss isn’t Just a Kiss: Castro Bar Tosses Straight Smoochers*, S.F. EXAMINER, Mar. 9, 1997, at A1 (illustrating an incident where a gay bar owner ejected a man and woman for kissing, and how the San Francisco Human Rights Commission ordered the gay bar to change its anti-heterosexual kissing policy in order to comply with the Commission’s sexual orientation discrimination prohibitions).

that being openly gay or lesbian is unsafe.¹²⁹ If a person is suspected of being lesbian or gay, 17.3% of court employees stated that it is harder to be hired; 13.4% agreed that sexual orientation is used to devalue the credibility of some gay or lesbian employees; and 9.8% believed that anti-gay prejudice is widespread at work.¹³⁰ Moreover, 40.4% acknowledge that people make jokes or comments about gay people behind their backs.¹³¹ These figures are even more striking because court employee respondents were over 93% heterosexual.¹³²

Additionally, when the gay or lesbian employee becomes more visible, employees believe workplace policies are applied less fairly.¹³³ For example, "I could never understand why all of a sudden I was treated with disrespect by management. Then a co-worker told me that she thought management hated gays and that they were told by a different co-worker that I was gay."¹³⁴ People expect lesbian and gay employees to remain closeted about their sexual orientation or risk suffering discrimination.¹³⁵ Other court employees report feeling invisible or being shunned by co-workers after they complained about different treatment of gay people.¹³⁶ Most telling of all, some employees did not report incidents of anti-gay behaviors because they feared others would think they were homosexual.¹³⁷ Thus, some lesbian or gay court employees would rather remain closeted than report incidents of abuse, and some non-gay employees may have chosen to keep silent rather than risk that identification.¹³⁸

129. See SOF REPORT, *supra* note 1, at 21.

130. See *id.*

131. See BREWER & GRAY, REPORT, *supra* note 7, at 69 tbl.48.

132. See *id.*

133. See *id.* (stating that employees strongly disagree that it is safe lesbians and gay men to be open about their sexual orientation at work).

134. See *id.* at 59. Accord LA BAR REPORT, *supra* note 2, at 16, 19 (discussing evaluations, promotions and career paths for openly gay or lesbian attorneys).

135. See BREWER & GRAY, REPORT, *supra* note 7, at 70-71.

136. See, e.g., *id.* at 60 (reporting comments such as: "It's like I don't exist anymore," and "[m]ade me feel uncomfortable," and "[f]ewer invitations to group lunches, etc."). See generally LA BAR REPORT, *supra* note 2, at 32 (discussing the choice of confronting or acquiescing in anti-gay behaviors).

137. Seven point and one-tenth percent of court employees, who experienced incidents of negative behaviors at work and did not report them, did not do so because of this fear. BREWER & GRAY, REPORT, *supra* note 7, at 64 tbl.43. Two and eight-tenths percent of employees, who observed such treatment in open court, did not report it for this reason. *Id.* at 54 tbl.33. Two and three-tenths percent of employees, who observed such behavior other than in open court, did not report it for this reason. *Id.* at 58 tbl.38.

138. See *id.* at 54 tbl.33, 58 tbl.38 (citing the particular reasons why court employees take no action in response to negative actions or comments observed in work settings).

Finally, the data from the court users' and court employees' surveys corroborate the results of the other survey on negative experiences and perceptions of bias or unfairness in the judicial system.¹³⁹ The survey asked court users and court employees the same questions on fair treatment, access and availability.¹⁴⁰ Fifty percent of lesbian and gay court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.¹⁴¹ Further, 24% of lesbian and gay court users believed the courts were unsuccessful on *all* of the following measures: being available to resolve disputes involving lesbians or gay men; being open or accessible to lesbians or gay men; providing fair and unbiased treatment of lesbians or gay men.¹⁴²

Unsurprisingly, non-gay court employees and lesbian or gay court employees have strikingly different attitudes from each other, and from lesbian and gay court users, about the courts' success in providing access and fairness.¹⁴³ Non-gay court employees generally had more favorable perceptions of the judicial system's fairness than did lesbian and gay court employees.¹⁴⁴ Moreover, when asked about

139. See *id.* at 59 (examining the responses of all lesbian, gay, and bisexual respondents). Overall, 6.6% of respondents reported at least one negative incident. *Id.*

140. See SOF REPORT, *supra* note 1, at 16-17 (finding that whether the level of bias and unfair treatment would be greater if gay men and lesbians were more visible either as court participants or court employees is a reasonable inquiry based on the results of this survey).

141. In all their California court contacts, 50.2% of lesbian and gay survey respondents rated the courts somewhat or very unsuccessful in providing fair and unbiased treatment for lesbians and gay men. BREWER & GRAY, REPORT, *supra* note 7, at 39 tbl.21. Similarly, on a one-to-ten scale, with 10 being highest, they gave the courts a mean rating of 5.23 for fairness to lesbians and gay men and 6.50 for fairness to people in general. *Id.* at 39 tbl.20 (indicating that higher scores amount to a higher level of fairness).

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

143. *Id.* at 73.

144. On a four-point scale with the higher scores indicating a higher degree of fairness, heterosexual employees gave the court a mean score of 3.33, while lesbians and gay male court employees gave the court a score of 2.83 with respect to the

2002]

OBSTACLE COURTS

65

the courts' success treating lesbians and gay men fairly, both gay and non-gay court employees gave higher ratings than did lesbian and gay court users.¹⁴⁵

CONCLUSION

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

Significantly, in modern American society, despite the gains in acceptance of lesbians and gay men,¹⁴⁶ gay identity still appears so distinctive that it changes the treatment of court users, court employees and lesbians or gay men generally. Further, lesbian or gay identity colors proceedings and situations even when it is not pertinent. Thus, it dominates situations in which lesbians and gay men find themselves, including the judicial system.

The disjuncture between legal rules and lesbians' and gay men's real-world experiences illustrates that it is insufficient merely to reason about lesbian or gay identity, its disclosure, or the message that it sends. We should encourage and explore empirical studies to gather information about gay people's treatment and perceptions, as well as to corroborate or challenge the assumptions underlying legal doctrine. This symposium is an important step towards those goals.

courts' success in providing access for lesbians and gay men. *Id.* at 82 tbl.52. Regarding the courts' availability to resolve disputes involving gay men and lesbians, heterosexual employees gave the courts a mean score of 3.19 compared to lesbians and gay male employees' score of 2.67. *Id.*

145. Employees rated the courts a 3.29 compared to users' rating of 2.42 on a four-point scale with higher scores indicating a higher degree of fairness. *Id.* at 39. With respect to the courts' success in providing access for lesbians and gay men, lesbian and gay users gave the courts a mean rating of 2.79; lesbian and gay employees gave the courts a mean rating of 2.83, while heterosexual employees gave the courts a mean rating of 3.33. *Id.* Regarding the courts' availability to resolve disputes involving gay men and lesbians, lesbian and gay users gave the courts a mean rating of 2.50; lesbian and gay employees gave the courts a mean rating of 2.54, heterosexual employees gave the courts a mean rating of 3.19. *Id.*

146. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 674 (Stevens, J., dissenting) (discussing changing views of homosexuality in the American Psychiatric and American Psychological Associations, some religions, and various organizations, schools, and corporations).