

# Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts.

Todd Brower\*

## I. Introduction



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\* . A.B. 1976 Princeton University; J.D. 1980 Stanford University Law School; LL.M. 1990 Yale University School of Law. Professor of Law, Western State University College of Law, Fullerton, California. Director of Judicial Education, The Williams Institute, UCLA School of Law, Los Angeles, CA, Visiting Academic Researcher 2001-02, Institute of Advanced Legal Studies, University of London (UK). Member, California Judicial Council, Advisory Committee on Access and Fairness. Professor Brower is the author of the two UK Department for Constitutional Affairs studies and reports on *Sexual Orientation Fairness in the Courts of England and Wales* (2005 and 2003) and the co-author of the California Judicial Council report, *Sexual Orientation Fairness in the California Courts* (2001) discussed in the article. He expresses his gratitude to the United Kingdom Department for Constitutional Affairs, especially Chris Park and the members of the Rainbow Network, the California Judicial Council, Access and Fairness Advisory Committee, the Williams Institute, and to Steve MacIsaac, Aaron M. Brower, and Alan-Thomas Preston. © 2006 Todd Brower.

Look at this picture of a woman.<sup>1</sup> Is she old or young? The image contains both; what you see will depend on where you focus your attention. Now that you know there are two women in the picture, look again to see the other one. After you have found the second figure, you are unlikely to view the illustration as you did originally; your eye alternates between the two images. Once you have that information about the drawing, it is not possible to erase that knowledge from your mind; your perception is unalterably changed.

This inability to ignore information and its effect on subsequent experience has parallels in lesbians' and gay men's<sup>2</sup> treatment in the courts. Once sexual orientation becomes visible, it significantly affects the experiences of both lesbian and gay court users and court employees. Thus, the judicial system is sometimes hostile and sometimes more tolerant. Second, similar to the opening illusion in which the same drawing contains two complete images, the courts are multiple environments in which sexual minorities function. Courtrooms, clerks' offices, judicial chambers, common areas are not only

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<sup>1</sup> . British cartoonist, W.E. Hill, created this version of a famous multistable figure. W. E Hill, "My Wife and My Mother-in-Law." *Puck* 16, (Nov. 11, 1915); see, Eric W. Weisstein, "Young Girl-Old Woman Illusion." From *MathWorld*--A Wolfram Web Resource. <http://mathworld.wolfram.com/YoungGirl-OldWomanIllusion.html> (last reviewed 7/9/2006). The old woman is looking to the left. Her mouth is the young woman's necklace; her eye is the young woman's ear. The young woman is facing away from you to the left. Her nose seems to be a wart on the old woman's nose or part of her eye. In a multistable figure the brain adopts first one image, then another, competing image; they alternately supplant each other. Thomas V. Papathomas, *The Brain as a Hypothesis-constructing-and-testing Agent*, 235, in *What is Cognitive Science?*, (Ernest Lepore & Zenon Pylyshyn Eds) (Malden, MA: Blackwell Pub. Inc., 1<sup>st</sup> Ed. 1999).

<sup>2</sup> . I use "lesbians and gay men" to refer to women and men whose sexual orientation is same-sex and "gay" or sexual minorities when referring to same-sex persons generally – illustrating that gender often, but not exclusively, mediates the experience of same-sex orientation. Todd Brower, "A Stranger to Its Laws:" *Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy*, 38 Santa Clara L. Rev. 65, 65 n.2 (1997). Accord, Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians And Gay Men*, 46 U. Miami L. Rev. 511, 535-36 (1992). Race also influences sexual orientation identity. See, e.g., Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 Conn. L. Rev. 561 (1997). Additionally, "LGBT" is a shorter version of the more proper descriptor "lesbian, gay, bisexual and transgendered." For more on "gay", see Alison Bechdel, *Dykes to Watch Out For #368* (2001), <http://icq.planetout.com/entertainment/comics/dtwof/archive/368.html> (last reviewed July 19, 2006)

legal institutions, but also private and public workplaces. We may perceive the courts in more than one way at the same time. Third, just as two individuals can look at an identical multistable figure but see divergent images, two persons can experience identical events in court in radically different ways based on the individual's sexual orientation. Indeed, the disparate perceptions of the judicial system can sometimes be quite striking. This combination of diverse environments, different perceptions, and varying degrees of sexual orientation disclosure complicates analysis of sexual minorities' experiences with the judicial system.<sup>3</sup>

The more LGBT rights issues are debated in society, the more the significance of this empirical analysis increases. One problem for sexual minorities is that judges<sup>4</sup> and legislators<sup>5</sup> often lack concrete, factual information on the personal experiences and

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<sup>3</sup>. See, e.g., M.V. Lee Badgett, *Employment and Sexual Orientation: Disclosure and Discrimination in the Workplace*, in Allen L. Ellis and Ellen D.B. Riggle, *SEXUAL IDENTITY ON THE JOB: ISSUES AND SERVICES*, 22-59, at 37-38 (Hayworth Press 1996).

<sup>4</sup>. See, e.g., Marriage: Hernandez v. Robles, 2006 N.Y. LEXIS 1836; 2006 NY Slip Op 5239, (July 6, 2006); Goodridge v Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003); Standhardt v Superior Court, 206 Ariz. 276, 77 P.d 451 (Ariz Ct App 2004); Morrison v Sadler, 821 N.E.2d 15 (Ind 2005); Baehr v Lewin, 74 Haw. 530, 852 P.2d 44 (1993); Baker v State, 170 Vt. 194, 744 A.2d 864 (1999); Adoption: Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275 (11<sup>th</sup> Cir. 2004), cert. denied (2005); Dep't of Hum. Servs. v. Howard, (Arkansas Supreme Court) available at <http://courts.state.ar.us/opinions/2006a/20060629/05-814.pdf>; Rumsfeld v. Forum for Academic and Institutional Rts, 126 S. Ct. 1297, (2006); Lawrence v. Texas, 539 U.S. 558 (2003), Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

<sup>5</sup>. See, e.g., Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996), E.J. Graff *Doubt Less* THE NEW REPUBLIC, at 9 (October 3, 2005)(discussing the California legislature's passage of same-sex marriage and Governor Schwarzenegger's veto); Cal. Fam. Code, secs. 300-301, 308.5 (West 2006); Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D.Neb. 2005) (discussing Neb. Const. art. I, § 29); UK civil union; Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) (effective 1 December 2003 in England, Scotland and Wales); Employment Equality (Sexual Orientation) Regulations 2003 (SN 2003/947) (effective 2 December 2003, Northern Ireland); Margaret Krome, *Gay Marriage Proposals Carry The Message Of Hate*, p. A10, THE CAPITAL TIMES (MADISON, WISCONSIN)( June 7, 2006); Cheryl Wetzstein, *Governor pushes law for foster parents; Arkansas ruling leaves door open to restrictions on gay households*, p. A02 THE WASHINGTON TIMES (DC), (July 2, 2006)(discussing legislative proposal to ban same-sex adoptions in Arkansas), Richard Fausset, *The Nation; Binational Gay Couples in Immigration Bind; Advocates say same-sex partners facing being separated should have same rights as spouses*. Part A, p.5, LOS ANGELES TIMES (June 10, 2006) (discussing the Uniting American Families Act).

treatment of gay people. Without knowing what the particular problems are, it is difficult to craft effective or appropriate solutions. Moreover, courts and tribunals will eventually interpret most of those issues and laws. Nevertheless, the judiciary barely knows how it treats its own workers or those members of the public who use the courts. Little empirical evidence exists on the day to day experiences of LGBT individuals in the legal system.

This article begins to fill this gap. It examines the results of all the studies of LGBT persons' experiences with the judicial system and analyses common patterns among the research.<sup>6</sup> After examining the various survey designs and respondents' demographic characteristics, the article explores how visibility of minority sexual orientation affects the perceptions, personal experiences and treatment of court users and employees. The article also references behavioral and economic research on LGBT persons at work and in other settings to show the similarities and differences between gay persons' interactions with judicial systems and with other social institutions.

## **II. Visibility and Invisibility – Disclosure and Hiding**

Most lesbians or gay men are not visibly identifiable.<sup>7</sup> Accordingly, the revelation of minority sexual identity usually occurs through speech or communicative

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<sup>6</sup> . This article is descriptive and not prescriptive; it reviews the court experiences of LGBT persons but does not always provide legal or political consequences or reforms required by that treatment.

<sup>7</sup> . Contrary to many people's beliefs, non-gay persons often cannot identify lesbians or gay men who do not disclose their sexual orientation. WARREN J. BLUMENFELD & DIANE RAYMOND, *LOOKING AT GAY AND LESBIAN LIFE* 86 (1993); Badgett, *Employment and Sexual Orientation*, at 34-35. However, one study suggested that "gaydar", the supposed ability of gay people to recognize other sexual orientation minorities, may have some factual basis. See e.g., Willow Lawson, *Queer Eyes: Blips on the Gaydar*, *PSYCHOLOGY TODAY*, (Nov/Dec. 2005) (reporting on the senior thesis of Harvard undergraduate, William Lee Adams), <http://www.psychologytoday.com/articles/pto-20051018-000007.html> (last viewed 6/23/2006).

conduct<sup>8</sup> in order to affirmatively break the assumption of heterosexuality that silence often brings.<sup>9</sup> This assumption allows some gay people to hide their identity and avoid the negative consequences of being open.<sup>10</sup> Nevertheless, hiding is not a solution to anti-gay discrimination; forced invisibility is a form of anti-gay inequality.<sup>11</sup> A lesbian or gay attorney surveyed in Los Angeles disclosed: “I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say “we” and risk someone asking who “we” is. . . . [I]f someone asks, “What happened this weekend?” and I slip and [say] “we” instead of “I,” then I go through a kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance.”<sup>12</sup>

In addition, silence about one’s self-identity reinforces lesbian and gay marginalization because it requires gay people to deny an essential difference between

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<sup>8</sup> . Eskridge, 106 Yale L.J. at 2442. Sexual orientation is complex and may be measured by identity or behavior; in the workplace, identity is often the salient characteristic. Badgett, *Employment and Sexual Orientation*, at 35.

<sup>9</sup> . Adrienne Rich calls this assumption and its consequences, “compulsory heterosexuality.” ADRIENNE RICH, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow, et al, eds. 1983).

<sup>10</sup> . See e.g., “I did not tell the truth about having a partner because I was not comfortable being ‘out’ in that setting. I pretended I was single – then ‘passed’ for heterosexual.” Dominic J. Brewer and Maryann Jacobi Gray, Survey Data, *Preliminary report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation Fairness*, at 21. (Hereinafter Brewer & Gray, Survey Data). *Accord, Los Angeles County Bar Association Committee on Sexual Orientation Bias, Report*, 27 (June 1994), [hereinafter “LA Bar Report”] (noting that “most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream.”).

<sup>11</sup> . Jane Schacter, *Romer v. Evans and Democracy’s Domain*, 50 Vand. L. Rev. 361, 371 (1997).

<sup>12</sup> . Response from gay or lesbian attorney surveyed, LA Bar Report, 28 n.181. To see how difficult hiding one’s sexual orientation identity is, try the thought experiment in Brower, 38 Santa Clara L. Rev. at 65 n. 1. See also, e.g., “I joined the Rainbow Network on the pretext of being a “friend” whereas I am a full member but not ‘out’. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people’s reaction as if it is assumed I was totally straight & why was I joining supporting this bunch of ‘weirdos’” Open-ended comments, Q10. Brower, 2003 UK Report, note 47, at 59-60.

them and others.<sup>13</sup> They may not share in everyday social interactions at work or in other contexts because they must mask certain aspects of their lives.<sup>14</sup>

Thus, open self-identity is more significant for lesbians and gay men than it is for non-gay persons.<sup>15</sup> The non-gay person may not feel any pressure to voice her sexual orientation explicitly.<sup>16</sup> She may use any of the many ways in which this fact is normally

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<sup>13</sup>. See, e.g., respondent's comment at note 28, below. For a fuller discussion of consequences, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915 (1989); William Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2442-43 (1997).

<sup>14</sup>. See, e.g., LA Bar Report, note 48, at 31-34. "[At social events] gay and lesbian attorneys are most likely to feel and be perceived as 'different' – usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious . . . not fitting in." *Id.* at 33 (quoting response from a gay or lesbian attorney respondent). *Accord*, Janie Ho, *Attracting Gay MBAs*, BUSINESSWEEK ONLINE (Aug. 8, 2006)(quoting lesbian PricewaterhouseCoopers employees). Also, some lesbians or gay men do not fit neatly into the standard categories of married or single, an often important distinction for courts and other government agencies or benefits. For further discussion of the interaction of visibility and LGBT persons' ability to be integrated into society and social organizations, see Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 San Diego L. Rev. 565 (2001).

<sup>15</sup>. William Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. at 2442.

<sup>16</sup>. We almost never think about the myriad ways in which non-gay people are open about their sexual orientation. Indeed, the strangeness of the expression "openly non-gay" to describe heterosexuals' sexual orientation identity illustrates how little we consider the public nature of heterosexuality.

When a heterosexual couple kisses in public, it is not viewed as a statement about sexual orientation. Conversely, when gay people engage in those same activities, it is often perceived as flaunting their sexuality. *E.g.*, *Singer v. United States Civ. Serv. Comm'n*, 530 F.2d 247, 249 (9<sup>th</sup> Cir. 1976). *Accord*, Open-ended Comment Q17. Brower, 2003 UK Report, note 47, at 37 ("Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited)."). The 'fear of flaunting' has often justified negative employment or other consequences for LGBT individuals. See *e.g.*, *Singer*, 530 F.2d at 249; *Shahar v. Bowers*, 114 F.3d 1097 (11<sup>th</sup> Cir. 1997)(en banc). See also, LA Bar Report, *above*, note 48, at 5-40 (describing the consequences of being an openly lesbian or gay attorney in Los Angeles County). *Accord*, Jacquie McNish, *Can Lawyers Be Too Gay?*, Globe and Mail (Toronto) (June 14, 2006) <http://www.globeinvestor.com/servlet/story/RTGAM.20060614.wxlawcolumn14/GIStory/> (last reviewed June 27, 2006) (describing the criticism of an openly gay male Vancouver attorney in a "gay-friendly" workplace for being too open and his subsequent resignation.).

In the United States, using affirmative communication to self-identify as LGBT has meant that courts have often viewed lesbian or gay identity under the First Amendment to the United States Constitution. See Brower, *Of Courts and Closets*, 38 San Diego L. Rev. 565. For a discussion of how same-sex marriage prohibitions erase gay and lesbian identity, see Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. Pa. L. Rev. 2215, 2245-2249 (2005).

communicated, by displaying pictures of a spouse or children at work,<sup>17</sup> by using the pronoun “we” to describe daily activities,<sup>18</sup> or simply by allowing people to presume that she is heterosexual.

These decisions are intuitive or unconscious for heterosexuals; gay persons must deliberately decide what to say or do, how much to disclose or allow to remain unspoken.<sup>19</sup> Consequently, the metaphor ‘coming out of the closet’ is misleading. We literally exit a closet into a room all at once. We are either in one place or another, in a closet or out. Unlike that literal decision to leave a closet and the binary options it implies, publicly acknowledging one’s identity as lesbian or gay is a continuing set of choices for LGBT persons that must be calibrated according to the setting, comfort level,

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<sup>17</sup> . The LA Bar Report found that nearly one half of all respondents, regardless of sexual orientation and sex, believed that simply discussing one’s personal or family life in a manner that revealed the sex of one’s partner – a matter of no consequence for non-gay attorneys – would harm a gay or lesbian attorney’s career. LA Bar Report, *above*, n. 48, at 31.

<sup>18</sup> . See note 12, *above*. See also, John Biewen, Robert Siegel, *Gay Teacher Files First Amendment Lawsuit in Utah*, ALL THINGS CONSIDERED (NPR) (21 Oct., 1997)(discussing lesbian coach and teacher threatened by school district with termination from tenured position if she talked about her sexual orientation or life with students, staff, parents.) (“BEIWEN: Weaver says in Spanish Fork, a town of 12,000, the order meant she couldn’t have ordinary conversation with most people I or out of school. WEAVER: If I was in a classroom and said something about, oh, Rachel and I went somewhere for the weekend, and – that that could be in violation. I went in and asked them actually that if I was at the ball park, and was talking to somebody, and I didn’t know whether they had a student in the school or not, if that could be part of what this memo was saying, and they said yes.”)

<sup>19</sup> . See, e.g., Dave Cullen, *A heartbreaking decision*, SALON.COM (7 June, 2000), available online at [www.salonmagazine.com/news/feature/2000/06/07/relationships/print.html](http://www.salonmagazine.com/news/feature/2000/06/07/relationships/print.html) (describing a Marine captain who originally created a separate gay life in Denver, Colorado, USA, 70 miles away from the ‘gay-free zone’ of Colorado Springs where he was stationed). (“He loosened those ties [with non-gay friends] by convincing his work friends that he found Colorado Springs stifling, and shifted all his free time to Denver, routinely spending three to five nights a week up there. But the constant questions of his juggling strategy still dog him -- “What you been up to? What did you do this weekend?” -- requiring an elaborate fictional life. “I have to be careful,” Alex says. “I have to be guarded when I come back from a weekend and start talking about where I’ve been or what I’ve done.” He has spent enough time in Denver’s straight clubs to swap them with the gay bars; dates and tricks are converted to feminine counterparts. “I try to keep it as close to the truth as possible, because if I have to retell the story, I’m not going to stumble over things,” he says. “If some guy has a broad chest, she’s got a rack. A guy named Clay becomes Claire. Everything else pretty much stays the same.”); LA Report, *above*, note 12, at 28 n.181. For academic insights on negotiating these boundaries, see Erving Goffman, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 15 (1959); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. Rev. 263, 287 (1995).

and assessment of the consequences.<sup>20</sup> Disclosure is often made first to trusted individuals and in a safe environment.<sup>21</sup> Thus, one can be open about sexual orientation to friends or family, but not at work,<sup>22</sup> or open to other lesbians or gay men, but not to non-gay people.<sup>23</sup> Alternatively, one may answer a direct question about sexual orientation, but not volunteer information.<sup>24</sup> Researchers must not only know if someone is open or closeted, but to whom and in what context.

Visibility is important to integration into the courts and other societal institutions, into the workplace, and to self-worth generally. It forms an additional dimension in the study of LGBT court experiences that is typically irrelevant to the treatment of other diverse populations like race or gender.<sup>25</sup> However, while it is particularly significant for

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<sup>20</sup> . E.g., Belle Rose Ragins & John M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees*, 86 J. of Applied Psych. 1244, 1256 (2000). (citing studies). See also, Badgett, *Empl. & Sex. Orientation*, at 50 n.5 (stating that disclosure is not a binary model and showing different types); Kenji Yoshino, *COVERING* (2006).

There are different tradeoffs for disclosure in various environments. M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 Indus. & Lab. Rel. Rev. 726, 727 (1995); See examples of workplace tradeoffs in James D. Woods: *The Corporate Closet: The Professional Lives of Gay Men in America*, at 216-222 (New York 1993). For more literary examples of coming out stories and the individual choices that those gay persons made, see *Boys Like Us: Gay Writers Tell Their "Coming Out" Stories*, (Patrick Merla, ed, 1996).

<sup>21</sup> . See, e.g., Ragins, *Heterosexism*, 28 Group & Org. Mgt. at 46, citing Badgett, *Empl. & Sex. Orientation*: A. Friskopp & S. Silverstein, *STRAIGHT JOBS, GAY LIVES: GAY AND LESBIAN PROFESSIONALS, THE HARVARD BUSINESS, AND THE AMERICAN WORKPLACE* (New York, Simon & Shuster 1996).

<sup>22</sup> . See notes 19, 61. *Accord*, note 142 and accompanying text (percentage of respondents open to friends or family compared to open in court.).

<sup>23</sup> . Cf., William Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2439 (1997). (stating that by 1960, some lesbians or gay men equated coming out with talking to non-gays about one's sexual orientation), 2440 (coming out means talking to people who do not share one's sexual orientation, not just those who do).

<sup>24</sup> . E.g., *Debate Over Grade School Teacher Divulging He's Gay*, S.F. Examiner, A-3 (June 11, 2000).

<sup>25</sup> . See generally, Todd Brower, *Report on the Possible Comparisons between the Rainbow Network Survey (2003) and the PROUD Network Survey (2003)*. Report generated for Chris Park, Rainbow Network Co-ordinator and Rob Neil, PROUD Network Co-ordinator. (discussing the two reports)(on file with author)..See also, note 41, *infra*.

LGBT persons, it is not exclusive to them. Adherents to non-minority religions and persons with invisible disabilities may also share these concerns.<sup>26</sup>

As the court experiences of lesbians and gay men demonstrate, visibility is a key to understanding the survey data. Some respondents took little ameliorative action when faced with discrimination because they feared being forced to disclose their sexuality.<sup>27</sup> Remaining silent caused other lesbians and gay men to feel that they deceived others in court and elsewhere.<sup>28</sup> Others were counseled to obscure their sexual orientation or criticized for disclosure.<sup>29</sup> Indeed, some sexual minorities may have wished to be open, but others in the courts forced them to stifle their non-majority identity.<sup>30</sup>

This latter option, being nominally open as LGBT but minimizing the differences between minority and majority sexual orientation, is an alternative approach to passing as

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<sup>26</sup>. See, e.g., Simon Sebag-Montefiore, *Being a Jew is dangerous now*, THE EVENING STANDARD (LONDON), A, at 30 (25 June 2004)(describing being a Jew in Great Britain and other people's reactions to his Jewishness); Program on Employment and Disability, Cornell University, Workplace Accommodations for People Living with Multiple Sclerosis (2001), last viewed at [http://www.ilr.cornell.edu/extension/files/download/Multiple\\_Sclerosis.pdf](http://www.ilr.cornell.edu/extension/files/download/Multiple_Sclerosis.pdf). 6/23/2006 (describing the hidden disability of MS and workplace accommodations).

<sup>27</sup>. See, e.g., "I took relatively little action as I was worried & still am that people would guess / find out about my transsexuality as I am not out & may not be ready to be out at work for fear of widespread ridicule & prejudice. I saw & heard the reaction to someone who now presents as a woman in HQ." Open-Ended Comments, Q15. Brower, 2003 UK Report, note 47 at 39.

<sup>28</sup>. See, e.g., "The judge asked all prospective jurors to state marital status and what their spouse's occupation was. I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner's occupation even though legally my marital status is single. Stating 'single' would have felt like lying." Dominic J. Brewer and Maryann Jacobi Gray, *Report on Sexual Orientation Fairness in California Courts* (1999), at 33. [hereinafter Brewer & Gray, Report.].

<sup>29</sup>. New Jersey Report, at 44, 48 (questions 18-19). See also, Brower, 2003 UK Report, note 47, at 30, 41.7 percent of Rainbow Network members believed that it was unsafe, 26.1 percent that it was preferable to hide their orientation [See Tables 29b and 29k]; 57.9 percent of all California court employees believe it is better if gay men and lesbians are not open about their sexual orientation, and 29.5 percent believe that being openly gay is unsafe. Brewer & Gray Report, supra at note, Table 48, at 70, Brower, *Obstacle Courts*, at.

<sup>30</sup>. See, e.g., "Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited)." Open-Ended Comments Q17. Brower, 2003 UK Report, note 47 at 37.

heterosexual or being completely visible.<sup>31</sup> A lesbian employee may decide to not respond to anti-gay comments that negatively affect her<sup>32</sup> or may not publicly attend workplace social events with her same-sex partner.<sup>33</sup> By underplaying her sexual orientation, she may allow others to ignore that difference and be more comfortable with her in the workplace.<sup>34</sup> Significantly, visibility as a lesbian, gay man or bisexual depends on both the choices that gay people make and the understandings of their non-gay peers.<sup>35</sup>

Like the opening multistable figure, this lesbian employee's actions can be perceived in competing ways. Whether this strategy is viewed as passing as non-gay or minimizing her sexuality depends on her co-workers' knowledge. For people who know she is a lesbian, her inaction allows them to forget that fact; for those who are unaware, they may assume that she is heterosexual.<sup>36</sup> This alternative is particularly important for lesbian and gay male court employees whose minority sexuality may be known because

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<sup>31</sup> . See, e.g., Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 772-73 (2002); for covering in the non-sexuality context, see, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259 (1999). Much of the writings on this strategy stem from sociologist, Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 102-04 (1963).

<sup>32</sup> . See, e.g., Brower, 2005 UK Report, note, at 54-55 (“Did not want to approach person as I work opposite them and felt I could ignore it. The comment was about others not myself. Spoke to another member of staff, a friend, as I was upset but took no further action 'to keep the peace'.” “negative comments / jokes about gay/transsexual people in particular are common at work and you are a troublemaker if you don't keep your head down or join in with the 'joke' - or you are very 'p.c.' - and as a result not 'one of the group'”)

<sup>33</sup> . See, e.g., LA Bar Report, note 48, at 33 “[At social events] gay and lesbian attorneys are most likely to feel and be perceived as ‘different’ – usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious ... not fitting in.” (quoting response from a gay or lesbian attorney respondent). See also, e.g., Yoshino, 111 Yale L.J. at 772.

<sup>34</sup> . *Accord*, Jacquie McNish, *Can Lawyers Be Too Gay?*, GLOBE AND MAIL (TORONTO) (June 14, 2006) <http://www.globeinvestor.com/servlet/story/RTGAM.20060614.wxlawcolumn14/GIStory/> (last reviewed June 27, 2006) (describing the resignation of an openly gay male Vancouver attorney and the different gradations of openness for gay and lesbian lawyers). For a similar action with race, see Erin Aubry Kaplan, *The Roots of Racial Pride*, Part B, p. 13 LOS ANGELES TIMES, (July 12, 2006)(discussing the meaning of straight/good and kinky/bad hair for African-Americans).

<sup>35</sup> . See, Carbado, *Working Identity*, 85 Cornell L. Rev. at 1264n. 8.

<sup>36</sup> . Yoshino, 111 Yale L.J. at 772-773, citing Goffman, *STIGMA*, at 50-51.

of their extended contact with colleagues, but who may opt to make it salient or insignificant.<sup>37</sup>

Finally, the non-observability of sexual orientation may also affect heterosexuals' identity and their court experiences. Minority sexual orientation may provoke an associative stigma because sexual orientation is non-obvious; confusion or misattribution is possible with sexuality unlike with race or sex. Thus, heterosexuals may be reluctant to associate with gay people because they fear misattribution as a sexual minority.<sup>38</sup> For example, some court users or employees did not report negative treatment of others based on sexual orientation to avoid being perceived as gay or lesbian.<sup>39</sup> Even people assumed

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<sup>37</sup> . These strategies may not always be successful or under the employee's control. David B. Wilkins, *On Being Good and Black*, 112 Harv. L. Rev. 1924, 1956 (1999)(Reviewing Paul M. Barrett, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999))(stating that despite effort to downplay race, African-American attorney was always seen as a "Black lawyer."), *see also*, Brower, 38 San Diego L. Rev. at 627n. 142 citing Amy Harmon, *How Race Is Lived in America: A Limited Partnership*, N.Y. Times, June 14, 2000, at A1. (contrasting the experiences of Timothy Cobb, a black internet entrepreneur, with those of his former white partner, Jeff Levy. The article notes: "Told that a white executive at Mr. Levy's company had described him as a "black James Bond," Mr. Cobb knew it was meant as a nod to his fondness for gadgets and risk. But "why a "black' James Bond?" he had wanted to know, supplying his own answer: "Black is the identifier that goes before you, always. It raises the odds that you will get a real reminder that you are an outsider every time they meet you.").

<sup>38</sup> . Ragins, *Heterosexism*, 28 *Group & Org. Mgt.* at 49 (discussing 'courtesy stigmas' and citing Erving Goffman, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY*, (New York 1974); G.M. Herek & J.P. Capitanio, "*Some of my best friends*": *Intergroup contact, concealable stigma, and heterosexuals' attitudes toward gay men and lesbians*, 22 *Personality and Soc. Psych. Bull.* 412-424 (1996). *See also* , Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 *UMKC L. Rev.* 643, 658 (2005). (heterosexual man sexually harassed at work because he associated with gay men.); *Vickers v. Fairfield Medical Center*, 2006 U.S. App. Lexis 18060 (6th Cir., July 19, 2006). For other examples of negative association with an openly gay or lesbian person, *see, e.g.*, Lee Romney, *Teen's Attack Investigated*, L.A. TIMES, ORANGE COUNTY EDITION, June 13, 1996, at B1 (discussing the harassment of a heterosexual student athlete because the student's coach disclosed his sexuality). Some people take great pains to avoid even the implication of association with lesbians or gay men. *E.g.*, *Fear of Gay Symbol Changed School Logo*, S.F. EXAMINER, July 28, 2000, at A9 (noting that University of Hawaii changed seventy-seven-year-old rainbow symbol and team name, "Rainbow Warriors," to avoid gay implications and stigma). *See generally*, Noah Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *Ind. L.J.* 63, 102-05, 125-26 (2002).

<sup>39</sup> . *E.g.*, CA Report, note 44, at 37 (approximately 2 percent of court employees did not take action because they might be thought to be gay or lesbian); Brower, 2003 UK Report, note 47 at 39. (9.1 percent did not act out of concern that they would by thought to be gay or lesbian). This can be distinguished from lesbian or gay court users or court employees who do not intervene or complain after negative treatment due to fear of discovery. *See, e.g.*, NJ Report, note 45, at 48-49.

to be heterosexual may receive negative workplace attention based on association with gay people.<sup>40</sup>

All these issues complicate research on the treatment of lesbians and gay men. Observability of sexual orientation is tougher because openness and identity can change over time and with location and context. Therefore, traditional statistical sampling techniques, such as random sampling, are harder to achieve.<sup>41</sup> Moreover, as each of the empirical studies on lesbians and gay men's treatment and courts experiences demonstrates, visibility and openness affect those experiences in multiple ways. Accordingly, besides examining the different situations in which lesbians and gay men interact with the courts, it is important to measure, review and disaggregate data by degrees of visibility.<sup>42</sup>

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<sup>40</sup> . See, e.g., "I joined the Rainbow Network on the pretext of being a "friend" whereas I am a full member but not 'out'. I received widespread negative comments & ridicule from junior staff through to senior managers. I felt very uncomfortable & I was able to see people's reaction as if it is assumed I was totally straight & why was I joining supporting this bunch of 'weirdos'?" Open-ended comments, Q10. Brower, 2003 UK Report, note 47, at 59-60.

<sup>41</sup> . M.V. Lee Badgett, *Empl. & Sex. Orientation*, at 35. James M. Croteau, *Research on the Work Experiences of Lesbian, Gay and Bisexual People: An Integrative Review of Methodology and Findings*, 48 J. of Vocational Behavior 195, 201-03 (1996). Professor Badgett compares studying race and gender with sexual orientation. Badgett, *Employment and Sexual Orientation*, at 34-35. As she notes, "In a functional sense, the 'observability' of these characteristics refers to an observers ability to infer the characteristics of race, ethnicity, and gender and an individual's willingness to reveal those characteristics consistently." Badgett, *Employment and Sexual Orientation*, at 49n.3. See also, M. Omi and H. Winant, *RACIAL FORMATION IN THE UNITED STATES*, (Routledge, New York 1986) (arguing that observability of race is more doubtful than usually recognized). Nor is sex always immediately apparent. E.g., *Boys Don't Cry* (Twentieth Century Fox 1999); *The Crying Game* (Miramax Films 1992); *Gender-Bending Played to the Hilt: Joan Smith Tells the Strange Story of Jazz Pianist Billy Tipton*, Financial Times, Jan. 23-24, 1999, at 6 (discussing Billy Tipton's story); Kim A. Lawton, *Joan of Arc: An Unlikely Popular Icon Today*, Plain Dealer, May 15, 1999, available at 1999 WL 2363213 (telling the story of Joan of Arc); Deb Price, *Transgendered Have Lessons for Society*, Detroit News, June 26, 2000, at A9, available at 2000 WL 3482557 (telling the real-life story of Teena Brandon/Brandon Teena, on which *Boys Don't Cry* was based).

<sup>42</sup> . See generally, Belle Rose Ragins, John M. Cornwell, Janice S. Miller, *Heterosexism in the Workplace: Do Race and Gender Matter?*, 28 Group & Organization Mgt. 45, 55 (Sage Pub. 2003). Both UK studies and the California report specifically asked about openness in the courts. Unfortunately, the New Jersey Report did not report any data on that question. In one non-court employment study, data showed that race and gender were unrelated to sexual orientation bias and that lesbians and gay men disclosed at equal rates. However, gay employees of color were less likely to disclose at work. Ragins,

### III. The Empirical Studies

#### A. Survey Methodology and Demographics

There are only four empirical studies of LGBT individuals and the courts.<sup>43</sup> The first, *Sexual Orientation Fairness in the California Courts*, appeared in 2001 and found significant examples of unequal treatment of lesbians and gay men in the California state courts.<sup>44</sup> Contemporaneously, the New Jersey Supreme Court Task Force on Sexual Orientation Issues issued its *Final Report*<sup>45</sup> and recounted similar findings. In the United Kingdom, the Department for Constitutional Affairs<sup>46</sup> commissioned studies and reports in 2003 and 2005 on sexual orientation minorities in the English and Welsh courts.<sup>47</sup>

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*Heterosexism*, 28 Group & Org. Mgt. at 59-68. That same study also reported that seeing sexual orientation as a choice was a predictor of anti-gay attitudes. *Id.* at 49, citing G.M. Herek & J.P. Capitanio, *Black heterosexuals' attitudes toward lesbians and gay men in the United States*, 32 J. of Sex Research 95 (1995); *Accord*, Karen Kaplan, *Study Links Male Gays, Birth of Older Brothers*, Part A, p. 1, LOS ANGELES TIMES, (June 27, 2006). Ragins suggested that sexual orientation is viewed differently from race and gender because it is seen as a chosen "lifestyle." Ragins, *Heterosexism*, 28 Group & Org. Mgt. at 49.

<sup>43</sup>. In contrast, there are several studies on racial and ethnic minorities' perceptions of the courts, and gender fairness studies. *See, e.g.*, National Center for State Courts, Racial Fairness, Task Force, Commission, and Committee Reports, State Links <http://www.ncsconline.org/WC/Publications/StateLinks/RacFaiStateLinks.htm> (last reviewed June 26, 2006); National Center for State Courts, Gender Fairness, Task Force, Commission, and Committee Reports, State Links <http://www.ncsconline.org/WC/Publications/StateLinks/GenFaiTaskForceStateLinks.htm> (last reviewed June 26, 2006); David B. Rothman & Randall M. Hansom, *How Recent Court Users View the Courts: Perceptions of Whites, African-Americans, and Latinos*, National Institute of Justice (2001).

<sup>44</sup> Judicial Council of California, Access and Fairness Committee, *Sexual Orientation Fairness in the California Courts* (2003) (hereinafter "CA Report").

<sup>45</sup>. New Jersey Supreme Court, Task Force On Sexual Orientation Issues, *Final Report*, (January 2, 2001) (hereinafter "NJ Report").

<sup>46</sup>. The Department for Constitutional Affairs (DCA) is the current name for this body; during the 2003 survey it was called the Lord Chancellor's Department (LCD). Accordingly, the 2003 survey and respondents used the terms, Lord Chancellor's Department and LCD. For simplicity, the article uses the older, then proper, terms when speaking in historical terms about the body studied in the 2003 report and survey, and uses the DCA when speaking of the modern entity and the 2005 survey and report. The DCA encompasses the DCA Head Quarters and Associated Offices, the Court Services and the Public Guardianship Office. *See*, [www.dca.gov.uk/links/dca.htm](http://www.dca.gov.uk/links/dca.htm) (downloaded 21 April 2004)

The Court Service is responsible for court operations in England and Wales. Court Service, Annual Report 2002-2003, at 203. Scotland and Northern Ireland have separate managing bodies. Scotland, *see*, [www.scotcourts.gov.uk/html/introduction.asp](http://www.scotcourts.gov.uk/html/introduction.asp) (last reviewed April 21, 2004); *see also*, The Judicial Committee (Devolution Issues) Rules Order 1999 (SI 1999/No. 665); for Northern Ireland,

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Northern Ireland Court Service Lord Chancellor's Departmental Report (2002-2003). The Northern Ireland Court Service was established by the Judicature (N.I.) Act of 1978.

For the English and Welsh courts, the Lord Chancellor's Department, Court Service Staff Opinion Surveys in 2000, 2001 and 2002 asked staff general diversity questions. For discussion of these LCD and DCA general employee surveys, see Todd Brower, *Pride and Prejudice: Results of an Empirical Study of Sexual Orientation Fairness in the Courts of England and Wales*, 13 Buff. Women's L.J. , nn. 18-35 and accompanying text (2006). These survey questions and results were too generalized in their approach and unspecific in the types of information they sought.

<sup>47</sup> . Todd Brower, The Department for Constitutional Affairs (UK), *Report on Sexual Orientation Fairness in the Courts of England and Wales* (DCA, London, UK 2003) (Hereinafter "Brower, 2003 UK Report"; Todd Brower, The Department for Constitutional Affairs (UK), *Report On The 2005 Survey Of The Department For Constitutional Affairs, Rainbow Network: Sexual Orientation Fairness in the Courts of England and Wales* (DCA, London, UK 2005) (Hereinafter "Brower, 2005 UK Report"). See also, Brower, *Pride and Prejudice*, 13 Buff. Women's L.J., supra, n. 46.

Ten American state or local bar associations<sup>48</sup> and two Canadian bars<sup>49</sup> have studied the treatment and experiences of lawyers in those jurisdictions. In Great Britain, both the Law Society (solicitors) and the Bar Council (barristers) have enacted

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<sup>48</sup> . Bar Association of San Francisco, *Manual of Model Policies and Programs to Achieve Equality of Opportunity in the Legal Profession*, (1994); Los Angeles County Bar Association Committee on Sexual Orientation Bias, *Report*, (June 1994), (hereinafter “LA Bar Report”); King County Bar Ass’n, *In pursuit of equality: The final report of the KCBA Task Force on Lesbian and Gay Issues in the Legal Profession* (Washington, King County Bar Ass’n. 1995); Bar Association of the City of New York, Committee on Lesbians and Gay Men in the Legal Profession, *Bar Association of the City of New York Report on the Experience of Lesbians and Gay Men in the Legal Profession* (1993); Lesbian and Gay Law Association of Greater New York, *LeGaL report on sexual orientation fairness in second circuit courts*, (New York LeGaL 1997); DC Bar, *Sexual Orientation Task Force Report* (DC, 1997) found at [http://www.dcbar.org/inside\\_the\\_bar/structure/reports/task\\_force/](http://www.dcbar.org/inside_the_bar/structure/reports/task_force/) (last reviewed 6/12/2006); Hennepin County Bar Association Lesbian and Gay Issues Subcommittee, *Legal Employers’ Barriers to Advancement and to Economic Equality Based on Sexual Orientation* (Minneapolis, MN 1995) (hereinafter “Hennepin County Report”); Mass. Gay and Lesbian Bar Ass’n. *The Prevalence of Sexual Orientation Discrimination in the Legal Profession in Massachusetts*, (1994); Comm. On Sexual Orientation Discrimination, State Bar of California, *Report and Recommendations Regarding Sexual Orientation Discrimination in the California Legal Profession* (1996); State Bar of Arizona Gay and Lesbian Task Force, *Report to the Board of Governors*, (April 1999) (hereinafter “AZ Report”). See also, Jennifer Durkin, *Queer Studies I: An Examination of the First Eleven Studies of Sexual Orientation Bias By the Legal Profession*, 8 UCLA Women’s L.J. 343 (1998); William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA Women’s L.J. 379 (1998).

The Arizona Report findings typify the bar association reports. Lesbians and gay men are substantially disadvantaged as employees or participants in the justice system because of sexual orientation bias. AZ Report, at 18. Forty-seven percent of the judges and lawyers surveyed heard disparaging remarks about lesbians or gay men in courthouse public areas, and thirteen percent observed judges in open court treating negatively those perceived to be lesbians or gay men. *Id.* at 18, 20. Further, some court personnel and court participants preferred not to work with lesbian or gay lawyers. *Id.* at 20 (8% of court personnel and 4% of litigants, jurors, and witnesses indicated such a preference.) The community-based survey also showed that the more contact lesbians or gay men had with the Arizona justice system, the more likely they were to witness discrimination or experience a hostile environment based on sexual orientation. *Id.* at 27-28. We must cautiously evaluate that statement, however. First, the Arizona Report broadly defined “justice system” to include attorneys, police, probation and parole officers, as well as other contacts with those persons not limited to the court or judicial context. *Id.* at Appendix, *Gay Community Survey*, at 1-2, Questions 7-16. Second, the more contact an individual had with the justice system, the more opportunity he or she has to observe negative treatment based on sexual orientation. *AZ Report*, at 22-23. The study did not attempt to control for the number of contacts an individual might have had with that system. Finally, many reported incidents of police harassment, seemingly unrelated to respondents’ court experiences. See, e.g., *id.* at 23-24 (Respondents’ comments).

<sup>49</sup> . Merrill Cooper, Joan Brackman, Irene Hoffart, Alberta Law Foundation, *Final Report on Equity and Diversity in Alberta’s Legal Profession*, (Calgary Alberta, Canada Jan. 26, 2004); Le Barreau du Haut-Canada, *Identité et orientation sexuelles: création d’un milieu de travail diversifié. Politique modèle pour les cabinets et autres organismes* (Toronto, May 2004).

protections against sexual orientation discrimination in their membership.<sup>50</sup>

Nevertheless, neither organization surveyed its members to explore the extent of the problem in those organizations or in the courts, either before or after the enactment of the non-discrimination provisions.<sup>51</sup>

As the California, New Jersey and United Kingdom courts recognized, judicial departments serving multicultural societies include significant communities of sexual

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<sup>50</sup> Bar Council, Code of Conduct of the Bar of England and Wales, para. 204, 305.1 (Bar Council); Law Society, Solicitors Anti-Discrimination Code 7.02; Law Society Code for Advocacy 2.4 (Amended 13 Jan, 2003)(Solicitors Advocates, Registered European Lawyers, and Bodies Corporate recognized as litigators) (Law Society). *Accord*, James Mills, *Barrister who refused to represent gay client reprimanded*, DAILY MAIL (UK), (July 26, 2006)(discussing Bar Council's reprimand of Christian barrister who refused to represent gay client based on sexual orientation).

<sup>51</sup> Author's Interview with Martin Bowley, QC; Author's Interview with Pamela Bhalla, Bar Council. Hodge, *Equal and Decent Treatment*, New LJ Vol 145 No 6685 p 303 (Mar. 3, 1995) (discussing the history of the Law Society's adoption of its sexual orientation discrimination rules); *Law Society Wrong to Exclude Gays*, Says Hodge, New L.J. Vol. 143, No 6584 p 79 (Jan. 23, 1993)(discussing the history of the Law Society's adoption of its sexual orientation discrimination provisions.)

In the United States and Great Britain, some non-legal professions have queried their members on sexual orientation fairness. For example, the UK Association of University Teachers' study revealed that LGB academics perceived high levels of discrimination and harassment, and reported salary gaps and glass ceilings in academe. *Lesbian, Gay and Bisexual Participation in UK Universities*, at 12 (November 2001). Additionally, a 2001 article in the *British Medical Journal* reviewed several studies of sexual orientation bias against medical professionals and documented homophobia among doctors and medical schools directors against LGB physicians. LGB doctors experienced verbal harassment from medical colleagues and that many feared job loss if they disclosed their sexual orientation. Burke, B.F., White, J.C., Saunders, D., *Well-being of Gay, Lesbian and Bisexual Doctors*, British Medical Journal, (Feb.17, 2001). Other studies have found that gay men fear judgmental attitudes or have other reservations about being open about their sexuality with their physicians. Tania Branigan, *National Roundup: Health: Gay men reluctant to tell GPs*, THE GUARDIAN (LONDON), at 10 (Aug. 18, 2004). Stonewall, the British LGB advocacy organization, found that seventeen percent of people in England were prejudiced against lesbians and gay men and thirty-five percent said that they knew other people who were prejudiced. Stonewall, *Profiles of Prejudice*, at 18, 21 (2003). Additionally, persons with negative beliefs about LGB persons were also likely to hold racist attitudes. *Id.* at 12.

The American legal and social science literature on the workplace treatment of LGBT persons is vast. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structured Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. L. Rev. 91 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995); David B. Oppenheimer, *Negligent Discrimination*, 141 U.Pa. L. Rev. 899 (1992). *See, e.g.*, Badgett, *Wage Effects* 48 Indus. & Lab. Rel. Rev.; Badgett, *Empl. & Sex. Orientation*, Croteau, 48 J. of Vocational Behavior 195.; Belle Rose Ragins & John M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination Against Gay and Lesbian Employees*, 86 J. of Applied Psych. 1244, (2000).

orientation minorities.<sup>52</sup> Accordingly, one of the first priorities of each study was to determine the extent, if any, of actual or perceived sexual orientation bias in those courts.<sup>53</sup> Each court surveyed staff regardless of sexual orientation, specifically focusing on sexual minority employees.<sup>54</sup> California and New Jersey also collected the experiences of lesbian and gay court users.<sup>55</sup>

Surveys focused on all aspects of the court system and emphasized respondents' direct experiences, observations and perceptions.<sup>56</sup> Both the California and UK surveys asked people to report on their experiences and observations in the year preceding the survey, and more generally on their experiences and perceptions during their use of or employment with the courts; the New Jersey instrument used a 5-year time period.<sup>57</sup> The California and New Jersey questionnaires occurred in 2000; the two UK surveys were deployed in 2003 and 2005. The California and UK surveys requested information on

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<sup>52</sup>. *E.g.*, *Court Service Employee Handbook* (Equality and Diversity Statement) (April 1 2002); Lord Chancellor's Department, *Equality and Diversity Annual Report 2002-2001*, at 2 (Policy Statement) (1 March 2002); CA Report, *supra*, note 44, at 11; see generally, NJ Report, note , *supra*, note 45, at 5 ("By forming the Task Force [on Gay and Lesbian Issues], the Court intended to signal 'its strong commitment to the equal treatment of all individuals seeking justice in our court system.'").

Sexual orientation minorities are located in virtually every county of the United States, see Gary Gates and Jason Ost, *The Gay and Lesbian Atlas*, (Urban Institute Press 2004). For official estimates of the numbers of lesbian and gay people in England, Wales, Scotland and Northern Ireland, see, Department of Trade and Industry (UK), [Final Regulatory Impact Assessment Civil Partnership Act of 2004](http://www.dti.gov.uk/files/file23829.pdf), at 13, available at <http://www.dti.gov.uk/files/file23829.pdf> (last checked 6/14/2006). Distribution of lesbians and gay men across Great Britain and Northern Ireland using 2001 British census data can be found at <http://www.gaydemographics.org/UK/index.htm>, (last checked 6/14/2006).

<sup>53</sup>. CA Report, note 44, at 12, NJ Report, note 45, at 1; Brower, 2003 UK Report, note 47, at 9.

<sup>54</sup>. Brower, 2003 UK Report, note 47 at 9, 10; CA Report, note 44, at 12; NJ Report, note 45, at 19.

<sup>55</sup>. The California court user and court employee surveys were separate instruments containing the same or similar questions. CA Report, note 44, at 12. The New Jersey survey instrument was sent to both court users and employees. NJ Report, note 45 at 19.

<sup>56</sup>. Brower, 2003 UK Report, note 47, at 5, 14; CA Report, note 44 at 12; NJ Report, note 45, at 19.

<sup>57</sup>. Brower, 2003 UK Report, note 47, at 14; CA Report, note 44 at 13; NJ Report, note , note 45, at 85 (survey Instrument instructions).

both positive and negative experiences and observations in order not to skew responses towards the negative.<sup>58</sup> All surveys were anonymous,<sup>59</sup> which was particularly important given the sensitivity of the research subject.

Response rates varied, as did the populations studied. The California study combined a court user survey and a separate, court employee one. 1, 225 lesbian and gay users of the California courts completed the survey for a total response rate of fifty-eight percent.<sup>60</sup> In contrast, California researchers developed the second survey for court employees of all sexual orientations.<sup>61</sup> It was designed to determine whether employees

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<sup>58</sup>. Brower, 2003 UK Report, note 47, at 14; Brower, Am. U. L. Rev. at n.51 (Author's recollection of survey drafting discussions in 1997 meetings of the Sexual Orientation Subcommittee. See also, CA Report, *supra*, note 44, at 17, (definition of "positive comments and actions.").

<sup>59</sup>. Brower, 2003 UK Report, note 47, at 14; CA Report, note 44, at 12; accord, NJ Report, note at 85 (Survey instructions: "Your responses will remain the property of the Task Force and remain confidential.")

<sup>60</sup>. CA Report, *supra*, note 44, at 13. Ninety percent of California court user survey respondents were white men. Sixty-nine percent were gay. Sixty-six percent lived in an urban area. Eighty-three percent had an undergraduate or graduate degree. Forty-eight percent had an income of at least \$60,000 a year. Sixty-one percent were selectively open about their sexual orientation, primarily with family, friends, and at work. CA Report, *supra*, note 44, at 15. Most gay or lesbian court users had relatively few contacts with the court system. Seventy percent had only two to three contacts since 1990. Those contacts tended to be with a criminal or civil court (73%). Further, nearly twice as many contacts were as a juror or potential juror (60%), than as a participant, either a litigant or attorney (32%). CA Report, *supra*, note 44, at 15. California analyzed survey results by demographics (i.e., sex, race, age, income, education, and urbanicity of the court, urban, suburban or rural) and by the nature of the court experience itself (i.e., reason for using the court, type of court, in-court or out of courtroom contact). No significant differences appeared based on demographics, socio-economic level or urbanicity. Major distinctions were a function of the court users' experiences. Dominic J. Brewer and Maryann Jacobi Gray, *Report on Sexual Orientation Fairness in California Courts* (1999). [hereinafter "Brewer & Gray, Report"]., at 33.

<sup>61</sup>. It sent questionnaires to about 5,500 of the approximately 17,000 California court employees around the state, including court clerks, reporters, administrators and attorneys. CA Report, *supra*, note 44, at 13. Brewer & Gray, Report, *supra*, note 60, at 9. Of those, 1,525 responded. *Id.*

Ninety-three percent of California court employee respondents were white, heterosexual, married women. Sixty-six percent earned less than \$50,000 a year and had no college degree. Ninety-eight percent were fulltime, permanent court employees. The typical respondent had worked for the courts for 12 years, seven in her current position, and was employed as court clerk, clerical staff or mediator. Most respondents participated in court proceedings at least once a month, with almost 50% participating daily. CA Report, *supra*, note 44, at 15. California analyzed court employee responses by sexual orientation, sex, education, urbanicity of court, type of court, type of court appointment, and whether respondents observed court daily or less than daily. Brewer & Gray, Report, *supra*, note 60, at 10, 69. Except for sexual orientation, the survey found relatively few differences in responses based on the other characteristics. *Id.* Out of 1525 court employee respondents, 64 identified themselves as lesbians, gay men or bisexuals.

observed negative behaviors toward gay men or lesbians in open court or other work settings, and whether employees personally experienced discrimination, negative actions, or heard negative comments based on their actual or perceived sexual orientation.<sup>62</sup>

In Great Britain, the DCA questioned all members of the LGBT court employee group, the Rainbow Network. The 2003 survey had a total response rate of 67.4 percent.<sup>63</sup> Seventy survey respondents identified themselves as lesbians, gay males or bisexuals, twenty-five as heterosexual and two as other.<sup>64</sup> The survey was repeated in spring 2005 for the then-current Rainbow Network membership.<sup>65</sup>

Although the New Jersey survey was similar in purposes and design, it differed more significantly from either the California or the two British studies. Of the

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Brewer Gray, Report, *supra*, note 60, at 9. Of those lesbian or gay court employees, over one-third were totally “out” at work; Over one-third were selectively “out” at work; Over one quarter were not “out” at work at all. CA Report, *supra*, note 44, at 15. Court employee survey respondents were considerably less likely to openly identify as lesbian or gay at work as compared to court users, where ninety-three percent were totally out or selectively out in their respective workplaces (although significantly, not in the court setting).

<sup>62</sup> . CA Report, *supra*, note 44, at 14.

<sup>63</sup> . Brower, 2003 UK Report, note 47, at 15 (144 total membership, 97 responses). The response rate compares favorably with that of the LCD, Court Service employee surveys and also with other surveys of minority employee networks in the DCA (See, e.g., *2003 Survey of PROUD Members* (Summary of Preliminary Findings) at 1 (2003) (response rate, 63% -- racial and ethnic employee network). Full members of the Network are self-identified LGBT individuals; Friends of the Network are interested self-identified heterosexual staff.

<sup>64</sup> . Brower, 2003 UK Report, note 47 at 15. A majority of 2003 UK survey respondents were Rainbow Network Full Members, white, gay men or lesbians, had earned at least an A-level degree, and often lived with a partner of the same sex. They were employed by the DCA for an average of 11.4 years, and were at their current job for an average of 3.6 years. They worked primarily at DCA Headquarters, and in the South Eastern Circuit (London), although a number of respondents were employed in the other judicial circuits. Of the respondents who replied to the question about sexual orientation visibility at work, nearly half were totally out at work, almost one fifth were selectively out, and less than 10 percent were not out at all.

<sup>65</sup> . Demographic changes in 2005 from the earlier study principally were the increase in LGBT court employees and the larger increase non-LGBT court employee “friends of the Network.” Thus, the percentage of LGBT respondents decreased compared to heterosexuals. Further, the 2005 respondents were more diverse geographically, although London and the South-East of England still dominated; they were also slightly more diverse racially and ethnically. Both the network membership and the number of responses increased, while the response rate declined from 67.4 percent to 45 percent. 55 percent of respondents in the spring 2005 study did not particulate in the earlier survey. Brower, 2005 UK Report, note, 47, at 5-6.

approximately 21,000 questionnaires distributed by various methods, 2594 were returned for a response rate of twelve percent. Nearly seventy percent of respondents who identified their relationship to the New Jersey courts were court employees. The high response rate from court personnel allowed them to report on the courts as a workplace and also to observe the judicial process as it affected LGBT persons.<sup>66</sup> Lawyers and judges comprised nearly one-quarter of New Jersey respondents. Seven percent of respondents who identified their sexual orientation were lesbians, gay men or bisexuals.<sup>67</sup>

### ***B. Study Limitations***

All empirical research projects have data limitations.<sup>68</sup> Both the California and the New Jersey court employee studies reached a wide cross-section of judicial system personnel, both gay and non-gay. However, some heterosexual court employees objected

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<sup>66</sup> . NJ Report, note 45, at 19.

Of the 2594 respondents, 1782 identified as heterosexual, 118 as lesbian or gay and 17 as bisexual. Thus, sexual orientation minorities comprised 7% of those who identified their sexual orientation. (NJ Report, note 45 at 20.) There were 42 lesbians and 12 bisexual women; 74 were gay men and 5 were bisexual men. (NJ Report, note 45, at 21-22.) 837 respondents were men; 1575 were women, and 182 did not state. The disproportionate female sample reflects the high response rate from court employees, most of whom are women. NJ Report, note 45 at 21.

2467 respondents identified their relationship to the courts. 267 were judges (223 male, 32 female, 12 did not state sex. Three male judges identified as gay or bisexual, one female judge was bisexual, 39 did not state their sexual orientation. (NJ Report, note 45 at 20.) 351 lawyers responded; 124 were females 14 of whom were lesbian or bisexual. 222 lawyers were men of whom 12 identified as gay or bisexual. (NJ Report, note 45, at 20.) 1586 respondents stated that they were court employees, 1235 were women, 299 men, 42 were gay, lesbian or bisexual. (NJ Report, note 45 at 21) Finally, there were 19 litigants, 17 of whom were gay, lesbian or bisexual, one witness and 48 individuals who identified as something other than judge, attorney, court employee, litigant or witness, half of whom were gay, lesbian or bisexual. 322 persons did not state their relationship to the courts. (NJ Report, note 45 at 21). No information was given about education, income, geographic distribution, marital status, race or ethnicity, or other demographic information.

<sup>67</sup> . NJ Report, note 45 at 24.

<sup>68</sup> . For discussions of the limitations of the bar association studies mentioned at note 48, see Rubenstein, 8 UCLA Women's L.J. at 388-392.

strongly to being asked about sexual orientation bias.<sup>69</sup> Accordingly, some sampling error may have been introduced into those studies.<sup>70</sup>

Second, the nature of the target group makes research into the treatment and experiences of LGBT individuals more difficult. Those persons constitute a significantly large group in society with a ‘hidden identity’; minority sexual orientation is not always immediately apparent from any outward, physical appearance or surname.<sup>71</sup> Many LGBT individuals choose not to expose their sexual orientation publicly.<sup>72</sup>

Both the California court user and UK studies specifically sought to get the experiences of gay men and lesbians who had contact with those judicial systems. Thus, they surveyed members of various court and external LGBT organizations. This sampling

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<sup>69</sup>. The court employee survey generated an unusually high number of negative responses to the survey itself -- more than other California Judicial Council employee survey. CA Report, *supra*, note 44, at 14. *E.g.*, “I find it incredible, and as a taxpayer, I am offended, that money is allowed to be spent on such a stupid survey. I can further assure you that, as a court clerk, I have better things to do than keep track of extraneous remarks regarding gays and lesbians.” “I have received your survey on sexual orientation and found it to be degrading and offensive. I am sure the Judicial Council could find better use of the talent, time and money that is being wasted on a minority of court personnel.” “I decline to answer your survey as I feel it covers a matter that is not appropriate to talk about in the work place.” CA Report, *supra*, note 44, at 14.

As in California, the New Jersey survey provoked a strong negative reaction primarily from court employees: For example, “[A]t one point in everyone’s life, everyone has felt discriminated. Get over it; we have.” “I feel this is bias against anyone who is not gay.” “I am insulted at having to answer what I believe to be a survey on an unfounded issue.” “To spend this much money on a group of people who are denounced in the Bible is pathetic. What is this world coming to?” The Bible teaches us that homosexuality is a sin. You cannot ask me to evaluate sin.” “Based on my religious beliefs, I feel that homosexuality is an aberration and is not an ‘alternative lifestyle.’ I resent having a ‘gay’ agenda being pushed on my beliefs.” “I am offended that the State of New Jersey would waste more money on another Task Force to single out this one issue of discrimination from a list of many. How much of my tax dollars are wasted in the implementation of this project, starting with salary, printing and postage.” NJ Report, note 45, at 59-60.

<sup>70</sup>. The consequences of this error are ambiguous. On one hand, heterosexual court employees may have refused to participate in the survey; on the other, they may have insisted that their voices be heard.

<sup>71</sup>. *See e.g.*, Association of University Teachers, *Lesbian, Gay and Bisexual Participation in UK Universities*, at 6, 10-11 (November 2001); Brower, *Courts and*, 38 San Diego L. Rev. at 570 n. 26; Warren J. Blumenfeld & Diane Raymond, *Looking at Gay and Lesbian Life* 86 (1993).

<sup>72</sup>. Association of University Teachers, *Lesbian, Gay and Bisexual Participation in UK Universities*, at 6, 10-11; Brower, 38 San Diego L. Rev. at 570 n. 26.

technique may have skewed the data. For example, although the Rainbow Network membership is representative of DCA employees (except for sexual orientation), it is a self-selecting group of LGBT persons and their heterosexual colleagues. As such, we cannot know how well their responses correspond to those of a broader employee group. If the similar California court employee studies provide guidance, the larger group of British court employees would have been less conscious of sexual orientation issues or discrimination and more likely to see the courts and the DCA as fair. They would, however, still confirm the presence of biased treatment based on sexual orientation, even if their own personal observations as heterosexuals differed from their non-heterosexual co-workers' experiences.<sup>73</sup>

Third, the self-identified group of UK court employee network members or the court-user members of LGBT organizations in California and New Jersey may under-represent closeted LGBT individuals who may be reluctant to join a gay or lesbian organization.<sup>74</sup> To some degree, those issues are common to all empirical research on LGBT persons, a group that is difficult to identify and sample appropriately. The ability of closeted LGBT persons to associate with the British network as 'Friends' may have ameliorated that issue.<sup>75</sup> The researchers in California and Great Britain made several attempts to encourage closeted individuals to participate. Survey respondents in all studies were anonymous.<sup>76</sup> Moreover, the UK author sent surveys without DCA funds,

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<sup>73</sup> . See, CA Report, at 68-72.

<sup>74</sup> . See, e.g., Rubenstein, 8 UCLA Women's L.J. at 390.

<sup>75</sup> . At least one closeted LGBT person joined as a "Friend" to hide his sexual orientation. Brower, 2003 UK Report, note 47, at 59-60.

<sup>76</sup> . Brower, 2003 UK Report, note 47, at 14; CA Report, note 44, at 12; *accord*, NJ Report, note 45 at 85 (Survey instructions: "Your responses will remain the property of the Task Force and remain confidential.")

stationery, or supplies, and respondents returned the completed questionnaires to the author and not the DCA or Rainbow Network members. In California and the UK, members were encouraged to give copies of the survey to persons they personally knew to be LGBT, but who were not members of the various organizations.<sup>77</sup> Nevertheless, some potential respondents may not have wished to participate, even with these safeguards.

Fourth, the British survey author was an American researching UK employees and workplaces. Although he had been living in London for 18 months at the time the survey was developed, he was not a native member of the culture. Accordingly, a group of British citizens and DCA employees vetted the surveys before dissemination to ensure that language, cultural and workplace references were appropriate to the survey group. Moreover, the researcher presented the preliminary and final data to the Rainbow Network and other members of the UK judicial administration to avoid cross-cultural or workplace-specific misunderstandings in data interpretation. Despite possible cross-cultural difficulties, the data are generally consistent with other DCA studies<sup>78</sup> and surveys of LGBT fairness in the American court system.<sup>79</sup>

Fifth, all surveys specifically asked about personal treatment, experiences and observations as well as perceptions of those events. In the British and California surveys,

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<sup>77</sup> . Recollections of Todd Brower, the author of the UK studies and co-author of the California report.

<sup>78</sup> . *Court Service Staff Surveys 2000 – 2002*, see note 46, and *2003 PROUD Network Survey*, Preliminary Report (Ethnos Consultancy, September 2003) (the PROUD Network is the DCA employee group for members of racial and ethnic minorities and those issues).

<sup>79</sup> . See generally, Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, Am. U J. of Gender, Soc. Pol’y & Law (2003); Todd Brower, “A Stranger to Its Laws:” *Homosexuality, Schemas, and the Lessons and Limits of Reasoning By Analogy*, 38 Santa Clara L. Rev. 65 (1997). *Accord*, Durkin, 8 UCLA Women’s L.J. 343 (discussing the various bar association studies on sexual orientation bias in the United States legal profession.)

researchers asked questions about both positive and negative experiences so as not to skew the answers negatively. However, all responses were self-reported; the researchers made no attempt to observe directly employees' daily work lives or court users' experiences.

Finally, each of the three jurisdictions surveyed a different sample of court users and court employees. We cannot necessarily generalize from these narrower or targeted samples to the larger national court user or court employee population. Nevertheless, these studies describe what happened to these participants.<sup>80</sup> Consequently, exact comparisons between the results are impossible, even though the California and UK surveys asked virtually the same questions.<sup>81</sup> However, survey methodologies and design were sufficiently close to discuss common experiences and treatment patterns across time and location and make references to similarities in the data, even if specific discrimination comparisons would be inappropriate.<sup>82</sup> Those common and divergent patterns are the focus of this article, not the specific data points.

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<sup>80</sup> . See, e.g., Croteau, 48 J. of Vocational Behav. at 202. The California surveys identified 2100 lesbian and gay court users with the assistance of various national and local LGBT advocacy and service organizations and were sent to all court employees, regardless of sexual orientation. CA Report, note 44, at 12-13. The New Jersey survey was sent to 21,000 persons, including all Superior and Municipal court employees, gay and lesbian organizations, published in the New Jersey Law Journal and New Jersey Lawyer, distributed to various private and public attorney organizations in the state and distributed in courthouses. NJ Report, note 45 at 18. The two UK surveys were sent all DCA employees who were full members or friends of the DCA Rainbow Network. Among those included were court clerks, ushers, administrators, and other professionals. (Brower, 2003 UK Report, note 47, at 14-15.

<sup>81</sup> . The UK surveys were based on the prior California study with slight modifications to account for linguistic differences between British and American English and judicial terminology. Moreover, although both legal systems share a common Anglo-American model, the two court systems, workplaces and job descriptions diverge somewhat. Recollections of the author, the drafter of both UK surveys and a drafting participant in the California instrument.

<sup>82</sup> . Accord, M.V. Lee Badgett, *Vulnerability on the Workplace: Evidence of Anti-Gay Discrimination*, *ANGLES: Pol'y J. Inst. For Gay & Lesbian Strategic Studies*, (Sept. 1997), at 1-2 ("Identifying a precise level of discrimination is impossible given [the self-reporting] method, but such consistent findings across time and region reflect gay employees' beliefs that their workplaces are unfair or hostile."); see also, Croteau, 48 J. of Vocational Behavior at 202.

## **IV. Sexual Orientation Minorities' Experiences and Treatment in the Courts**

### **A. Court Users**

Visibility affected the two groups studied, court users and court employees, in slightly different ways. For court users, the dominant pattern is degradation in lesbian and gay court users' experiences when sexual orientation became visible, either as a topic in the court proceeding, or as a characteristic of the court users themselves. Sexual orientation remains salient. Just as a viewer alternates between the two figures in the opening multistable illusion and cannot see only one, visibility and knowledge of minority sexuality cannot be ignored once learned. Although present in the other jurisdictions, this pattern is most obvious in the California study because it specifically inquired about two different court experiences: the most recent California court contact and another, significant contact.

The California survey results for respondents' most recent court contact provide a typical experience or a baseline for lesbian and gay court users' treatment and perceptions of fairness in the California courts.<sup>83</sup> By focusing on the most recent contact, the survey drew on a random sample of lesbian and gay court users' experiences, rather than have them describe a court contact that they deemed negatively or positively noteworthy.<sup>84</sup> Moreover, sexual orientation was overwhelmingly not pertinent to that

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Lesbian and gay male court users in California completed a separate survey about their experiences, while in New Jersey all persons received the same questionnaire. In both US jurisdictions and in the UK, court employees were asked about what they witnessed happening to lesbian and gay court users. Because the DCA and the California and New Jersey Administrative Offices of the Courts regulate courts and associated agencies in those localities, court employees observed the treatment of LGBT persons in the legal system.

<sup>83</sup> . See, Brewer & Gray, Report, *supra*, note 60, at 7.

<sup>84</sup> . Brewer & Gray, Report, *supra*, note 60, at 7.

latest contact<sup>85</sup> and so it was not likely to be unusual in that regard. Finally, sixty percent of lesbian and gay court users' most recent experiences concerned some manner of jury service, rather than as a party, lawyer or witness in the proceedings (44.2 percent).<sup>86</sup>

In contrast, the other, significant court contact predominantly involved sexual orientation issues.<sup>87</sup> Further, lesbian and gay court users participated more actively in that court contact as a party, witness or lawyer (55.1 percent), as opposed to some form of jury service (22 percent).<sup>88</sup> Survey respondents' agreement with the statement "As far as I could tell, I was treated the same as everyone else" dropped from 89.2 percent in the most recent contact to 74.5 percent in the noteworthy contact.<sup>89</sup> Similarly, respondents' perception that people treated them respectfully fell from 80.4 percent to 70.4 percent in the recent and significant contact.<sup>90</sup> Because the survey asked identical questions in both contexts, the difference is a function of the nature and duration of these court experiences.<sup>91</sup> Visibility of sexual orientation, either as a topic within the court

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<sup>85</sup> . At least 81.4 percent of those court contacts did not involve sexual orientation issues. Brewer & Gray, Dominic J. Brewer and Maryann Jacobi Gray, Survey Data, *Preliminary report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation Fairness*, at 21. (Hereinafter Brewer & Gray, Survey Data), Question 19 responses, at 8.

<sup>86</sup> . Brewer & Gray, Report, *supra*, note 60, Table 5, at 16.

<sup>87</sup> . Lesbian and gay court users reported that the other contact focused on sexual orientation issues 74.3 percent of the time. Those issues included, adoption, parenting involving lesbian or gay parents, hate crimes, family dissolutions involving lesbian or gay family members, domestic violence, employment discrimination, wills and trusts, and other issues directly related to sexual orientation. Brewer & Gray, Report, *supra*, note 60, Table 14, at 29.

<sup>88</sup> . Brewer & Gray, Report, *supra*, note 60, Table 13, at 28. Additionally, the rank order of percentages of lesbian and gay respondents' involvement in the two court contacts is very different. Lesbian and gay court users' active participation ranks significantly higher in the other contact than in the more recent one. *Compare* Brewer & Gray, Report, *supra*, note 60, Table 5, at 16 *with* Table 13, at 28.

<sup>89</sup> . Brewer & Gray, Report, *supra*, note 60, Table 10 at 24, Table 18 at 37.

<sup>90</sup> . *Id.*

<sup>91</sup> . *See generally*, Brewer & Gray, Report, *supra*, note 60, at 8 (making statement in the context of demographic analysis of the data.). Alternatively, lesbian and gay court users' experiences may have improved over time. While this explanation initially appears plausible, it ignores the actual timing of respondents' court contacts. The most recent court contact necessarily occurred before the other contact,

proceeding or as a characteristic of the court users themselves, significantly affected lesbian and gay court users' treatment and perceptions of fairness.<sup>92</sup>

Individuals with casual court contacts, such as paying a traffic ticket or being called for a jury panel, may understandably have more favorable impressions of the courts<sup>93</sup> than those with more extended contacts or personal involvement. Those limited contacts often end up being sexual orientation-neutral events,<sup>94</sup> a quality often missing when lesbian and gay court users' became more personally involved.<sup>95</sup> Further, the more limited the court contact, the less likely others learned of respondents' sexual orientation. For example, "I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up."<sup>96</sup> Consequently, lesbian or gay identity was not manifest and could not affect treatment.

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and both contacts must have taken place between January 1, 1990 and May 1998. Brewer & Gray, Survey Data, *supra*, note 85, at 2-3, at 9. However, we cannot generalize about the timing of the court contacts among all court users. Some respondents' most recent experiences might have occurred before another respondent's "other, significant contact," and vice versa. *See generally*, Brewer & Gray, Report, *supra*, note 60, at 6-7.

<sup>92</sup>. The high correlation between active participation by lesbian and gay court users or the pertinence of sexual orientation as an issue in a court experience and deterioration in their treatment and perceptions is unlikely to be mere coincidence.

<sup>93</sup>. For many respondents these contacts were sexual orientation neutral events. *See e.g.*, Brewer & Gray, Report, *supra*, note 60, at 18, ("My most recent contact involved paying a traffic ticket. Everyone was very nice. No one noticed/asked my sexual orientation. It did not and should not come up." "My jury service seemed to be a gay-neutral event.")

<sup>94</sup>. "My last contact with the courts was to report for jury duty, where I sat for two hours then we were all released. I never spoke to anyone." Dominic J. Brewer and Maryann Jacobi Gray, Survey Data, *Preliminary report Draft 3/31/99, reported in 4/9/99 materials of the Subcommittee on Sexual Orientation Fairness*, at 6 (responses to question 16) (Hereinafter Brewer & Gray, Draft Survey Results). In the most recent contact, at least 81.4 percent did not involve sexual orientation issues. Brewer & Gray, Draft Survey Results, *supra* note 94, at 8 (responses to question 19).

<sup>95</sup>. In the more actively participatory contact, 74.3 percent of those contacts involved sexual orientation issues. Brewer & Gray, Report, *supra*, note 60, Table 14, at 29.

<sup>96</sup>. Brewer & Gray, Draft Survey Results, *supra* note 94, at 6 (responses to question 16).

However, when more lesbian and gay court users participated as an attorney, party, or witness,<sup>97</sup> they also perceived the California courts as less fair.<sup>98</sup> Direct participants in a case reported more negative incidents than did all respondents.<sup>99</sup> Their extended contact and more active roles may have provided others with the opportunity to learn their sexual orientation<sup>100</sup> and increased their negative experiences and perceptions. Once people perceive court users to be lesbian or gay, that trait overshadows other aspects of their identity.

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<sup>97</sup> . Compare lesbian and gay court user survey respondents' most recent contact with the California courts, which contact tended to be through jury service (60%), with a different, recent contact with the courts, which contact tended to be when they were a party, witness, or lawyer in the proceedings (55.1%, jury service during that contact, 22.2%). Brewer & Gray, Report, supra, note 60, *compare* Table 5, at 16 *with* Table 13, at 28.

<sup>98</sup> . When more lesbian and gay court users participated actively in a court contact, 25.5 percent believed that they were treated differently from everyone else as far as they could tell, whereas 10.8 percent believed they were treated differently in their primarily jury service contact. Brewer & Gray, Report, supra, note 60, *compare* Table 18, at 37 *with* Table 10, at 24. *See generally*, Brewer & Gray, Report, supra, note 60, *compare* Table 19, at 39 *with* Table 11, at 26. [“In a domestic abuse case, the judge did not ask me the same questions she asked potential jurors regarding my relationship with my companion or my experience with domestic abuse.” *Id.* at 19.] Similarly, in a court contact in which they participated more actively, 29.6 percent of lesbian and gay court users felt those who knew their sexual orientation did not treat them with respect; however in their primarily jury service contact, 19.6 percent of respondents felt that those who knew their sexual orientation treated them disrespectfully. Brewer & Gray, Report, supra, note 60, *compare* Table 18, at 37 *with* Table 10, at 24. *See generally*, Brewer & Gray, Report, supra, note 60, *compare* Table 19, at 39 *with* Table 11, at 26. Finally, when more respondents participated actively in a court contact, 37.7 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “My sexual orientation was used to devalue my credibility.” In contrast, 13.6 percent of them agreed somewhat or very strongly with the statement “My sexual orientation was used to devalue my credibility,” in their primarily jury service contact. Brewer & Gray, Report, supra, note 60, *compare* Table 18, at 37 *with* Table 10, at 24. *See generally*, Brewer & Gray, Report, supra, note 60, *compare* Table 19, at 39 *with* Table 11, at 26.

<sup>99</sup> . 14% of direct participants in a case reported ridicule compared to 12% for the entire sample of lesbian or gay respondents; 5.3% reported negative comments about themselves versus 4.2% for the overall sample, and 8% of direct participants reported negative actions compared to 6.4% overall. Brewer & Gray, Report, supra, note 60, at 17.

<sup>100</sup> . In that contact, 28,7 percent of lesbian and gay court users reported that someone else disclosed their sexual orientation without respondents' approval, and 24.5 percent felt compelled to state their sexual orientation against their will. Brewer & Gray, Report, supra, note 60, Table 18, at 37. *See also*, “I reported for jury duty but the case was settled out of court. I am openly gay but not outwardly gay, so it never came up.” “My last contact with the courts was to report for jury duty, where I sat for two hours then we were all released. I never spoke to anyone.” Brewer & Gray, Draft Survey Results, supra note 94, at 6 (responses to question 16).

Similarly, when sexual orientation became an issue in the court contact, thirty percent believed those who knew their sexual orientation did not treat them with respect, and thirty-nine percent believed their sexual orientation was used to devalue their credibility.<sup>101</sup> Survey responses illustrate this connection: “Defendant’s lawyer . . . used my relationship and my partner as object of focus to denigrate my loss and income claim and create smoke and mirrors. That would not have been used in non-gay situation.”<sup>102</sup> “One defendant was a gay man suing an ex-lover – snickers and comments from jury members.”<sup>103</sup> “Jury member suggested that witness was gay and therefore his testimony could not be trusted.”<sup>104</sup> “I was discredited as a witness because they said I was probably ‘out at a club or something’ before I witnessed the accident.”<sup>105</sup>

Interestingly, disparaging remarks and negative comments about sexual orientation minorities are sometimes litigation tactics used to win cases.<sup>106</sup> One California study comment illustrated the use of sexuality to resonate with some jurors’ negative perceptions of lesbians and gay men.<sup>107</sup> “[A lawyer] questioned potential jurors

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<sup>101</sup> . 74.3 percent of respondents’ other recent, significant contact with the courts involved certain sexual orientation issues.). Brewer & Gray, Report, *supra*, note 60, Table 14, at 29. In that contact, 25.5 percent of lesbian and gay court users believed they were treated differently from everyone else, and 29.6 percent of lesbian and gay respondents felt those who knew their sexual orientation did not treat them with respect. In that same contact, 39 percent of lesbian and gay court users believed that their sexual orientation was used to devalue their credibility. Brewer & Gray, Report, *supra*, note 60, Table 18, at 37; *see generally*, Brewer & Gray, Report, *supra*, note 60, Table 19, at 39 (mean ratings). Compare the data for these same questions in respondents’ most recent contact: 10.8%, 19.6%, and 13.6% respectively. *Id.* at Table 10, at 24.

<sup>102</sup> . Brewer & Gray, Draft Survey Results, *supra*, note 94, (April 9, 1999 Draft of Survey Results, at 4.

<sup>103</sup> . *Id.* at 9.

<sup>104</sup> . *Id.* at 2.

<sup>105</sup> . *Id.* at 12.

<sup>106</sup> . Other tactical uses of sexual orientation, *see, e.g.*, New Jersey, NJ Report, note 45 at 41-42; United Kingdom, Brower, 2005 UK Report, note 47 at 36.

<sup>107</sup> . See juror studies, *infra*, note 128.

about whether they would accept unbiased testimony from gay witnesses. The manner of question implied gays were unreliable witnesses, thus placing a bias in the minds of potential jurors.”<sup>108</sup>

The New Jersey and UK studies contained similar reports. “In one case, a lawyer, his client and several witnesses used the other litigants’ homosexuality to assert [that] both the defendants and [their] witnesses were alcoholic and sexual promiscuous and predatory.” One gay male litigant reported that his former wife’s attorney repeatedly referred to his “alternate lifestyle” as often as possible, regardless of the issue at hand.<sup>109</sup> In a parental visitation matter, an attorney “impugned my client... as unfit solely because of his sexual orientation.” The person reporting this incident noted that the court “rejected those remarks;” however, he limited the father’s visitation “for other reasons.”<sup>110</sup> British respondents stated that it is “[u]sual in Family Proceedings to put down to sexuality inability to care for children.”<sup>111</sup> “In a court case between two gay women seeking custody of a child - the words 'it's not normal' ‘You know what they are,

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<sup>108</sup> . Brewer & Gray, Report, supra, note 60, at 33. *See also, id.* at 18 “I was a jury prospect but it was evident that the defense lawyer didn’t want gays on the jury. One of his questions to me during selection was Mr. X, would you say you have more straight friends or gay friends? I was discharged.” Cal. Civ. Proc. Code § ??? (West 2000) added sexual orientation as a prohibited category for exclusion during peremptory challenges during jury selection, and for jury service exemption. Although this law gives lesbians or gay men protections unavailable at the time of the survey, the survey data also reflect that legal doctrine and actual treatment of lesbians or gay men often diverge. *Accord*, Ragins, *Pink Triangles*, 48 J. of Applied Psych. at 1252 (discussing disclosure as a function of gay-protective legislation, gay-supportive workplace policies and other factors). Moreover, at least one study has shown that even where gay men have anti-discrimination protections, male couples earn less and are less likely to be employed than their heterosexual counterparts. Angela Balakrishnan and Elizabeth Bauer, *Gay men earn less and are more likely to be jobless, survey shows*, Financial p. 25, THE GUARDIAN (UK)(July 28, 2006)(discussing the Centre for Economic Performance, London School of Economics study.).

<sup>109</sup> . New Jersey Report at 42.

<sup>110</sup> . New Jersey Report at 41.

<sup>111</sup> . Open-Ended Comments, Q3. Brower, 2003 UK Report, note 47, at 55.

don't you' were frequently used.” “This was always used in order to 'fight' for their client, especially where children were concerned.”<sup>112</sup>

Gay persons' more active court participation and/or increased sexual orientation visibility in the proceedings also corresponded to an increased perception of threat. Despite the relative neutrality of their most recent court contact, over one fifth of all lesbian and gay court users felt threatened based on their sexual orientation.<sup>113</sup> However, the percentage of respondents who felt threatened nearly doubled once sexual orientation became more significant or more of them participated actively in the court contact.<sup>114</sup> “I felt intimidated – didn't want them [two clerks and a police officer observed by Respondent while in line] to talk about me the way they were talking about other gays – kept my mouth shut.”<sup>115</sup> “Death threats and name calling. Not of me but of the lesbians directly involved in the case.”<sup>116</sup>

If minority sexual orientation remains salient and overshadows other aspects of the court users' identity, sexual orientation should color even those proceedings in which it would otherwise not appear. The California report corroborates this hypothesis. Lesbian and gay court users reported that their sexual orientation was raised as an issue almost as often when it did not pertain to the proceedings as when it played a relevant

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<sup>112</sup> . Open-Ended Comments Q10. Brower, 2003 UK Report, note 47, at 56.

<sup>113</sup> . In their most recent contact with the California courts, 21.5 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” Brewer & Gray, Report, *supra*, note 60, Table 10, at 24.

<sup>114</sup> . 37.7 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “I felt threatened because of my sexual orientation.” Brewer & Gray, Report, *supra*, note 60, Table 18, at 37.

<sup>115</sup> . Brewer & Gray, Draft Survey Results *supra*, note 10, April 9, 1999 Draft of Survey Results, at 12.

<sup>116</sup> . *Id.* at 12.

role in their case or in their reason for using the courts.<sup>117</sup> In a similar anecdote, one New Jersey gay litigant stated that his ex-wife’s attorney frequently referred to his “alternate lifestyle”, without regard to its pertinence to the issues.<sup>118</sup> Lesbian and gay identity, once known, appears to shade all other aspects of the court experience, even when it is irrelevant.<sup>119</sup>

California gay and lesbian court users’ demographic profile reinforces this inference. Those respondents were predominantly educated, relatively affluent, white males.<sup>120</sup> Consequently, they should have the most sophistication and ability to navigate through the judicial system, and have the most positive experiences and perceptions of the courts.<sup>121</sup> However, even relatively privileged court users have more negative experiences and unfairness when they become visible as non-heterosexual.

Readers familiar with sexual orientation bias in modern American society should find this connection neither unexpected nor aberrant. Some have called anti-gay animus

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<sup>117</sup> . In their most recent contact, 15.3 percent of lesbian and gay court users agreed somewhat or very strongly with the statement, “My sexual orientation was pertinent to the court proceedings,” and 11.2 percent those same respondents agreed somewhat or very strongly with the statement “My sexual orientation was raised as an issue even though it did not pertain to the case.” Brewer & Gray, Report, *supra*, note 60, Table 10, at 24. In another, recent, significant contact with the courts, 38.2 percent of lesbian and gay court users agreed somewhat or very strongly with the statement “My sexual orientation was pertinent to the court proceedings.” and 35 percent of those same respondents agreed somewhat or very strongly with the statement “My sexual orientation was raised as an issue even though it did not pertain to the case.” Brewer & Gray, Report, *supra*, note 60, Table 18, at 37.

<sup>118</sup> . New Jersey Report at 42.

<sup>119</sup> . *See, e.g., Dale*, 120 S.Ct at 2476 (Stevens, J. dissenting); LA Bar Report, *supra*, note 48, at 32; Louis Sahagun, *California and the West: Lesbian Coach Sues Utah School in Court: Woman Says She Lost Volleyball Team Post and Was Warned Not to Discuss Her Sexual Orientation On or Off Campus*, Pt. A, at 3, LOS ANGELES TIMES, (Oct. 22, 1997)(once lesbian teacher told student she was gay, her school principal removed her as coach because “his perception of [her] had changed” after eight years).

<sup>120</sup> . Brewer & Gray, Report, *supra*, note 60, at 11-12, CA Report, *supra*, note 44, at 15.

<sup>121</sup> . *See generally, e.g.,* David B. Rottman and Randall M. Hansen, *How Recent Court Users View the State Courts: Perceptions of Whites, African-Americans, and Latinos*, at 2, National Institute of Justice (2001) (African-Americans with recent court experience report significantly less fairness than do Whites and Latinos. In turn, Latino litigants generally perceive less fairness than do Whites.).

the last socially acceptable form of prejudice existing today.<sup>122</sup> Indeed, fearing negative consequences from disclosing minority sexuality is one reason many persons remain hidden. As one California court user commented, "... many homosexuals, unless self-identified as homosexuals, are assumed to be heterosexuals. [...] Why do I prefer to pass as heterosexual? To avoid mistreatment."<sup>123</sup> Similarly, the Arizona Bar Report found that judges and lawyers reported some court participants and personnel preferred not to work with openly gay or lesbian attorneys.<sup>124</sup> A significant number of gay and non-gay lawyers in Los Angeles County believed that disclosing sexual orientation would be harmful to an attorney's career.<sup>125</sup> Indeed, nearly one half of all Los Angeles lawyers surveyed, regardless of sexual orientation or sex, believed that simply discussing one's personal or family life in a manner that revealed the sex of one's partner – an inconsequential matter for a non-gay lawyer – would harm a gay attorney's livelihood.<sup>126</sup>

Sixty-one percent of the New Jersey litigants and six percent of lawyers said that they had avoided or been advised to avoid using the judicial system because of their or their clients sexual orientation. Virtually all of the litigants so reporting were lesbian or gay; thirty-six percent of the gay or lesbian lawyers answered affirmatively, while only four percent of the non-gay attorneys did so.<sup>127</sup>

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<sup>122</sup> . See e.g., E.A. Harvey, *The last 'acceptable' prejudice; in an increasingly tolerant world, gay teens still face harassment and social isolation. Two who survived high school remember*, Living, Pg. G-1, SUNDAY NEWS (LANCASTER, PA.) (May 21, 2000); Richard Williamson, *Gay Exec Talks About 'Glass Ceiling' Business*; Ed. Final; Pg. 4B, THE ROCKY MOUNTAIN NEWS (DENVER, CO.), (November 11, 1999).

<sup>123</sup> . Brewer & Gray, Draft Survey Results, *supra* note 10, at 8 (responses to question 19).

<sup>124</sup> . AZ Bar Report, *supra* note 49 at 20.

<sup>125</sup> . LA Bar Report, *supra* note 48, at 29-31.

<sup>126</sup> . *Id.* at 31.

<sup>127</sup> . New Jersey Report at 28, (Question 4).

Annual nationwide juror polls routinely find that jurors report they are three times less likely to be fair to gay litigants than to African-Americans, Asians, Hispanics or Whites.<sup>128</sup> Only eight percent of all New Jersey respondents reported experiencing or observing litigants or witnesses treated disadvantageously because they were or were perceived to be gay or lesbian, but forty-five percent of lesbian or gay respondents in that state reported that experience.<sup>129</sup> Similar figures exist for lawyers being treated disadvantageously based on their actual or perceived minority sexual orientation<sup>130</sup> or that of their clients.<sup>131</sup>

As in California and the UK, significantly more New Jersey lesbian and gay respondents reported observing or experiencing negative behaviors than did their non-gay counterparts. Sixty-one percent of the lesbian or gay respondents, but only ten percent of

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<sup>128</sup> . Peter Aronson, David Rovella, and Bob Van Voris, *Jurors: A Biased Lot*, THE NATIONAL LAW JOURNAL, p. A1 (Nov. 2, 1998)(reporting results of annual National Law Journal-Decision Quest 1998 Juror Outlook Survey); Ben Schmitt, *Poll: Jurors Would Buck Laws to Achieve Justice*, FULTON COUNTY (GA) DAILY REPORT (Nov. 16, 1998)(reporting results of 1998 National Law Journal-Decision Quest 1998 Juror Outlook Survey: less than 5% of respondents said they could not be fair to a Black or Hispanic litigant, 17% could not be fair to a lesbian or gay litigant.); Bob Van Voris, *Voir Dire Tip: Pick Former Juror*, p.A1, NATIONAL LAW JOURNAL (Nov. 1, 1999)(1999 Juror Outlook Survey results: 3% of respondents said could not be fair if a litigant were Black, Asian, American Indian or White, 4% for Hispanic litigants, 12% if the party were a lesbian or gay man) The 1999 data show that among respondents over the age of 65, 20.4 percent stated they could not be fair to a lesbian or gay litigant. Press Release from Decision Quest on website: [www.nlj.com/1999/jury1101](http://www.nlj.com/1999/jury1101), downloaded 2/8/00 1:18 pm PST. *Accord*, Rachel Vincent, *'I overheard a juror saying his idea of a drug dealer was a big black bloke'*, THE GUARDIAN (LONDON) (Oct 28, 2003)(discussing racial bias by jurors); Candida Lloyd, *"Is that a writ in your pocket?"*, THE INDEPENDENT (UK), (Feb. 3, 2004)(same). However, most traditional British legal doctrine has prevented examination of juror attitudes by empirical means. *Id.* See also, R. v. Mizra, (The House of Lords), THE TIMES (LONDON), (Jan. 23 2004); See generally, Peter Herbert, *Racism, Impartiality and Juries*, 146 New L.J. no 6706, p 1138 (1995).

<sup>129</sup> . NJ Report, note 45 at 26. (Question 1). Of those reporting such an incident, 30.2% said that a judge took those actions, 34.1% said a lawyer did so, 60% answered other court personnel, and 40% other. (Answers do not sum to 100% since respondents may have reported that more than one person acted in this way.) *Id.* at 25.

<sup>130</sup> . NJ. Report at 26-27. (Question 2) (3% of all respondents answered yes compared to 23% of lesbian or gay respondents. Of those reporting such an incident, 44.9% said that a judge took those actions, 55.1% said a lawyer did so, 62.8% answered other court personnel, and 25.6% other. *Id.* at 26.

<sup>131</sup> NJ. Report at 27. (Question 3) (3% of all respondents answered yes compared to 28% of lesbian or gay respondents. Of those reporting such an incident, 49.3% said that a judge took those actions, 47.4% said a lawyer did so, 60.8% answered other court personnel, and 26.6% other. *Id.* at 26.

all New Jersey respondents with litigation experience, believed that sexual orientation bias affected the outcome of a case in which they were involved or which they observed.<sup>132</sup> Compared to all Garden State respondents, sexual minorities reported many more incidents in which gay litigants or clients of gay lawyers fared worse in the family or criminal courts.<sup>133</sup>

New Jersey respondents described two incidents where a judge's sexual orientation bias was cause for recusal. A lesbian couple's custody matter was transferred to another judge because of demeaning remarks on and off the bench. Another respondent indicated that some bench officers who acknowledged being biased against gay or lesbian litigants had cases reassigned to other judges where sexual orientation matters were involved.<sup>134</sup> In addition, a person familiar with family court said that a judge had joked in chambers that a child who was the subject of a custody dispute "would 'skip to school' if custody was awarded to the gay father."<sup>135</sup> Another gay father in family court reported that "the judge wanted to force me to take an HIV test [as] requested by my [ex] wife's attorney."<sup>136</sup>

Criminal cases reflected analogous bias. "[Courts] don't take crimes against homosexuals/lesbian people as seriously. It appears that the perpetrators of crimes against gays are given lighter sentences." A clinical social worker noted that "sentencing patterns are clearly stricter [for homosexual sex offenders] than [for] heterosexual sex

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<sup>132</sup> . New Jersey Report at 35 (Question 7). (All respondents: 148 yes, 1,384 No, 951 No Experience. Gay/Lesbian respondents: 55 yes, 35 no, 39 no experience. Gay/Lesbian Lawyers: 21 out of 35 (60%) reported this experience.).

<sup>133</sup> . New Jersey Report at 36-37 (Question 9 – family law), *id.* at 37-38 (Question 10 – criminal law); *id.* at 39-40 (Question 11).

<sup>134</sup> . New Jersey Report at 41.

<sup>135</sup> . New Jersey Report at 40.

<sup>136</sup> . New Jersey Report at 40.

offenders” That same person remarked that clients who had been physically assaulted in bias attacks were “threaten[ed], cajole[d] and pressure[d by lawyers] not to file complaints.”<sup>137</sup>

California lesbian and gay court users’ treatment is consonant with the New Jersey experiences. Overall, fifty-six percent of gay and lesbian court users in a contact where sexual orientation became significant, reported observing or experiencing a range of negative experiences directed toward themselves or other gays and lesbians.<sup>138</sup> Specifically, thirty-six percent heard negative comments about someone else, and twenty-three percent heard negative comments about themselves. Twenty-nine percent heard negative remarks arising from a case; twenty-six percent experienced or heard ridicule, snickering, or jokes about lesbians and/or gay men, twenty-five percent heard other negative remarks.<sup>139</sup> “Jury member suggested that witness was gay and therefore his testimony could not be trusted.” “Two attorneys were in the hall outside of the courtroom talking. One said, ‘did you see that?’ This was followed by a joke, then laughing. Bailiff joined attorneys briefly – all laughed.”<sup>140</sup>

The most direct evidence of the stigmatizing effects in the courts of open lesbian or gay identity appears in the various reports’ specific findings on disclosure of sexual orientation and responses to requests for personal information. Because being an open lesbian or gay man involves a continuing series of choices about disclosure, even otherwise open gay people may be reluctant to reveal their sexual orientation in the

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<sup>137</sup> . New Jersey Report at 40-41.

<sup>138</sup> . Brewer & Gray, Report, supra, note 60, Table 16, at 30.

<sup>139</sup> . Brewer & Gray, Report, supra, note 60, Table 16, at 30.

<sup>140</sup> . Brewer & Gray, Report, supra, note 60, at 18 (emphasis in original).

courts. Fifty-six percent of California sexual minorities did not want to state their sexual orientation during their court contact,<sup>141</sup> although most of these court users were openly gay or lesbian in other contexts. Over ninety percent were totally or selectively open at work, to family, to friends, and within the community.<sup>142</sup> The size of the disparity in visibility between the judicial system and other settings may reflect that lesbian and gay court users' experiences are far from ideal, despite their legal protections in the courts.<sup>143</sup> "One man in particular made gestures and anti-gay comments. Others would nod in agreement it was very scary to come out in that environment. The judge did dismiss this man after a while."<sup>144</sup> Another court user noted that attorney, witness, and court audience stated that a gay man "asked for it" by being out.<sup>145</sup> At least one court user respondent

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<sup>141</sup> . 59.7% of lesbian and gay court users did not want to state their sexual orientation during their most recent contact with the California courts. Brewer & Gray, Report, *supra*, note 60, Table 10, at 24. 55.6% of lesbian and gay court users did not want to state their sexual orientation during another significant recent contact with the California courts. Brewer & Gray, Report, *supra*, note 60, Table 18, at 37.

<sup>142</sup> . 92.8% at work, 94.6% to family, 99.4% to friends, 91.5% within their community. Brewer & Gray, Report, *supra*, note 60, at 13, Table 2.

<sup>143</sup> . All the jurisdictions studied have legal protections against sexual orientation discrimination in the court and in workplaces. However, as Professor Ragins and others have shown, legal protections against discrimination are not the most significant factor determining whether lesbians and gay men disclose their sexuality in the workplace. Ragins, *Pink Triangles*, 86 J. of Applied Psych. at 1254.

<sup>144</sup> . Brewer & Gray, Report, *supra*, note 60, at 20.

<sup>145</sup> . Brewer & Gray, Draft Survey Data, *supra*, note 10, at 9. The idea that openly gay people deserve negative treatment is common. *See e.g., Nabozny v. Podlesny*, 92 F.3d 446, 451 (7<sup>th</sup> Cir. 1996)(After a mock rape by male students, gay middle school boy fled to his principal's office. Principal's response was "that 'boys will be boys' and told [the complaining student] that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students."); Ed Bradley, *Don't Ask, Don't Tell: Law Regarding Homosexuals in the Military*, 60 Minutes (CBS) (Dec. 12, 1999)(discussing the policy and the conviction of a soldier for killing another soldier believed to be gay), (discussing the murder of gay soldier. "Mr. JAVIER TORRES: Here is someone else, a y--another soldier, in the same position that I am, and he was gay and he got murdered over that fact. When I heard it, inside I was scared, I was shocked. But on the outside I pretended to be, like, 'Cool. No big deal. Just a fag, you know.' And--and that was the part that hurt the most, because here I am gay. I--I mean, obviously I was scared. I was fearful of my own life. BRADLEY: What--what did the--the other guys say after Barry Winchell was murdered? Mr. TORRES: There was some who was, like, 'Hey, it's just one less fag to deal with. I mean, they don't really belong here anyways. You know, I mean, it's their fault for putting themselves in that position. They should know better.'").

specifically reported that he or she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian.<sup>146</sup>

Further, choosing whether and how to reveal one's sexual orientation is very different from being forced to disclose it or having someone else do so.<sup>147</sup> Given the increased likelihood of negative consequences that attach to visible sexual orientation, losing control over that decision can produce significant anxiety.<sup>148</sup> Thus, it is important that over one in four lesbian or gay California court users believed that someone else disclosed their sexual orientation without their approval in a court contact involving

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<sup>146</sup> . Brewer & Gray, Draft Survey Data, *supra*, note 10, at 8. *Accord*, LA Report, *supra* note 48, at 27 (“most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream”); *id.* at 27 n.179 (one lesbian lawyer married in order to make partner); NJ Report, note 45 at 48-49 (lesbian or gay court employees refusing to disclose their sexual orientation).

Passing for non-gay is not always an option, even for those persons who might wish to do so. Some gay men or lesbians show more deviation from societal gender or sexual orientation norms. *See e.g.*, Carbado, 85 Cornell L. Rev. at 1267-68n.16 (some people fall between categories, and therefore have more or less work to do to conform or to fit in.); *see also* Badgett, *Empl. & Sex. Orientation*, at 50 n.5. As one British court employee noted, “Security personnel seem to think the visual disparity between my appearance and my gender identity is a subject of hilarity.” Open-Ended Comments Q17. Brower, 2003 UK Report, note 47 at 37.

<sup>147</sup> . Commentators have extensively discussed the controversial practice of “outing” -- disclosing the sexual orientation of closeted lesbian or gay politicians or celebrities without their permission, particularly those who have taken anti-gay actions. *See e.g.*, Mathieu J. Shapiro, *Note: When Is A Conflict Really A Conflict? Outing And The Law*, 36 B.C. L. Rev 587 (1995); Jon E. Grant, *Note, "Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence*, 77 Cornell L. Rev. 103 (1991); Larry Gross, *Contested Closets: The Politics And Ethics Of Outing* (1993); Michelangelo Signorile, *QUEER IN AMERICA*, 70-77 (1993).

<sup>148</sup> . For an extreme example of the stress that forced disclosure brings, *see* Robert Sallady, *Davis, Lawmakers fight over parole for model inmate*, THE SAN DIEGO UNION-TRIBUNE, at A-3 (May 3, 2000)(discussing parole in the case of Robert Rosenkrantz, who was so distraught over the unconsented disclosure of his homosexuality that he killed the person who revealed the information).

sexual orientation issues.<sup>149</sup> Further, in that same setting, nearly an equal number felt forced to state their sexual orientation against their will.<sup>150</sup>

Despite their unwillingness to disclose this personal information, in the baseline California contact, a few lesbian and gay court users were directly asked about their sexual orientation.<sup>151</sup> Lawyers predominantly asked that question and always in court.<sup>152</sup> However, when the contact involved more active court participation, over one in five lesbian and gay court users were asked to indicate their sexual orientation.<sup>153</sup> Once again, three-quarters reported that a lawyer asked that question.<sup>154</sup>

The New Jersey survey queried judges whether lawyers sought to question potential jurors about sexual orientation attitudes, and whether judges allowed those inquiries.<sup>155</sup> Although both those questions are important,<sup>156</sup> they assume that sexual orientation only arises in jury selection through specific inquiries; it does not.

Standard voir dire questions on marital status may make minority sexual orientation so invisible during jury service that often courts do not even realize the effects

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<sup>149</sup> . 28.7% of lesbian and gay court users reported someone else stated their sexual orientation without their approval. Brewer & Gray, Report, supra, note 60, Table 18, at 37, compare Table 10, at 24, 8.6% during their most recent contact with the California courts.

<sup>150</sup> . 24.5% of lesbian and gay court users reported they felt compelled to state their sexual orientation against their will. Brewer & Gray, Report, supra, note 60, Table 18, at 37, compare Table 10, at 24, 10.5% during their most recent contact with the California courts.

<sup>151</sup> . 3% of respondents were asked directly about their sexual orientation. Brewer & Gray, Report, supra, note 60, Table 6, at 16.

<sup>152</sup> . Brewer & Gray, Report, supra, note 60, at 15. *Accord*, NJ Report, note 45 at 58-(Questions 21-22)(asking judges whether they had been asked to conduct voir dire on sexual orientation attitudes and whether the judge permitted it.)

<sup>153</sup> . 20.4% of respondents were asked their sexual orientation directly. Brewer & Gray, Report, supra, note 60, Table 15, at 29.

<sup>154</sup> . Brewer & Gray, Report, supra, note 60, at 32.

<sup>155</sup> . Sixteen judges were asked to conduct voir dire about sexual orientation attitudes, fourteen permitted those questions. New Jersey Report, at 58.

<sup>156</sup> . For a discussion of conducting voir dire on sexual orientation, see Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 Yale J.L. & Feminism 1 (2001).

those questions have or how inattentive they are to the diversity of lesbian and gay court users' lives.<sup>157</sup> In their most recent California court experience, forty-four percent of gay men and lesbians were jurors or venire panelists.<sup>158</sup> In that contact, 48.3 percent were asked if they were married.<sup>159</sup> Many respondents felt they could only reply incompletely or inadequately to that query.

The judge asked all prospective jurors to state marital status and what their spouse's occupation was. I have a long-term

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<sup>157</sup> . See, e.g., "It may appear that one or more of the parties, attorneys or witnesses come from a particular national, racial or religious group (or may have a lifestyle different than your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?" Cal. Judicial Admin. Standards, §8(c)(16) (West 2000) Appendix to Rule of Court, Division I Standards of Judicial Administration Recommended by the Judicial Council (Examination of Jurors in Civil Cases); *Id.* §8.5(b)(18)(Examination of Jurors in Criminal Cases)(same).

Although the jury instruction mentions race, ethnicity and religion, it does not specifically address sexual orientation. Second, if the quoted material in parentheses was intended to capture sexual orientation, the use of "lifestyles" rather than "lives" when referring to gay people is problematic. The term connotes a conscious and socially unacceptable choice, and not merely another manner of living. Tellingly, courts had once described interracial marriages as a "lifestyle" to create the same marginalizing effect. *E.g.*, *Palmore v. Sidotti*, 466 U.S. 429, 431 (1984), citing the Record at 84 (lower court changed custody from the mother because "the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society.") Currently, using "lifestyle" to describe an interracial marriage is strange and shows how much the view of marriage has changed in a quarter century. See, Todd Brower, *supra* note, 2, 38 *Santa Clara L. Rev.* at 79-82 (discussing *Palmore* and same-sex relationships). That it does not sound equally odd when applied to sexual minorities illustrates how salient sexual orientation identity is. Courts see lesbians or gay men in *voir dire* as distinct from others. This segregationist view is an error. In short, like their heterosexual counterparts, lesbians and gay men have lives, not lifestyles.

<sup>158</sup> . Forty-four percent of gay men and lesbians participated either as a juror or in jury *voir dire*. Brewer & Gray, Report, *supra*, note 60, Table 5, at 15.

<sup>159</sup> . Brewer & Gray, Report, *supra*, note 60, at 15. 26.1 percent of all lesbian or gay court users were asked if they were married. *Id.* at Table 6, at 16. At the time of the survey, the California recommended that judges ask about marital status during standard *voir dire* questioning. *E.g.*, "Each of you should now state your name, where you live, your marital status (whether married, single, widowed or divorced), [ . . . ] If you are married, you should also briefly describe your spouse's occupational history and present employer, if any." Cal. Judicial Admin. Standards, §8(c)(20) (West 2000) Appendix to Rule of Court, Division I Standards of Judicial Administration Recommended by the Judicial Council (Examination of Juror in Civil Cases). That standard has since been changed. See, e.g., *Id.* §8.5(b)(15) (2006). The current language is "'anyone with whom you have a significant personal relationship.' The term, 'anyone with whom you have a significant personal relationship' means a domestic partner, life partner, former spouse, or anyone with whom you have an influential or intimate relationship that you would characterize as important."

In contrast, only 6.8 percent were asked if they had a domestic partner. Brewer & Gray, Report, *supra*, note 60, Table 6, at 16. Some respondents were uncomfortable with that question as well. "I did not tell the truth about having a partner because I was not comfortable being 'out' in that setting. I pretended I was single – then 'passed' for heterosexual. I did not want my partner 'outed' – they asked name and profession of spouse or significant other." Brewer & Gray, Draft Survey Data, *supra*, note 10, at 21.

domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner's occupation even though legally my marital status is single. Stating 'single' would have felt like lying.<sup>160</sup>

The marital status question reinforces the assumption that individuals are heterosexual and either single, married, divorced or widowed.<sup>161</sup> Thus, the question may create the perception of bias or foster a feeling of invisibility in anyone whose life cannot be described by those categories. Unless specifically relevant to a case, the marital status inquiry may undermine the credibility of the judicial process in several ways. First, it deprives the court and lawyers of valuable information about relationships necessary or useful for a fair jury selection or court process. "In a domestic abuse case, the judge did not ask me the same questions she asked the other potential jurors regarding my relationship with my companion or domestic abuse."<sup>162</sup> "I was serving jury duty. Questions asked of straight jurors were not asked of me. Things that excluded 'married' people were not applied to gay/lesbian even with long time partners."<sup>163</sup>

Second, it forces the gay or lesbian juror or witness either to disclose their sexual orientation or answer the question narrowly according to its specific terms, leaving them to deny or be incomplete about their lives. As one survey respondent noted: "All prospective jurors were asked about marital status. I have been in a monogamous relationship 33 years and consider myself married. It would have been wrong to deny my

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<sup>160</sup> . Brewer & Gray, Report, *supra*, note 60, at 19

<sup>161</sup> . *Viz.*, in the traditional heterosexual sense; even Vermont uses the term Civil Union for same-sex couples, and not Marriage. See *e.g.*, Carey Goldberg, *Gay and Lesbian Couples Head for Vermont to Make It Legal, but How Legal Is It?*, THE NEW YORK TIMES, Sec. 1; at 12; Col. 1; National Desk (July 23, 2000). Of course in Massachusetts, same sex couple can legally marry. *Goodridge v Dept of Pub. Health*, 798 N.E.2d 941 (Mass 2003).

<sup>162</sup> . Brewer & Gray, Report, *supra*, note 60, at 19.

<sup>163</sup> Brewer & Gray, Draft Survey Results, *supra*, note 10, at 14 (response to question 36)

relationship but it would have been legal to do so. It would have been a very public ‘outing’!”<sup>164</sup>

Third, it may foster a perception among gay and lesbian court users that their subsequent judicial experience may not be fully informed or fair. “I feel the court does not take sexual orientation seriously and excludes it as an issue, which may be a mistake under certain circumstances – assuming everyone is either single or married.”<sup>165</sup>

“Lawyers questioned jurors about relevant medical conditions of spouses and family with disregard for other relationships of gays, lesbians, and domestic partners. Judge did not clarify the lawyer’s intent. The net effect: Our relationships don’t count.”<sup>166</sup>

The stigmatizing effects of court users’ open LGBT identity cut across all the jurisdictions studied. Their treatment deteriorated once sexual orientation became salient, either as a characteristic of the court users themselves or as a function of the legal matter. Because many sexual minorities had fairly transient contacts with the judicial system, the choice to become visible was relatively binary; their sexuality was either open or hidden. Although not always, disclosure was often within their control – albeit sometimes forced through legal process or direct inquiry. For court employees, however, the interaction between sexual orientation visibility and court experiences is more complex.

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<sup>164</sup> . Brewer & Gray, Draft Survey Results, *supra*, note 10, at 14 (response to question 36); *see also, e.g., id.* at 3 (response to question 16) (“The judge asked all prospective jurors to state marital status and what their spouse’s occupation was. I have a long-term domestic partner, so I felt that answering the question honestly required me to reveal my sexual orientation and to state my partner’s occupation even though legally my marital status is single. Stating ‘single’ would have felt like lying.”)

<sup>165</sup> . Brewer & Gray, Draft Survey Results, *supra*, note 10, at 16 (response to question 36).

<sup>166</sup> . Brewer & Gray, Report, *supra*, note 60, at 20.

## ***B. Court Employees***

### **1. Openness**

When we view a multistable illusion, our minds switch back and forth between one figure and the other; we recontextualize what we see. For court employees, the courts alternate between being places where legal matters are determined and being places of employment; the context shifts here as well. Thus, visibility plays a similar, but more complicated, role in lesbian and gay court employees' experiences. Unlike court users, gay employees have repeated contact with the courts as their workplace. Thus, although not all felt pressure to hide their sexuality, no one described their experience with the courts as a sexual orientation-neutral event.<sup>167</sup> Similar also to the various images that diverse individuals see in multistable figures, different people have divergent court experiences. Like sexual minority court users, lesbian and gay court employees had very different perceptions and more negative experiences in the courts than did their heterosexual co-workers

Like court users, most California and British court employees surveyed believed that lesbian and gay people were treated the same as any other employee.<sup>168</sup> Additionally, over seventy-six percent of UK respondents and ninety-four percent of California employees believed that the court personnel policies were fair to lesbian and

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<sup>167</sup> . Cf., Brewer & Gray, Draft Survey Results, at 18, note 93 (“My jury service seemed to be a gay-neutral event.”). Accord, *Id.* at 6, (response to question 16), see note 93.

<sup>168</sup> . UK: 59.6 percent of respondents agreed or strongly agreed with the statement “Lesbian and gay employees are treated the same as any other employee.” However, 37.5 percent disagreed or strongly disagreed with that statement. Brewer, 2003 UK Report, note 47, at 26. See Table 29a. CA: 88 percent of respondents agreed or strongly agreed with the statement “Lesbian and gay employees are treated the same as any other employee.” CA Report, note 44, at 39-40.

gay people.<sup>169</sup> Visibility of sexual orientation remains significant in this data as well. The predominant pattern for court employees is the deterioration in sexual minorities' treatment and perceptions of fairness when court workers are asked about their day-to-day experiences, specific observations, and the application of workplace policies. That pattern was repeated in the 2005 UK study<sup>170</sup> and in New Jersey.<sup>171</sup>

A significant percentage of court employees in all the jurisdictions reported that open lesbians and gay men received worse treatment.<sup>172</sup> When the gay or lesbian employee becomes more visible, employees believe workplace policies are applied less fairly. 32.3 percent of all UK respondents thought that people used sexual orientation to devalue the credibility of some lesbian or gay employees. Moreover, 27.6 percent believe that openly gay or lesbian employees do not have the same chance of promotion as heterosexual employees, while 16.7 percent said it was harder to be hired if people suspect you are a LGBT person. Finally, a small number [5.2 percent] believed that LGBT employees receive less favorable work assignments than do their heterosexual

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<sup>169</sup> . UK: 76.8 percent of respondents agreed that their written workplace policies were fair to lesbian and gay men, Brower, 2003 UK Report, note 47, at Table 29e; CA: 94 percent of respondents agreed that their written workplace policies were fair to lesbian and gay men. CA Report, note 44 at 39.

<sup>170</sup> . Brower, 2005 UK Report, note, at 20-21.

<sup>171</sup> . *See, e.g.*, NJ Report, note 45 at 25 (Question 1), 26 (Question 2), 27 (Question 3), 28 (Questions 4-5)

<sup>172</sup> . *See* text accompanying note 215. Other social science workplace studies confirm this finding, but are somewhat less absolute. *See, e.g.*, Croteau, , 48 J. of Vocational Behavior at 200-01(discussing studies); *but see*, Ragins, *Pink Triangles*, 48 J. of Applied Psych. at 1256. Professor Ragins speculates that disclosure may lead to increased reports of discrimination in more hostile environments than the one she studied. *Id.*

peers.<sup>173</sup> The 2005 data are similar, as are the responses to the same questions asked of California employees.<sup>174</sup>

Axiomatically, disclosure of one's sexual orientation is necessary for direct discrimination based on sexual orientation to occur.<sup>175</sup> Like other workplaces, open lesbians and gay men often experience more discrimination and negative treatment.<sup>176</sup> For example a California judicial worker stated, "I could never understand why all of a sudden I was treated with disrespect by management. Then a co-worker told me that she thought management hated gays and that they were told by a different co-worker that I was gay."<sup>177</sup> A New Jersey lesbian court employee heard rumors about her sexual activity, resulting in negative workplace treatment. "Although I was the most qualified, I was not [promoted] because [my supervisor] didn't approve of my lifestyle. I was advised of this information in confidence by another supervisor."<sup>178</sup>

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<sup>173</sup> . See Tables 29g, 29f, 29j, 29i. Brower, 2003 UK Report, note 47 at 33.

<sup>174</sup> . Brower, 2005 UK Report, note, at 21-22; Brewer & Gray, Report, *supra*, note 60, Table 48, at 70. Brewer & Gray, Report, *supra*, note 60, at 59. If a person is suspected of being lesbian or gay, 17.3 percent of California court employees stated that it is harder to be hired; 13.4 percent agreed that sexual orientation is used to devalue the credibility of some gay or lesbian employees; and 9.8 percent believed that anti-gay prejudice is widespread at work. Brewer & Gray, Report, *supra*, note 60, Table 48, at 70. *Accord*, LA Bar Report, *supra*, note 48, at 16, 19 (discussing evaluations, promotions and career paths for openly gay or lesbian attorneys). *See also, e.g.*, CA Report, *supra* note 44, at (referring to Brewer & Gray, Report, *supra*, note 60, Table 48, at 70, and Table 49, at 71.) *See* Brower, *Courts and Closets*, 38 San Diego L. Rev. at notes 283-285.

<sup>175</sup> . *See, e.g.*, Badgett, *Wage Effects*, 48 Indus. & Lab. Rel. Rev. at 728.

<sup>176</sup> . Croteau, , 48 J. of Vocational Behavior at 200-01 (reviewing studies of workplace discrimination). *See also, e.g.*, Hennepin County Report, note 48 at 15-17, 26.

<sup>177</sup> . Brewer & Gray, Report, *supra*, note 60, at 59. *Accord*, LA Bar Report, *supra*, note 48, at 16, 19 (discussing evaluations, promotions and career paths for openly gay or lesbian attorneys); NJ Report, note 45 at 46, (Question 20).

<sup>178</sup> . New Jersey Report at 47. *See also*, NJ Report, note 45 at 54 (During another promotion review, after the supervisor noted in personnel files that "one female candidate had named another female in the unit as a primary beneficiary of an insurance [policy]. The news spread throughout the department like wildfire. The two women felt humiliated and resigned shortly thereafter.").

British examples are similar. “When people became aware of my homosexuality, some people who I had previously called friends stop[ped] talking to me! Others talked but refused to acknowledge anything to do with what they had heard....”<sup>179</sup> “[I]n short, 15 years ago I was offered the post of Principal Private Secretary of the Lord Chancellor; [I] came out; and the offer was withdrawn. [...] Since then, my sexual orientation has not been an issue in formal terms (although it has [...] affected some relationships).”<sup>180</sup>

The incident in question occurred a few years ago. My working relationship with a young, female line Manager broke down when she discovered I was gay. She was a very religious person. She had a very negative view of homosexuality as a result of her beliefs. Having previously worked together harmoniously before she discovered I was gay, she started to pick fault with me once she was aware. LCD personnel were very supportive.<sup>181</sup>

The salience of minority characteristics increases bias.<sup>182</sup> Individuals who stand out or are different from their peers are rated more extreme on a number of levels than are non-salient individuals.<sup>183</sup> Moreover, people remember and judge more harshly the undesirable behavior of out-group members than of in-group members.<sup>184</sup> They

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<sup>179</sup> . Open-Ended Comments Q17. Brower, 2003 UK Report, note 47 at 40. *See also, id.* (“I have no 'firm' evidence that this has happened - it is simply that the attitude of me [sic] particular colleague has changed considerably since he was told that I am gay. The sniggers, whispers, and 'appears' to be anti - gay - again, I can't prove this. [...]”)

<sup>180</sup> . Open-Ended Comments Q26. Brower, 2003 UK Report, note 47 at 47.

<sup>181</sup> . Open-Ended Comments Q26. Brower, 2003 UK Report, note 47, at 47.

<sup>182</sup> . Christine Jolls, *Antidiscrimination Law's Effects on Implicit Bias, forthcoming in Behavioral Analyses of Workplace Discrimination*, at note 75 (2006). For a discussion of the salience of lesbian and gay identity and its effects on legal doctrine, see Brower, *Courts And Closets*, 38 San Diego L. Rev. 565. Like other non-majority statuses within organizations, salience can change over time. *E.g., id.* at 590-91.

<sup>183</sup> . Krieger, *Content of Our Categories*, 47 Stan. L. Rev. at 1193 n.142. More familiarity with the different characteristic reduces the extremes in evaluations because those characteristics overshadow other elements less and judgments become more complex, *Id.* at 1194-95, 1995 n. 151; Brower, *Courts and Closets*, 38 San Diego L. Rev. at 627, nn. 154-55 and accompanying text.

<sup>184</sup> . Krieger, 47 Stan. L. Rev. at 1192.

disproportionately attribute minority members' failures to personal characteristics, while majority members' failures are attributed to situations beyond the individuals' control.<sup>185</sup>

The distinctiveness of lesbian and gay identity helps explain these findings. More specifically, we do not separate out non-gay people; they are just "people" and not a group characterized by their sexual orientation or behavior.<sup>186</sup> Accordingly, we rarely perceive the sexual orientation of heterosexuals because we measure difference against that baseline.<sup>187</sup> For example, sexual orientation protections apply to gay and non-gay persons alike, but we usually do not notice that symmetry.<sup>188</sup> Non-gay people appear not to need that protection<sup>189</sup> because they do not appear different enough to provoke a

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<sup>185</sup> . Krieger, 47 Stan. L. Rev. at 1192; *accord*, Wilkins, 112 Harv. L., Rev. at 1958 ("When white evaluate blacks, they frequently attribute negative acts 'to personal disposition, while positive acts are discounted as the product of luck or special circumstances.'"), quoting Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. Rev. 1251, 1285 (1995).

<sup>186</sup> . Some gay people refer to heterosexuals as "breeders." *E.g.*, Rob Morse, *We're here, we're having a beer...*, SAN FRANCISCO EXAMINER, p. A-2 (June 29, 1997); Rich Kane, *AOHELL, Can A Gay Man Find Love Online?*, OC WEEKLY (ORANGE COUNTY, CALIF.), p. 8, First Person (Apr. 4, 1997); Michael J. Ybarra, *Odd Man In: Businessman Gavin Newsom Is the Latest Addition to S.F.'s Board of Supervisors. His Biggest Selling Point? The Fact That He's A Straight White Male – A Relatively Rare Commodity In That City*, L.A. TIMES, Life-Style, pt E, p. 1 View (Mar. 31, 1997); Edward Porter, *Nine Dead Gay Guys*, TIMES NEWSPAPERS, LTD.(U.K.), Features, at 12 (Sept. 21 2003) (reviewing movie from the perspective of a "boring old Breeder"), *accord*, Kevin Courtney, *The Straight Talk, There's never been a better time to be a gay Irishman. I hate to say it, guys, but being straight is sooo last season*. THE IRISH TIMES, (IRELAND), at 61 (Nov. 24, 2001) (using the term in Ireland as an 'affectionate term' by gay people for non-gays.). The rhetorical impact of that term illustrates the pejorative, misleading, and stigmatizing effect of a view that reduces people to one facet of their assumed sexual activity.

<sup>187</sup> . Indeed, "heterosexual" did not appear in English until preceded by, and perhaps, in contradistinction to, "homosexual." David Halperin, *Sex Before Sexuality: Pederasty, Politics and Power in Classical Athens*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 37-39 (Martin Duberman, et al., eds. 1989).

<sup>188</sup> . Justice Scalia's dissent in *Romer v. Evans*, 517 U.S. 620 (1996) provides a striking example of this inattention in his description of Amendment 2 as merely banning special rights for gay people and returning Colorado law to neutrality. *Id.* at 638-39 (Scalia, J., dissenting). Purely descriptively, he misstates the effect of the Colorado law. Each of the ordinances affected by the amendment, e.g., Aspen, Boulder, Denver, and the state Executive Order, barred discrimination on the basis of sexual orientation. *Id.* at 623-24, 626-27 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993)(*Evans I*). Amendment 2 prohibited anti-discrimination provisions based on homosexual, lesbian, or bisexual orientation only. Colo. Const. Art. II, § 30b; *Romer*, 517 U.S. at 624. Thus, heterosexuals, as heterosexuals, would have remained protected against sexual orientation discrimination under these ordinances; gay people would not.

<sup>189</sup> . *Cf.*, *Id.* at 631.

negative reaction.<sup>190</sup> Unsurprisingly, few heterosexual court employees suffered negative treatment based on their sexual orientation.

All the court reports also found a significant disparity in the personal work experiences of gay and lesbian versus heterosexual employees. California lesbian and gay employees were over five times more likely to experience negative actions, discrimination, or hear comments based on sexual orientation than were heterosexual employees.<sup>191</sup> Thirty percent of all New Jersey respondents and seventy-eight percent of lesbian and gay respondents heard a co-worker, supervisor or judge make a derogatory statement or inappropriate joke about homosexuals.<sup>192</sup> Moreover, fourteen percent of all judicial employees and forty-nine percent of lesbian and gay workers heard those remarks or jokes about a person in the office because that person was or was perceived to be lesbian or gay.<sup>193</sup> UK court employees rated the court system as less fair to LGBT people

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<sup>190</sup> . *But see, e.g.,* Susan Ferriss & Erin McCormick, *When a kiss isn't just a kiss: Castro bar tosses straight smoochers*, SAN FRANCISCO EXAMINER, p. A-1 (Mar. 9, 1997)(gay bar owner ejects man and woman for kissing, SF Human Rights Comm'n orders gay bar to change anti-heterosexual kissing policy to comply with sexual orientation discrimination prohibitions.); *Straights complain of intolerance by gays in Provincetown*, p. A-09, THE PROVIDENCE JOURNAL (R.I.) (July 27, 2006) (anti heterosexual comments made in a gay-friendly municipality).

<sup>191</sup> . While 3.4% of non-gay court employees reported hearing negative comments based on their sexual orientation in the last year, 20.4% of lesbian and gay court employees reported hearing such comments. Just 3.2% of non-gay employees reported their sexual orientation being the subject of jokes or ridicule, while 16.2% of lesbian and gay employees reported such incidents; only 2% of non-gay employees reported verbal abuse based on their own sexual orientation, while 12.5% of lesbian and gay court employees reported such abuse. Brewer & Gray, Report, supra, note 60, Table 40, at 62. Similarly, 2.5% of non-gay employees reported experiencing negative actions based on sexual orientation, compared with almost 15.7% of lesbian and gay male employees. Finally, 12.9% of lesbian and gay employees report being called derogatory names based on their own sexual orientation, compared with 1.7% of non-gay employees. Brewer & Gray, Report, supra, note 60, Table 40, at 62. Finally, one in five lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their work place based on their sexual orientation. Merely two percent of the non-gay employees reported being discriminated against based on sexual orientation. Brewer & Gray, Report, supra, note 60, Table 40, at 62. *Accord*, Brower, 2005 UK Report, at 38-39.

<sup>192</sup> . New Jersey Report at 43 (Question 16).

<sup>193</sup> . New Jersey Report at 43 (Question 17).

than to the general population.<sup>194</sup> This last finding was echoed in the California study. California employees rated the courts less fair to lesbians and gay men than to people generally, with sexual orientation minorities rating the courts significantly lower than their non-gay colleagues.<sup>195</sup>

One court employee stated, “There were quite a few gay men who worked at our court and were openly harassed because of it.”<sup>196</sup> One gay employee noted, “I’ve heard derisive references such as ‘faggot’ from judges, co-workers, and bailiffs. Questions have been asked of me re: flowers/gardening and other areas where gay men are stereotyped.”<sup>197</sup> Another employee reported, “When helping lesbians or gays some of the clerks handle their paperwork touching only the tips or edges of the paper. One stated, ‘You never know what they did or touched.’”<sup>198</sup>

Besides correlating with negative treatment, visibility also affected court employees in other ways. People expected lesbian and gay employees to keep their sexual orientation hidden.<sup>199</sup> Sixteen percent of lesbian or gay New Jersey respondents and two percent of all court employees heard a co-worker, supervisor or judge criticize an

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<sup>194</sup> . On a scale of 1 to 10, with higher scores indicating higher levels of fairness, respondents rated the court system with a mean score of 5.83 on fairness to lesbians and gay men while they rated the courts with a mean score of 6.91 for fairness to people in general. See Tables 31a, 31b. Brower, 2003 UK Report, note 47, at 34-35. Brower, Brower, 2005 UK Report, note, at 26-27 (2005 respondents rated the courts with a mean score of 5.66 on fairness to lesbians and gay men and 6.13 for fairness to people generally.)

<sup>195</sup> . Heterosexuals rated the courts with a mean score of 7.88 (out of 10) for fairness to lesbians and gay men and 7.98 in fairness to people in general. Lesbians and gay men rated the courts with a mean score of 6.44 in fairness to sexual orientation minorities and 7.15 to people generally. CA Report, note 44 at 40 (Table 50).

<sup>196</sup> . Brewer & Gray, Report, supra, note 60, at 48.

<sup>197</sup> . Brewer & Gray, Report, supra, note 60, at 49.

<sup>198</sup> . *Id.*

<sup>199</sup> . See, also, CA Report, note 44, at (referring to Brewer & Gray, Report, supra, note 60, Table 48, at 70, and Table 49, at 71.)

employee or applicant for openly identifying him or herself as lesbian or gay.<sup>200</sup> Twenty-one percent of lesbian or gay employees and one percent of all employees reported that someone in their office was advised or asked to conceal their sexual orientation.<sup>201</sup> The 2003 UK report reported that 41.7 percent believe that it is unsafe for lesbians and gay men to be open about their sexual orientation at work, while 26.1 percent think that LGBT employees should keep their sexual orientation to themselves there.<sup>202</sup>

Gay and non-gay people also differently perceive the risks and benefits of disclosing one's sexual orientation in court. A greater percentage of heterosexual UK court employees thought that LGBT persons were able to be open about their sexual orientation at work than did non-heterosexuals – with bisexuals and transgendered persons counseling the most caution about openness.<sup>203</sup> Remember that the heterosexual UK respondents surveyed were all “friends of the Rainbow Network,” a group

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<sup>200</sup> . New Jersey Report at 44 (Question 18).

<sup>201</sup> . New Jersey Report at 44 (Question 19). Co-workers were responsible for the majority of this treatment. *Id.*

<sup>202</sup> . See Tables 29l, 29h, 29b, and 29k] Brower, 2003 UK Report, note 47 , at 30.

<sup>203</sup> . Bisexuals, 80 percent agreed or strongly agreed that it is better for LGBT people to keep their sexuality to themselves at work, transgendered individuals 50 percent, lesbians and gay men 25 percent, heterosexuals 16 percent. See Table Q29.k\*Q34. Brower, 2003 UK Report, note 47, at 30. In addition, nearly twice as many men as women agreed or agreed strongly with that statement. Men 30.7 percent, women 15.2 percent. See Table Q29.k\*Q33). Brower, 2003 UK Report, note 47, at 30. The reasons for these differences are obscure. Male homosexuals and bisexuals may perceive more hostility towards them in the workplace than do female homosexuals and bisexuals. Lesbian invisibility and the stronger negative reactions to male homosexuality may also play a role. On lesbian invisibility, see Julie Shapiro, *Custody and Conduct, How the Law Fails Lesbian and Gay Parents and their Children*, 71 Ind. L. J. 623, 648 (1996) (discussing the sometimes positive effects of lesbian invisibility). For gender hostility differences between society's views of male and female homosexuals, see Mary Ann Case, *Disaggregating Gender From Sex and Sexual Orientation, The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 63-64 (1995); See also, *Casenote*, 115 Harv. L. Rev. 2074, 2080 nn. 49, 52 (2002); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1776-1777 (1998). Moreover, other studies have shown that men as a group tend to express more prejudice against people from other groups than do women. E.g., Stonewall, *Profiles of Prejudice*, at 23 (race), at 25 (Lesbians and gay men), at 27 (other prejudice).

characterized by their interest in and sensitivity to sexual orientation issues.<sup>204</sup> If those persons undervalued the risks in disclosing one's sexual orientation at work,<sup>205</sup> we should see even stronger disparities in the more randomly drawn New Jersey and California court employee samples. Indeed, on virtually every question in which the data was separated by respondents' sexual orientation, gay men and lesbians in the Garden State reported worse experiences or observations than did their heterosexual counterparts when reporting on negative treatment based on minority sexual orientation.<sup>206</sup>

Despite the strong correlation between sexual orientation openness and adverse treatment as well as the significant co-worker sentiment that minority sexuality should remain hidden, the data on court worker visibility is not uniformly negative. Openness about one's sexual orientation appears to correlate positively with some fairness perceptions.<sup>207</sup> In 2003, British respondents who were more open at work believed that it was unnecessary to keep one's sexual orientation quiet in that setting.<sup>208</sup> This same pattern also appeared when they were asked: (1) if an open LGBT person would have a

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<sup>204</sup> . See note 64.

<sup>205</sup> . As with general perceptions of fairness, specific beliefs about LGBT persons in the DCA improved between 2005 and 2003. However, heterosexuals still tended to have more positive attitudes about sexual orientation fairness than did LGBT persons. In 2005, heterosexuals believed that their co-workers were sensitive to diversity more often than did LGBT respondents [80.4% to 63.7%]. That same difference was reflected in attitudes about whether co-workers included sexual orientation when they discussed workplace diversity [68.7% to 57.9%].

<sup>206</sup> . NJ Report, note 45, at 26-31, 35, 37-40, 43-44, 56-57; *but see, id.* at 54 (Question 15, satisfaction after reporting bias).

<sup>207</sup> . *Accord*, Croteau, 48 J. of Vocational Behavior at 201 (discussion two studies that found a correlation between openness and fairness perceptions.)

<sup>208</sup> . Respondents agreed or strongly agreed with the statement, "It is better if LGBT people keep their sexual orientation to themselves whilst at work." as follows: Totally out at work 17.7 percent, selectively out at work 33.3 percent, not out at work 77.7 percent. See Table Q29k\*Q44a. Brower, 2003 UK Report, note 47, at 30-31.

harder time being hired;<sup>209</sup> (2) if people made jokes about LGBT persons behind their backs;<sup>210</sup> and (3) whether prejudice was widespread at work.<sup>211</sup> In 2005, a larger percentage of open British lesbian or gay court employees reported that the court's policies were fair to LGBT people.<sup>212</sup> Other workplace studies also evidence this correlation.<sup>213</sup>

Perceptions of treatment may improve as one becomes more visible about sexual orientation, even if actual treatment did not necessarily do so. Because the study data reflect correlation and not causation, however, we may only cautiously assign cause and effect. Conceivably, better perceptions of fair and equal treatment based on sexual orientation may lead to increased openness about respondents' sexuality, rather than the other way around.<sup>214</sup> Cause and effect may also run in both directions at the same time.<sup>215</sup>

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<sup>209</sup> . Totally out at work 15.7 percent, selectively out at work 23.8 percent, not out at work 33.3 percent. See Table Q29j\*Q44a. Brower, 2003 UK Report, note 47, at 31.

<sup>210</sup> . Totally out at work 49 percent, selectively out at work 61.9 percent, not out at work 77.8 percent. See Table Q29i\*Q44a. Brower, 2003 UK Report, note 47, at 31.

<sup>211</sup> . Totally out at work 17.7 percent, selectively out at work 23.8 percent, not out at work 33.3 percent. See Table Q29h\*Q44a. Brower, 2003 UK Report, note 47, at 31. Alternatively, the apparent risks of disclosure may lessen with the size of the group into which one falls. Heterosexuals naturally are the largest group of DCA employees, with lesbians and gay men perhaps having sufficient numbers to make it relatively relaxed to come out in that setting. Finally, the small numbers of bisexual and transgendered respondents may make their perceptions of risk much higher.

<sup>212</sup> . Brower, 2005 UK Report, note, at 24-25. [totally open agree = 80%, disagree = 12.5%; selectively open agree = 73%, disagree = 4.3%; not open agree = 50%, disagree = 0%].

<sup>213</sup> . Openly lesbian or gay employees were more committed to their workplaces, had higher job satisfaction, and lower conflict between work and home. Nancy E. Day & Patricia Schoenrade, *The relationship among reported disclosure of sexual orientation, anti-discrimination policies, top management support and work attitudes of gay and lesbian employees*, 29 Personnel Rev. 346, 351-52 (2000). Openly gay or lesbian workers are more satisfied with that degree of openness than are less visible employees. Croteau, 48 J. of Vocational Behavior at 201 (discussing studies).

<sup>214</sup> . Other workplace studies found that lesbian and gay employees were less likely to disclose their sexual orientation when they reported experiencing or witnessing discrimination. Ragins, *Pink Triangles*, 48 J. of Applied Psych. at 1256; Croteau, *Research on Work Experiences*, 48 J. of Vocational Behavior at 199-200. The CA Report found evidence that negative treatment affected one's comfort in disclosing sexual orientation. "One man in particular made gestures and anti-gay comments. Others would nod in agreement it was very scary to come out in that environment. The judge did dismiss this man after a while." Brower, *Obstacle Courts*, at 56. See also, NJ Report, note 45 at 48-49, discussed at text accompanying notes 228-229 supra. At least one California court user respondent specifically reported that

We must be cautious about this interpretation, however. Alternatively, colleagues may simply hide their prejudices when an openly gay person is present.<sup>216</sup> Employees who were not visible heard more jokes about sexual minorities behind their backs and perceived more widespread prejudice in the workplace than did their more open colleagues.<sup>217</sup> Visibility sometimes pushes bias underground. “I hope they will begin to think about what they are saying, as I confront their behaviour every time. I am worried though, that they will just stop saying things in front of me, which means I can no longer try to change their behaviour and/or attitudes.”<sup>218</sup>

Courts should worry about what this interpretation portends. Bias and prejudice may not be eliminated; they may merely be hidden until co-workers believe it is safe to express them after an open gay person has left the room.<sup>219</sup> Because not all sexual

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he or she passed as heterosexual rather than be subjected to mistreatment as gay or lesbian. Brower, *Obstacle Courts*, at 48-49. A British court employee engaged in the same strategy: Open-ended comments, Q10. Brower, 2003 UK Report, note 47, at 59-60. *See also*, “[I] feel it worth mentioning that when I worked at another government dept. some 3 or so years ago, I was subject to many of the above incidents [of negative treatment] - hence, since returning (from loan) to DCA, I have decided to keep quiet about my sexuality - just in case!” Brower, 2005 UK Report, note, at 26 (Open-ended comments Q15). A New Jersey court employee also lied about his sexual orientation. NJ Report, note 45 at 48-49, open-ended comment quoted at note 229, *supra*. *Accord*, LA Bar Report, at 27, (“most gay attorneys attempt to avoid unlawful discrimination by leaving their sexuality ambiguous, or even making it appear mainstream”); LA Bar Report at 27 n.179 (one lesbian lawyer married in order to make partner).

<sup>215</sup>. *See generally, e.g.*, EARL BABBE, *THE PRACTICE OF SOCIAL RESEARCH*, (5<sup>th</sup> Ed. Wadsworth Publishing Co., Belmont, CA 1989).

<sup>216</sup>. 40.4 percent of California court employees acknowledge that people make jokes or comments about gay people behind their backs. Brewer & Gray, Report, *supra*, note 60, Table 48, at 70. In the 2005 UK study, 46.9 percent stated that people made jokes or comments about LGBT people behind their backs. Brower, 2005 UK Report, note, at 23

<sup>217</sup>. *See above*, note 210, Tables Q29l\*Q44a, Q29h\*Q44a.

<sup>218</sup>. Open-Ended Comments Q13. Brower, 2003 UK Report, note 47, at 39. *See also, e.g.*, Open-ended comments Q12.7 (2005), Brower, 2005 UK Report, note, at (“I am a senior manager: a) if I confront someone about an action, they usually stop – that’s good. b) but they don’t really debate the issue and their actions may just go ‘underground’ – no idea if that’s an improvement.”); Open-ended comments Q10 (2005), Brower, 2005 UK Report, note, at (“Although general atmosphere is one of tolerance + respect, 'sniggering culture' does remain - I experienced this when not out, but when out have noticed it less. This, for me, demonstrates that there does exist a residual unease with LGBT issues.”).

<sup>219</sup>. *See also*, NJ Report, note 45 at 49 (“Several gay or lesbian respondents said that because co-workers and others do not know that they are gay, they feel free to make gay jokes in their presence.”).

minorities are visible, LGBT people may be present even when they are not openly identified. A biased workplace environment may affect invisible sexual minorities and heterosexuals, as well as openly identifiable gay persons.<sup>220</sup>

## 2. Hiding or Passing

To avoid the negative treatment discussed above, another option for lesbian and gay men in the courts is to hide their sexuality or pass as heterosexual. Unlike court users who may have only fleeting or sporadic contact with the judicial system, court employees have repeated workplace experiences. Accordingly, the costs of remaining invisible increase. Forced passing can lead to painful choices. One Los Angeles lesbian attorney married in order to make partner.<sup>221</sup> Some UK employees' negative experiences in prior jobs meant that they would not disclose their sexual orientation in their current court employment.<sup>222</sup> Other California court employees report feeling invisible or being

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<sup>220</sup> . Both US and UK employment law make employers and employees responsible for harassment. *See, e.g.*, US: Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Harris v. Forklift Sys., 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); UK: Employment Equality (Sexual Orientation) Regulations, Reg. 5 (SI 2003/1661)(effective Dec. 1 2003)(England, Wales, Scotland); *see also*, Department of Trade and Industry (DTI), *Protection against discrimination at work on gender and sexual orientation, Explanatory Notes*, note 54, at 13-14 (Dec. 2003)(same); Employment Equality (Sexual Orientation) Regulations 2003 (SR 2003/497)(Northern Ireland, effective Dec. 2, 2003). Harassment includes name-calling, teasing, nicknames or upsetting behaviors, even without malicious intent. Moreover, behavior is actionable although not targeted at specific individuals if it leads to a general culture that appears to tolerate the telling of homophobic jokes or other similar activities. *See*, Advisory, Conciliation and Arbitration Service (ACAS), *Sexual Orientation in the Workplace – a guide for employers and employees*, at 9 (Nov. 2003) (The ACAS is a taxpayer-funded, public body. The Department of Trade and Industry approvingly referred to ACAS's interpretation of the 2003 Employment Equality (Sexual Orientation) Regulations. *DTI Explanatory Notes*, Nos. 47-56, at 11-14 (2003)). *See generally*, *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (holding that the objective severity of harassment should be evaluated by the reasonable person standard while considering "all of the circumstances" and the "social context" in which the alleged harassing conduct occurred); *Harris*, 510 U.S. at 21, 23 (reaffirming that Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment and designating relevant factors that might indicate the existence of a hostile work environment).

<sup>221</sup> . LA Bar Report at 27 n.179, cited in Brower, *Obstacle Courts*, at 56, n. 92.

<sup>222</sup> . “[I] feel it worth mentioning that when I worked at another government dept. some 3 or so years ago, I was subject to many of the above incidents [of negative treatment] - hence, since returning (from loan) to DCA, I have decided to keep quiet about my sexuality - just in case!” Brower, 2005 UK Report, note, at 26 (Open-ended comments Q15). This action is confirmed by social science studies, Beth

shunned by co-workers after they complained about different treatment of gay people.<sup>223</sup>

Most telling of all, some employees did not report incidents of anti-gay behaviors because they feared others would think they were LGBT.<sup>224</sup> “I took relatively little action as I was worried & still am that people would guess / find out about my transsexuality as I am not out & may not be ready to be out at work for fear of widespread ridicule & prejudice. I saw & heard the reaction to someone who now presents as a woman in HQ.”<sup>225</sup> One New Jersey respondent detailed how he or she either kept quiet or even participated in anti-gay comments so as to deflect suspicion that he or she was non-heterosexual.<sup>226</sup>

Nevertheless as other responses indicate, some gay and lesbian employees believe that the bias evident in the courts requires them to keep completely quiet about their sexual orientation.<sup>227</sup> “A gay court employee stated that having heard words like “faggot”

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E. Schneider, “*Coming Out At Work: Bridging the Private/Public Gap*”, in 13 *Work and Occupations* 463-87 (Nov. 1986); Badgett, *Wage Effects*, 48 *Indus. & Lab. Rel. Rev.* at 728.

<sup>223</sup> . “It’s like I don’t exist anymore.” “Made me feel uncomfortable. Fewer invitations to group lunches, etc.” Brewer & Gray, Report, *supra*, note 60, at 60. *Accord*, NJ Report, note 45 at 54. (open-ended comment that after reporting anti-lesbian harassment to management, that employee “became even more of a pariah...[and eventually] resigned under the pressure and strain of the ordeal.”). *See generally*, LA Bar Report, *supra*, note 48 at 32 (discussing the choice of confronting or acquiescing in anti-gay behaviors).

<sup>224</sup> . 7.1% of California court employees, who experienced incidents of negative behaviors at work and did not report them, did not do so because of this fear. Brewer & Gray, Report, *supra*, note 60, Table 43, at 64; 2.8% of employees, who observed such treatment in open court, did not report it for this reason. *Id.* at Table 33, at 54. 2.3% of employees, who observed such behavior other than in open court, did not report it for this reason. *Id.* at Table 38, at 58. In the UK, 9.1 percent did not intervene out of concern that they would be thought to be gay or lesbian. Brower, 2003 UK Report, note 47 at 39. *See also*, NJ Report, note 45 at 54. (open-ended comment that after reporting anti-lesbian harassment to management, that employee “became even more of a pariah...[and eventually] resigned under the pressure and strain of the ordeal.”)

<sup>225</sup> . Open-Ended Comments, Q15. Brower, 2003 UK Report, note 47 at 39.

<sup>226</sup> . NJ Report, note 45 at 48; *see also*, NJ Report, note 45 at 49.

<sup>227</sup> . This is consistent with the findings of Belle Ragins and her colleagues. Gay or lesbian colleagues who perceived greater workplace discrimination were more likely to conceal their sexual orientation than those who reported less discrimination. Ragins, *Pink Triangles*, 48 *J. of Applied Psych.* at 1252.

and “queer” directed at others in the office made him believe “that ‘coming out’ in [his] office will subject [him] to comments and increased scrutiny.”<sup>228</sup>

As a gay employee there is not much that I can say about this delicate subject because I cannot even be myself at my place of employment. I have to lead two different lives. Sometimes my co-workers ask me if I have a girlfriend, if I am married, how many children I have, and I have to answer with a lie. All this makes me feel very unhappy. In addition, sometimes the people that I work with make fun of gay people in front of me, and I have to laugh about it and pretend that it does not bother me... I have a co worker who is gay too; this person lives in a fantasy world and lives in a constant fear that people will find out that he is gay. What I am trying to say here is that it is not very easy to be gay and work in the judicial system. I do not think there are very many gay employees of the court who openly identify themselves as lesbian or gay.<sup>229</sup>

Finally, one state-employed attorney said:

I am not open about my lifestyle at my job for fear of retaliation and/or job loss. I have appeared in many of the different county courthouses as a part of my State job. I have heard and seen, countless times, gay/lesbian jokes, comments, disparaging looks, mocking behavior, etc. I have seen many instances of discrimination towards gays and lesbians in the New Jersey courts... The system is in desperate need of reform and education. How surprised all the judges and lawyers I deal with on a continuing basis would be if I was allowed to be open and honest about my life.<sup>230</sup>

Despite co-workers’ recommendations to hide minority sexual orientation to avoid discrimination, even successful passing as heterosexual results in job-related,

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<sup>228</sup> . New Jersey Report at 48; see also, e.g., New Jersey Report at 49 (“I have heard people make rude comments about female sheriffs officers, openly gossip about ‘suspected people. I have heard the terms ‘fag’ and ‘dyke’ used openly. Anyone who is gay would understandably be afraid in this atmosphere.”).

<sup>229</sup> . New Jersey Report at 48-49.

<sup>230</sup> . New Jersey Report at 49.

economic effects.<sup>231</sup> Passing can lead to higher absenteeism or job turnover<sup>232</sup> and the energies involved in passing may reduce productivity or increase stress.<sup>233</sup> Moreover, the conscious effort involved in passing also means avoiding potentially awkward workplace social interactions where sexual orientation may be exposed or made express.<sup>234</sup> As one large firm attorney said,

I knew that I would lose work if any of the partners found out that I was gay. I did not reveal this fact to anyone except my closest friends at the firm. I was conscious of having to remain somewhat distant to most people. I did not get close to people because in their natural course of conversation most people talk about their spouses and families and I had resolved never to lie by fabricating an opposite-sex spouse... I only spoke about work-related matters, never joined any group of co-workers for a drink, and never went to any firm events except those that were absolutely obligatory, and then I left as soon as possible.<sup>235</sup>

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<sup>231</sup> . Badgett, *Wage Effects*, 48 Indus. & Lab. Rel. Rev. at 728, citing Jeffery Escoffier, “Stigmas, Work Environment, and Economic Discrimination Against Homosexuals” in 2 *Homosexual Counseling J.* 8-17 (Jan. 1975); Richard Mohr, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW* (New York, Columbia University Press 1988).

Building on Mohr, Badgett suggests that a different strategy, over-compensating by being super-competent and super-productive, may have positive economic effects. Badgett, *Wage Effects*, 48 Indus. & Lab. Rel. Rev. at 728, quoting Mohr, supra note 231, at 149; *Accord*, Wilkins, 112 Harv. L. Rev. at 1932-33 (describing the strategy of an African-American attorney). For a view that the best way for minority or outsider workers to overcome stereotypes is to work harder and more productively, see Amy Wax, *Discrimination As Accident*, 74 Ind. L.J. 1129, 1202-03 (1999); *but see* Carbado, 85 Cornell L. Rev. at 1288n.80 (criticizing Wax).

<sup>232</sup> . Ragins, *Pink Triangles*, 48 J. of Applied Psych. at 1248; *accord*, Brower, 2003 UK Report, note 47 at 48 (open-ended comments to Q24.8, 25.6).

<sup>233</sup> . Escoffier, at 8-17. *See also, e.g.*, Hennepin County Report, note 48 at 18, L.A. Bar Report, note 48, at 28 (“I have to sit anxiously in the office and, at every moment, try to figure out whether and when I can say “we” and risk someone asking who “we” is. . . . [I]f someone asks, “What happened this weekend?” and I slip and [say] “we” instead of “I,” then I go through a kind of turmoil. That really requires energy that . . . prevents you . . . from achieving any peace and assurance.”)

<sup>234</sup> . Badgett, *Wage Effects*, 48 Indus. & Lab. Rel. Rev. at 728. *See also, e.g.*, Hennepin County Report, note 48, at 18, 30, 37.

<sup>235</sup> . Hennepin County Report, note 48, at 37. *See also*, NJ Report, note 45 at 48 (quoting court employees comments on their choices and actions to hide their sexuality.)

### 3. Minimizing Minority Sexual Orientation

As the last comment noted, lesbians and gay men can minimize social interactions to avoid disclosing information that would reveal sexual orientation. Whether this is perceived as passing as heterosexual or minimizing sexual orientation difference depends on the knowledge of co-workers.<sup>236</sup> Like the opening optical illusion, what you observe depends on the knowledge and perceptions of the viewer.

The New Jersey Report stated that most people believed that homosexuality was a private matter and ought not be revealed in the workplace.<sup>237</sup> One respondent commented that keeping quiet about their sexuality is a choice that most sexual orientation minorities would prefer. “Gays and lesbians do not wear badges of identification; most would prefer to ‘blend in.’”<sup>238</sup>

Nevertheless like passing as heterosexual, blending-in or downplaying one’s sexual orientation is not cost-free. As a Minneapolis lawyer noted, “[If you want to succeed in this firm], get a wife, get a Lexus, get a mortgage.”<sup>239</sup> As with hiding, avoiding social interactions that might highlight differences between gay and non-gay employees may mean that others perceive lesbian and gay co-workers as standoffish or

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<sup>236</sup> . See text accompanying note 35.

<sup>237</sup> . New Jersey Report at 47; see also, “They sometimes try and come on to you. If they are gay, they should keep it to themselves. I don’t care one way or the other.” *Id.*

<sup>238</sup> . New Jersey Report at 47. This belief may be false, however. *See, e.g.*, Hennepin County Report, note 48, at 31-32 (“The thing that concerns me most about my firm is a general attitude that being gay is simply not an issue and shouldn’t even be addressed in the work context. This attitude pervades to the extent that I personally feel pressure not to raise ‘gay’ issues, even when it otherwise seems appropriate to do so.”).

<sup>239</sup> . Hennepin County Report, note 48, at 21. As the managing partner in a major Minneapolis noted, “[Hiding sexual orientation makes it] virtually impossible for them [gay and lesbian lawyers] to participate fully in the culture of the workplace environment. Over time, many are driven away from their practice environments, resulting in lost opportunities for both the employees/attorney and the employer.” *id.* at 30

abnormal.<sup>240</sup> Some gay or lesbian court employees report that others forced them to dampen their minority sexuality in workplace social settings by reducing invitations so that a same-sex partner would not attend.<sup>241</sup> This latter experience is particularly significant because engaging in social interactions in parity with their heterosexual co-workers is one of the employment practices that had the strongest inverse relationship to perceived discrimination.<sup>242</sup> Finally, not participating in these events equally may mean that gay court employees fail to develop ally or mentoring relationships important for advancement.<sup>243</sup> Accordingly, minimizing one's sexual orientation can sometimes be a counter-productive strategy in the courts.

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<sup>240</sup> . “[At social events] gay and lesbian attorneys are most likely to feel and be perceived as ‘different’ – usually attending events without a date/spouse, making it more difficult to enjoy the event and participate fully. As a result, they are often perceived by other attorneys as antisocial or mysterious ... not fitting in.” *See, e.g.*, LA Bar Report, note 48, at 33 (quoting response from a gay or lesbian attorney respondent). *See also*, NJ Report, note 45 at 48 (quoting court employees comments on their choices and actions to hide their sexuality.). *See also, e.g.*, Hennepin County Report, note 48, at 33 (“When I was hired only one associate knew I was gay... [...] Even though the situation went well for the first three years, it was apparent to everyone that I just did not fit in socially with most other lawyers in the firm... After a while it seemed obvious that a few of the partners would have been a lot happier if I just went elsewhere.”)

<sup>241</sup> . *Accord*, Brower, 2003 UK Report, note 47, at 37 (“Not invited to senior office meetings as partners were invited and they did not want me to attend with my same-sex partner (no other reason not to be invited).

<sup>242</sup> . Rugins, *Pink Triangles*, 48 J. of Applied Psych. at 1255-56. Although disclosure of sexual orientation was higher when there were gay-protective legislation in the jurisdiction and gay-supportive policies at work, neither was as significant as welcoming social interactions. *Id.* at 1252. The presence of gay colleagues was related to disclosure, but having gay supervisors were not, nor was diversity training. *Id.* at 1252.

<sup>243</sup> . *See e.g.*, Rugins, *Pink Triangles*, 48 J. of Applied Psych. at 1256; Rosabeth .M. Kantor, MEN AND WOMEN OF THE CORPORATION (Basic Books, 1977). *See generally, e.g.*, FEDERAL GLASS CEILING COMM’N (1995) (lack of mentoring and placement of women in corporations where likely not to get experience and contacts leads to lack of promotion and the glass ceiling.). For discussion of gay glass ceilings, *see*, Jeff Frank, *Gay Glass Ceilings*, Discussion Papers Series 2004-20 (Royal Holloway, Univ. of London 2004) (UK academics), and also works at <http://ideas.repec.org/p/hol/holodi/0420.html>. Moreover, anti-lesbian bias may be present even as women combat gender discrimination, Sherianne Shuler, *Breaking Through the Glass Ceiling Without Breaking a Nail: Women Executives in Fortune Magazine's "Power 50" List*, 6 Am. Communication J. (Issue 2, 2003) (discussing how women successful at breaking gender glass ceilings are always depicted as traditional female gender conforming to avoid the association with homosexuality.).

## V. Conclusion

Whether lesbians or gay men opt to be open, to be invisible, or to minimize their sexual orientation, each decision carries consequences for their treatment and experiences in the courts. It is inappropriate to study the data on LGBT persons and the judicial system without considering visibility and disclosure of minority sexuality. Once uncovered, minority sexual orientation persists as salient and affects the experiences and treatment of lesbian and gay court users and court employees, although it operates slightly differently for each group. It is “a pattern that once seen, cannot be unseen.”<sup>244</sup>

In the opening multistable illusion, whether you see an old woman or a young one depends on where you focus in the image and how you sort the visual information. The illustration itself does not change; only our perception of what it shows is altered. The analogy to sexual orientation minorities’ experiences in the courts is that shifting perspectives leads to diverse analysis of the data. We see divergent pictures of how lesbians and gay people are treated in the courts depending on whether we ask for the observations of heterosexuals or gay people. Even more significantly, we get a very different image when we focus on how visible sexual orientation becomes in the court, either as a topic in a court proceeding or as a characteristic of court users and court personnel. Accordingly courts and those who study the treatment of sexual minorities in the judicial system must not only examine sexual orientation, but also the visibility of that identity. Only then will an accurate, multifaceted picture emerge of LGBT persons’ experiences in court.

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<sup>244</sup> . See, Brian Boyd, “Nabokov As Storyteller”, in THE CAMBRIDGE COMPANION TO NABOKOV, 45 (Julian W. Connolly, ed. 2005).