TWELVE ANGRY—AND SOMETIMES ALIENATED—MEN: THE EXPERIENCES AND TREATMENT OF LESBIANS AND GAY MEN DURING JURY SERVICE

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TABLE OF CONTENTS

I. Introduction 669
II. The Experiences and Treatment of Sexual Minorities During Jury Service 672
A. General Court Experiences and Perceptions 674
B. Disclosure of Sexual Orientation—Visibility and Choice.....679
C. Additional Voir Dire and Jury Service Experiences and Treatment 689
III. Conclusion: Consequences of Sexual Minority Jurors' Experiences on Access and Use of the Courts 695
IV. Appendix.....702
A. Survey Methodology and Demographics.....702
B. Study Limitations.....703

I. INTRODUCTION

For many persons, jury service represents "their first and only direct contact" with the courts.[1] Empirical research on jurors and the public at large finds both groups typically have positive attitudes about their court

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1. Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 284 (Robert E. Litan ed., 1993).

experiences and about the legal system.[2] However, their views are not uniformly favorable. For example, venire members who were not selected possessed less positive feelings than those who actually served on a jury.[3] Moreover, both racial and ethnic minorities and the general public believe minorities and those with lower incomes are treated less favorably in the courts than white, wealthier individuals.[4] Accordingly, both specific experiences during jury service and juror demographic characteristics represent important influences on juror and public confidence in the courts and justice system.[5]

For lesbian, gay, bisexual and transgender (LGBT) individuals, their most common court contact is also through jury service.[6] Despite knowing juror confidence in courts varies with personal characteristics and experiences, the treatment of lesbian and gay court users during their jury

2. NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 14 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (finding a majority of people rate the local court's handling of cases as "excellent" or "fair" in cases that deal with issues other than juvenile delinquency and family relations); *see also* Diamond, *supra* note 1 (discussing jurors' positive reactions to their experiences). However, jurors commonly report feeling stress in relation to jury service. NAT'L CTR. FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 4 (1998), *available at* http://www.ncsconline.org/wc/Publications/Res_Juries_JurorStressPub.pdf ("[A]lthough few individuals experienced *clinical* stress as a result of their juror experience, approximately one-third of *all* individuals who reported for jury duty reported experiencing *some* stress as a result of their jury duty and over half thought other jurors experienced stress during jury duty." (emphasis in original)).

3. NAT'L CTR. FOR STATE COURTS, THROUGH THE EYES OF THE JUROR, *supra* note 2, app. at 61.

4. *See* Richard R.W. Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 249, 249–51 (2001) (finding even "higher-income African American are more skeptical of the notion that blacks receive equal treatment in the courts"); *see also* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS, *supra* note 2, at 7, 37–38 (detailing perceptions of equal treatment based on wealth and race); DAVID B. ROTTMAN ET AL., NAT'L CTR. FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY 6, 40–44 (2003) *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf; David B. Rottman & Alan Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, CT. REV., Fall 1999, at 24, 24–26.

5. Brian H. Bornstein et al., *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 BEHAV. SCI. & L. 321, 322 (2005).

6. ACCESS & FAIRNESS ADVISORY COMM., JUDICIAL COUNCIL OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS 33 (2001) [hereinafter CAL. REPORT], *available at* http://www.courts.ca.gov/xbcr/cc/sexualorient_report.pdf.

service has been relatively under studied. The literature on LGBT people during jury trials or in court has primarily focused on bias against sexual minorities as victims, defendants, or parties,[7] or on limited issues during voir dire—specifically when questions regarding sexuality are appropriate[8] or when peremptory challenges based on sexual orientation fall within the Supreme Court's *Batson v. Kentucky* decision.[9]

This Article fills this gap. It examines the empirical studies of gay persons' experiences with the judicial system and analyzes common patterns among the research.[10] The Article first explores how visibility of

7. *See, e.g.*, Drury Sherrod & Peter M. Nardi, *Homophobia in the Courtroom: An Assessment of Biases Against Gay Men and Lesbians in a Multiethnic Sample of Potential Jurors*, *in* STIGMA AND SEXUAL ORIENTATION 24 (Gregory M. Herek, ed., 1998); Robert G. Bagnall, Patrick C. Gallagher, & Joni L. Goldstein, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984); Heather C. Brunelli, *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 B.C. THIRD WORLD L.J. 201 (2000); Aaron M. Clemens, *Executing Homosexuality: Removing Anti-Gay Bias from Capital Trials*, 6 GEO. J. GENDER & L. 71 (2005); Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39 J. HOMOSEXUALITY 93 (2000); Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual, and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257 (2001); Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 J. FAM. VIOLENCE 363 (2005).

8. *See, e.g.*, Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1 (2001); Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285 (2002); Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 LAW & SOC'Y REV. 601 (2005); Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors From Personally Intrusive Voir Dire Questions?*, 3 RUTGERS J.L. & URB. POL'Y 287 (2006).

9. *See, e.g.*, Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN'S L.J. 157 (2001); Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061 (2003); Maisa Jean Frank, Note, *Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study*, 94 MINN. L. REV. 2075 (2010); Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231 (1998); John J. Neal, Note, *Striking* Batson *Gold at the End of the Rainbow?: Revisiting* Batson v. Kentucky *and Its Progeny in Light of* Romer v. Evans *and* Lawrence v. Texas, 91 IOWA L. REV. 1091 (2006).

10. This Article is descriptive and not prescriptive; it reviews the court

minority sexual orientation affects the perceptions and personal experiences of court users during jury service. Second, the Article discusses how the treatment of sexual minorities during jury service affects their access to and satisfaction with the courts. Throughout, the Article references behavioral and economic research on LGBT persons at work and in other settings to show the similarities and differences between gay persons' interactions with the judicial system and other social institutions. Those readers interested in the details of the various survey designs and data limitations will find that information in the appendix.

Review of sexual minorities' experiences during jury service is crucial for understanding how those individuals interact with the courts and how they are treated. More broadly, those experiences shape how gay people perceive the quality of justice and access to the judicial system—two factors that influence the overall legitimacy of courts within society.[11] Finally, the treatment of sexual minority jurors reflects the place of those persons in American culture, which in turn impacts the extent gay people participate in courts and other social institutions.

II. THE EXPERIENCES AND TREATMENT OF SEXUAL MINORITIES DURING JURY SERVICE

There are few empirical studies regarding the treatment of LGBT court users,[12] although several reports exist on LGBT attorneys and sexual orientation bias in the legal profession generally.[13] *Sexual Orientation*

experiences of LGBT persons but does not always identify legal or political consequences or propose reforms necessitated by that treatment.

11. *See, e.g.*, NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS, *supra* note 2, at 43; Rottman & Tomkins, *supra* note 4, at 26, 29.

12. *See infra* Part IV. In contrast, there are numerous studies on racial and ethnic minorities' perceptions of the courts. *See* DAVID B. ROTTMAN & RANDALL M. HANSEN, HOW RECENT COURT USERS VIEW THE STATE COURTS: PERCEPTIONS OF WHITES, AFRICAN–AMERICANS, AND LATINOS (2001), *available at* http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf; *Racial Fairness: Resource Guide*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/topics/access-and-fairness/racial-fairness/resource-guide.aspx (last visited Apr. 30, 2011) (compiling studies).

13. *See, e.g.*, COMM. ON DIVERSITY IN THE LEGAL PROFESSION, STATE BAR OF N.M., EXECUTIVE SUMMARY: THE STATUS OF MINORITY ATTORNEYS IN NEW MEXICO—AN UPDATE 1999–2009 (2009), *available at* http://www.nmbar.org/Attorneys/lawpubs/MinoritiesintheProfessionReportUpdate2009.pdf; COMM. ON SEXUAL ORIENTATION BIAS, L.A. CNTY. BAR ASS'N, REPORT ON SEXUAL ORIENTATION BIAS (1994) [hereinafter L.A. BAR REPORT]; BAR ASS'N OF S.F., MANUAL OF MODEL POLICIES AND PROGRAMS TO ACHIEVE EQUALITY OF OPPORTUNITY IN THE LEGAL

Fairness in the California Courts was released in 2001 and found significant examples of unequal treatment of lesbians and gay men in the California state courts, including jury service.[14] Contemporaneously, the New Jersey Supreme Court Task Force on Sexual Orientation Issues issued its *Final Report* and recounted similar findings in that state.[15] In the United Kingdom, the Ministry of Justice commissioned studies and reports in 2003 and 2005 on sexual orientation minorities in the English and Welsh courts.[16] Because the role of juries is dramatically curtailed in the U.K. courts,[17] this Article will focus on the two American court user studies and,

PROFESSION 67–83 (1994), *available at* http://womenlaw.stanford.edu/pdf/basf-manuallegprof.pdf; KING CNTY. BAR ASS'N, IN PURSUIT OF EQUALITY: THE FINAL REPORT OF THE KCBA TASK FORCE ON LESBIAN AND GAY ISSUES IN THE LEGAL PROFESSION (1995); LESBIAN & GAY ISSUES SUBCOMM., HENNEPIN CNTY. BAR ASS'N, LEGAL EMPLOYERS' BARRIERS TO ADVANCEMENT AND TO ECONOMIC EQUALITY BASED UPON SEXUAL ORIENTATION (1995) [hereinafter HENNEPIN COUNTY REPORT], *available at* http://www.lgbtbar.org/documents/LegalEmployersBarriersToAdvancementAndToEconomicEquality.pdf; MASS. LESBIAN & GAY BAR ASS'N., THE PREVALENCE OF SEXUAL ORIENTATION DISCRIMINATION IN THE LEGAL PROFESSION IN MASSACHUSETTS (1994), *available at* http://www.lgbtbar.org/documents/ThePrevalenceOfSexualOrientationDiscriminiationInTheLegalProfessioninMassach.pdf; SUBCOMM. ON EMP'T PRACTICES, ASS'N OF THE BAR OF THE CITY OF N.Y., PRELIMINARY REPORT ON THE EXPERIENCE OF LESBIANS AND GAY MEN IN THE LEGAL PROFESSION (1993), *available at* http://www.lgbtbar.org/documents/PreliminaryReportOnTheExperienceOfLesbiansAndGayMenInTheLegalProfession.pdf; Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias by the Legal Profession*, 8 UCLA WOMEN'S L.J. 343 (1998) (evaluating and comparing the goal and methodologies of studies done on sexual orientation bias); *Sexual Orientation Task Force Report*, D.C. BAR, http://www.dcbar.org/inside_the_bar/structure/reports/task_force/ (last visited Apr. 25, 2011); Gay & Lesbian Task Force, *Executive Summary*, STATE BAR OF ARIZ., http://www.myazbar.org/Content/SecComm/Committees/SOGI/summary.html (last visited May 7, 2011) [hereinafter ARIZ. BAR REPORT]; Prof'l Servs. Comm., *LeGaL Report on Sexual Orientation Fairness in Second Circuit Courts*, LESBIAN & GAY LAW ASS'N OF GREATER N.Y. (Apr. 2, 1997), http://www.le-gal.org/legalfair.htm.

14. CAL. REPORT, *supra* note 6, at 29–34.

15. *See* TASK FORCE ON SEXUAL ORIENTATION ISSUES, N.J. SUPREME COURT, FINAL REPORT 1–3, 58–60 (2001) [hereinafter N.J. REPORT].

16. *See* TODD BROWER, SEXUAL ORIENTATION FAIRNESS IN THE COURTS OF ENGLAND AND WALES (2003) [hereinafter BROWER, 2003 U.K. REPORT] (unpublished) (on file with author); TODD BROWER, SEXUAL ORIENTATION FAIRNESS IN THE COURTS OF ENGLAND AND WALES (2005) [hereinafter BROWER, 2005 U.K. REPORT] (unpublished) (on file with author).

17. Sally Lloyd-Bostock, *The Jury in the United Kingdom: Juries and Jury Research in Context*, *in* PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE 349, 350–52 (Graham Davies et al. eds., 1996).

to a lesser degree, on the various bar reports.

As the California and New Jersey courts recognized, judiciaries serving multicultural populations include significant communities of sexual orientation minorities.[18] Each study determined the extent, if any, of actual or perceived sexual orientation bias in those courts by collecting the experiences of lesbian and gay court users.[19] Additionally, each court surveyed staff regardless of sexual orientation, specifically focusing on sexual minority employees' experiences and the treatment of LGBT jurors and other court users witnessed by court employees.[20]

A. *General Court Experiences and Perceptions*

Sexual orientation significantly affected court users' experiences—the dominant pattern was degradation in lesbian and gay jurors' and other 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. Although present in the New Jersey report and bar studies,[21] this pattern is most obvious in the California data because that survey specifically inquired about two different court experiences: the most recent California court contact and another significant contact in which sexual orientation became an issue.[22]

The California survey results for respondents' most recent court contact provided a typical, baseline experience for sexual minorities' treatment and perceptions of fairness in California courts.[23] By focusing on

18. *See* CAL. REPORT, *supra* note 6, at 13 ("Gay men and lesbians constitute a significantly large group in our society . . . ."); N.J. REPORT, *supra* note 15, at 5 ("By forming the Task Force [on Gay and Lesbian Issues], the Court intended to signal 'its strong commitment to the equal treatment of all individuals seeking justice in our court system.'"). Sexual orientation minorities are located in virtually every county of the United States. *See* GARY J. GATES & JASON OST, THE GAY AND LESBIAN ATLAS 24 (2004). Therefore, courts throughout the United States serve significant numbers of LGBT people.

19. CAL. REPORT, *supra* note 6, at 12; N.J. REPORT, *supra* note 15, at 1. The California court user and court employee surveys were separate instruments containing the same or similar questions. CAL. REPORT, *supra* note 6, at 12. The New Jersey survey instrument was sent to both court users and employees. N.J. REPORT, *supra* note 15, at 19.

20. CAL. REPORT, *supra* note 6, at 12–13; N.J. REPORT, *supra* note 15, at 19.

21. *See* N.J. REPORT, *supra* note 15, at 25.

22. CAL. REPORT, *supra* note 6, at 12.

23. *See* DOMINIC J. BREWER & MARYANN JACOBI GRAY, SEXUAL ORIENTATION FAIRNESS IN CALIFORNIA COURTS 5–11 (2000) [hereinafter BREWER &

the most recent contact, the survey randomly sampled lesbian and gay court users' experiences, rather than having them describe a court contact they deemed negatively or positively noteworthy.[24] Sexual orientation was overwhelmingly not pertinent to the individual's latest court contact and thus could be used as "a comparison with the other significant court contact."[25] Importantly for this Article's focus, sixty percent of lesbian and gay court users' most recent experiences concerned some manner of jury service, rather than an experience as a party, lawyer, or witness.[26] However, when the contact was "one in which sexual orientation became an issue, most often that contact was as a participant, either as a litigant or attorney."[27]

In that most recent, predominantly jury service contact, not all sexual minority court users had positive experiences; their sexual orientation still colored their treatment. One respondent explained, "In a domestic abuse case, the judge did not ask me the same questions she asked other potential jurors regarding my relationship with my companion or my experience with domestic abuse."[28] Moreover, the more active participants became, the greater the incidence of negative treatment.[29] Although 10.8% lesbian and gay court users believed they were treated differently from everyone else in their most recent primarily jury service contact, that percentage increased to 25.5% when more lesbian and gay court users actively participated as a party, witness, or lawyer in the other significant court contact.[30] Similarly, in their most recent, primarily jury service contact, 19.6% of respondents felt those who knew their sexual orientation treated them with disrespect,[31] while 29.6% of lesbian and gay court users felt those who knew their sexual

GRAY, SURVEY DATA].

24. *Id*. at 7–8.

25. CAL. REPORT, *supra* note 6, at 33. ("[A]t least 81.4 percent of those court contacts did not involve sexual orientation issues.").

26. *Id*. at 15.

27. *Id.*

28. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 20.

29. *See* CAL. REPORT, *supra* note 6, at 21.

30. *Compare* BREWER & GRAY, SURVEY DATA, *supra* note 23, at 37 (reporting 74.5% of respondents "somewhat" or "strongly" agreed with the statement "[a]s far as I could tell, I was treated the same as everyone else" during a significant court contact other than their most recent contact), *with id*. at 25 (reporting 89.2% of respondents "somewhat" or "strongly" agreed with the statement "[a]s far as I could tell, I was treated the same as everyone else" during their most recent court contact, which likely occurred as a juror).

31. *See id.* at 25 (showing 80.4% of respondents felt they were "treated with respect by those who knew [the respondent's] sexual orientation").

orientation did not treat them with respect in their more active court contact.[32] Finally, 13.6% "agreed somewhat or strongly with the statement, 'My sexual orientation was used to devalue my credibility'" in the most recent, primarily jury service contact.[33] In contrast, 39% of lesbian and gay court users agreed somewhat or very strongly with the same statement in the more active participation contact.[34] Accordingly, the more sexual minorities became involved in court proceedings, the quality of their experiences worsened. Although feelings of discriminatory treatment and bias were greater when sexual minorities were more active court participants, they also had negative experiences during jury service.

Additionally, in the other significant court contact that predominantly involved sexual orientation issues,[35] 22.2% of respondents experienced such contact as a juror or during some form of reporting for jury service.[36] Survey respondents' agreement with the statement "[a]s far as I could tell, I was treated the same as everyone else" dropped from 89.2% in their most recent contact to 74.5% in the other contact.[37] Respondents' perception of respectful treatment also fell from 80.4% to 70.4% in these same settings.[38] The survey asked identical questions in both contexts, [39] indicating the difference is a function of the nature and duration of these court experiences. Sexual orientation visibility, either as a topic within the court proceeding or as a court user characteristic, significantly affected lesbian and gay jurors' and court users' treatment and perceptions of fairness. [40]

Individuals with casual court contacts, such as people called for a jury

32. *See id*. at 37.

33. *Id*. at 25.

34. *Id*. at 37.

35. Lesbian and gay court users reported the "other contact" focused on sexual orientation issues 74.3% of the time. *See id.* at 29. Those issues included adoption, lesbian or gay parenting, hate crimes, same-sex family dissolutions, domestic violence, employment discrimination, wills and trusts, and other issues related to sexual orientation. *Id.*

36. *See id.* at 28. To the contrary, over sixty percent of respondents experienced their most recent court contact as a juror or during some form of reporting for jury service. *Id.* at 17.

37. *Compare id.* at 25, *with id.* at 37.

38. *Compare id.* at 25, *with id.* at 37.

39. *Id.* at 5–9 (discussing the survey methodology and data).

40. The high correlation between the deterioration in lesbian and gay court users' perceptions about their treatment and their active participation or the pertinence of sexual orientation as an issue in their court experience is unlikely to be mere coincidence.

panel but not questioned on voir dire, may understandably have more favorable impressions of the courts than those with more extended or personal involvement. Those limited contacts often end up being sexual orientation-neutral events,[41] a quality often missing when sexual minority court users became more personally involved.[42] Further, the more limited the court contact, the less likely others learned of respondents' sexual orientation.[43] For example, one respondent stated, "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."[44] Consequently, lesbian or gay identity was not manifest and could not affect treatment.

However, when sexual minority court users participated as an attorney, party, or witness, they perceived the California courts as less fair.[45] Direct participants in a case reported more negative incidents than did all respondents.[46] Their extended contact and more active roles may have provided others with the opportunity to learn their sexual orientation and in turn increased their negative experiences and perceptions.[47] Once

41. *See id.* at 18–19. Comments by respondents included, "My jury service seemed to be a gay-neutral event," and "[M]y 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." *Id.* at 19

42. *Id.* at 29.

43. *Id.* at 17, 30 (reporting only 17.4% either revealed or were asked to reveal sexual orientation at their most recent contact with a court, but 66.9% of survey respondents were asked or revealed their sexual orientation at the other contact with a court). The other contact with the courts was more likely to occur as a party or lawyer than as a juror, which differs from the most recent contact, which most often involved jury service. *See id.* at 17, 28.

44. *Id.* at 6.

45. Compare lesbian and gay court user survey respondents' most recent contact with the California courts—in which contact tended to be through jury service (60.1%)—with a different, recent contact with the courts—in which 55.1% of respondents were a party, witness, victim, or lawyer in the proceedings and only 22.2% were involved as a juror or potential juror. *Id.* at 17, 28. When discussing their most recent contact, 89.2% felt they were treated the same as everyone else. *Id.* at 25. That number fell to 74.5% when respondents were asked about another contact with the courts—the contact that was less likely to be as a juror and more likely to be as a party, witness, or attorney. *Id.* at 37.

46. *See id.* at 18 (reporting "14.0 percent of direct participants reported ridicule versus 12.0 percent for the whole sample of lesbian and gay court users, 5.3 percent reported negative comments about themselves compared to 4.2 percent for the sample overall, and 8.0 percent of direct participants reported negative actions versus 6.4 percent overall").

47. *See id.* at 37. In the other significant contact, 28.7% of lesbian and gay

people perceive court users to be sexual minorities, that trait overshadows other aspects of their identity. Given the negative experiences open sexual minorities face in the courts, the consequences of disclosure of sexual orientation identity during jury service and voir dire become even more significant when judges and attorneys sometimes require such disclosure.[48]

Responses indicate that some lesbian and gay jurors believed they were dismissed from the venire panel because of their sexuality. "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."[49] The current California Civil Procedure Code section 231.5 prohibits using sexual orientation to exclude jurors.[50] Although this law gives sexual minorities protections unavailable at the time of the survey, we might question whether that provision would have altered these data. Empirical research has found legal protections do not necessarily improve the actual treatment of lesbians or gay men.[51]

In addition, lesbian and gay jurors witnessed fellow jurors treat sexual minorities poorly when sexual orientation became an issue in the court context. One respondent reported hearing "'snickers and comments from jury members'" in a case where a gay man was suing an ex-lover.[52] Another stated, "A jury member suggested that witness was gay and

court users reported someone else disclosed their sexual orientation without their approval, and 24.5% felt compelled to state their sexual orientation against their will. *Id*. at 37.

48. *See* CAL. REPORT, *supra* note 6, at 20–21 (noting lesbian and gay court users' negative perceptions of the courts).

49. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 19.

50. CAL. CIV. PROC. CODE § 231.5 (West 2006) (prohibiting peremptory challenges based on sexual orientation during jury selection).

51. *See, e.g.*, Belle Rose Ragins & John M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees*, 86 J. APPLIED PSYCH. 1244 (2001) (discussing the effects of gay-protective legislation, gay-supportive workplace policies, and other factors on the level of workplace discrimination and likelihood of disclosure, and noting a gay-friendly workplace culture—not legislation—was the best predictor of workplace discrimination). Moreover, at least one study has shown even where gay men have anti-discrimination protections, male couples earn less and are less likely to be employed than their heterosexual counterparts. Angela Balakrishnan & Elizabeth Bauer, *Gay Men Earn Less and Are More Likely to Be Jobless, Survey Shows*, THE GUARDIAN, July 28, 2006, http://www.guardian.co.uk/business/2006/jul/28/gayrights.money (discussing the Centre for Economic Performance study).

52. CAL. REPORT, *supra* note 6, at 32.

therefore his testimony could not be trusted."[53] These comments reinforce a perception of gay jurors that the courts are unwelcome environments in which to litigate their relationships and legal issues.

Respondents' observations of jurors are interesting from another perspective. Disparaging remarks and negative comments about sexual orientation minorities were sometimes litigation tactics used to win cases.[54] One comment in the California report illustrates the use of sexuality to resonate with some jurors' negative perceptions of lesbians and gay men: "[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."[55]

The New Jersey report contained similar comments. "'In one case, a lawyer, his client and several witnesses used the other litigants' homosexuality to assert [that] both the defendants and [their] witnesses were alcoholic[s] and sexually promiscuous and predatory.'"[56] One gay male litigant reported that his former wife's attorney repeatedly referred to his "'alternate lifestyle'" as often as possible, regardless of the issue at hand.[57] In a parental visitation matter, an attorney "'impugned [a] client . . . as unfit solely because of his sexual orientation.'"[58] The person reporting this incident noted that the court "'rejected those remarks;' however, [the court] limited the father's visitation 'for other reasons.'"[59] Once again, sexual minorities' court experiences reflect the perception that juries and courts are ill-suited to provide gay people and their issues with a fair and respectful hearing and undermine access to justice for gay individuals.

B. *Disclosure of Sexual Orientation—Visibility and Choice*

During jury service and in court generally, the most direct evidence of the stigmatizing effects of open lesbian or gay identity appears in the various reports' specific findings on disclosure of sexual orientation and responses to requests for personal information. Most of these experiences

53. *Id.* at 33.
54. *See, e.g.*, N.J. REPORT, *supra* note 15, at 41–42.
55. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 31.
56. N.J. REPORT, *supra* note 15, at 41 (alterations in original).
57. *Id.* at 42.
58. *Id.* at 41.
59. *Id.*

are likely to have been during voir dire or ancillary to it, although the data are unspecific on this point.

However, before we can investigate these findings, the fact that gay people as a group have a hidden identity requires us to explore how sexual orientation visibility operates generally in American society, and how that is reflected in the courts and during jury service. Most sexual minorities are not identifiable visually, by accent, or surname.[60] Accordingly, the revelation of gay identity usually occurs through speech or communicative conduct[61] that breaks the assumption of heterosexuality implicit in silence.[62] This assumption allows some gay people to hide their identity and avoid the negative consequences of being open about their sexual orientation.[63] Nevertheless, hiding is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality.[64] A Los Angeles lesbian or gay attorney discussed remaining closeted:

> 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.

60. Contrary to many people's beliefs, heterosexuals often cannot identify lesbians or gay men who do not disclose their sexual orientation. *See* WARREN J. BLUMENFELD & DIANE RAYMOND, LOOKING AT GAY AND LESBIAN LIFE 86 (1993); M.V. Lee Badgett, *Employment and Sexual Orientation: Disclosure and Discrimination in the Workplace*, *in* SEXUAL IDENTITY ON THE JOB: ISSUES AND SERVICES 29, 34–35 (Allen L. Ellis & Ellen D.B. Riggle eds., 1996). However, one study suggested "gaydar," the supposed ability of gay people to recognize other sexual orientation minorities, may have some factual basis. *See, e.g.*, Willow Lawson, *Queer Eyes: Blips on the Gaydar*, PSYCHOL. TODAY, Nov. 1, 2005, http://www.psychologytoday.com /articles/pto-20051018-000007.html.

61. William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2442 (1997). Sexual orientation is complex and may be measured by either identity or behavior; in the workplace, identity is often the salient characteristic. *See* Badgett, *supra* note 60, at 35.

62. Adrienne Rich calls this assumption and its consequences "compulsory heterosexuality." Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983).

63. L.A. BAR REPORT, *supra* note 13, at 27 ("[I]t appears that most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream . . . .").

64. Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 371 (1997).

> That really requires energy that . . . prevents you . . . from achieving any peace and assurance.[65]

In addition, silence about self-identity reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between them and others. They might not share in everyday social interactions at work, in court, or elsewhere because they must mask certain aspects of their lives.[66]

> [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 perceived by other attorneys as antisocial or mysterious . . . not fitting in.[67]

As the managing partner in a major Minneapolis firm noted, "'[Hiding sexual orientation makes it] virtually impossible for [gay and lesbian lawyers] to participate fully in the culture of the workplace environment. Over time, many are driven away from their practice environments, resulting in lost opportunities for both the employee/attorney and the employer.'"[68]

Although these comments appear in the bar studies, the consequences of hiding or disclosing sexual orientation are also relevant to LGBT persons' participation in the court system and other societal institutions, specifically during jury service and voir dire where direct inquiry and disclosure of jurors' personal information often occurs.[69]

Further, open self-identity is important for LGBT persons.[70] A heterosexual may not feel any pressure to explicitly voice her sexual

65. L.A. BAR REPORT, *supra* note 13, at 28 (alterations in original).

66. *See, e.g.*, *id.* at 31–34; *see also* N.J. REPORT, *supra* note 15, at 48 (quoting court employees' comments on their choices and actions to hide their sexuality); Janie Ho, *Attracting Gay MBAs*, BLOOMBERG BUSINESSWEEK, Aug. 9, 2006, http://www.businessweek.com/bschools/content/aug2006/bs2006089_3298_bs001.htm (describing employees' hesitation to come out in the workplace).

67. L.A. BAR REPORT, *supra* note 13, at 33 (alteration in original) (quoting a response from a gay attorney).

68. HENNEPIN COUNTY REPORT, *supra* note 13, at 30.

69. Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 REV. LITIG. 285, 304–05 (2002).

70. Eskridge, *supra* note 61, at 2442.

orientation.[71] She may communicate this fact in unnoticed ways, such as displaying pictures of a spouse or children at work,[72] by using the pronoun "we" to describe daily activities, or simply by allowing people to presume that she is heterosexual.

These decisions are intuitive or unconscious for heterosexuals; gay persons must deliberately decide what to say or do and how much to disclose or allow to remain unspoken.[73] Whether to publicly acknowledge one's identity as lesbian or gay is a continuing set of choices for LGBT persons that is calibrated according to the setting, comfort level, and assessment of the consequences.[74] Interestingly, the courts are one societal institution where sexual minorities' choices about visibility differ significantly from other settings. Normally, disclosure is often made first to trusted individuals and in a safe environment, with the workplace or

71. *Id.* We almost never think about the myriad ways in which heterosexuals are open about their sexual orientation. When a heterosexual couple kisses in public, it is not viewed as a statement about sexual orientation. Conversely, when gay people engage in those same activities, they are often perceived to be flaunting their sexuality. *See, e.g.*, Singer v. U.S. Civil Serv. Comm'n, 530 F.2d 247, 249 (9th Cir. 1976) (discussing specific acts of "flaunting" that led to termination). Flaunting has often justified negative consequences in employment or other contexts for LGBT individuals. *See id.* at 249, 255; *see also* Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997); L.A. BAR REPORT, *supra* note 13, at 5–40 (describing the consequences of being an openly lesbian or gay attorney in Los Angeles County); Jacquie McNish, *Can Lawyers Be Too Gay?*, GLOBE & MAIL, June 14, 2006 (describing the criticism and subsequent resignation of an openly gay Vancouver attorney for being too open in a "gay-friendly" workplace).

72. L.A. BAR REPORT, *supra* note 13, at 34.

73. *See, e.g.*, *id.* at 27–28 (noting comments of "closeted" gay attorneys reflect "fear, isolation, and other negative consequences"); Dave Cullen, *A Heartbreaking Decision,* SALON, June 7, 2000, http://www.salon.com/news/feature/2000/06/07/relationships/ (describing a Marine who created a separate gay life seventy miles away from where he was stationed). Academics have attempted to explain the negotiation of these boundaries. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 15 (1959) (explaining individuals' attempts to control the impressions of others); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 287 (1995) (explaining how interactions with others affect social identity).

74. *See* Badgett, *supra* note 60, at 50 n.5 (stating disclosure is not a binary model and showing different types of sexuality disclosure); Ragins & Cornwell, *supra* note 51, at 1256 (explaining how visible workplace discrimination, coworker support, and other similar factors can affect an employee's choice to come out at work); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (providing three separate types of homosexuality disclosure).

societal institutions like the courts provoking different tradeoffs.[75] Jury service contains particularly troubling instances of these choices, perhaps because jurors find the court environment foreign or uncomfortable or because they perceive the risks of openness to be higher.

Fifty-six to sixty percent of California sexual minorities did not want to state their sexual orientation during their court contact,[76] although most of these court users were openly gay or lesbian in other settings.[77] Over ninety percent were totally or selectively open at work, to family and friends, and within their community.[78] One juror stated, "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."[79] At least one other juror specifically reported that he or she passed as heterosexual to avoid being subjected to mistreatment as gay or lesbian.[80]

California gay and lesbian court respondents' demographic profile reinforces the inference that visibility as a sexual minority adversely affects court users' treatment, including their treatment while serving on juries.

75. *See, e.g.*, M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 727 (1995) [hereinafter Badgett, *Wage Effects*] (discussing how those who disclose their sexual orientation may trade off the risk of diminished career advancement or income loss for potential benefits such as enhanced self-esteem, a more supportive workplace, and the extension of benefits to spousal equivalents); Belle Rose Ragins, John M. Cornwell & Janice S. Miller, *Heterosexism in the Workplace: Do Race and Gender Matter?*, 28 GROUP & ORG. MGMT. 45, 46 (2003) (citations omitted) (discussing how a gay employee might consider how coming out to one employee "may result in a domino effect of coming out to the entire organization"); *see also* JAMES D. WOODS, THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA 216–222 (1994) (describing examples of workplace tradeoffs).

76. The responses indicated 59.7% of lesbian and gay court users did not want to state their sexual orientation during their most recent contact with a California court. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 24–25 tbl.10. In the other significant contact with a California court, 55.6% of lesbian and gay court users did not want to state their sexual orientation. *Id.* at 37 tbl.18.

77. *Id.* at 12.

78. *Id.* at 14 (reporting 92.8% were open at work, 94.6% were open to family, 99.4% were open to friends, and 91.5% were open within their community.

79. Meeting Notes from the Sexual Orientation Fairness Subcommittee Meeting, Judicial Council of Cal. 21 (April 9, 1999) (on file with author).

80. L.A. BAR REPORT, *supra* note 13, at 27 ("[I]t appears that most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream . . . . "); *id.* at B1-39 (noting one attorney commented, "[O]ne closeted lesbian actually got married so she would make partner.").

California respondents were predominantly educated, relatively affluent, white males.[81] Consequently, they should have the highest level of sophistication and ability to navigate through the judicial system, and thus the most positive experiences and perceptions of the courts.[82] However, even these relatively privileged court users had more negative experiences and unfairness when they became visible as non-heterosexual.[83]

Further, the size of the disparity in visibility between the judicial system and other settings suggests lesbian and gay court users' experiences are far from ideal, despite legal protections in the California and New Jersey courts.[84] All the jurisdictions studied have legal protections against sexual orientation discrimination in the court and in workplaces. However, as Professor Ragins and others have shown, legal protections against discrimination are not the most significant factor determining whether lesbians and gay men disclose their sexuality.[85]

This finding holds true for jury service as well as other courtroom participation. One venire panelist stated, "One 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."[86]

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.[87] Nationwide juror polls routinely find jurors report they are three times more likely to be biased against gay litigants than African-

81. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 12; CAL. REPORT, *supra* note 6, at 15.

82. *Cf.* Brooks & Jeon-Slaughter, *supra* note 4 (finding higher income African-Americans and white respondents have more positive perceptions of the courts); ROTTMAN ET AL., *supra* note 4, at 28.

83. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 18–19.

84. *E.g.*, CAL. CIV. CODE § 51(West 2007 & Supp. 2011); N.J. STAT. ANN. § 10:5–4 (West 2002 & Supp. 2010).

85. Ragins & Cornwell, *supra* note 51, at 1254.

86. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 19.

87. *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; Richard Williamson, *Gay Exec Talks About 'Glass Ceiling,'* ROCKY MOUNTAIN NEWS (Denver, Co.), Nov. 11, 1999, at 4B.

Americans, Asians, Hispanics, or whites.[88]

Further, mere visibility itself may often be a justification for negative treatment of sexual minorities.[89] Similarly, the Arizona Bar Report found judges and lawyers reported some court participants and personnel preferred not to work with openly gay or lesbian attorneys.[90] A significant number of gay and non-gay lawyers in Los Angeles County believed disclosing sexual orientation would be harmful to an attorney's career.[91] Indeed, nearly one half of all Los Angeles lawyers surveyed, regardless of their sexual orientation or gender, "believe[d] that simply discussing one's personal or family life in a manner that revealed the gender of one's partner—a matter of no consequence whatsoever for a heterosexual attorney—would harm a gay attorney's career."[92]

Accordingly, one reason many persons remain hidden is the fear of negative consequences after disclosing their sexuality. For instance, one California juror was forced to either lie about his relationship status or risk discrimination due to his sexual orientation.[93]

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88. Peter Aronson, David Rovella, & Bob Van Voris, *Jurors: A Biased, Independent Lot*, THE NAT'L L.J., Nov. 2, 1998, at A1 (reporting results of 1998 National Law Journal, Decision Quest Juror Outlook Survey); Ben Schmitt, *Poll: Jurors Would Buck Law to Achieve Justice*, DAILY REPORT (Fulton County, Ga.), Nov. 16, 1998, at 12 (indicating less than five percent of respondents could not be fair to a black or Hispanic litigant, while seventeen percent could not be fair to a lesbian or gay litigant); Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, THE NAT'L L.J., Nov. 1, 1999, at A1, A6 (reporting 1999 Juror Outlook Survey results indicating three percent of respondents reported they could not be fair if a litigant were black, Asian, American Indian, or white; four percent reported bias against Hispanic litigants; and twelve percent said they could not be fair if the party were a lesbian or gay man). In a specific case, jurors polled expressed a bias against homosexuals. Brunelli, *supra* note 7, at 224 (citing Commonwealth v. Plunkett, 664 N.E.2d 833, 838 (Mass. 1996)); *see generally* Sherrod & Nardi, *supra* note 7, at 24 (reporting the results of a research study identifying the presence of homophobic biases among ethnic and gender subparts of the population).

89. The idea that openly gay people deserve negative treatment may be common. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (noting a gay middle school boy fled to his principal's office after a mock rape by male students and the principal allegedly told the complaining student "if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students").

90. ARIZ. BAR REPORT, *supra* note 13.

91. L.A. BAR REPORT, *supra* note 13, at 29–31.

92. *Id.* at 31.

93. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 20 (quoting a survey respondent—a potential juror in a domestic violence case—who stated: "The case was one involving domestic violence between two gay male partners. During questioning

Additionally, empirical research demonstrates that even passing as heterosexual is not cost-free, but instead results in negative economic, psychological, or employment-related effects.[94] The conscious effort involved in passing as heterosexual also means avoiding jury service or other societal institutions where disclosure may be necessary and social interactions where sexual orientation may be exposed or made express.[95]

Finally, passing as heterosexual is not always an option, even for those individuals who might wish to do so. Some gay men or lesbians show more deviation from societal gender or sexual orientation norms.[96] In a 2003 study of LGBT British court employees, one employee noted, "'[Court s]ecurity personnel seem to think the visual disparity between my appearance and my gender identity is a subject of hilarity.'"[97] Similarly, it

by the judge and lawyers, several of the prospective jurors made disparaging remarks about gay 'lifestyles.' Several also didn't believe that physical abuse in a gay couple was as serious as in a heterosexual couple. 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.").

94. *Cf.* Badgett, *Wage Effects*, *supra* note 75, at 728 (citing Jeffrey Escoffier, *Stigmas, Work Environment, and Economic Discrimination Against Homosexuals*, 2 HOMOSEXUAL COUNSELING J. 1, 8–17 (1975)); RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 149 (1988); Ragins & Cornwell, *supra* note 51, at 1248–54; HENNEPIN COUNTY REPORT, *supra* note 13, at 18. Building on Mohr's work, Badgett suggests that a different strategy—overcompensating by being excessively competent and productive—may have positive economic effects. Badgett, *Wage Effects*, *supra* note 75, at 728 (quoting MOHR, *supra* note 94, at 149). Others present the view that the best way for minority or outsider workers to overcome stereotypes is to work harder and more productively. *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1202–03 (1999) (stating, "[A]n employee who responds to the prospect of bearing the risk of loss from unconscious bias by looking for ways to minimize his own victimization will look for ways to be a better employee."); *but see* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1288 n.80 (1999) (disputing Wax's assertion that victim minimizing strategies will promote better work).

95. Badgett, *Wage Effects*, *supra* note 75, at 728; *see also, e.g.*, HENNEPIN COUNTY REPORT, *supra* note 13, at 18, 30, 37; N.J. REPORT, *supra* note 15, at 48–49 (reporting court employees' comments on their choices and actions to hide their sexuality).

96. *See, e.g.*, Carbado & Gulati, *supra* note 94, at 1267–68 n.16 (noting some people fall between categories of insider and outsider groups and therefore have to do more work to conform); *see also* Badgett, *supra* note 60, at 50 n.5 (discussing gay men's strategies for managing their sexual identities in the workplace).

97. TODD BROWER, REPORT ON THE SURVEY OF THE DEPARTMENT FOR

would be expected that some gender non-conforming LGBT jurors would face analogous difficulties.

Given the important consequences of—and fears about—sexual orientation visibility, power and control over the decision to reveal one's sexual orientation are crucial issues. 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.[98] Because of the increased likelihood of negative consequences in court that attach to visible sexual orientation, losing control over that decision can produce significant anxiety.[99] Thus, it is important that over one-quarter of lesbian or gay California court users believed someone else disclosed their sexual orientation without their approval during a court contact involving sexual orientation issues.[100] Furthermore, nearly an equal number felt forced to state their sexual

CONSTITUTIONAL AFFAIRS, RAINBOW NETWORK: SEXUAL ORIENTATION FAIRNESS IN THE COURTS OF ENGLAND AND WALES 37 (2003) [hereinafter 2003 REPORT] (quoting Open-Ended Comments Q17) (unpublished) (on file with the author).

98. Commentators have extensively discussed the controversial practice of "outing"—disclosing the sexual orientation of closeted lesbian or gay politicians or celebrities, particularly those who have taken anti-gay actions, without their permission. *See, e.g.*, 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 (1991) (discussing the tension between individual rights, like privacy rights, and freedom of the press); LARRY GROSS, CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING 1–6 (1993) (discussing the rising tension within the homosexual community as "outing" has transformed into a political tactic that originated as a respected decision of the individual); Mathieu J. Shapiro, Note, *When Is a Conflict Really a Conflict? Outing and the Law*, 36 B.C. L. REV. 587 (1995) (arguing the speech and privacy rights implicated by "outing" converge rather than conflict); MICHELANGELO SIGNORILE, QUEER IN AMERICA 70–77 (1993) (noting the natural progression of "outing" as a political move and the underlying homophobia beneath its opposition).

99. *See* Ted Rohrlich, *Murderer's Release After 21 Years Seen Saturday*, L.A. TIMES (Aug. 4, 2006), http://articles.latimes.com/2006/aug/04/local/me-parole4. (providing the story of Robert Rosenkrantz, a man who was so distraught over the unconsented disclosure of his homosexuality that he killed the person who revealed the information by shooting him ten times out of anger—an extreme case of the stress that forced disclosure causes).

100. *Compare* BREWER & GRAY, SURVEY DATA, *supra* note 23, at 37 (reporting 28.7% of lesbian and gay court users reported someone else stated their sexual orientation without their approval during a significant contact with a California court), *with id.* at 24–25 (reporting 8.6% of gay and lesbian California court users had their sexual orientation stated without approval during their most recent contact with a California court).

orientation against their will.[101] The data do not permit us to know which court experiences triggered this treatment, but other responses suggest voir dire and jury service played a significant role.

The New Jersey Report specifically asked judges whether they had been asked to conduct voir dire on sexual orientation attitudes and whether the judge permitted it.[102] Twenty-one judges were asked to conduct voir dire about sexual orientation attitudes and seventeen permitted such questions.[103]

Despite their unwillingness to disclose this personal information, some California sexual minority court users were directly asked about their sexual orientation during jury service in their most recent court contact.[104] Lawyers predominantly asked such questions and always did so in open court.[105] Given these facts, it is likely these questions occurred during voir dire. In contrast, when the contact involved more active court participation, twenty percent of lesbian and gay court users were asked to indicate their sexual orientation.[106] Once again, three-quarters reported a lawyer asked the question.[107]

The stigmatizing effects of court users' open LGBT identity cut across both jurisdictions studied. Their treatment deteriorated once sexual orientation became salient, either as a characteristic of the court users themselves or as a function of the legal matter.[108] Because many sexual minorities had fairly transient contacts with the judicial system, often during jury service, the choice to become visible was relatively binary—their sexuality was either open or hidden. Disclosure was often nominally within their control, albeit sometimes forced through the legal process or

101. *Compare id.* at 37 (reporting 24.5% of lesbian and gay court users reported they felt compelled to state their sexual orientation against their will during a significant contact with a California court), *with id.* at 24 (10.5% of gay and lesbian court users felt compelled to state their sexual orientation during their most recent contact with a California court).

102. N.J. REPORT, *supra* note 15, at 58.

103. *Id.*

104. In their most recent court contact, three percent of California respondents were directly asked about their sexual orientation. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 16.

105. *Id.*

106. *Id.* at 30.

107. *Id.*

108. *See id.*; N.J. REPORT, *supra* note 15, at 25–27.

direct inquiry on voir dire.[109]

C. *Additional Voir Dire and Jury Service Experiences and Treatment*

As noted above, the New Jersey survey queried judges about whether lawyers sought to question potential jurors about sexual orientation attitudes and whether judges allowed those inquiries.[110] Although both those questions are important, they assume sexual orientation only arises through specific inquiries in jury selection. It does not.

Standard voir dire questions on marital status may render minority sexual orientation so invisible during jury service that often lawyers and judges do not even realize how those questions affect the venire panel and the court, or how inattentive traditional inquiries are to the diversity of lesbian and gay court users' lives.[111] These questions enshrine "compulsory heterosexuality" within jury service.[112]

A lesbian from South Carolina captured the gamut of emotions felt by some gay or lesbian venire panelists:

> Before anything else, we had to go around the room and state our name, address, length of residence, employment, education, legal marital status and our spouse's employment. I was immediately angry. Right there in my face was another screaming example of discrimination. South Carolina, unlike Massachusetts, of course, does not allow gay couples to marry. Otherwise my partner and I would already be legally hitched. But because we are not allowed to marry, my legal marital status is regarded as single.
>
> I am NOT single. I am as married as a person can get without access to that damn piece of legal paperwork called a marriage license. But here I was, standing in a court of law, where my relationship with my partner meant absolutely nothing. When the questions came around

109. *See, e.g.*, BREWER & GRAY, SURVEY DATA, *supra* note 23, at 16, 32 (noting percentages of respondents who were asked about their sexual orientation, most often by an attorney).

110. *See supra* text accompanying notes 102–03.

111. *See, e.g.*, L.A. Vess, *Jury Duty: Can Being Queer Land You in Contempt of Court?* (originally published Jan. 25, 2006), reposted on My Gay Online (blog), http://replay.web.archive.org/20081120032515/http://www.mygayonline.com/i-just-read-an-interesting-jury-duty-article-in-lesbian-nation.html (last accessed May 18, 2011) (describing the jury service experience of a lesbian).

112. Rich, *supra* note 62, at 195–96. "Compulsory heterosexuality" describes the assumption that all persons are heterosexual. *Id.*

> to me, I was legally bound to say I was single—because according to the law, I was.
>
> I thought about it hard as the judge went around the room asking for everyone's personal information. Since my last name starts with a "V", I was near the end. Finally, when the judge came around to me, I said out loud what I had been practicing in my head. I didn't care if I got in trouble, I just had to say it—I felt morally obligated.
>
> I gave my full name, my address, my length of residence, my employment and my education. Then, I said: "I am gay and partnered, but not legally allowed to marry my partner under the laws of the state of South Carolina. So I guess that means, under the legal definition, I would erroneously be labeled 'single'."
>
> And then I promptly sat down. The judge gave me a very nasty look, perhaps she was considering if I could be held in contempt of court. And, in a way, I did have contempt for the court—and the legal system—and the government. I have major contempt for the legal institutions that prevent me and my partner from being equally recognized and given the same rights as straight married couples.[113]

The range of emotions this South Carolina juror experienced is mirrored in the empirical juror research. In their most recent California court experience, approximately 44% of gay men and lesbians with court interactions were jurors or venire panelists.[114] In that contact, 48.3% were asked if they were married.[115] Some respondents felt they could only reply incompletely or inadequately to that query:

> 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.[116]

In contrast, only 6.8% were asked if they had a domestic partner.[117]

113. Vess, *supra* note 111.

114. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 17 tbl.5.

115. *Id.* at 16. Of all lesbian or gay court users, 26.1% were asked if they were married. *Id.* at 17 tbl. 6.

116. *See id.* at 20.

117. *See id.* at 17 tbl.6.

One respondent, uncomfortable with the question, stated, "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."[118]

Generally, the marital status question reinforces the assumption that individuals are heterosexual and either single, married, divorced, or widowed.[119] As demonstrated by the South Carolina lesbian venire panelist, the question may create the perception of bias or foster a feeling of invisibility or contempt in anyone whose life cannot be described by those categories.[120] Unless specifically relevant to a case, the marital status inquiry may undermine the credibility of the judicial process in several ways.

First, it deprives the court and lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process.[121] See, for example, the following statements by homosexual venire panelists: "'In a domestic abuse case, the judge did not ask me the same questions she asked other potential jurors regarding my relationship with my companion or my experience with domestic abuse.'"[122] Further, another respondent stated, "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."[123]

Second, the marital status question forces gay and lesbian jurors to disclose their sexual orientation or answer the question narrowly according to its specific terms, leaving them to deny or be incomplete about their lives. One respondent noted, "'All prospective jurors were asked about marital status. I have been in a monogamous relationship 33 years and

118. *Id*. at 21.

119. This assumption may apply only in jurisdictions where only opposite-sex marriage is recognized. *See, e.g.*, Defense of Marriage Act, 1 U.S.C. § 7 (2006) ("[T]he word 'marriage' means only a legal union between one man and one woman . . . [and] the word 'spouse' refers only to a person of the opposite sex . . . ."). To the extent voir dire takes place where same-sex marriage is legal, the effect on court users may be different. *See infra* notes 172–76 and accompanying text.

120. *See* Vess, *supra* note 111.

121. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 15.

122. *Id.* at 20.

123. JUDICIAL COUNCIL OF CAL., ACCESS AND FAIRNESS ADVISORY COMM., SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE MEETING: USER SURVEY OPEN ENDS 14 (1999) [hereinafter JUDICIAL COUNCIL OF CALIFORNIA] (on file with author).

consider myself married. It would have been wrong to deny my relationship but it would have been legal to do so.'"[124] Another stated,

> 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.[125]

Third, the marital status question 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."[126] Another respondent explained, "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 clarify the lawyer's intent. The net effect: Our relationships don't count."[127]

The New Jersey and California studies on court user experiences were conducted prior to relationship recognition for same-sex couples in those states and elsewhere.[128] Currently, same-sex couples may legally marry in some foreign countries,[129] and in Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, Vermont, and—at one time—California.[130] Same-sex relationships are also recognized to varying

124. BREWER & GRAY, SURVEY DATA, *supra* note 23, at 31.

125. *Id.* at 20.

126. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 123, at 16.

127. *Id*. at 9.

128. *See* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. Times, May 17, 2004, *available at* http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html (stating Massachusetts was the first state to recognize same-sex marriage in 2004). Both the California report published by the California Judicial Council's Access and Fairness Committee and the New Jersey Report were published in 2001 prior to same-sex relationship recognition in those states.

129. Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden.

130. *Relationship Recognition Map for Same-Sex Couples in the United States,* NAT'L GAY AND LESBIAN TASK FORCE (Apr. 21, 2011), http://www.thetaskforce.org/reports_and_research/relationship_recognition (follow hyperlink "Click to download a color version of this map"). Maryland and New York recognize gay and lesbian marriages granted in other states. *Id*.

degrees short of marriage in California, Colorado, Hawaii, Illinois, Maine, Maryland, Nevada, New Jersey, Oregon, Rhode Island, Washington, and Wisconsin.[131] Couples often state it feels different to be married or that others perceive them differently.[132] Accordingly, those couples' relationships take on a different societal and legal character, which should be recognized on voir dire and during jury service. Consequently, the effects on both courts and sexual minority jurors of recognizing same-sex relationships may be either positively or negatively intensified.

Those individuals in states where voir dire questions accurately reflect the diversity of same-sex couples and families may feel validated and believe the judicial system is accessible to them.[133] For example, as a result of the juror responses discussed above, the California Judicial Council's Standards for the examination of prospective jurors uses "the terms 'family,' 'close friend,' and 'anyone with whom you have a significant personal relationship,'" and defines the last term as "a domestic partner, life partner, former spouse, or anyone with whom you have an influential

131. *Id*. Vermont and New Jersey offer civil unions; California, Oregon, Washington, and Nevada offer domestic partnerships. *Id.* Maine, Maryland, Rhode Island, and Wisconsin offer a more limited form of domestic partnership. *Id.* Colorado allows a same-sex partner to be a named beneficiary, and Hawaii allows partners to be reciprocal beneficiaries. *Id.*

132. *See, e.g.*, *Lesbian Couple Hopes Third 'I Do' Proves Charm*, NAT'L PUB. RADIO (June 13, 2008), http://www.npr.org/templates/story/story.php?storyId =91475392 ("'People don't talk about working hard to create a domestic partnership as they do talk about—let's say—working to create a marriage . . . .'"); Stephen Magagnini, *Gay Marriage Legalized: Davis Partners Jubilant as Long Wait Nears End*, SACRAMENTO BEE, May 16, 2008, at A1 ("During those six months [we were married], people responded to us in a different way."); Janet Kornblum, *Gay Couples in California Get Ready for the Rush*, USA TODAY (June 12, 2008), http://www.usatoday.com/news/nation/2008-06-11-California-gay-marriage_N.htm (noting one mother still refers to her daughter's same-sex spouse as "my daughter's roommate" even after nearly four decades of a committed relationship); Madeline Brand & Alex Cohen, *Same-Sex Couples Prepare to Marry Again*, NAT'L PUB. RADIO (June 13, 2008), http://www.npr.org/templates/story/story.php?storyId=91480953 ("Finally [our daughters] are getting some validity. And . . . it's our society saying that their family matters and to them that means that they matter, so they are thrilled."); *see also* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 71 (1996) ("Getting married signals a significantly higher level of commitment, in part because the law imposes much greater obligations on the couple and makes it much more of a bother and expense to break up. . . . Moreover, the duties and obligations of marriage directly contribute to interpersonal commitment.").

133. *See, e.g.*, CAL. REPORT, *supra* note 6, at 27 (describing the positive experiences of respondents as resulting from "equal"—not preferential—treatment in California courts).

or intimate relationship that you would characterize as important."[134] Conversely, for those lesbian or gay jurors in states like South Carolina where same-sex relationships are ignored or inaccurately labeled on voir dire, gay or lesbian court users may now perceive that loss more sharply.[135]

The jury inquiries about marital status do not exclusively trigger this alienating effect on sexual minority potential jurors. Another standard voir dire question in California asks:

> 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?[136]

Although the voir dire question mentions race, ethnicity, and religion, it does not specifically address sexual orientation.[137] This omission may engender a perception of marginalization in gay people.[138]

Second, if the parenthetical material refers to sexual orientation, the use of "lifestyle" rather than "life" when referring to gay people is problematic. The term connotes a deliberate and socially unacceptable choice, not merely a different manner of living. Tellingly, courts once

134. CAL. R. CT., Standard 4.30(b) (2011), *available at* http://www.courtinfo.ca.gov/rules/index.cfm?title=standards&linkid=standard4_30. This provision amended former Standards of Judicial Administration, sections 8 and 8.5 and Form MC-001 in order to respond to the findings of the California Report. *See Activities*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, http://www.courts.ca.gov/12522.htm (last visited May 13, 2011). At the time of the survey, CAL. JUD. ADMIN. STANDARDS § 8(c)(20) (2000) recommended standard voir dire questions: "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." *See* Margaret Bull Kovera, Jason J. Dickerson, & Brian L. Cutler, *Voir Dire and Jury Selection*, *in* HANDBOOK OF PSYCHOLOGY: FORENSIC PSYCHOLOGY 161, 168–69 (Alan M. Goldstein et al. eds., 11th ed. 2003) (discussing standard demographic voir dire questions, including marital status).

135. Vess, *supra* note 111 (describing how a juror—when asked during voir dire to state her marital status—had to answer "single" because she could not legally marry her lesbian partner in South Carolina).

136. CAL. R. CT., Standard 4.30(b)(20) (2011), *available at* http://www.courtinfo.ca.gov/rules/index.cfm?title=standards&linkid=standard4_30 (last visited May 13, 2011).

137. *See id.*

138. *See* BREWER & GRAY, SURVEY DATA, *supra* note 23, at 20.

described interracial marriages as a lifestyle to create the same marginalizing effect.[139] Today, referring to an interracial marriage as a lifestyle is strange and shows how significantly society's perspective on those marriages has changed in a quarter century.[140] That it does not sound equally odd when applied to sexual minorities illustrates how salient and unequal sexual orientation identity is, despite the significant progress that has been made.[141] In short, like heterosexuals, lesbians and gay men have lives, not lifestyles. Through questions regarding marital status on voir dire, courts view lesbians or gay men as distinct from others. This segregationist view is an error and influences sexual minority and heterosexual jurors' perceptions of the justice system.

III. CONCLUSION: CONSEQUENCES OF SEXUAL MINORITY JURORS' EXPERIENCES ON ACCESS AND USE OF THE COURTS

The perception that government segregates or does not value or understand lesbian and gay relationships is significant because it affects how sexual minorities view the courts.[142] The public's evaluation of the courts is heavily dependent on the belief that the justice system is concerned about procedural fairness. This includes: (1) treating court users with dignity and respect; (2) providing honest and impartial decision

139. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 430–31 (1984) (The lower court changed custody from the mother because "'[t]he wife . . . has chosen for herself and for her child, a life-style unacceptable to the father *and to society*.'" (alteration and emphasis in original)).

140. *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, 81–82 (1997) (citations omitted) (discussing *Palmore* and same-sex relationships).

141. *See id.*; *see also* Patt Morrison, *Two Gay Heroes Thwart Assassinations—What a Difference 35 Years Makes*, L.A. TIMES (Jan. 10, 2011, 5:00 p.m.), http://opinion.latimes.com/opinionla/2011/01/two-gay-heroes-thwart-assassinations-what-a-difference-35-years-make.html (comparing public reaction to gay man Daniel Hernandez, a legislative aide to Congresswoman Gabrielle Giffords, with public reaction to Oliver Sipple, a gay man credited with thwarting an assassination attempt on President Ford).

142. *Cf.* GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES IN U.S. CENSUS BUREAU DATA: WHO GETS COUNTED AND WHY (UCLA 2010) ("Approximately 10% of same-sex coupled described their relationship as roommates or non-relatives rather than as spouses or unmarried partners. When asked why they selected that [inaccurate] option, about a third said that they just thought of their relationship in some other way, a quarter cited confidentiality concerns about disclosing their relationship, and a third were protesting either because they opposed the fact that the Census was not asking a sexual orientation or gender identity question or they were offended by the options presented.").

makers who render verdicts based on facts; (3) the opportunity to have everyone's views expressed in court; and (4) employing decision makers who are concerned with fair treatment and hearing all sides of the story.[143] Negative treatment and experiences undermine the achievement of these goals.

Accordingly, it is important the California and New Jersey empirical studies show that compared to heterosexual respondents, lesbians and gay men generally hold less favorable opinions of the ability of the judicial system to treat sexual minorities fairly.[144] This view may reflect actual bias on the part of juries and judges or court users' perception of bias. However, such a distinction is less important for procedural fairness and perceptions of court access than the disconnect between how sexual minorities experience their court treatment and how their heterosexual counterparts see LGBT people treated in court.

Significantly, more New Jersey lesbian and gay respondents than their non-gay counterparts reported observing or experiencing negative behaviors.[145] Only eight percent of all New Jersey respondents reported experiencing or observing "litigants or witnesses being treated disadvantageously because they are or were perceived to be gay or lesbian," but forty-five percent of lesbian or gay respondents reported the experience or observation.[146]

The percentage of jurors or other court participants who witnessed lawyers being treated disadvantageously based on their actual or perceived minority sexual orientation,[147] or that of their clients,[148] also differed when only gay or lesbian respondents were considered. While sixty-one percent

143. *See* DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS, PART I: FINDINGS AND RECOMMENDATIONS 26 (2005); Roger K. Warren, *Public Trust and Procedural Justice*, COURT REV., Fall 2000, at 12, 13.

144. *See supra* Part II.A (analyzing juror surveys received from California and New Jersey courts related to this phenomenon).

145. *See* N.J. REPORT, *supra* note 15, at 34.

146. *Id*. at 26.

147. *Id.* at 26–27 (three percent of all respondents answered "yes" to whether they observed lawyers being treated disadvantageously based on their actual or perceived minority sexual orientation compared to twenty-three percent of lesbian or gay respondents).

148. *Id.* at 27 (three percent of all respondents answered "yes" to whether they observed lawyers being treated disadvantageously based on their clients' actual or perceived minority sexual orientation compared to twenty-eight percent of lesbian or gay respondents).

of the lesbian or gay respondents believed sexual orientation bias affected the outcome of a case in which they were involved or they observed,[149] only ten percent of all New Jersey respondents with litigation experience held the same belief.[150] Compared to all New Jersey respondents, sexual minorities reported many more incidents of gay litigants or clients of gay lawyers faring worse in the family or criminal courts.[151]

The treatment of lesbian and gay court users in California is consonant with experiences in New Jersey. Overall, fifty-six percent of gay and lesbian court users—in a contact where sexual orientation became significant—reported observing or experiencing a range of negative experiences directed toward themselves or other gays and lesbians.[152] Examples of these negative experiences included one jury member who suggested a "witness was gay and therefore his testimony could not be trusted."[153]

The data are cumulative and wide-ranging. Sixty-one percent of respondent New Jersey litigants and six percent of respondent lawyers said they avoided or had been advised to avoid using the judicial system because of their sexual orientation or their client's sexual orientation.[154] Nearly all of these reporting litigants were lesbian or gay; thirty-six percent of the gay or lesbian reporting lawyers answered affirmatively, compared to only four percent of heterosexual reporting attorneys.[155] As discussed, sexual minorities feel unwelcome in courts and legal institutions,[156] and further, even openly gay people may prefer to be closeted in such places.[157] Moreover, studies demonstrate heterosexuals sometimes undervalue the risks sexual minorities run by making their sexual orientation visible,[158]

149. *Id.* at 35.

150. *See id.* ("Of all respondents with litigation experience who answered the question 90% believed bias did not affect case outcome.").

151. *See id.* at 36–38 (providing charted results with astronomical differences in responses between lesbian and gays compared to overall respondents, with lesbian and gay respondents being ten times more likely to indicate observing bias against gay or lesbian litigants).

152. *See* BREWER & GRAY, SURVEY DATA, *supra* note 23, at 31 (noting these most commonly include negative comments made by a number of different judicial actors).

153. *Id.* at 19.

154. N.J. REPORT, *supra* note 15, at 28.

155. *Id.*

156. *See supra* Part II.A.

157. *See supra* Part II.B. and notes 76–80 and accompanying text.

158. *See, e.g.*, BROWER, 2003 U.K. REPORT, *supra* note 16, at 30. In analyzing

particularly in court.[159]

Consequently, if people believe society and institutions are hostile, insensitive, and shut them out, or that they must hide their sexuality,[160] they may avoid engagement in activities and institutions where disclosure of the characteristic is mandatory—as in jury service. Informal alternative dispute resolution mechanisms might be perceived as being better equipped to fairly handle issues by providing a better understanding of the lesbian or gay community or its values due to the private nature of such alternative mechanisms.[161] For example, lesbian and gay people may prefer friends or peers address the dissolution of relationships, or they may utilize available counseling or mediation instead of the courts.[162]

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empirical data gathered regarding UK court employees, "[a] greater percentage of heterosexuals [UK court employees] thought that lesbian, gay, bisexual and transgendered persons were able to be open about their sexual orientation at work than did non-heterosexuals." *Id.*

159. Moreover, on virtually every question in which the data was separated by respondents' sexual orientation, New Jersey sexual minorities reported worse experiences or observations than did their heterosexual counterparts when reporting on negative treatment based on minority sexual orientation. *See* N.J. REPORT, *supra* note 15, at 26–31, 35, 36–38 43–44, 56–57.

160. *See supra* notes 152–59 and accompanying text.

161. *See* Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1706–08 (1997).

> [D]isputes between same-sex couples may fall into a category of cases involving parties [that] heavily disfavor litigation. Part of this fear, as discussed above, may stem from a concern of bias and animus because gays and lesbians remain classic out-groups. Indeed, one of the most frequently cited appeals of alternative dispute resolution for lesbians and gays is that it is more private than litigation.

Id. at 1738 (citations omitted). Scholars have researched and analyzed the hurdles created by legal realities and decisions lesbian and gay individuals face. William B. Rubenstein, *Divided We Propagate: An Introduction To* Protecting Families: Standards for Child Custody in Same-Sex Relationships, 10 UCLA WOMEN'S L.J. 143, 144–46 (1999) (summarizing problems that arise when gay or lesbian parents seek custody through the court system); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 18–21 (1999) (detailing the complex legal implications faced by lesbians seeking to take part in adoption).

162. *See* Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 LAW & SEX. 45, 66–74 (2007) (providing a detailed framework of how to deal with lesbian child custody suits outside the legal system); Freshman, *supra* note 161, at 1738; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families,* 78 GEO. L.J. 459, 463 (1990) ("If the relationship

The avoidance of judicial fora and recourse to nonjudicial alternatives has significant consequences. If sexual minorities do not bring relationship, dissolution, domestic violence, and other issues to courts, the law will not evolve in order to accommodate the different households and issues. Further, if the law is not seen as reflective or understanding of the realities of gay or lesbian life, people continue to lose confidence in those institutions and their access to them. Thus, those problems are exacerbated, creating a circle of mistrust and withdrawal.[163]

Conversely, visibility is an important indicator of how accepted people feel and how comfortable they are participating in mainstream culture. Demographically, the lesbian and gay population is shifting away from traditional, urban, gay-identified locations to suburban and other venues.[164] Sociologically, lesbian and gay visibility is increasing throughout civil society.[165] As gay individuals feel they are integrated into society, they

between the two women ends and they cannot agree on matters of custody and visitation, [the] family will find itself in a court system ill-prepared to recognize its existence and to formulate rules to resolve its disputes."); *Community Mediation Services*, CENTER FOR CIVIC MEDIATION, http://www.centerforcivicmediation.org /community-services/community-mediation-services (last visited May 31, 2011) ("Conflicts involving the lesbian, gay, bisexual and transgender (LGBT) community share many similarities with interpersonal and community conflicts generally, but they often also implicate a unique set of issues, biases and perspectives. We provide a safe, confidential environment to work through and resolve conflicts relating to such issues as cohabitation arrangements, domestic partnership dissolution, child support, HIV/AIDS issues and employment discrimination disputes.").

163. A parallel development occurred in minority religious communities in Canada. *See* Marion Boyd, *Religion Based Alternative Dispute Resolution: A Challenge to Multiculturalism*, *in* THE ART OF THE STATE III BELONGING? DIVERSITY, RECOGNITION AND SHARED CITIZENSHIP IN CANADA 465–66, 468–71 (Keith Banting et al. eds., 2007); *Indepth: Islam, Shariah Law: FAQs,* CBC NEWS (CANADA) (May 26, 2005), http://www.cbc.ca/news/background/islam/shariah-law.html. Traditional conflicts of laws, as well as arbitration and contract principles, also allow parties to decide disputes according to their preferred legal doctrine and institutions. *See* Nat'l Grp. for Commc'ns & Computers Ltd. v. Lucent Techs. Int'l, Inc., 331 F. Supp. 2d 290 (D.N.J. 2004) (utilizing and interpreting Saudi law for this contractual dispute); Abd Alla v. Mourssi, 680 N.W.2d 569 (Minn. Ct. App. 2004); Jabri v. Qaddura, 108 S.W.3d 404 (Tex. Ct. App. 2003).

164. *See* GARY J. GATES, THE WILLIAMS INSTITUTE, GEOGRAPHIC TRENDS AMONG SAME-SEX COUPLES IN THE U.S. CENSUS AND THE AMERICAN COMMUNITY SURVEY 6–7 (2007); Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 6 (2009).

165. *See* GATES, *supra* note 164, at 8 (noting reasons for this include more people coming out and choosing to live together); Brower, *supra* note 164, at 4–5.

will also turn to societal institutions to resolve disputes and enforce rights.[166] Increasingly, these individuals may believe courts and other institutions are appropriate venues for their issues and that they "deserve" to be openly represented within those legal and institutional structures.[167] Therefore as acceptance grows, these disputes will become progressively more visible in court.[168] Jury administrators, judges, and courts will increasingly have to grapple with sexual minorities and the issues they raise—something they are not always well-equipped to do now. Accordingly, we should expect gay people to be both geographically and jurisprudentially visible in courts and legal institutions where they have not previously been as apparent.[169]

Anecdotal data on younger lesbians and gay men who have grown up with more openness about their sexuality reinforce this conclusion that visibility and normalization of minority sexuality may lead to an increased desire to join conventional legal and social institutions. In an era of growing acceptance of civil partnerships or marriage for same-sex couples and increasing numbers of same-sex families rearing children, younger sexual minorities see themselves fitting into those familiar patterns and structures.[170] For the younger cohort, marriage and the fight for

166. *Cf.* Dale Carpenter, *Religious Liberty and SSM*, THE VOLOKH CONSPIRACY (June 17, 2008, 8:24 pm), http://volokh.com/archives/archive_2008_06_15-2008_06_21.shtml#1213748649 ("It's also true that we are likely to see a rise in conflicts between antidiscrimination law and religious objectors in the future. That's not really something gay marriage is 'causing,' though married gay couples will probably be most prominent among those complaining about discrimination. They don't see themselves as second-class citizens and are more likely to object when they think they're being treated as if they are.").

167. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 400–02 (Cal. 2008) (holding it is an unconstitutional denial by a state to grant same-sex couples civil unions but withhold access to the institution of marriage).

168. Alison Leigh Cowan, *Gay Couples Say Civil Unions Aren't Enough*, N.Y. TIMES, Mar. 17, 2008, *available at* http://www.nytimes.com/2008/03/17/nyregion/17samesex.html (discussing arguments before the Connecticut Supreme Court on this issue).

169. *Compare* GATES, *supra* note 164, at 3 (noting the year 2000 was the first year in which the census accurately accounted for homosexual relationships), *with* GATES, *supra* note 164, at 6–7 (detailing the ability to not only account for increases but to also actually track patterns in homosexual relationship growth across the country).

170. *See* Benoit Denizet-Lewis, *Young Gay Rites*, N.Y. TIMES, Apr. 27, 2008, *available at* http://www.nytimes.com/2008/04/27/magazine/27young-t.html?_r=1 ("[G]ay teenagers are coming out earlier and are increasingly able to experience their gay adolescence. That, in turn, has made them more likely to *feel* normal. Many young gay

relationship recognition is consistent with a broader expectation of equal citizenship in society and its institutions,[171] which likely include courts and jury service. When called for jury duty, those court users will anticipate that voir dire, jury service, and other associated processes will describe and reflect their relationships accurately. As shown above, standard jury questioning that assumes heterosexuality or provokes other negative experiences frustrate those assumptions.[172] Higher expectations, if unmet, trigger greater disillusionment and estrangement from the current system.[173] Alternatively, recognition of these issues would provide an opportunity for courts to grant greater access for LGBT individuals, instilling additional confidence and trust in legal institutions.

In 1835, Alexis de Tocqueville wrote:

> Juries have an exceptional success in shaping people's judgment and improving their natural wisdom. That, in my view, is their main advantage. They must be looked upon as a free, and ever-open classroom in which each juror learns his rights . . . . [Juries are] one of the most effective means available to society for educating the people.[174]

If sexual minorities are to learn the lessons from their jury

men don't see themselves as all that different from their heterosexual peers, and many profess to want what they've long seen espoused by mainstream American culture: a long-term relationship and the chance to start a family."); Joe Jervis, *Study: Young Queers Want LTRs & Kids*, JOE. MY. GOD. (Apr. 24, 2008), http://joemygod.blogspot.com/2008/04/study-young-queers-want-ltrs-kids.html (citing *Study Finds Shift in Gay Demographic*, 365GAY (Aug. 5, 2008, 4:36 PM), http://www.365gay.com/living/080508-suburb-study (providing the details of a recent survey that showed "two-thirds of younger gay people expect to be partnered with kids at some point in their adulthood")).

171. *See* Patrick Range McDonald, *Young, Gay Dreams of Matrimony*, LA WEEKLY NEWS (Aug. 12, 2010), http://www.laweekly.com/2010-08-12/news/young-gay-dreams-of-matrimony.

172. *See, e.g.*, Vess, *supra* note 111 ("[W]e had to go around the room and state our . . . legal marital status and our spouse's employment. I was immediately angry. Right there in my face was another screaming example of discrimination. South Carolina . . . does not allow gay couples to marry.").

173. *See id*. ("The judge gave me a very nasty look, perhaps she was considering if I could be held in contempt of court. And, in a way, I did have contempt for the court—and the legal system—and the government. I have major contempt for the legal institutions that prevent me and my partner from being equally recognized and given the same rights as straight married couples.").

174. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 320–21 (Gerald E. Bevan trans., Penguin Books 2003) (1835).

experiences that courts would like them to, courts should be prepared to study the treatment and experiences of LGBT court users during jury service and act on the results of those studies. Only then will de Tocqueville's belief that jury service educates the American populace hold true for all its citizens, including its lesbian and gay ones.

IV. APPENDIX

A. *Survey Methodology and Demographics*

The California and New Jersey surveys explored numerous aspects of the court system and emphasized the direct experiences, observations, and perceptions of respondents.[175] The California surveys, which were distributed in 1998, collected in early 1999, and first reported in 2000, asked users to describe their most recent court contact in addition to another contact occurring since 1990.[176] The New Jersey survey was created in 1997, received from individuals until mid-1998, and reported in 2001.[177] All surveys were anonymous,[178] which was particularly important given the sensitivity of the research subject.

Response rates varied, as did the populations studied. The California study combined a court user survey and a separate court employee survey.[179] Of all the identifiable lesbian and gay users of the California courts, 1,225 completed the survey for a total response rate of fifty-eight percent of this population.[180] Although the New Jersey survey had similar

175. CAL. REPORT, *supra* note 6, at 12; N.J. REPORT, *supra* note 15, at 19.

176. CAL. REPORT, *supra* note 6, at 2.

177. N.J. REPORT, *supra* note 15, at 5, 85, 88.

178. CAL. REPORT, *supra* note 6, at 2; N.J. REPORT, *supra* note 15, at 85 (providing in the survey instructions, "Your responses will remain the property of the Task Force and will be kept confidential" in the survey instructions).

179. CAL. REPORT, *supra* note 6, at 12–13.

180. *Id.* at 13. Most gay or lesbian court users had relatively few contacts with the court. *Id.* at 15. Seventy percent likely had two to three contacts since 1990. *Id.* Those contacts—seventy-three percent— tended to be with a criminal or civil court. *Id.* Further, nearly twice as many contacts—sixty percent—were as a juror or potential juror than—thirty-two percent—as either a litigant or attorney. *Id*. California analyzed survey results by demographics—sex, race, age, income, education, and the urban, suburban, or rural location of the court—and by the nature of the court experience itself—reason for using the court, type of court, and in-court or out-of-courtroom contact. *Id.* The report did not delineate significant differences based on demographics, socioeconomic level, or urbanicity. *See id.* at 17–23. Major distinctions were a function of the court users' experiences. *See id.* at 19–21.

purposes and design, it differed from the California studies. Of the approximately 21,000 New Jersey questionnaires distributed by various methods, 2,594 were returned for a response rate of twelve percent.[181] Court users constituted approximately three percent of New Jersey survey respondents.[182] In contrast, nearly seventy percent of respondents who identified their relationship to the New Jersey courts were court employees, and only 322 respondents declined to state their connection to the courts.[183] Lawyers and judges comprised nearly one-quarter of New Jersey respondents.[184] The high response rate from court personnel allowed the survey authors to not only observe the judicial process as it affected LGBT persons, but also to report on the courts as a workplace.[185] Seven percent of respondents who identified their sexual orientation were LGBT.[186]

B. *Study Limitations*

Inevitably, all empirical research projects on LGBT persons have data limitations.[187] First, the target group's "hidden identity" makes

181. N.J. REPORT, *supra* note 15, at 1.

182. *See id.* at 21.

183. *See id.* at 20–21.

184. *See id.* at 21.

185. *See id.* at 19.

186. *See id.* at 20. Of the 2,594 respondents, 1,782 identified as heterosexual, 118 as lesbian or gay, and 17 as bisexual. *Id.* Of those identified as LGBT, there were forty-two lesbians, twelve bisexual women, seventy-four gay men, and five bisexual men. *Id.* at 21–22. Of the 2,467 respondents who identified their relationship to the courts, 267 were judges—223 male, 32 female, and 12 unidentified. *Id.* Three male judges identified as gay or bisexual, one female judge identified as bisexual, and thirty-nine did not state their sexual orientation. *Id.* 351 lawyers responded. *Id.* There were 124 female lawyers, 14 of whom were lesbian or bisexual. *Id.* Of the 222 male lawyers, 21 identified as gay or bisexual. *Id.* There were 1,586 respondents who stated they were court employees—1,235 of those were women, 299 were men, and 52 did not identify their gender. *Id.* at 21. Forty-two were LGBT. *Id.* Finally, there were nineteen litigants, seventeen of whom were LGBT, and of the forty-eight individuals and one witness who identified as something other than judge, attorney, court employee, witness or litigant, half were LGBT. *Id.* The disproportionate female sample reflects the high response rate from court employees who were mostly women. *Id*. No information was reported about education, income, geographic distribution, marital status, race or ethnicity, or other demographic information.

187. One scholar's criticism of the LGBT bar association studies included their limited scope, confusion regarding these types of studies, which may include limited scope, confusion regarding "gay" identifiers, and bias affecting gay men as separate from bias toward lesbian women. *See* William B. Rubenstein, *Queer Studies II: Some*

research into the treatment and experiences of LGBT individuals difficult. Minority sexual orientation is not always immediately apparent from any outward physical appearance or surname, and many LGBT individuals choose not to expose their sexual orientation publicly.[188]

Second, the California and New Jersey court user studies specifically sought the experiences of gay men and lesbians who had contact with the judicial system.[189] The studies involved surveying members of various court and external LGBT organizations.[190] This sampling technique may have skewed the data because it was a self-selected group of LGBT persons and some heterosexual members of those organizations. As such, we cannot know how well their responses correspond to those of a broader LGBT court user or general population. Nevertheless, if the California and New Jersey court employee responses provide guidance, heterosexual court users would have been less conscious of sexual orientation issues or discrimination and more likely to see the courts as fair compared to their LGBT counterparts.[191] They would, however, still confirm biased treatment based on sexual orientation, even if their own personal observations as heterosexuals differed from their non-heterosexual co-workers' experiences.[192] These conclusions parallel studies of court users compared by race and ethnicity, where racial and ethnic minorities also

Reflections on the Study of Sexual Orientation Bias in the Legal Profession, 8 UCLA WOMEN'S L.J. 379, 388–392 (1998).

188. BLUMENFELD & RAYMOND, *supra* note 60, at 86; *see, e.g.*, LESBIAN, GAY AND BISEXUAL PARTICIPATION IN UK UNIVERSITIES, RESULTS FROM A PILOT STUDY 6, 10–11 (Ass'n of Univ. Teachers, Nov. 2001) [hereinafter UK UNIVERSITY STUDY]; *see also supra* note 85 and accompanying text.

189. CAL. REPORT, *supra* note 6, at 1–2. It should be noted the New Jersey sample included heterosexual respondents as court users, unlike California. N.J. REPORT, *supra* note 15, at 19–20.

190. The California court user survey identified 2,100 sexual minority court users through the assistance of various national and local LGBT advocacy and service organizations. CAL. REPORT, *supra* note 6, at 12. Moreover, the court employee survey was sent to all court employees, regardless of sexual orientation. *Id.* at 12–13. The New Jersey survey was sent to all superior and municipal court employees, provided to gay and lesbian organizations, published in the *New Jersey Law Journal* and *New Jersey Lawyer*, and distributed to various private and public attorney organizations in the state, as well as the courthouses in the state. N.J. REPORT, *supra* note 15, at 19.

191. *See id.* at 34.

192. *See* CAL. REPORT, *supra* note 6, at 21 ("Lesbian and gay employees were at least four times more likely to experience negative actions or comments based on sexual orientation than were heterosexual employees.").

report less fairness in courts than do their white counterparts.[193]

Third, the court-user members of LGBT organizations in California and New Jersey may underrepresent closeted LGBT individuals who may be reluctant to join a gay or lesbian organization. Researchers made several attempts to encourage closeted individuals to participate. Survey respondents in all studies were anonymous.[194] In California, members were encouraged to give surveys to persons they personally knew to be LGBT but were not members of the various organizations. Nevertheless, some potential respondents may not have wished to participate, even with these safeguards.

Fourth, all surveys specifically asked about personal experiences, and observations, as well as perceptions of those events.[195] The California survey asked questions about all experiences to avoid negatively skewing the answers.[196] New Jersey respondents were not asked about positive experiences.[197] However, all responses were self-reported; researchers did not directly attempt to observe court users' experiences.[198]

Finally, the states surveyed two different court user samples.[199] Consequently, exact comparisons between the results are impossible, even when certain questions were very similar. Thus, automatic generalizations cannot be drawn from these targeted state samples to the larger national court user population. Nevertheless, the studies describe what happened to these participants,[200] and survey methodologies and design were

193. *See, e.g.*, ROTTMAN & HANSEN, *supra*, note 12, at 3 ("African-Americans with recent court experience report significantly less fairness than do Whites and Latinos. In turn, Latino litigants generally perceive less fairness than do Whites.").

194. CAL. REPORT, *supra* note 6, at 12; N.J. REPORT, *supra* note 15, at 85 (providing in the survey instructions, "Your responses will remain the property of the Task Force and will be kept confidential.").

195. CAL. REPORT, *supra* note 6, at 12; N.J. REPORT, *supra* note 15, at 25.

196. CAL. REPORT, *supra* note 6, at 12.

197. N.J. REPORT, *supra* note 15, at 25.

198. CAL. REPORT, *supra* note 6, at 9 (noting fifty-eight percent of court users who received the survey completed it); N.J. REPORT, *supra* note 15, at 19 (noting a twelve percent return rate of the survey).

199. *Compare* CAL. REPORT, *supra* note 6, at 9–10 (noting questionnaires were completed by 1,225 court users, many of whom were targeted through the use of gay and lesbian organization mailing lists), *with* N.J. REPORT, *supra* note 15, at 7–8 (noting 2,594 court user surveys were returned out of large amount distributed to bar associations and other groups).

200. *See* James M. Croteau, *Research on the Work Experiences of Lesbian, Gay and Bisexual People: An Integrative Review of Methodology and Findings*, 48 J. OF

sufficiently similar to compare common experiences and treatment patterns across time and location, even if specific discrimination comparisons would be inappropriate.[201] Those common and divergent patterns in jury service experiences, not the specific data points, constitute this Article's focus.

VOCATIONAL BEHAVIOR 195, 201–02 (1996) (providing the narrow scope of participants is not problematic when the purpose is to discover information regarding their work lives by analyzing the descriptive experiences of the participants rather than generalizing the findings).

201. *See* M.V. Lee Badgett, *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination*, ANGLES: THE POL'Y J. OF THE INST. FOR GAY AND LESBIAN STRATEGIC STUDIES 1, 1–2 (1997) ("Identifying a precise level of discrimination is impossible given [the self-reporting] method, but such consistent findings across time and region reflect gay employees' beliefs that their workplaces are unfair or hostile.").