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A Better Analogy:
“Jews,” “Homosexuals,” and the
Inclusion of Sexual Orientation as a
Forbidden Characteristic in
Antidiscrimination Laws
by
Marc A. Fajer

I. INTRODUCTION
A key issue in the struggle over civil and political rights for lesbians, bisexuals and gay men is whether to include “sexual orientation” in the list of forbidden characteristics in traditional antidiscrimination statutes. During the 1990s, this “inclusion” issue was fought (with mixed results) in state legislatures, municipal councils, public elections on state or local initiatives and repeal measures, and even in the United States Congress. Eventually, the attempt by the state of Colorado to enshrine a ban on inclusion in its constitution led to the Supreme Court’s decision in Romer v. Evans, which is clearly the Court’s most gay-friendly ruling to date.

During public debate over inclusion and related issues such as openly gay and lesbian people serving in the military, proponents of inclusion often analogize race and sexual orientation (“the race analogy”), pointing out similarities in the exclusionary treatment of African-Americans and of lesbians, bisexuals and gay men (“les/bi/gay” people). However, opponents of inclusion dispute the validity of the race analogy for several reasons. First, they view race as an immutable status, and sexual orientation as chosen conduct. Second, they argue that the economic and social consequences of discrimination are much more severe for African-Americans than for les/bi/gay people. Third, they argue that although race is usually revealed by appearance, people can choose not to reveal their sexual orientation, and thus les/bi/gay people can avoid discrimination in a way that most African-Americans cannot.

The difficulties with the analogy to race are important because race has been the primary paradigm underlying the development of American antidiscrimination law. However, advocates of inclusion can respond to criticisms of the race analogy by emphasizing the closer analogy to another group whose protection by antidiscrimination laws is relatively non-controversial: Jewish people (“the Jewish analogy”). Although it has not been an important part of the

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discourse about antidiscrimination statutes, parallels between the experiences of Jewish people and those of les/bi/gay people have been noted frequently in other contexts, particularly by people who identify both as Jewish and as gay or lesbian. For example, writer Eric Rofes said, “Nothing prepared me better for my life as a gay activist than growing up as a Jew in America.”

In this essay, I explore the analogy between “Jews” and “homosexuals” and argue that it is particularly useful in the context of the debate about the inclusion of sexual orientation in antidiscrimination statutes. In Part II, I note some of the difficulties with the race analogy and argue that these difficulties are not presented by the Jewish analogy. In Part III, I address some of the parallels that bolster the Jewish analogy, focusing primarily on two ways in which Jewish and les/bi/gay identities are similar: the classification uncertainties described in Part III help support a culture of muffling identity—of “closeting”—that has a variety of destructive consequences. I conclude by arguing that the analogy is not merely a useful rhetorical tool for advocates of inclusion. It also helps demonstrate that antidiscrimination laws should protect not only minority aspects of one’s identity.

II. THE RACE ANALOGY AND ITS DISCONTENTS

Antidiscrimination law in the United States initially arose out of the need to protect African-Americans from various forms of state and private race-based discrimination. In their most common form, antidiscrimination statutes and ordinances bar decision-making on the basis of a list of prohibited characteristics. Advocates for additions to these lists commonly rely on analogies to race and to the African-American experience. Advocates for gay rights are no exception. For example, during the very public “gays-in-the-military” debate in 1993, some of those favoring inclusion of sexual orientation made the race analogy the cornerstone of their arguments.

The use of the race analogy by supporters of inclusion is not surprising, as there are important parallels between the struggle for racial equality and the struggle for gay rights. Particularly in the context of the military, drawing the race-sexual orientation analogy is logical because opponents’ concerns about gays in the military—majority discomfort with living in close quarters with the minority and the supposed resulting harm to unit cohesion and morale—are strikingly similar to those concerns voiced by opponents of military racial integration. However, opponents of inclusion vociferously reject the race analogy, generally making one or more of three important arguments. Although one clearly could take issue with the way opponents sometimes articulate them, each of these arguments does suggest important ways in which the treatment and understanding of race and of sexual orientation in American society differ.

First, opponents of the race analogy often contrast race, which they view as an immutable status without moral content, to homosexuality, which they see as immoral chosen conduct. For example, during the gays-in-the-military debate, General Colin Powell argued “[S]kin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.” Whether homosexuality is based in biology or is entirely voluntary conduct is highly disputed. However, this very dispute makes it different from race, which is mainly treated as an immutable status in American society.

Second, opponents argue that race discrimination is more severe and has harsher social and economic effects than discrimination based on sexual orientation. Loretta Neet of the Oregon Citizen’s Alliance, a group working to prevent inclusion of sexual orientation in state and local antidiscrimination statutes, argued of “homosexuals”:

They’re not politically disadvantaged, they’re not politically incapable of politically advocating for themselves by any way shape or form. They are the most powerful lobby in the United States today. Their situation is nothing like what it was for black people in America... they could not advocate for themselves. Politically, they were segregated from bathrooms, from public fountains, they were not allowed in certain businesses... they had to sit in the back of the bus, all those sorts of things. You don’t find that for the homosexual community.

The claim of political strength is dubious given recent overwhelming defeats on issues like same-sex marriage in popular elections, state legislatures, and in Congress. But Neet is correct that, whatever the extent of social ostracism that has accompanied perceptions of homosexuality, anti-gay discrimination has never been as explicitly and systematically embedded in the American legal system as has racism. Moreover, the long-term effects of anti-gay discrimination include neither a high degree of spatial segregation nor a nearly permanent underclass, both of which are closely associated with race
in the United States. Finally, opponents of inclusion argue that, unlike African-Americans, les/bi/gay people can hide their minority status by keeping quiet. Thus, any discrimination they suffer is in some sense their own fault. Here, the opponents are correct that most people who self-identify as African-Americans cannot prevent others from so identifying them. By contrast, most people who self-identify as lesbian or gay can choose whether to let strangers know their sexual orientation. This means that discrimination on the basis of race will be experienced very differently from discrimination on the basis of sexual orientation. Business owners, employers, and housing providers generally will know immediately that a patron or applicant belongs to a racial group they might disfavor. By contrast, people who self-identify as lesbian or gay can avoid possible negative consequences by not raising the issue of sexual orientation and, in some cases, refusing to correct explicitly stated incorrect assumptions by employers, interviewers, and employees of businesses they patronize.

Significantly, each of the three arguments that "homosexuals" are different from African-Americans could be made about "Jews" as well. There is cultural uncertainty as to whether being Jewish is a question of race or ethnicity (immutable biology) or of religion (a chosen characteristic of considerable moral import). Anti-Semitism was never as systematically embedded in American law as racism, nor has it had the same kind of long-term social and economic consequences. And Jewish people are often able to hide their Jewish identity from employers and providers of housing and public accommodation. Yet "Jews," unlike "homosexuals," are uncontroversially (and nearly universally) protected by antidiscrimination laws. That suggests that a Jewish analogy might be a useful rhetorical device for advocates of inclusion. The remainder of this essay explores this analogy in more detail, focusing primarily on the difficulties identifying with precision who is, or even what is, a "Jew" or a "homosexual."

III. THE JEWISH ANALOGY: UNCERTAINTY IN CLASSIFICATION

Commentators have identified many parallels between the experience of Jewish people and les/bi/gay people in the United States. A common example is a particular kind of cultural unease that comes of the combination of being dispersed widely throughout American society, contributing significantly to its culture, and yet being frequently reminded that, in fundamental ways, one is an outsider. Some see this sense of separateness as a defining characteristic of Jewish identity. For example, philosopher Isaiah Berlin argued, "What does every Jew have in common . . . . A sense of unease in society. Nowhere do almost all Jews feel entirely at home."

My own awareness of being Jewish is always greatest during the Christmas season, when the outpouring of public holiday celebration—store decorations, advertisements, songs played on the radio, specials on television—reminds me that I am an outsider in what is essentially a Christian society. Until very recently, the gay experience of American popular culture was much like being Jewish at Christmas all year round: the advertisements, the crucial stories, the presentation of life on TV and in the movies all served as a constant reminder of non-inclusion.

Another important parallel is the danger historically associated with "Jews" and "homosexuals" by their most virulent antagonists. "Jews," according to a tradition dating from the Middle Ages, are supposed to drink Christian blood, especially that of children, as part of Passover rituals. The truth of this "blood libel" was seriously debated in Western Europe and America as an issue of public importance as late as the "Damascus Affair" of 1840, and has recurred more recently in a few isolated incidents in Central and Eastern Europe. The remarkably similar recurring imagery of "homosexuals" as child molesters, preying vampire-like on innocents, persists in today's public discourse despite strong evidence that a disproportionate amount of child abuse is perpetrated by heterosexual men and that very few abuse cases involve people who identify as "homosexuals."

For the purposes of antidiscrimination law, the most important parallels between "Jews" and "homosexuals" may relate to difficulties of classification. For example, the Sixth Circuit, in discussing whether sexual orientation could be a suspect classification for constitutional purposes, made the following argument:

[No law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual "orientation" simply do not, as such, comprise an identifiable class. Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute a suspect class or a quasi-suspect class because "they do not
[necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group . . . .”

Of course, precisely the same statements could be made about “Jews.” Religious identity, which we believe we have “successfully . . . drafted” laws to protect, is after all, “defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts,” not by “obvious, immutable or distinguishing characteristics.” The Sixth Circuit’s construction of suspect or quasi-suspect classes would therefore exclude from protection religious identity as well as homosexuality.

However faulty its logic, the passage illustrates two common concerns about the inclusion of sexual orientation as a prohibited classification. First, the court is explicitly uncomfortable about providing antidiscrimination protection for a group whose members are difficult to identify with certainty. Second, the use of scare quotes around “orientation” demonstrates a discomfort about the nature of the category itself. Charitably read, the passage asks, “How can we provide protection for ‘homosexuals,’ when we are not even sure what type of category that is?” The following analysis demonstrates that both these concerns apply equally to “Jews,” whose protection by antidiscrimination law is taken for granted, and to “homosexuals,” whose protection is so controversial.

A. UNCERTAINTY ABOUT WHO IS IN THE GROUP: AGNOSTIC “JEWS” AND CELIBATE “HOMOSEXUALS”

For any group defined by a characteristic protected by antidiscrimination laws, some individuals will present classification difficulties. Although laws arising in conjunction with slavery and its aftermath traditionally defined anyone with any non-European ancestry as non-white, discussions of race in the last decade show an increasing attention to the classification of “mixed race” individuals. In addition, there is a rich history of individuals who self-identify as African-Americans but have the ability to “pass” as white. Some marginal cases also exist at the border of the categories “male” and “female.” In addition to hermaphrodites and transsexuals, there are occasional examples of women “passing” as men for extensive periods of their lives.

Despite the existence of a variety of hard cases regarding race or gender classification, the cultural understanding of these characteristics remains the one implicit in the Sixth Circuit’s discussion of sexual orientation: most people believe they can identify a person’s race and sex “on sight.” Moreover, given the relative infrequency of the marginal race and sex cases, in most instances an outsider’s identification of a person’s race and sex probably will conform to that person’s self-identification.

By contrast, although some people certainly believe they can identify “Jews” and “homosexuals” “on sight,” there is a clear cultural understanding that these identifications are considerably more difficult than for race or sex. Both the cliché phrase, “That’s funny, you don’t look Jewish” and the military’s “Don’t Ask; Don’t Tell” policy rest on a common understanding of this difficulty. This classification problem is exacerbated in each case by a lack of agreement about the precise boundaries of the category in question. The rest of this section examines these boundary problems.

I. Who is a “Jew”?

Traditionally, the Jewish religion defined as “Jews,” (1) people whose mothers were Jewish and who had not converted to another religion, and (2) anyone who underwent established procedures to convert to Judaism. In the United States today, however, largely because of widespread intermarriage and different positions taken by the various branches of Judaism, the situation is considerably more complex.

First, a significant number of people of Jewish heritage do not engage in religious observance and may not even believe in God, but still self-identify as “Jews.” A 1990 survey found that one-third of those of Jewish heritage defined themselves as members of another religion or as having no religious affiliation at all. Similarly, a 1988 survey asked respondents what they considered most important to their Jewish identity; only 17% said “religious observance.”

Second, there are some people with some Jewish heritage and beliefs who do not fall within the traditional definition. For example, those with Jewish fathers and non-Jewish mothers traditionally would not be considered Jewish without converting. However, many people in this category consider themselves observant Jews and some Jewish congregations will accept them without conversion.

Third, there are people who undergo a conversion that does not incorporate all of the traditional elements. Some, like Marilyn Monroe (who participated in a conversion ceremony before her marriage to Arthur Miller), have little training and practice the religion fitfully at best. Monroe died without converting to any other religion, but was she Jewish? The answer depends on whether self-identification, conduct, or formal ritual is the defining element. Moreover, this very uncertainty may be a part of contemporary Jewish identity; for example, one guide to Jewish living asserts that to be...
Jewish today “means figuring out how to be Jewish, and how Jewish to be.”

2. Who is a “homosexual”? Several federal courts have argued that they should not apply heightened scrutiny to government classifications based on sexual orientation so long as the states can constitutionally criminalize sodomy, which they say is the “conduct that defines the class.” Similarly, some anti-gay advocates insist that “sexual orientation is not an identity, it’s a behavior.” However, saying that one’s sexual orientation is defined by one’s sexual conduct raises obvious questions like “Which conduct?” and “How much of it?”

What sexual conduct counts? As Janet Halley has pointed out, sodomy statutes proscribe different conduct in different states and more than half the states have no sodomy statutes at all. Therefore, if sodomy “defines the class,” an individual can be a “homosexual” in some states but not in others. Even assuming that the courts were simply using “sodomy” as shorthand for “sexual activity with someone of the same sex,” which same-sex sexual activities are sufficient to cross the threshold into becoming a “homosexual”? Kissing? Heavy petting? Oral sex?

Even if everyone agreed on the precise sexual conduct that warrants the label “homosexual,” we still would need to have rules regarding how frequent the conduct must be both in absolute terms and relative to the amount of sexual activity with persons of the other sex. Is there some minimum amount of same-sex sexual activity required? Or is the experience of sexual activity as powerful as African blood was historically understood to be, where one drop could irrevocably classify a person? If so, is everyone who has engaged in some sexual activity with both men and women therefore “bisexual”? Conversely, if one really wants to engage in same-sex sexual behavior but has never engaged in any sexual activity at all, is he or she simply an undifferentiated “virgin”?

Related problems emerge because people’s behavior changes over time. Many men have same-sex sexual experiences with peers during adolescence and never repeat them as adults. Is there a statute of limitations? Is pre-majority sexual activity voidable like a contract or does a same-sex experiment by two fifteen-year-olds “vest” their status as “homosexuals”? Can a person “divest” the label with a lot of heterosexual sex? As these rather absurd questions suggest, relying on behavior alone yields difficult line-drawing problems and strange results.

On the other hand, relying on self-identification instead of sexual conduct also can be problematic. People have frequently responded to the stigma attached to homosexuality by living lives of contradiction. Some engage only in heterosexual sexual activity that they may not particularly desire or enjoy, and limit their same-sex sexual activity to fantasies. Are they “homosexuals” or “bisexuals” if they so define themselves? Others engage in same-sex sexual acts but protect themselves by holding fast to the notion that they themselves are not “homosexuals.” In one striking example, a woman recalled that even after taking private marriage vows with another woman she did not consider herself a “lesbian.” Two-and-a-half years later, “when we actually met our first lesbian friends, we still avoided confronting our identities, suspecting that we and our new friends were somehow ‘different’ from those weird lesbians out there somewhere.” Should it be possible to define oneself as other than “homosexual” (at least for purposes of the legal system) regardless of the conduct in which one engages? Given these problems, and to the extent we find it necessary to attach one of two or three labels to a person’s sexual orientation, there will always be many marginal cases and it will remain impossible to attach the labels “on sight.”

B. Uncertainty about the Nature of the Category: “Half Jews” and “Practicing Homosexuals” Another part of the problem with determining who is a “Jew” and who is a “homosexual” is that the nature of each category is itself contested. When someone describes other people as “Jews,” does the speaker refer to their race, their religion, or their ethnicity? Is homosexuality a biological trait, a psychological trait, or a behavioral choice? This section will explore the difficulty defining the nature of each category.

1. What is a “Jew”? Some Jewish people are insistent that Judaism should be seen exclusively as a religion, not as a race or ethnicity. The politics that presumably underlies their position is captured in the following passage about Edith Stein, a Holocaust victim singled out for recognition as a saint by the Catholic Church.

Edith Stein was arrested as a Jew, but at that time and at the time of her death she was a professed Christian. Whether or not she felt sympathy, solidarity or even identity with her former coreligionists is beside the point. To maintain that she was Jewish is to endorse the Nazi position that a Jew is a member of a race, not of a religion, and thus deny the human conscience its choices. That some Jews insist
on Stein’s Jewishness in the face of her Carmelite habit is deeply ironic.\textsuperscript{77}

Yet however distasteful Jewish people may find endorsing a view of Jewishness that appears similar to that of the Nazis, viewing Jewishness solely in religious terms seems imprecise in the United States today. As noted above, many Americans self-identify as Jewish while believing few or none of the traditional tenets of the religion.\textsuperscript{78} Lists of famous people who were “Jews” often include those who converted to Christianity or whose parents did.\textsuperscript{79} The Supreme Court even has held that for the purposes of the Civil Rights Act of 1866, “Jews” constitute a “race” because that was the Congress’s understanding when it passed the statute.\textsuperscript{80}

Jewish people came to America from many different countries, so being “Jewish” does not constitute a “national origin.” However, it is easy to view it as an ethnicity,\textsuperscript{81} especially because many of us who consider ourselves Jewish have no other obvious ethnic identity.\textsuperscript{82} For example, my father was born in Belgium, but his parents were recent immigrants and would not have been seen (by themselves or others) as Belgian, French, or Flemish. All four of my grandparents were born in places that, at least for part of the twentieth century, were part of Poland. But Jewish people in Poland had separate cultural traditions from other Poles, who in turn certainly did not consider the Jewish people among them to be “Polish.”\textsuperscript{83}

More significantly, people who self-identify as “Jews” often share the kinds of complex cultural associations with food, attitudes, and behaviors usually associated more with ethnic groups than with religions.\textsuperscript{84} Confirmation that our culture views these associations as constituting an ethnic identity is found in the common use of the phrase “half-Jewish.”\textsuperscript{85} On-line searches for the phrase\textsuperscript{86} revealed that people most often employ it with a racial or ethnic counterpart like “half-black” or “half-Japanese,” although it occasionally showed up paired with another religious denomination.\textsuperscript{87} Equivalent phrases like half-Christian or half-Catholic appeared much less frequently and Christian denominations were never paired with a racial or ethnic counterpart.\textsuperscript{88}

All this suggests that “Jewish” is viewed as an ethnicity and not a religion in some circumstances. Indeed, one commentator called Jewish ethnicity the “single most powerful agent of Jewish communal solidarity for a century in America”\textsuperscript{89} and concluded that it “remains powerful for many Jews, and it is a factor in the Jewish identity of most.”\textsuperscript{90}

At the same time though, a description of Jewish identity that completely ignored the religious element surely would be incomplete.\textsuperscript{91} Beverly Horsburgh’s formulation nicely enumerates a number of elements that are undoubtedly part of the identity-mix for many Jewish people in varying proportions. She identifies that which “truly unites and sustains many Jews: religious/cultural traditions, shared historical experiences, and Zionist aspirations mixed with fears of extinction and antisemitic persecution.”\textsuperscript{92}

2. What is a “homosexual”?

Some human beings desire to engage in sexual activity with others of the same sex; some do not. There is no very strong evidence about why this is so.\textsuperscript{93} Despite this lack of evidence, the debate about whether homosexuality is “chosen” or not consumes a large part of the discussion about the inclusion of sexual orientation in antidiscrimination laws. The debate is rhetorically important because if sexual orientation is “chosen,” it can be distinguished from characteristics like race or sex that are viewed as outside an individual’s control, thus arguably weakening the claim that the fight for gay rights is simply an extension of earlier civil rights movements.\textsuperscript{94} Viewing homosexuality as “chosen” is also more consistent with anti-gay advocates’ claim that it is “unnatural”; an innate characteristic would likely be viewed as “natural.”

As noted in Part II, anti-gay advocates generally argue that homosexuality is a “choice.”\textsuperscript{95} However, conservative opponents of gay rights may not be as sure about this characterization as their rhetoric would suggest. Their frequent use of the odd phrase, “practicing homosexual”\textsuperscript{96} indicates this uncertainty. In context, the phrase clearly refers to someone who engages in same-sex sexual activity. But if homosexuality itself merely consists of chosen behavior, what then is a “non-practicing homosexual”?\textsuperscript{97} Within the rhetoric of “choice,” someone who chooses to refrain from homosexual behavior would seem not to be a “homosexual” at all. However, the phrase inherently suggests the possibility of someone who is a “homosexual” but does not engage in same-sex sexual conduct. Yet this is the very separation of conduct and identity that the rhetoric of choice denies.\textsuperscript{98}

Unsurprisingly, many advocates for gay rights argue that sexual orientation is beyond a person’s control.\textsuperscript{99} Although to date this position is not strongly supported by biological evidence, it is bolstered by the perception of almost all gay men and many lesbians that they can not control which people they find sexually attractive,\textsuperscript{100} and by the common cultural understanding that love strikes in uncontrollable ways. However, this argument does not take into account the perception of some lesbians that they have chosen their orientation.\textsuperscript{101} In any event, the lack of control argument only can take one so far. Assuming that

42

STANFORD LAW & POLICY REVIEW
people cannot control desire, they still can control how they act in response to desire. To flirt, to seduce, to make love, and to rape are all choices people make for which they should be held responsible. The claim of the moral correctness of same-sex sexual intimacy must rest on some foundation other than compulsive desire.  

The political rhetoric focused on the source of sexual desire ignores completely the ways in which les/bi/gay identity has become enmeshed with cultural connections similar to those that are important parts of Jewish ethnic identity. Les/bi/gay writers can refer to two sets of cultural symbols—one set pertaining to each sex—confident that a large audience will understand them. For example, many lesbians are supposed to be vegetarians and jokes about vegans and tofu are common. Jokes about turkey basters enjoy widespread comprehension because lesbians who want to have children generally utilize artificial insemination. Gay men are understood to have some shared attachment to certain old movies, many of which are characterized by witty (some might say bitchy) dialogue and a set of female singers who generally can be characterized as divas. In this view, les/bi/gay identity functions as a kind of alternate ethnicity for people who do not conform to the heterosexual assumptions of their own families’ traditions. If this is even partly correct, then the debate about the etiology of desire is a significantly incomplete discourse about the nature of homosexuality.

C. THE SIGNIFICANCE OF CLASSIFICATION

Uncertainties in classification are not necessarily significant. For many cultural categories (e.g., “hero” or “superstar”), people would likely disagree strongly about both who belongs in the group and the defining characteristics of the group. However, these disagreements usually are not seen as particularly important. By contrast, for both “Jews” and “homosexuals,” many people who consider themselves to be members of each group view some of the debates about the boundaries of inclusion as extremely important.

Particularly controversial for those with a Jewish identity are “Messianic Jews,” people who self-identify as being part of Jewish cultural and religious traditions, but also believe that Jesus was the messiah prophesied in the books of Isaiah and Ezekiel. Many Jewish people become very angry at what they view as deceptive tactics and the “expropriation of [Jewish] symbols” by people they consider to be Christians. Many les/bi/gay people have a similar reaction to people who identify themselves as “homosexuals” who have been “cured” by psychologists, religion, or a combination of the two. The result of the “cure” is that the person gives up same-sex sexual activity altogether and sometimes claims no longer to feel sexual desire for others of the same sex. Common skeptical responses by les/bi/gay people are that those “cured” either were not really gay to begin with or their “cure” will not last permanently.

The strong response in both cases may be related to the perception that Messianic Jews and cured homosexuals implicitly attack the groups to which they claim to belong. In both cases the process of “conversion” involves conceding a point of critical importance to opponents of the group: for opponents of Judaism, that Jesus was the messiah; for opponents of gay rights, that homosexuality is a pathology. Indeed, these responses may suggest that the center of both Jewish and les/bi/gay identities is in some sense negative. One can hold a wide range of religious beliefs including atheism and still be a “Jew.” However, if one acknowledges the divinity of Jesus, he or she is a “Christian.” Alan Dershowitz argues that an important part of the rejection of Messianic Jews is that they are a reminder “that it is only the rejection of Jesus as Christ that really distinguishes most Jews from many mainline Christians.” Similarly, “homosexuals” can engage in a range of sexual activity including celibacy, but if they both renounce same-sex sexual acts and cease to desire them, then they are “straight.”

However, the large emotional impact of these marginal cases does not mean that precision in classification is crucial for antidiscrimination law. The proper focus for analyzing disparate treatment antidiscrimination claims is on the mind-set of the decision maker. Indeed, I would suggest that if a Messianic Jew is denied housing because the landlord hates all “Jews” or if a cured lesbian loses a job because the employer dislikes all “homosexuals,” antidiscrimination law should be invoked. Someone who intentionally discriminates on the basis of a prohibited classification should not be able to defend the suit by claiming that the plaintiff was not “really” a member of the protected group.

Of course, any decision about which classifications are included on the list of prohibitions will incorporate some discussion of the nature of the category. However, the debate over whether homosexuality is chosen or innate cannot resolve the question of the inclusion of sexual orientation. The military presently is allowed to exclude people for a wide range of biologically based characteristics, which allows opponents of inclusion to argue that the cause of homosexuality is irrelevant to the inclusion debate. More importantly, as Janet Halley has demonstrated, a conclusion that homosexuality is innate can be used by anti-gay advocates as well as by gay activists.
In any case, the experience of the Jewish people in Europe confirms that the argument over immutability is unwinnable and thus not an appropriate focus. Jewish people through much of the Christian Era have been persecuted for their “choice” to deny the divinity of Jesus. Yet in the twentieth century, exercising the “choice” to convert to Christianity did not protect the Jews from Nazi Germany. “Jew” became a racial category and millions of people were killed for the asserted immutability of Jewishness. Ultimately, the horror with which we view the Holocaust does not depend on whether anti-Semitism stems from concerns about race or about religion.

IV. THE JEWISH ANALOGY: CLOSETS AND OTHER COSTS OF UNCERTAINTY

The uncertainty in the nature of the categories “Jew” and “homosexual,” and in determining who fits into the categories, ought to be irrelevant to the question of whether discrimination based on those categories should be prohibited. But the uncertainty when combined with external antipathy to the category yields a special set of problems that suggest the need for the protections of antidiscrimination laws. These problems, which arise from the tendency of people to remain “in the closet” (i.e., to hide disfavored identities to the extent possible), are the focus of Part IV.

A. CLOSETING AND THE EXTERNAL CONSEQUENCES OF CLASSIFICATION UNCERTAINTY

Because people have trouble defining and discerning “Jews” and “homosexuals,” the consequences of any societal disapproval of the two groups tend to fall most heavily on those perceived to be in the categories: people who fit common stereotypes and people who publicly self-identify. This section will discuss the consequences to each of these groups in turn.

1. Stereotyping

The classifications “Jew” and “homosexual” invoke a set of strong cultural stereotypes. “Jews” are often associated with a fast-talking aggressive style of personal interaction, and a closeness with money that sometimes goes as far as shadiness. To “Jew someone down” means to bargain hard (and perhaps dishonestly) to get a better price. The related term “Jewish American Princess” evokes a stereotype of spoiled self-indulgence: young women who care about little except material things and whose parents deny them nothing.

These stereotypes are themselves heavily associated with the northeastern United States, and particularly with New York City. Jesse Jackson’s famous reference to “Hymietown” echoed the cultural understanding of extremely strong ties between Jewish people and New York City. On the one hand, if a person is Jewish, he or she must be from New York. And on the other, as Jewish comedian Lenny Bruce joked, “if you live in New York or any other big city, you are Jewish. It doesn’t matter even if you’re Catholic, if you live in New York you are Jewish. If you live in Butte, Montana, you’re going to be goyish even if you’re Jewish.” Thus, the consequences of anti-Semitism can fall on those who, by behaving or even sounding like a stereotypical New Yorker, will be presumed to be Jewish.

Of course, this set of stereotypes interacts with other aspects of the racial and ethnic aspects of Jewish identity. That is, even people who sound and behave in a way seen as stereotypical of New York “Princesses” are unlikely to be taken for Jewish if they have facial features viewed as typically African or Scandinavian, or if they reveal that their surnames are Ramirez or Giuliani. And people whose behavior does not fit Jewish stereotypes may nonetheless be treated as “Jews” if they have names currently understood to be Jewish.

People also commonly decide who is a “homosexual” based on stereotypes. For example, one federal civil rights case arose when a school district rejected a job applicant who was assumed to be gay because his behavior reminded the principal’s secretary of her former husband, who was in fact gay. Although the case is not specific on this point, the behavior in question was likely to be related to deviation from gender norms. Our culture often presumes masculine women and feminine men are gay and, as a result, they become primary targets of anti-gay bias in various forms.

Closeting reinforces these stereotypes. First, those who do not fit the stereotypes often have the most to lose by coming out. Jewish people who do not “look Jewish” or have “Jewish” names and le/sbi/gay people who conform to “gender-appropriate” behavior are unlikely to trigger discriminatory responses unless they self-identify. Unsurprisingly, some of these people will prefer to accept privileges that accompany being perceived as heterosexual or Christian. By contrast, those whom others generally assume to be “Jews” or “homosexuals” have little to lose by coming out; they are likely to be treated as members of those categories in any event. Thus, those who come out probably disproportionately fit stereotypes and so reinforce them.

Second, to the extent that the stereotypes involve public activities, closeting can prevent the general population from being aware of people who do not conform. For example, many people believe that Jewish people are not good at athletics and that homosexuals are incapable of having long-term relationships. Thus, the choice of Jewish athletes or committed same-sex
couple to keep their identities secret represents the loss of an opportunity to combat those stereotypes.

2. **Punishment of Public Self-Identification**

People who publicly self-identify as Jewish or as les/bi/gay become targets for anti-Jewish or anti-gay bias, regardless of whether they conform to cultural stereotypes. Indeed, culture often strongly signals that these identities will be more tolerated the less public they are. For example, places where people openly gather to engage in activities that are “gay” or “Jewish” often are targets of the most virulent hate crimes.

“Don’t Ask; Don’t Tell” is one of many ways in which les/bi/gay people are repeatedly told that their acceptance is contingent on their keeping quiet about who they are. The preference for non-disclosure seems to be true even when people are in fact aware of the disfavored identity. A common complaint is that “everybody knows so-and-so is gay, but why does he have to keep rubbing our noses in it?” The desired behavior seems to be for people to continue hiding their identities even when others are aware of the truth. I think of this phenomenon as creating “glass closets”: Everyone else can see in, but the individual still must remain inside.

For Jews, the most powerful form of self-identification may be the retention of a Jewish-sounding name that can, by itself, trigger negative consequences. For example, a Marietta, Georgia city councilman named Goldstein routinely gets hate mail and once had his car torched. A neighbor commented that “if his name was Jones he wouldn’t have these problems.” This type of story helps explain why the author of a book on Jewish men said of Goldberg, a Jewish pro wrestler, “[b]y keeping his name, he is committing an act of serious Jewish macho.”

The phenomenon of glass closets is less common for Jewish people today than it once was, but it is not unknown. A newspaper article about Goldberg noted with approval that he “never flaunts his heritage. He once rejected a suggestion that he wear a Star of David on his trunks.” Notably, the authors employ the “flaunting” language normally associated with “homosexuals.” Similarly, one of my former students reported that a partner at a law firm began an interview with her by talking about how pleased he was to be able to send his children to Catholic schools. He then castigated her for “inappropriately” mentioning various Jewish organizations and activities on her resume, saying that her religion was no one else’s business and should be kept private.

3. **Conspiracy Theories**

Punishing self-identification has the obvious and intended effect of deterring people from “coming out,” which in turn makes it easier to spin conspiracy theories about Jews and homosexuals. Because people are aware that it is hard to identify members of these groups and that there is an indefinite number of unidentified members, it becomes easy to suggest that a few identifiable “Jews” and “homosexuals” are part of a larger dangerous group that includes numerous invisible cohorts. As Jane Schacter has argued, “the abstract class of invisible homosexuals [can] be molded in the image of hate.”

Various forms of anti-Jewish conspiracy theories date back to the Middle Ages. While the old blood libel is not much in evidence today, myths utilized by Hitler of powerful Jews “controlling” various aspects of society continue to appear periodically in the United States. In 1974, George Brown, Chairman of the Joint Chiefs of Staff memorably said, “Jewish influence [in Congress is] so strong you wouldn’t believe . . . . They own, you know, the banks in this country, the newspapers. Just look at where the Jewish money is.” Similar statements have been a recurring part of the rhetoric of, for example, the Nation of Islam. In the spring of 2000, online booksellers garnered attention because of their sales of “The Protocols of the Elders of Zion,” a tract ostensibly written by Jewish leaders that has bolstered conspiracy theories throughout the last century. Most recently, the NAACP suspended the president of its Dallas branch for making remarks about Al Gore’s selection of Joseph Lieberman as his running mate that included:

I think we need to be very suspicious of any kind of partnerships between the Jews at that kind of level, because we know that their interest primarily has to do with money and these kinds of things.

Anti-gay rhetoric has increasingly adopted similar claims of hidden influence and power. Anti-gay conspiracy theories have been fueled by the publication of some unfortunate and highly questionable marketing data that allegedly demonstrate that “homosexuals” are wealthier on average than the public at large. Indeed, in the dissent to *Romer v. Evans*, Justice Scalia suggested that the fact that nearly a majority of Coloradoans who voted had opposed Amendment 2 demonstrated that “homosexuals” had disproportionate (and presumably unwarranted) political power.

B. **Internal Consequences and Costs of Closeting**

The pressure to hide their disfavored identities alters the behavior of many Jewish and les/bi/gay people. Some
engage in various forms of self-censorship, resulting in negative psychological consequences. Some attempt to censor other members of the group, discouraging behavior that might reflect badly on all its members. Some adopt what I call the “Politics of Safety”: political positions designed to minimize the stress caused by glass closets. I discuss these responses in turn in this section.

1. Beards: Passing and Self-Censoring

The experience of being “in the closet” is not unique to gays and lesbians. Many times in history, Jewish people have hidden their Jewish identity to try to survive threats ranging from the Spanish Inquisition to Hitler’s storm troopers. The struggle about how and when to attempt to “pass” has been an important element in the cultural history of both groups. One shared symbol of self-censorship is the “beard.” Jewish men shaved their beards to indicate that they were becoming modernized. Gay men brought “beards”—women whom they seemed to be dating—to public functions to suggest that they were heterosexual.

Self-censorship takes many forms. However, as the beards examples suggest, it is often crucial to closet life to change those external aspects most closely associated with the hidden identity. For Jewish people, this often meant their names. Thus, the children of Jewish immigrants gave up their parents’ names along with their clothing. It became a running joke that parents would ask of their children’s dates, “What’s the family’s name? What was it before?” Similarly, the Hollywood publicity machine turned much-too-Jewish names like Issur Danielovitch, Emmanuel Goldenberg, and David Kaminsky into Kirk Douglas, Edward G. Robinson, and Danny Kaye.

For les/bi/gay people, the crucial element to hide is usually one’s sexual and romantic relationships. Thus, the same Hollywood publicity machine that Anglicized Jewish names also insisted that gay stars like Rock Hudson appear to carry on affairs and marriages with women. Many less famous people followed Hollywood’s lead and carried on real or apparent heterosexual relationships to hide their true identities. Same-sex couples have similarly gone to great lengths to hide the nature of their relationships.

One of the more amusing and relatively harmless results of a history of self-censorship is that some members of each group find it important to identify and “claim” historic figures that were closeted members of the group. However, closeting has a variety of considerably more negative consequences. Constant monitoring of behavior creates a great deal of stress and makes it difficult to maintain a healthy self-image. It prevents people from finding others with whom they have things in common. And as the next sections demonstrate, it creates rifts among members of groups who might otherwise be allied.

2. Community Censoring

Members of many minority groups who worry about the majority’s perception of their group may be unhappy when individuals act in ways that they believe reflect poorly on the entire group. This problem is exacerbated for the categories at issue here because outsiders find it easy to attribute the acts of the visible few to the invisible masses. As a result, members of both groups sometimes engage in what might be thought of as community censoring: attempting to discourage behavior that might unduly call negative attention to the community.

These concerns about community image arise in the way that many assimilated American Jews feel discomfort at the presence of Hasidic communities whose members still dress and act as did their Eastern European forebears. Similar concerns about image underlie the uneasy relationship between American Jews and Israel; American Jews often articulate a desire that Israel act better than other nations and worry that Israeli acts might reflect badly on Jews generally.

Notable examples of widespread community censoring took place among the Jewish communities in the southern United States in the mid-twentieth century. As vividly captured in Alfred Uhry’s The Last Night of Ballyhoo, prominent southern Jewish families had lived in major southern cities such as Charleston and Savannah since before the Revolutionary War. They were descendants of German Jews who looked down on the more recent Eastern European Jewish immigrants who largely went to cities in the Northeast and Midwest.

The southern Jewish community engaged in widespread self-censorship. They went to synagogues, but some held services on Sundays, rather than Friday nights or Saturday mornings. These families mimicked the habits of wealthy Christian families, going so far as to put up Christmas trees. Their religious leaders called themselves “minister” or “reverend” rather than “rabbi” and dressed in black with white collars rather than the traditional embroidered white robes. Rabbi Calisch of Richmond, a leading figure among southern Jews, discarded orthodox Jewish customs like men wearing hats and keeping Sabbath strictly. He was dedicated to developing the image of a Jewish person as a thoroughly assimilated southerner “completely unaware of any personal problem as a Jew.”

In an atmosphere where assimilation was seen as paramount, this community acted to censor those who
engaged in “anti-social” behavior, which in the South primarily meant challenging the existing racial social order. For example, in the early 1930s, one congregation fired a rabbi who spoke out against lynching. They decided his conduct was inappropriate because none of the Christian clergy had taken a similar position.\textsuperscript{181} In the Civil Rights era, Southern congregations spoke out against Jewish organizations working on behalf of rights for African-Americans. They thought the organizations should focus only on problems that directly affected Jews.\textsuperscript{182} Tragically, in the summer of 2000, after a series of anti-Semitic incidents in Marietta, Georgia, Jewish residents similarly entreated their rabbi to keep silent about the incidents, presumably to avoid upsetting the social order of their predominantly Christian community.\textsuperscript{183}

The reactions of the southern Jewish congregations to northern Jewish civil rights activists find clear parallels today in the les/bi/gay community. More conservative gay individuals call for toning down public displays of sexuality and cross-gender behavior.\textsuperscript{184} They eschew participation in progressive political coalitions, arguing that being gay does not require adoption of positions supporting, for example, affirmative action and abortion.\textsuperscript{185} Their message is clearly that all les/bi/gay people would be better off if more activists tried harder to fit into mainstream society.\textsuperscript{186}

Like those of the southern Jews, these attitudes are not a surprising outcome in a world where safety can depend on not calling too much attention to one’s differences. To put it another way, people in glass closets should not throw stones. Unfortunately, community censoring, by dichotomizing the world into “good Jews” and “bad Jews” or “good gays” and “bad gays,” can divide communities and prevent people from providing one another with much-needed support. It also can implicitly give approval to external sanctions on the “bad” members of the community.

3. The Politics of Safety

In a less internally focused response to the glass closet, the community may take positions based on what might be called “the Politics of Safety.” That is, one way to make differences less dangerous is to make the defining characteristics less a part of public life.\textsuperscript{187} For example, although Judaism traditionally is a religion that involves some public display,\textsuperscript{188} Jewish organizations often lead the fight in America for religion-free public space.\textsuperscript{189} The assumption behind this position seems to be that if the government supports religion in any form, it will favor Christians over Jews.\textsuperscript{190} Thus, to defend the safety of Jews, religion must be eliminated from the public sphere.\textsuperscript{191}

An even more fundamental example of the Politics of Safety is the feeling shared by some Jewish people that any notoriety attached to “Jews” is dangerous.\textsuperscript{192} “Any major national or international problem or controversy in which Jews may be involved—even tangentially—creates waves of anxiety among Jews with fine tuned historical memories.”\textsuperscript{193} This kind of concern was evident in the ambivalent responses of some Jewish Americans to Al Gore’s choice of Joseph Lieberman as his running mate. Some viewed it as an opportunity to see how far America really has come.\textsuperscript{194} Others worried that it would be bad for Jewish people because it would encourage anti-Semitic responses\textsuperscript{195} or because Lieberman would be blamed if Gore failed to win the election.\textsuperscript{196}

The Politics of Safety plays a similar role in gay politics. Some activists on the left favor what might be termed “family-free” public space, which is the idea that the government should have no role at all in defining or supporting relationships or families.\textsuperscript{197} The underlying assumption is that any government involvement will favor “traditional” structures that are heterosexual and often sexist.\textsuperscript{198} Similarly, more conservative gay activists tend to favor less public sexuality of any type.\textsuperscript{199} The assumption seems to be that if sexual activity—what they see as the primary difference between heterosexuals and themselves—is made more invisible, they will be more safely viewed as being “just like everyone else.” Much of the intra-community debate over same-sex marriage\textsuperscript{200} can be seen as a dispute about whether there is more danger in allowing state regulation of gay relationships or in continuing to suffer the enforced (and visible) difference of not having same-sex marriage as an available option, leaving all same-sex sexual activity as extra-marital and therefore immoral in the eyes of some.

Many of the positions that arguably stem from the Politics of Safety may be justifiable on other grounds. However, it is troubling to think that important political decisions are being driven, even in part, by a desire to minimize the extent to which disfavored identities might attract the attention of a disapproving majority. Like the other consequences of closeting, the Politics of Safety suggests that antidiscrimination law has a place in making it safer to leave the closet.

V. CONCLUSION: TOWARD MORE NUANCED ANTIDISCRIMINATION LAW

The promise of antidiscrimination laws is to create access to jobs, housing, and public accommodations for those who have been denied access in the past because of class-based discrimination of one form or another. Although race discrimination was the original target of these laws, a complete reliance on race as a paradigm is inappropriate. Race is conceived in our society as a
visible and immutable attribute; the passage from the Sixth Circuit quoted above demonstrates a belief that other classifications included on the list should share those traits. Yet we often protect the decision to have children, which is hardly immutable. We protect people with invisible disabilities such as HIV infection, diabetes, impaired hearing, and dyslexia. And we protect religion, which is neither visible nor immutable.

The focus on “Jews,” a category whose protection by antidiscrimination laws is currently uncontroversial, demonstrates that race is not the only paradigm for included classifications. This has a number of important consequences. First, the very strong parallels to the les/bi/gay experience suggest the inclusion of sexual orientation or identity is appropriate. Second, difficulty defining who belongs in a category, or even what kind of category it is, need not and should not prevent us from prohibiting employers and housing providers from excluding people on the basis of their own understanding of the category, whatever that might be.

Of course, not every arbitrary form of discrimination necessarily warrants legal prohibition. Individual decisions to exclude tall people or water polo players or people who chose Yale over Princeton probably do not cause enough social dislocation to warrant the administrative costs of including relevant categories on the prohibited list. But the Jewish analogy suggests that the conversation about what categories should be included needs to be considerably more thoughtful than the “I don’t know ‘em if I don’t see ‘em” analysis of the Sixth Circuit.

Finally, full inclusion in public life should not be subject to variations of “Don’t Ask; Don’t Tell.” Public expression may well be an important element of any unprivileged identity, including those commonly viewed as immutable. Access to jobs, housing, and public accommodations should not be contingent on complete adherence to the cultural norms of the majority. People of various stripes should be able express their differences to some extent without impeding the functioning of the relevant enterprise. The experiences of people who are les/bi/gay or Jewish (or both) teach “that silence about difference creates ignorance, fear and isolation.”

Antidiscrimination law that is focused only on immutable status provides little protection for public expression of identity. Even with regard to characteristics like race and sex, penalties imposed on people who openly deviate from majority norms can be rationalized as punishing conduct rather than protected status. Of course the line beyond which difference becomes disruptive is hard to draw. However, it seems a more appropriate line to draw than a bright status/conduct line that means, in practice, that only people who behave like stereotypical white protestant heterosexual males receive the full protection of antidiscrimination statutes.

Jewish people have come to the New World fleeing from a wide range of persecutors, beginning with closeted Jews sailing with Columbus in 1492 following their expulsion from Spain by Ferdinand and Isabella and continuing through Holocaust survivors and émigrés from both Soviet and post-Soviet Russia in our own time. Cultural heirs to the Marranos and to Anne Frank, Jewish people did not come to America to hide, but in the hope that they could live openly without fear. If the antidiscrimination statutes uncontroversially covering Jewish people are designed to fulfill that hope, they must protect public expressions of Jewish identity, despite the uncertainty over who is a “Jew.” And if they can do that, they surely can protect the expressions of les/bi/gay identity that face such strikingly similar social sanctions, despite the uncertainty over who is a “homosexual.” In sum, a properly nuanced law of antidiscrimination would protect the decisions of both “Jews” and “homosexuals” to come out of the closet by focusing on the mind-set of the actors outside the closet door and the consequences of their actions, not on the details of the identity of the person huddled fearfully inside.

NOTES


2. See discussion infra Part II.

3. See infra note 17.

4. See infra note 21.

5. See infra note 26.

6. See John Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century 15-16 (1980) (arguing that the treatment of Jewish and of gay people has been similar throughout European history); Christie Balka & Andy Rose, Introduction to Twice Blessed: On Being Lesbian, Gay, and Jewish 1-2, 4, 7 (Christie Balka & Andy Rose eds. 1989) (hereinafter Twice Blessed) (noting parallels relating to hiding identity); Amy E. Schwartz, Editorial, Self-Fulfilling Prophecies, WASH. POST, Feb. 5, 1993, at A25 (arguing that the present day bigotry against gays is similar to post-World War II anti-Semitism); Jim Sollisch, Don’t Ask/Don’t Tell Is Simply Bad Policy, PHIL. INQUIRER, Dec. 18, 1999, at A19 (arguing that “Don’t Ask; Don’t Tell” was an
employment practice regarding Jews long before it became the policy regarding gays in the military); see also Deborah Sontag, Matan Has Two Mommies, and Israel Is Talking, N.Y. TIMES, June 4, 2000, at 3 (arguing that being a lesbian in Israel is like being Jewish in the United States).

Following these authors, my argument here will be based on parallels in the treatment and experiences of members of the group. I am not addressing David Richards’ argument (which is not inconsistent with mine) that the expression of sexual identity should, like the expression of religious identity, be protected as an aspect of freedom of conscience. David A.J. Richards, Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies 92-101 (1999).

I recognize that using any analogy in this context may be problematic. As Jane Schacter has argued, the use of analogy improperly suggests that a group must show itself to be the “same” as others to be protected and tends to hide the significant differences between the experiences of the groups already protected. Jane S. Schacter, The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents, 29 HARV. C.R.—C.L. L. REV. 283, 296-97 (1993). However, I think putting this argument into public discourse is important because the race analogy remains a major element in the debate around inclusion. I also hope this “better analogy” will allay some of Schacter’s concerns because it explicitly focuses on ways that one currently protected group is different from others.


See Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other Isms), 1991 DUKE L.J. 397, 398.


See Gomes, supra note 14 (describing the parallels).

See, e.g., Ronald D. Ray, Gays: In or Out? The U.S. Military & Homosexuals: A Sourcebook 81-85 (1993) (listing arguments against the validity of the race analogy); Michael Boot, Controversial Researcher Focus of Rights Debate, DENVER POST, Sept. 27, 1992, at 6A (describing an anti-gay rights activist’s argument that giving sexual orientation treatment “equivalent to an ethnic minority” would be a “distortion”); Tony Marco, Homosexuals Should Not Be Granted Special Rights, in GAY RIGHTS, supra note 14, at 160, 164-65 (quoting opposition of some African-American leaders to use of the race analogy). The very use of the controversial analogy can engender quite hostile reactions. In the context of a proposed Florida ballot measure substantially similar to the one at issue in Romer v. Evans, 517 U.S. 620 (1996), the Reverend James Sykes of the St. James African Methodist Episcopal Church in Tampa told the press:

[T]here is no comparison whatsoever . . . . When we marched, we had dogs sicked on us, fire hoses turned on us. I don’t think Martin Luther King or other leaders walked down the streets of Selma, Ala., so they could walk down the street j—ing off. That’s not what we marched for.

See Schacter, supra note 10, at 294-95. For specific examples of this kind of argument, see Jeffrey Rosen, Sodom and Demurrer: Should the Courts Deliver Gay Civil Rights?, NEW REPUBLIC, Nov. 29, 1993, at 16, 17 (quoting expert witness for the state of Colorado in his deposition for the trial phase of Evans v. Romer as saying, "Disapproval of gays is not like racial or gender discrimination; there is nothing wrong with being black or being a woman, but it is perfectly reasonable to think that there is something wrong with being gay."); Cal Thomas, Gays, the Military, and the Editor, MIAMI HERALD, Dec. 13, 1992, at 3M (making this argument); see also Thomas, supra note 16 (quoting Rev. James Sykes, "I don't think being black is immoral . . . [but] being gay is immoral. It is against nature.")

Ray, supra note 16, at 85 (quoting letter from Gen. Colin Powell, Chairman of the Joint Chiefs of Staff, to Rep. Patricia Schroeder (May 6, 1992)).

See discussion infra Part III.B.2.

Although much important recent scholarship has focused on the extent to which "race" is a socially constructed category, it seems fair to say that this insight has not deeply permeated perceptions outside academia.

See Schacter, supra note 10, at 291-92. For specific examples of this argument, see Marco, supra note 16, at 161, 163 (arguing that "homosexuals" have economic and political power); Rosen, supra note 17, at 18 (quoting chairman of Coloradoans for Family Values that homosexuals are "extremely affluent" and "politically powerful"); Thomas, supra note 16 (quoting Henry Carley, former president of the Tampa NAACP, "[I]n some circles [gays] have been discriminated against, but not categorically as a class. [For blacks], there was no place to go.").


Whatever social or political oppression les/bi/gay people have faced, the American legal system has never incorporated anything equivalent to the embedding of slavery in the constitutional structure, see U.S. CONST. art. I §§ 2(3), 9(1) (apportioning representation and taxes by numbers of free and "other" people; allowing for the importation of persons); Dred Scott v. Sandford, 60 U.S. 393 (1856) (holding that no state has the power to free or grant citizenship to a person enslaved under the property laws of another state), or the systematic legal segregation through Jim Crow laws, see Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of laws mandating "separate but equal" accommodations).

See generally Douglas S. Massey & Nancy A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (describing the extent, persistence, and consequences of racial segregation in housing in American cities). This distinction exists partly because, whatever the connection between genetics and sexual orientation, les/bi/gay people usually are raised by parents who ostensibly are heterosexual. See Boswell, supra note 6, at 16 ("Gay people are for the most part not born into gay families."). Thus, unlike racism, homophobia does not have cumulative effects over many generations within the same family. There is no record of discrimination against one generation of "homosexuals" resulting in fewer opportunities for "homosexual" offspring. See Rosen, supra note 17, at 18 (noting that it is "hard to prove" that les/bi/gay people have "a legacy of disadvantage").

See, e.g., St. George Crosse, A Disaster for the American People; Homosexuals Aren't Disadvantaged; The Supreme Court and Gay Rights, Sun (Baltimore), June 2, 1996, at 6F ("All you have to do is look at me to know that I am black. I cannot tell your sexual orientation by looking at you."); Don Feder, Supreme Court Ruling Blow to Morality, SAN ANTONIO EXPRESS-NEWS, May 29, 1996, at 4B (arguing that discrimination against "homosexuals" is difficult because they cannot be identified "absent a declaration"); see also Equality Found. v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), vacated on other grounds, 518 U.S. 1001 (1996) (making this argument in the context of a federal constitutional claim); Lisa Popyk, Pro-Issue 3 Group Defies Archbishop, CINCINNATI POST,
Some less//gay people who precisely fit stereotypes of "homosexuals" will have more difficulty hiding convincingly.

See Patricia J. Williams, The Alchemy of Race and Rights 44-51 (1991) (accounting the refusal of a store clerk to admit her when she buzzed and "pressed [her] round brown face to the window").

Of course, the notion that closeted "homosexuals" therefore live safe and carefree lives ignores the particular psychological pressures that stem from facing a constant stream of decisions about when and whether to "come out" and, when a person chooses not to, from attempting to maintain the resulting secrecy. See infra Part IV.B. For example, the so-called "Don't Ask; Don't Tell" policy would be absurd as a resolution to the question of whether African-Americans can be integrated into the military. It is also hard to imagine many situations in which it will be necessary for someone to agonize over how and whether to tell her parents she is African-American, although analogous decisions are often pivotal to less//gay people. See, e.g., Felice Yeskel, You Didn't Talk About These Things: Growing Up Jewish, Lesbian and Working Class, in Twice Blessed, supra note 6, at 40, 45 (describing the author's coming out to her family as "the release from fear and guilt that I needed"); cf. Balka & Rose, supra note 6, at 4 (arguing that "coming-out stories have assumed the role of sacred text in lesbian and gay culture").

For a summary of evidence of the relatively comfortable social and economic position of Jewish people in the United States as of 1997, see Alan M. Dershowitz, The Vanishing American Jew: In Search of Jewish Identity for the Next Century 7, 9-11 (1997) (hereinafter, Dershowitz, Vanishing); see also Laurie Goodstein, And Now for Something Completely Different, N.Y. Times, Aug. 13, 2000, at 1 (arguing that Jewish people have reached an all-time high level of social acceptance). But see Beverly Horsburgh, The Myth of a Model Minority: The Transformation of Knowledge into Power, 10 UCLA Women's L.J. 165, 178-92 (1999) (book review) (arguing that the apparent success of the American Jewish community may have come at the expense of autonomy and status of Jewish women).

Discrimination on the basis of religion is protected by the major federal rights statutes. See, e.g., 42 U.S.C. § 2002-e (employment); 42 U.S.C. §§ 3604, 3617 (housing). These statutes have been applied without question to cases involving claims of discrimination against people because they were Jewish. See, e.g., Shipkowitz v. Bd. of Trustees, 914 F. Supp. 1 (D.D.C. 1996) (applying §2000e-2), aff'd mem., 124 F.3d 1309 (D.C. Cir. 1997); LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995) (applying § 3604); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238 (E.D.N.Y. 1998) (applying § 3617). In addition, the Supreme Court has interpreted the Civil Rights Act of 1866 to prohibit discrimination against "Jews" on the theory that the 1866 Congress understood there to be a "Jewish race." See Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

See, e.g., Balka & Rose, supra note 6, at 3 (describing lesbian gay Jewish people as "doubly other"); David Margolick, For American Jews, Hope and Uncertainty, N.Y. Times, Aug. 12, 2000, at A27 (noting that the surprise Jewish people felt when Joseph Lieberman was picked as Al Gore's running mate showed that "we still felt like outsiders."); Yeskel, supra note 29, at 41 (describing "feeling different" in being "a Jew, a lesbian, and not being middle class").


The obligatory appending of "Happy Hanukkah" if anything makes the situation worse; Chanukah is a relatively minor Jewish festival that is perceived by Christians as disproportionately important because of its proximity to Christmas. See Anita Diamant & Howard Cooper, Living a Jewish Life: Jewish Traditions, Customs, and Values for Today's Families 204 (1991); Morris N. Kertzer, What Is a Jew? 223 (rev. ed. 1993) (revised by Lawrence A. Hoffman).

Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 584-87 (1992); cf. Michelangelo Signorelli, Queer in America: Sex, the Media, and the Closets of Power 250-255 (1993) (describing the resistance of media to portrayals of gay life). See also Faith Rogow, Speaking the Unspeakable: Gays, Jews, and Historical Inquiry, in Twice Blessed, supra note 6, at 71, 81-82 (arguing that Jewish people have "failed to recognize gay voices as part of" their own culture).

See Herman, supra note 22, at 78-79 (noting similar concerns about children and contamination in discourse about both Jews and homosexuals).

Dershowitz, Vanishing, supra note 31, at 105. For examples of this story being taken seriously, see Leonard Dinnerstein, Antisemitism in America 18, 21, 101, 167-68 (1994); Cecil Roth, A History of the Jews: From Earliest...
A Catholic priest in Damascus had disappeared. Jewish residents were accused of killing him to use his blood to make Passover matzohs and some of them, under torture, “admitted” their guilt. See Vital, supra note 38, at 232-34, 236-44; Chaim I. Waxman, America's Jews in Transition 17-18 (1983). The American consul in Syria believed the story, see id. at 18, which was reported as fact in newspapers like the New York Herald. See Dinnerstein, supra note 38, at 28.

See Vital, supra note 38, at 511, 535-38.

See, e.g., J.L.P. v. D.J.P., 643 S.W. 2d 865, 869 (Mo. Ct. App. 1982) (“Every . . . judge knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicates[s]”); Boot, supra note 16, at 6A (recounting a proponent of Colorado's Amendment 2 claim that “a propensity toward child molestation . . . is prevalent in the homosexual community”); Willard R. Price, Editorial, Silence Is Taken for Approval, Idaho Statesman (Sept. 6, 1999), at 9B (arguing that “thousands of innocent elementary youth . . . are the practicing homosexual's present target”); Thomas, supra note 16 (reporting several examples of anti-gay advocates claiming that “homosexuals” prey on children).

See Marc E. Elovitz, Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research, 2 Duke J. Gender L. & Pol'y 207, 216-17, 221 (1995) (citing studies supporting these propositions); Devjani Mishra, The Road To Concord: Resolving The Conflict of Law over Adoption by Gays and Lesbians, 30 COLUM. J.L. & SOC. PROBS. 91, 96-97 (1996) (surveying literature supporting these propositions).


Indeed, my first thought upon reading this passage was, “As opposed to Jews, who are easily identifiable ‘on sight’ by their horns and tails.”

See supra note 32; see also infra note 204.

Less charitably read, the scare quotes suggest that the judges simply disbelieve that there is such a thing as “sexual orientation” and wonder why there should be protection for the choice to engage in particular sex acts. This appears to be the use Justice Scalia made of the scare quotes in his Romer dissent. Romer v. Evans, 517 U.S. 620, 641-43, 648 (1996) (Scalia, J. dissenting).

“For generations, the boundaries of the African-American race have been formed by a rule, informally known as the ‘one drop rule,’ which, in its colloquial definition, provides that one drop of Black blood makes a person Black.” Christine B. Hickman, The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 Mich. L. Rev. 1161, 1163 (1997).

For example, considerable public discussion surrounded the question of how “mixed race” individuals should respond to the question about their race on the 2000 census form. E.g., D’Vera Cohn, A Racial Tug of War over Census, Wash. Post, Mar. 3, 2000, at B1; Clarence Page, How Race Counts in the 2000 Census, Chi. Trib., Mar. 15, 2000, at 23.

See Tamala M. Edwards, Family Reunion, Time, Nov. 23, 1998, at 85 (reporting that passing is “well-known among blacks”); Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1712 (1993) (same); id. at 1712 n.5 (citing other supporting evidence).


See Richards, supra note 6, at 9 (arguing that sexual orientation is much less “socially transparent” than race or gender); Rogow, supra note 36, at 77 (noting difficulty of identifying members of each category).

By contrast, some classifications that are difficult to identify externally are relatively easy to identify by other means and therefore create very few marginal cases. For example, respiratory problems like emphysema or asthma will not be recognizable to most laypeople, which often results in the unwarranted belief that people without disabilities are unduly taking advantage of “handicapped” parking spots. Yet there is not a great deal of medical uncertainty about which patients have these conditions.

Wayne Dershowitz, Vanishing, supra note 31, at 203-08; see also Horsburgh, supra note 31, at 174-75 nn.30 & 35 (noting complexity of Jewish identity).

For purposes of this discussion, people of Jewish “heritage” are those who had at least one parent who self-identified as Jewish.
REv. Protection for Gay, Lesbian and Bisexual Identity, 65
Kristin Hansen, spokesperson for the Family Research Council).

DEmorr News, Apr. 6, 2000, Metro Section, at 1 (quoting Cir. 1989),
Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir.
have followed
6
1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed.
822 F.2d 97, 103 (D.C. Cir. 1987). A number of other courts
have converted to Judaism turns on whether the Israeli religious
because Israeli citizenship for people born outside of Israel who
This issue has taken on particular legal significance today
Jewish women who had to decide whether to include Monroe).
decision-making process of editors of a history of American
6,
movement to accept people of patrilineal descent).

See supra note 56, at 128.

See DOSICK, supra note 53, at 57 (noting that such a person
if reared in a synagogue that accepts him as Jewish, may
"consider[] himself completely and legally Jewish.").

See id. at 56 (noting that the Reform and Reconstructionist
movements accept people in this category as Jewish); ABRAMS, supra note 56, at 122 (describing decision by the Jewish Reform
movement to accept people of patrilineal descent).

See Whitfield, supra note 34, at 10-11 (discussing
decision-making process of editors of a history of American
Jewish women who had to decide whether to include Monroe).
This issue has taken on particular legal significance today
because Israeli citizenship for people born outside of Israel who
have converted to Judaism turns on whether the Israeli religious
authorities accept that the conversion rituals were performed
properly. See Deborah Sontag, Debate in Israel: Jewish State or

DIAMANT & COOPER, supra note 35, at 3.

This argument was first articulated in Padula v. Webster,
822 F.2d 97, 103 (D.C. Cir. 1987). A number of other courts
have followed Padula on this point. E.g., High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir.
1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed.

Cameron McWhirter, Gays Seek Recognition on Census,
Detroit News, Apr. 6, 2000, Metro Section, at 1 (quoting Kristin Hansen, spokesperson for the Family Research Council).

Protection for Gay, Lesbian and Bisexual Identity, 36 UCLA L.
Rev. 915, 949 (1989) [hereinafter Halley, Politics].

See supra note 47. The Supreme Court of New Hampshire
apparently thought not, as it excluded from the statutory
definition of “homosexual” those people who had “one
homosexual experience during adolescence.” In re Opinion of
the Justices, 525 A.2d 1095, 1098 (N.H. 1987). Similarly,
former military regulations allowed the retention of service
personnel who only engaged in “a homosexual act on a single
occasion and who [did] not profess or demonstrate proclivity to
repeat such an act.” Halley, Politics, supra note 65, at 951
(quoting SEC/NAV Instruction 1900.9C para. 6b (Jan. 20,
1978)).

Almost 2% of adult men in one large study (the “Laumann
Study”) reported this pattern. EDWARD O. LAUMANN, ET. AL.,
THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN
THE UNITED STATES 296 (1994).

The New Hampshire Supreme Court believes there is. It
excluded from the definition of “homosexual” people who had
committed homosexual acts not “reasonably close in time” to
the point at which the state has to make the determination. In re
Opinion of the Justices, 525 A.2d at 1098. For those who have
a well-developed les/bi/gay identity, the answer is probably no.
As one lesbian comic put it, “If I never had sex with another
woman again, I would still be a lesbian. I wouldn’t be a very
happy lesbian, but I would still be a lesbian.” Robin Tyler,
Still a Bridesmaid, Never a Groom, in ED KARVOSKI, JR., A FUNNY
TIME TO BE GAY 25, 26 (1997).

According to the Laumann Study, more than 90% of those
who have engaged in some same-sex sexual activity have also
had heterosexual sex. LAUMANN ET AL., supra note 67, at 311.

Id. at 291.

In the Laumann Study, significantly more men and women
reported same-sex sexual activity within the past five years than
self-identified as “homosexual” or “bisexual.” Id. at 297. Of
respondents who had both engaged in adult same-sex sexual
behavior and experienced same-sex sexual desire, 13% of the
women and 6% of the men did not self-identify as “homosexual”
or “bisexual.” Id. at 299.

Ruth Baetz, I See My First Lesbian, in THE LESBIAN PATH 3,
5-6 (Margaret Cruikshank ed., 2d ed. 1985).

See KERTZER, supra note 35, at 7-9 (discussing these and
other possibilities); WAXMAN, supra note 39, at 34-35 (noting
debate on this issue between Jewish people of German and of
Eastern European descent).

See LAUMANN ET AL., supra note 67, at 290 (arguing that
“homosexuality” lacks an “unambiguous definition”).
See, e.g., KERTZER, supra note 35, at 8 (arguing that Judaism is not a race because of extensive intermarriage and the existence of Jewish people of several different racial groups).

See Cynthia Koury, Jewish-Born Saint Is Debated, WORCESTER TELEGRAM & GAZETTE, Oct. 21, 1999, at B3 (giving biographical information on Stein and discussing controversy over her canonization); Tad Szulc, Challenging the Church, WASH. POST, June 4, 2000, at X01 (same).


See supra text accompanying notes 55-58.

For example, although Heinrich Heine, Karl Marx and Felix Mendelssohn were all baptized, see VITAL, supra note 38, at 126-28 (Heine and Marx); PAUL JOHNSON, A HISTORY OF THE JEWS (1987) (quoting Heine as saying “The most Jewish thing that Mendelssohn ever did was to become a Christian.”), all three are listed in books of famous Jewish people. See MAC DAVIS, THEY ALL ARE JEWS 47, 51 (rev. ed. 1951) (Mendelssohn, Marx); 2 DEBORAH PESSIN, GIANTS ON THE EARTH: STORIES OF GREAT JEWISH MEN AND WOMEN FROM THE TIME OF THE DISCOVERY OF AMERICA TO THE PRESENT, at 17-18 (1940) (Heine).

Although often invoked by those trying to use these lists to foster Jewish pride, the same type of practice can occur in contexts in which the implication is derogatory. For example, in Houston in the 1970s, people whose grandfathers had converted to Christianity were still referred to by others as “Jews.” DINNERSTEIN, supra note 38, at 195-96. Similarly, one debutante’s proposed escort was considered unacceptable by a social club in Scarsdale, New York in the 1960s because he was deemed a “Jew,” although he had become an Episcopalian. Id. at 171.


See WHITFIELD, supra note 34, at 10 (arguing that the definition of “Jew” seems “loose enough to embrace culture rather than religious belief or the identity of one’s mother”); Freedman, supra note 57, at 47 (contrasting “religious Jews” with “ethnic Jews”).

That this position is commonly understood is evidenced by its invocation by Dr. Mitch Glaser, a Messianic Jew arguing that belief in the divinity of Jesus is not inconsistent with a Jewish identity: “When Italians accept Jesus, they remain Italian . . . when Jewish people believe in Jesus, they remain Jewish ethnically, culturally and in their communal identification.” Nadine Brozan, Worshipping Jesus While Wearing a Yarmulke, N.Y. TIMES, Dec. 16, 1999, at B18.

See VITAL, supra note 38, at 769 (describing anti-Jewish acts and sentiments in Poland between the World Wars); WAXMAN, supra note 39, at 35 (noting that Jewish immigrants from Poland choosing from a list on a standard form would usually identify themselves as “Hebrew” not “Polish”).

See KERTZER, supra note 35, at 126. For example, in the movie Hannah and Her Sisters, after Woody Allen’s character converts to Catholicism he returns from shopping with a variety of religious implements, a package of Wonder Bread and a jar of mayonnaise. The movie is playing off of a common understanding among many Jewish people that rye bread and mustard are Jewish; white bread and mayonnaise are not. Similarly, “The Chanukah Song” identifies some celebrities as Jewish by saying, “Guess who eats together at the Carnegie Deli?” Adam Sandler, The Chanukah Song, on WHAT THE HELL HAPPENED TO ME? (Warner Bros. Records 1996). Of course, these associations will not be universal among Jewish people, in part due to significant differences between Sephardic and Ashkenazi cultural practices. See Horsburgh, supra note 31, at 176 n.35.

One recent popular example is “The Chanukah Song”, which refers to Goldie Hawn and Paul Newman as “half-Jewish” and Harrison Ford as “a quarter Jewish.” Sandler, supra note 84. See also DERSHOWITZ, VANISHING, supra note 31, at 45 (describing “partially Jewish children” as sharing other racial or ethnic heritages such as Chinese, Irish, or African).

Separate searches in the LEXIS newspaper database for all of 1997 and for the first six months of 2000 produced similar results.

This is a rather odd formulation that suggests attending different religious services in alternate weeks, or perhaps going to Synagogue on Friday night and to church on Sunday morning, but almost certainly refers to the differing religious beliefs of the parents of the person in question.

The sole religious-ethnic pairing I found that did not involve half-Jews was “half-Moslem/half-Serb,” which is understandable in light of the recent history of Yugoslavia. Corinna Lothar, Old and New in Kosovo, Maine, and London, WASH. TIMES, June 18, 2000, at B6 (book review).

ABRAMS, supra note 56, at 162.

Id. at 163; see also WAXMAN, supra note 39, at xviii (noting that many American Jewish people retain Jewish ethnic identity despite being “unaffiliated with the American Jewish communal structure”).
very good at it, and I don’t have to practice anymore at all.


Another complicated anti-gay take on this problem is found in the military regulations regarding homosexuality. In the pre-Clinton era, being a “homosexual” was grounds for discharge and engaging in same-sex sexual activity created a presumption that you were one. See Halley, Politics, supra note 65, at 951. Today, engaging in same-sex sexual activity is grounds for discharge; admitting that you are a les/bi/gay person creates a rebuttable presumption that you have a propensity to engage in such activity. JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 2-3 (1999) [hereinafter HALLEY, DON’T]. There also are detailed regulations about what you are allowed to do. See id. at 144-45 (listing regulations). As one gay male comic described: “One [rule] says that you can be gay, and you can go to bars, but you can’t go home with anyone. This means that most nights I qualify for the military.” Danny Williams, Common Ground, in KARVOSKI, supra note 68, at 67, 69.

There seems to be an implicit understanding that it is possible to separate act and identity, but see HALLEY, DON’T, supra, at 2-3 (noting difficulty of disproving “propensity”), although the current regulations, much like Justice Scalia’s dissent in Romer v. Evans, suggest great skepticism about the possibility of celibate “homosexuals.” 517 U.S. 620, 643 (1996) (Scalia, J. dissenting) (concluding from the litigants’ self-descriptions as either “a gay man” or “a lesbian” that they were not celibate).

98 See RICHARDS, supra note 6, at 7 (noting that arguments about immutability pushed gay rights advocates to seek a biological link); Halley, Critique, supra note 93, at 507 n.7 (collecting sources); Schacter, supra note 10, at 311 n.137 (calling this “a standard gay rights answer”).

99 Halley, Critique, supra note 93, at 526; see also LAUMANN ET. AL., supra note 67, at 286 (noting that “many, if not most” respondents to the Laumann Study believe in an essentialist notion of homosexuality).

100 See Halley, Critique, supra note 93, at 526 & n.91 (noting that some “people who experience anti-gay discrimination . . . understand themselves to have chosen the form of their desire” while citing only two articles about lesbians).

101 See RICHARDS, supra note 6, at 9 (arguing that the biological argument “omits . . . a normative analysis of the burdens placed on an ethically responsible choice of one’s identity as . . . that of
a gay or lesbian person

See, e.g., Karvoski, supra note 68 at 35, 39-40.


See, e.g., Cohen, supra note 106, at 96, 100 (referencing Judy Garland, Barbra Streisand, Liza Minnelli); DiLallo & Krumholtz, supra note 106, at 109-10, 168-69 (listing must-have CDs and “Gay Goddesses”—Garland, Streisand, Minnelli, Madonna and Bette Midler among others); Karvoski, supra note 68, at 63, 126 (referencing Bette Davis movies).

See, e.g., Cohen, supra note 106, at 96, 100 (referencing Judy Garland, Barbra Streisand, Liza Minnelli); DiLallo & Krumholtz, supra note 106, at 109-10, 168-69 (listing must-have CDs and “Gay Goddesses”—Garland, Streisand, Minnelli, Madonna and Bette Midler among others); Karvoski, supra note 68, at 63, 126 (referencing Garland, Streisand, and Midler).


See, e.g., Abrams, supra note 56, at 81 (referencing Judy Garland, Barbra Streisand, Liza Minnelli); DiLallo & Krumholtz, supra note 106, at 109-10, 168-69 (listing must-have CDs and “Gay Goddesses”—Garland, Streisand, Minnelli, Madonna and Bette Midler among others); Karvoski, supra note 68, at 63, 126 (referencing Garland, Streisand, and Midler).

See, e.g., Abrams, supra note 56, at 81 (referring to tactics used by Messianic Jews as “ruses” and “devious”); Dershowitz, Vanishing, supra note 31, at 195 (describing the proselytization of Messianic Jews as “often misleading” and claiming that many Jewish people are “appalled” by them); Brozan, supra note 82 (claiming that critics describe these tactics as “misleading” and “deceptive”).

Gustav Niebuhr, Coalition of Jews Protests Southern Baptist Conversion Tactics, N.Y. Times, Nov. 9, 1999, at A19 (discussing Jewish messianic organizations that use prayer shawls and skullcaps in services worshipping Jesus); see also Judy Tarjanyi, Jews for Jesus Walks Difficult Path to Gain Acceptance, Minneapolis Star Trib., July 10, 1999, at 5B (expressing similar concern about misappropriated symbols).

In one notable case, the Israeli government refused to grant Messianic Jews the right of citizenship available for all Jewish people; it determined they belonged to another religion.

Alexander, supra note 108, at vii-viii, 128-34.

My own worry is that sufficiently severe behavioral therapy may be able to make anyone give up any targeted behavior. If so, the reported cures are both credible and unsurprising. Indeed, if adults are so unhappy with their lives that they are willing to undergo the trauma of aversion therapy, I cannot see that it would be helpful to interfere. The two real problems with the cure stories are (1) the common assumption that the mere fact that you can do it suggests that it ought to be done, and (2) the use of the therapy on nonconsenting adolescents at the request of their parents.

See Herman, supra note 22, at 42 (arguing that ex-Jews and ex-homosexuals play important and similar roles in conservative Protestant discourse).

See Dershowitz, Vanishing, supra note 31, at 44 (describing Jewish people who define “their Judaism largely in negative terms”); Whifield, supra note 34, at 11-12 (discussing Jewish identity as being found only in relation to others).

See Stuart Eskinazi, Traditional Jews Say Messianic Brothers Just Aren't Kosher, Ark. Democrat-Gazette, Mar. 11, 2000, at H8 (quoting rabbi as saying, “The rock-solid non-negotiable, bottom-line principle for all Jews is that once you profess Jesus as your Messiah, you have left Judaism and become a Christian.”); Liz Szabo, Jews Offended at Effort to Bring Them to Jesus, The Virginian-Pilot, May 28, 2000, at A1 (quoting rabbi as saying that Messianic Jews “[b]elieve in Jesus Christ . . . [and for] that reason, the Jewish community regards them as Christians, not Jews”); ABRAMS, supra note 56, at 81 (“To Jews . . . belief in Jesus is not compatible with Judaism.”); Alexander, supra note 108, at 168 (expressing concern that Israel seems to accept as “Jews” people with a wide variety of beliefs that seem incompatible with traditional Judaism but will not similarly accept Messianic Jews); Kertz, supra note 35, at 9 (“[Jews do not] believe that Jesus is the son of God”).

Dershowitz, Vanishing, supra note 31, at 195.

Categories allowing exclusion or restriction of duty include “too large, too small . . . the blind, the deaf . . . paraplegics, epileptics, asthmatics, dyslexics, the nearsighted . . . [and] the color-blind. . . .” Ray, supra note 16, at 86.

Id.

Halley, Critique, supra note 93, at 523-26; see also Richards, supra note 6, at 9-10 (noting dangers of arguments based in biology); Rogow, supra note 36, at 79 (noting that the
discovery of a cause can lead to the search for a “cure”).

132 The religious focus of most of the European persecution of Jewish people is demonstrated by the fact that Jews could avoid it by converting. See DERSHOWITZ, VANISHING, supra note 31, at 5. For examples of Jewish people becoming Christians to avert persecution in different eras, see ROTH, supra note 38, at 147, 181, 199-200; VITAL, supra note 38, at 107, 126.

133 See DERSHOWITZ, VANISHING, supra note 31, at 5 (noting change in anti-Semitism “from religious bigotry to ‘racial’ bigotry”); VITAL, supra note 38, at 815-16 (describing Nazi “Nuremberg Laws,” which defined “Jews” by bloodlines). Discrimination based on a racial conception of “Jews” did not originate with the Nazis. As early as the fifteenth century, Spanish towns were evicting people of “Jewish blood” even if they had converted to Christianity. ROTH, supra note 38, at 223.

134 See DINNERSTEIN, supra note 38, at 22, 59, 65, 164, 178, 236 (providing examples from various periods in American history).

135 Id. at 22.

136 See id. at 236 (noting common use of this stereotype in the 1980s); Horsburgh, supra note 31, at 190-91 (arguing that the Princess myth incorporates some of the degrading stereotypes traditionally ascribed to Jewish people).


138 See Mideast Peace Must Survive, DAILY NEWS, Nov. 6, 1995, at 34 (referring to New York as “the largest Jewish city the world has ever seen”).

139 For example, one Jewish woman who moved to Ohio from Chicago in the 1950s reported that her neighbors were convinced she must be from New York. DINNERSTEIN, supra note 38, at 164-65.

140 WHITFIELD, supra note 34, at 13 (quoting THE ESSENTIAL LENNY BRUCE 56 (John Cohen ed., 1975)). See also Calev Ben-David, Our Bill, JERUSALEM POST, July 4, 1997 at 4 (citing Bruce’s joke with approval).

141 See discussion of names infra notes 138, 159-162 and accompanying text.

142 Jantz v. Muci, 976 F.2d 623 (10th Cir. 1992).


144 See Schwartz, supra note 6, at A25 (noting that non-stereotypical people who come out receive “heavy societal penalties”).


146 See Fajer, supra note 36, at 542-43 (providing examples of this stereotype).

147 Desecration of Jewish cemeteries and synagogues is unfortunately commonplace. See, e.g., Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616 (1987) (involving a synagogue sprayed with anti-Semitic symbols and slogans in red and black paint); Jewish Vets Building Defaced, MIAMI HERALD, July 6, 2000, at 2B (describing incident where vandals “scrawled black swastikas” on a Jewish veterans building). Violence also often targets places where les/bi/gay people assemble. See Fajer, supra note 36, at 574-75 (noting frequency of violent acts targeted at and around gay bars).

148 See Boy Scouts of America v. Dale, 120 U.S. 2446 (2000) (upholding the Boy Scouts’ refusal to allow respondent to serve as a counselor after he publicly discussed being a gay activist); Fajer, supra note 36, at 571-91 (noting examples of silencing in various forms); Halley, Politics, supra note 65, at 957-58 (describing former CIA policy toward les/bi/gay employees).

Enforced closeting has also shown in the courts in family law decisions. See, e.g., In re J.S. & C., 362 A.2d 54 (N.J. App. Div. 1976) (affirming limitation of gay father’s visitation with rules including forbidding the presence of his lover and “not involv[ing] the children in any homosexual related activities or publicity”). Even where the gay parent does not lose the case, the decision may be contingent on demonstrating that the parent remains in the closet. For example, one court found it important that one lesbian mother “never displayed any sexual behavior in the presence of her children, and that she refrains from any demonstration of affection toward other women when the girls are present. Moreover, she is not a member of any homosexual organization.” M.P. v. S.P., 404 A.2d 1256, 1259 (N.J. Super. Ct. 1979).

Other recent examples include two women being ejected from a professional baseball game for sharing a kiss after “someone complained and said children should not be exposed to ‘those people.’” DODGERS APOLOGIZE FOR EJECTING LESBIAN COUPLE, MIAMI HERALD, Aug. 24, 2000, at 5D. At the Republican National Convention, the only openly gay
Republican Congressman was invited to speak on free trade, but only after agreeing not to discuss gay issues. Steve Rothaus, *Despite GOP Effort, Gay Politics Evident at Republican Convention*, MIAMI HERALD, Aug. 15, 2000, at 1E. Meanwhile, Lynne Cheney, wife of Vice-Presidential nominee Dick Cheney, castigated an interviewer about bringing up her daughter Mary’s sexual orientation even though Mary has self-identified publicly as a lesbian for years. *Id.* at 2E.

137 See Fajer, *supra* note 36, at 587-91 (describing public concern with “flaunting” of homosexuality).

138 Some Jews worry that “every new Jewish-sounding surname in the headlines only stokes the widely held conspiracy theories that the world is run by Jews.” Goodstein, *supra* note 31 at 4.


140 De Vise & Varsallone, *supra* note 133, at 2A.

141 Most recently, the Lieberman announcement was met with an outpouring of anti-Semitic slurs on the Internet. Clyde Haberman, *Sense of Pride Among Jews Is Tempered with Concern*, N.Y. TIMES, Aug. 8, 2000, at A23. This can be viewed as a response to the senator’s very public self-identification as Jewish, and certainly might discourage other Jewish people from doing the same.

142 De Vise & Varsallone, *supra* note 133, at 2A.

143 See Richards, *supra* note 6, at 120, 123 (noting similarities between anti-gay and anti-Semitic conspiracy theories).

144 Schacter, *supra* note 10, at 313.

145 See *supra* notes 38-40 and accompanying text.

146 For examples from several different periods in American history, see Dinnerstein, *supra* note 38, at 46, 49-50, 62-63, 80-83, 103, 163-64; Waxman, *supra* note 39, at 75. For current examples, see Dershowitz, *Vanishing*, *supra* note 31, at 99-103, 105-06; see also Goodstein, *supra* note 31, at 1.

147 Dinnerstein, *supra* note 38, at 233.


151 Herman, *supra* note 22, at 125-27; see Boot, *supra* note 16, at 6A (noting that claims of homosexuals earning higher income than the national average is “a throwback to the ‘rich Jew’ theories of the Nazis and other hate groups”).

152 E.g., Boot, *supra* note 16 (citing statistics showing homosexuals’ average household income as more than $20,000 above the national average); Thomas, *supra* note 16 (citing a 1988 study done for the National Gay Newspaper Guild). The results of the above surveys need be qualified by acknowledging that most of this data was compiled by surveying subscribers of high-circulation gay publications, Thomas, *supra* note 16 (explaining that 1988 study surveyed economic status of readers of 10 largest gay publications); Herman, *supra* note 22, at 117 (same), a group one would expect to be wealthier, as a whole, than other persons who self identify as les/bi/gay. Herman, *supra* note 22, at 117. Moreover, since surveys sponsored by publishers are often conducted with the purpose of luring advertisers, see Thomas, *supra* note 16, one might expect them to try to display the wealth of les/bi/gay people in the best light.

The problems with the survey data are symptomatic of a larger problem, which is that any statistical information on “homosexuals” depends on self-identification. See Laumann *et al.*, *supra* note 67, at 284 (noting that participants in study of sexuality “are likely to have been reluctant to report behaviors and feelings that they think might reflect badly on them”); Schacter, *supra* note 10, at 299 (“[T]he closet makes demographic assessment of gay men and lesbians notoriously difficult . . . ”). There is no reason to believe that the same proportion of people in every demographic group would tend to self-identify. Indeed, you might guess that people who are more economically secure would be most likely to do so, tending to present the bias toward higher income respondents that has in fact appeared. See Boot, *supra* note 16 (quoting gay activist making this point).

153 See 517 U.S. 620, 652 (1996) (Scalia, J. dissenting) (“It is . . . preposterous to call ‘politically unpopular’ a group which . . . though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.”).

154 See Roth, *supra* note 38, at 147 (describing Jewish people hiding their religious affiliation in seventh-century Spain); *id.* at
This section largely deals with the difficulties of trying to hide identity. However, the process of revealing a non-obvious identity is also stressful. The shared experience of overcoming internal barriers to "coming out," particularly to one's biological family, has been an important element in creating community among lesbian/gay people. For some humorous accounts and advice that illustrate the coming out experience, see DiLallo & Krumholtz, supra note 106, at 50-53; Karvoski, supra note 68, at 48-49, 72, 107, 116, 129, 141, 180-81, 186; Tracey & Pokorny, supra note 103, at 19-27.

See Vital, supra note 38, at 164.

DiLallo & Krumholtz, supra note 106, at 215.

For example, Jewish Singer Eddie Cantor chose not to record the song "Be Mi Bistu Shein" that the Andrews Sisters made a hit because it was "too Jewish." Whitfield, supra note 34, at 1-2. The Jewish publishers of the New York Times, not wishing it to be seen as under "Jewish influence," opposed the appointment of Louis Brandeis to the Supreme Court, relegated stories of the Holocaust to the back pages, and shrank from identifying death camp victims as Jews. Ron Chernow, Book Review, Who's in Charge Here, N.Y. Times, Sept. 26, 1999, (Magazine), at 116.

See Richard Cohen, It's Wrong to Ask Gays to Hide Their Identity, Miami Herald, June 25, 1993, at 15A (describing decision of his Jewish mother to work under the name Patricia Tyson to hold a job during the Depression).

This was true of first names as well as surnames. The names of the early Twentieth Century immigrant generation, Irving, Seymour, Milton, Morris, Stanley, themselves British surnames that represented a break from Eastern Europe, gave way to ever more Americanized names with each passing generation. Cf. Dosick, supra note 33, at 290 ("[I]t is understandable that some parents want to reflect the society in which they live. They choose secular names that they feel will help their children fit comfortably into their everyday world.") A good example of this trend is found in the scene in Angels in America in which a Rabbi delivers the eulogy for an Eastern European immigrant:

We are here this morning to pay respects at the passing of Sarah Ironson, devoted wife of Benjamin Ironson, ... loving and caring mother of her sons Morris, Abraham and Samuel, and her daughters Esther and Rachel; beloved grandmother of Max, Mark, Louis, Lisa, Maria . . . uh . . . Lesley, Angela, Doris, Luke and Eric. Eric? This is a Jewish name?

Tony Kushner, Angels in America Part One: Millennium Approaches 9-10 (1993). It is clear that most modern American Jews no longer wear clothing of their ancestors' style. See, e.g., Vital supra note 38, at 164; cf. Dershowitz, Vanishing, supra note 31, at 190 (noting that Hasidic Jews do wear clothing similar to that of their Eastern European ancestors).

See Vital, supra note 38, at 164; cf. Dershowitz, Vanishing, supra note 31, at 190 (noting that Hasidic Jews do wear clothing similar to that of their Eastern European ancestors).


Fajer, supra note 36, at 592-95.

Id. at 594.

See Phyllis Burke, Family Values: Two Moms and Their Son 206-211 (1993) (describing the process of hiding their relationship: concealing their young son's doll and their incense sticks and pro-gay bumper stickers in anticipation of the home visit of the social worker who would recommend whether to permit a second-mother adoption). DiLallo & Krumholtz, supra note 106, at 115-16 (giving tips on how to "straighten" your living space); see generally Kath Weston, Families We Choose: Lesbians, Gays, Kinship 43-67 (1991) (describing various approaches to and strategies for hiding from or coming out to different family members).
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Sandler’s popular song listing current celebrities who are children have only too few books of stories which serve both to reveal the possibilities to which Jews may aspire Jewish. supra people who were Jewish, to claim everybody”). (1997) (Jewish character describes his family as “always trying

MARC

Jewish characters demonstrate hostility toward Eastern West Bank were (describing claims of American Jews that Israeli actions on the Orthodox Jews in a primarily Jewish suburb).

note

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Balka & Rose, supra note 106, at 70-76. One colleague even has a coffee cup emblazoned with such a list. One purpose of such lists is “to gain legitimacy for a hated minority by pointing out that some of society’s accepted heroes belong to that minority . . . .” Rogow, supra note 36, at 76-77.

Fajar, supra note 36, at 596-98, 600-602 (cataloguing harms to mental health and to the development of positive gay self-identity caused by closeting); Schacter, supra note 10, at 299 (“[T]he closet exacts a high price in self-esteem [and] emotional health . . . .”).

Fajar, supra note 36, at 598-99 (explaining ways in which closeting can interfere with relations between les/bi/gay people); Schacter, supra note 10, at 299 (arguing that secrecy imposes isolation from the support of a larger community); see also Balka & Rose, supra note 6, at 4 (“[V]isibility is our key to finding each other.”).

ABRAMS, supra note 56, at 167; see also Freedman, supra note 57 (describing tension between Orthodox and non-Orthodox Jews in a primarily Jewish suburb).

See, e.g., ALAN M. DERSHOWITZ, CHUTZPAH 234-35 (1991) (describing claims of American Jews that Israeli actions on the West Bank were “embarrassing them as Jews”).

UHRY, supra note 167.

See WAXMAN, supra note 39, at 5-6.

See UHRY, supra note 167, at 54-55, 57, 87-88 (southern Jewish characters demonstrate hostility toward Eastern European Jewish character); see generally WAXMAN, supra note 39, at 38-47 (noting tensions between the two groups).

See DINNERSTEIN, supra note 38, at 184-85 (describing attempts of southern Jewish communities to conform to standards of their Christian neighbors); see id. at 195 (quoting scholar Carolyn Lipsom-Walker’s claim that before the 1970s southern Jewish people “did nothing that would mark them as significantly different” from the non-Jewish population).

See id. at 181 (describing one such congregation in Atlanta).

See UHRY, supra note 167, at 5-7, 50 (characters discuss Christmas tree put up by southern Jewish family).

DINNERSTEIN, supra note 38, at 180.

Id.

Id.

Id. at 185.

Id. at 189-91.

Gross, supra note 139.

E.g., BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 158-59 (1993) (“If Jerry Falwell or Pat Robertson had wanted to orchestrate an annual spectacle designed to increase hostility towards gays . . . they could hardly have done a better job than [the New York Gay Pride Day march].”); MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE ’90s 305-08, 360 (1989) (arguing that gay political success requires eliminating public displays of sexuality and cross-gender behavior).

E.g., Bruce Bawer, Notes on Stonewall, in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 4, 6-8 (Bruce Bawer, ed. 1996) (arguing that the linking of the gay rights cause to “any left-wing cause” has been a “disaster” for the gay rights movement).

E.g., Bawer, supra note 184, at 19, 221-22 (discussing the “image problems created by the irresponsible antics” of some gays); KIRK & MADSEN, supra note 184, at 373 (“For twenty immature years, the gay community has shrieked for rights while displaying an alarming degree of irresponsibility. If gays expect straights ever to accord them their rights, this is one of the things that must change.”).

The Politics of Safety clearly exists in other less privileged communities that do not face closeting issues. Yet my instinct is that, like conspiracy theorizing and perhaps in response to it, the Politics of Safety plays a more significant role when many members of the group are not identifiable by the public at large.
Traditionally, observant Jewish men wear beards and long sidelocks, keep their heads covered at all times and wear prayer shawls under their garments with fringe sticking out. See ABRAMS, supra note 56, at 167. Rituals associated with certain festivals also are at least semi-public: Chanukah candles are supposed to be displayed in a window, DIAMANT & COOPER, supra note 35, at 202; KERTZER, supra note 35, at 224; and the Sukkah for Sukkot is built outdoors, DIAMANT & COOPER, supra note 35, at 193-94; KERTZER, supra note 35, at 219-20.

ABRAMS, supra note 56, at 26-29, 33-34 ("Most American Jewish leaders came to believe that security in America would be found by insisting that this country was meant to be secular. . . .").

Id. at 22-23, 37.

This may explain the discomfort felt by some Jewish people at Joseph Lieberman's public religiosity. See Margolick, supra note 33, at A27.

See Haberman, supra note 141 at A21 (quoting one Hasidic Jew as saying "[w]hen Jews are too visible, it's bad news"). This feeling may explain the behavior of the members of the Marietta Jewish community described in the text supra accompanying note 183.

DINNERSTEIN, supra note 38, at 242.

E.g., Margolick, supra note 33, at A27 ("Jews are about to learn just how high America's beautiful and spacious skies really reach.").

E.g., Goodstein, supra note 31 at 1 (reporting this response among some Jewish people); Haberman, supra note 141 at A21 (reporting that some Jews feared the appointment would "set off an anti-Semitic backlash").

E.g., Goodstein, supra note 31 at 1 (reporting this response among some Jewish people).

See, e.g., Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed, 70 Va. L. Rev. 879 (1984) (arguing that the law should cease to privilege the nuclear family structure by treating parental relationships as exclusive and should instead recognize a variety of other de facto parent-child relationships as creating non-exclusive legal rights); Martha Albertson Fineman, Cracking The Foundational Myths: Independence, Autonomy, and Self-Sufficiency 8 Am. U. J. GENDER, SOC. POL'Y & L. 13 (1999) (considering mechanisms other than the traditional family unit for providing economic and social support for caregivers); 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 (1990) (proposing recognition of existing adult-child 'parental' bonds regardless of the existence of the criteria traditionally imposed and recognized by law).


E.g., KIRK & MADSEN, supra note 184, at 308-12 (condemning public sexual acts by gay men in part because of the assumption that all public sex is inappropriate).


See supra text accompanying note 43.

See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the decision to bear a child is a fundamental right); 42 U.S.C. § 3602 (k) (2000), § 3604(a) (2000) (forbidding discrimination in housing on basis of "familial status" defined to include having or living with children); Wisc. STAT. § 106.04 (1m), (h), (k) (1999) (same).


Certain kinds of discrimination based on religion are prohibited by the Free Exercise Clause. U.S. CONST. amend. I. For statutory protections, see supra note 32.

RICHARDS, supra note 6, at 93 ("The constitutional protection of religion never turned on its putative immutable and salient character (people can and do convert, and can and do conceal religious convictions").

Yeskel, supra note 29 at 46.
MARC A. FAJER

207 Schacter, supra note 10, at 308.

208 See Davis, supra note 79, at 15 (telling story of Luis de Torres, a secret Jew who sailed with Columbus to the New World and later settled in Cuba); see generally Waxman, supra note 39, at 3 (describing influx of Jewish people to the Western Hemisphere after expulsion from Spain).

209 See Waxman, supra note 39, at 124 ("During the years 1937-48, an estimated two hundred thousand to one-quarter million Jewish refugees from Eastern Europe arrived in the United States . . . .").

210 See Waxman, supra note 39, at 190-97 (describing immigrants from the Soviet Union); Abrams, supra note 56, at 162 (noting that the only large number of Jewish immigrants to the United States in the 1990s were from the former Soviet Union).

211 "Marranos" were Jewish people in Spain who practiced the religion in secret after being forced to convert outwardly to Christianity to avoid persecution or exile. See Roth, supra note 38, at 222-23; Waxman, supra note 39, at 3. "'Marrano' is a pejorative name meaning 'swine,' given to secret Jews by suspicious Christians during the Spanish Inquisition." Trudi Alexy, The Mezuzah in the Madonna's Foot: Marranos and Other Secret Jews 9 (1993). Following Alexy, I use the term "because it is a historical term with which most people are familiar and because it symbolizes the demeaned status and fear suffered by Jews who were forced to convert during that terrible time." Id.

212 See Balka & Rose, supra note 6, at 7 ("Lesbian and gay Jews do not wish to live as the secret Jews of Spain.").