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ACKNOWLEDGMENTS

I have written longer books, but never one that took so long to write. It is appropriate therefore that I begin by expressing appreciation for the extraordinary patience shown by Michael Briggs of the University Press of Kansas. When other editors would have hectored and badgered if not given up, Mike continued to offer support and sympathy. His faith helped lift my spirits even if did not always dispel my doubts.

Those doubts stemmed in part from a political scientist's frustration at not being able to get more direct access to the decision-making process of the institutions I had chosen to write about. It soon became apparent that my original hope that I could tell the story of the behind-the-scenes maneuvering within the Boy Scouts of America and the US Supreme Court was hopelessly naïve. Both these august institutions work hard to prevent people from peering behind the curtains concealing their deliberations. Supreme Court clerks must even take a vow of secrecy in exchange for the privilege of serving the justices. BSA executives clam up almost as tight. The justices want us to believe that they are simply following the dictates of the law and the Constitution, just as Scouting's leaders have wanted us to accept that they simply follow the dictates of the Scout Oath and Scout Law and act in the best interests of Scouting. Neither the Court nor the Scouts want the public to see their institutions as political. At least I'm not that naïve.

Since beginning this book in the summer of 2008, I often asked myself whether it would be better to leave the writing of this book for another time and author. One day, after all, researchers will have access to the papers of the justices on the Supreme Court at the time of the *Dale* decision—though we will have to wait until all of these justices are dead (the youngest of whom, Clarence Thomas, is only sixty-five as of this writing) before Chief Justice William Rehnquist's papers will be available to the public. And although Dale's case is fast slipping into history, the controversy over admitting gays in the Boy Scouts is still as contentious as ever. Perhaps in several decades, when the morality of gay and lesbian relationships no longer divides the nation as sharply and when the principals in-

volved have exited the stage, the Boy Scouts will be prepared to open their archives to researchers. That seems too long to wait, however, to begin to tell such an important story.

Fortunately, I encountered many people willing to help me tell this story. I am especially grateful to David Peavy, who devoted untold hours to answering an endless stream of questions. David's encyclopedic knowledge of the Boy Scouts is unrivaled, as is his generosity in helping those who wish to understand the Scouts. I also benefited greatly from the wide array of resources that he makes available to the public on two websites: http://www.bsa-discrimination.org/ and http://paxtu.org/index.html. David also was kind enough to read the completed manuscript and he saved me from countless embarrassing errors, large and small.

I also owe a particular debt to Merril Hirsh, an attorney at Troutman Sanders who represented Michael Geller and Roland Pool, two gay men who challenged the Scouts' exclusionary policy two years after Dale did. I contacted Hirsh looking for a few depositions and ended up with a massive box full of relevant materials from that case that enriched the story in countless ways. Roland Pool was also eager to help and he, too, sent me an entire box of documents and filings from the case.

Also deserving of special thanks is Kenneth Ritchie of the New Jersey State Law Library. In the course of my research I benefited from many acts of generosity and kindness, but nobody came close to putting in more time on my behalf than Ken, who graciously scanned for me an immense trove of New Jersey court documents related to the *Dale* case. Willamette University's librarians Melissa Treichel and Rich Schmidt were also unfailingly helpful in locating needed documents. Several Willamette University undergraduate students also helped me tremendously in gathering information related to the *Dale* case. In particular, I would like to thank Catie Theisen, Katie Johannsen, and Will Nevius.

A few other individual also deserve thanks for helping me track down hard-to-find documents. Tim Curran not only answered my questions related to his pioneering case, he also dug up from his files several important documents, most notably a revealing five-page letter sent to him by BSA attorney Malcolm Wheeler in July 1981. Jon Davidson, legal director of Lambda Legal, also gathered

up a number of documents that I asked about and, most important, sent me a several-hundred-page deposition by Edelman's Blake Lewis that I had been unable to find elsewhere. Thomas Moloney of Cleary Gottlieb also dug out several important briefs that I had been unable to locate.

The cooperation and assistance of many of the principals involved in the *Dale* litigation were also critically important in reconstructing events. Among those who gave generously of their time to talk with me and educate me were Evan Wolfson, James Dale, Ruth Harlow, David Buckel, Donna Costa, Mark Agrast, Jim Hough, and Deborah Poritz. I also learned from conversations with Richard Socarides, Robert Raben, Dan Marcus, and Kinga Borundy.

Notably lacking from this list of names, unfortunately, are the officials and lawyers representing the Boy Scouts of America. My requests to speak with BSA officials were almost always rebuffed or ignored. Local officials directed me to the national office, specifically the then BSA corporate counsel David Park. I did have a brief telephone conversation with Park in August 2008, but he insisted that I submit all questions in writing—and then never responded to the questions I did submit. Requests for interviews to various others, including Edelman's Blake Lewis and several BSA attorneys, specifically Sanford Brown and George Davidson, also went unanswered or were declined, though toward the end Davidson did respond helpfully via email to some specific factual questions. An Edelman representative was willing to tell me when the company began operations in Dallas, but once I asked about the public relations firm's connection with the Scouts their representative stopped communicating. I recognize that this book is poorer for my lack of access to those on the other side of this story. My only consolation is that the voluminous court records—not just in Dale's case but in several other similar cases—go a significant way toward compensating for that lack.

One part of the story that I opted not to tell here is the Clinton administration's aborted involvement in the writing of an amicus brief on the side of Dale. That the Clinton administration considered such a brief and that the question was contentious is clear from many interviews I conducted and email communications I received. However, the accounts were sufficiently contradictory, imprecise, or

secondhand that I did not feel confident telling the story without more direct access to the Clinton administration's internal deliberations regarding the brief. I have submitted a Freedom of Information Act request related to these internal deliberations, but since the administration's aborted brief is at best a side story in my tale I decided against further delaying publication of the book for the sake of its inclusion.

There would have been no book at all without the financial support I received from several quarters. Completion of the book was made possible by a timely grant from Willamette University's Center for Religion, Law, and Democracy, directed by my colleagues Steve Green and David Gutterman. Early work on the project was supported by Willamette University's Atkinson grant program and by the National Endowment for the Humanities. My special thanks to Jay Mechling and Karen Orren for writing in support of my NEH application. Both Karen and Jay also kindly read the completed manuscript and offered encouraging words leavened, in Karen's case, with loving criticism and constructive suggestions. This isn't the book Karen would have written, but it's better for her having read it.

This book is also better for the close attention and critical reading given it by Chuck Myers, now director of the University Press of Kansas. One of the embarrassing measures of how long this book took me to finish is that by the time I got around to delivering the long-promised manuscript, UPK had reshuffled some of its internal responsibilities, with Chuck taking over from Mike Briggs the in-house handling of the Landmark Law Cases series. Any concerns I might have had about being handed off from one editor to another were quickly dispelled by Chuck's deft touch and sound judgment. *Judging the Boy Scouts* is the sixth book I have published with UPK, and I am so profoundly grateful to everyone at the press—most especially my friend and mentor Fred Woodward—for their incredible support over the past two decades. I have always found the entire UPK staff to be consummate professionals dedicated to their craft, and this time has been no different.

Finally, I need to acknowledge my debt to Nancy Rosenblum's wonderful book *Membership and Morals: The Personal Uses of Pluralism in America*. My interest in writing about Dale's case stems di-

rectly from teaching *Membership and Morals* in my course on Liberalism and Its Critics. Rosenblum's nuanced discussion of the freedom of association challenged students to think deeply about the dilemma at the heart of liberal democracies. On the one hand are the freedom from discrimination and the importance of equal treatment. Allowing powerful, socially favored groups to discriminate against marginalized minorities perpetuates prejudice and fosters hate, and thereby undermines liberal democratic life. On the other hand is the importance to a free society of private, voluntary groups. Empowering the state to dictate a group's membership poses a threat to liberal democracy that seems every bit as great as the threat of untrammeled discrimination and prejudice.

Dale's case is not discussed in *Membership and Morals*. At the time the book was published in 1998, Dale's case had not even reached the New Jersey Supreme Court, let alone the US Supreme Court. But in teaching the book between 1999 and 2005, I became drawn to Dale's case as a prism through which to think about Rosenblum's provocative analysis of the importance of associational life in a liberal society. For the final essay assignment, I asked students to imagine that the US Supreme Court's ruling in *Boy Scouts of America v. Dale* had been appealed to a "higher court," upon which sat nine of the political theorists they had read during the semester—along with Rosenblum, the others on this august court included Isaiah Berlin, Amy Gutmann, Friedrich Hayek, Mary Ann Glendon, Susan Okin, Michael Sandel, and Judith Shkar. I tasked students with determining the court's decision and writing the majority and dissenting opinions.

Although I no longer offered the class after 2005, the experience of teaching the Scouts' case stuck with me. It was impossible not to be moved by how profoundly the case engaged students' intellect and emotions and how it provoked classroom debate of the highest order. Those memorable classroom discussions—and equally memorable final papers—planted the seed that would eventually grow into this book. Without those discussions and without those wonderful students I would never have dreamed of suggesting to Fred Woodward, in the spring of 2008, that I write a book on Dale's case for UPK's Landmark Law Cases and American Society series. For better or for worse, that is how someone who had never been a Boy

Scout, never been to law school, and had little connection to the LGBT community decided to write a book on *Boy Scouts of America v. James Dale*. Whether that was a wise or foolhardy decision, I leave the reader to judge.

Judging the Boy Scouts of America

Freedom of Association and the Right to Exclude

Few things are more fundamental to liberal democracy than freedom of association. Without the freedom to associate, there would be no political parties, no labor unions, no churches, indeed no groups of any kind, except those sanctioned by the state. For most of us, free speech would mean little if we could not band together and pool our resources with others who share our views. In joining with others, we also build what social scientists call "social capital" by learning to trust, cooperate, and negotiate with others. But freedom of association is more than an instrumental value; choosing who we associate with is an essential part of what it means to be free. If you cannot choose your comrades and companions, then you can hardly be said to be free.

Yet there is a dark side to the freedom of association. For the freedom to associate, if it is to be meaningful, must include a right to exclude. What happens, then, when my freedom to associate comes at the expense of *your* freedom of association and your right to live free from discrimination? One response is to say, "tough, go find your own group." But even the most vigorous defenders of voluntary associations typically concede some limits on the freedom to associate, particularly when the exercise of that freedom involves serious injury to others. This concession is a version of John Stuart Mill's famous "harm principle," which states that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." However, if the harm principle is construed too expansively, there would be little left of the freedom of association. In the quest to eradicate discrimination we would have all but abolished the

freedom of association. The question, then, as the political theorist Stuart White poses it, is, "When is the freedom to exclude essential to meaningful freedom of association and, therefore, something which a state may not legitimately restrict or prohibit: and when may, and should, a state legitimately curtail the freedom to exclude in the interests of securing other important values?"

Some cases are easy. Clearly we don't want the state picking our friends for us. It certainly might hurt your feelings and damage your self-esteem to be excluded from a circle of friends, but that's not a harm that the government should seek to remedy, no matter how arbitrary or hurtful the grounds for exclusion (though bullying or harassment might justify state action). Matters become more complex when we enter the realm of formal associations, groups like the American Legion, Red Cross, Elks, National Rifle Association, League of Women Voters, and Boy Scouts of America. Should groups such as these be allowed to exclude anybody for any reason? Or can we distinguish between acceptable and unacceptable reasons?

The British sociologist Paul Hirst thinks we should distinguish between exclusions based on beliefs, such as political ideology or religious affiliation, and exclusions based on inherent characteristics, such as race or sex. Under Hirst's "associative ethics," the former type of exclusion is fine since those wishing to join a group have only to change their beliefs. There is no problem, then, with Catholics excluding Protestants or Republicans shutting out Democrats. Excluding individuals based on sex or race, on the other hand, is unacceptable, Hirst tells us, because individuals do not choose their race or sex.

At first blush, this distinction may seem appealing, but it quickly runs into a host of difficulties. There is, to start with, the problem that one's race may be itself a choice—the United States census, after all, allows individuals to choose which racial group they identify with. And many Americans would regard their religion not as a choice but as a given part of their identity. The problem is compounded if we think about sexuality, where the question of whether sexual orientation is freely chosen is itself a point of contestation. Things get messier still if the exclusion is premised on sexual conduct: would Hirst's associative ethics prevent a group from barring lesbians and gays because we do not choose our sexual orientation

but allow that same group to bar "practicing homosexuals" since sexual conduct is a choice? The difficulties run still deeper. Should the state bar a women-only health and fitness club from excluding men? And does it make sense to prevent civic groups from excluding Asians or African Americans on the basis of their skin color yet allow them to exclude Muslims or Sikhs based ostensibly on their religious beliefs? Is the latter exclusion less unjust than the former? And do we really want to compel an avowedly white supremacist group to admit nonwhites?

Instead of looking at whether an individual characteristic is innate or chosen, it perhaps makes more sense to weigh the harm done to those who are excluded against the harm done to those who are forced to include. The harm of compelled association appears particularly troubling when it undermines or contradicts the group's express purposes. Race may be innate and religious belief a choice, but the white supremacist group compelled to admit blacks suffers a harm that is every bit as great as the Catholic Church compelled to admit atheists. But by resting the right to exclude on the association's expressive message, we end up with a paradoxical result in which classic voluntary associations such as the Elks, Odd Fellows, Jaycees, and Boy Scouts of America may have less freedom of association than hate groups such as the Ku Klux Klan or the Aryan Nations. Even worse, it may encourage civic groups to adopt and espouse a discriminatory expressive message so as to justify their right to exclude.

Even if we allow that the harm of compelled association should be evaluated in terms of the damage done to a group's expressive message, that does not answer the question of who gets to decide the group's message. Is the association the sole judge of its expressive message, or can judges second-guess the association? It is disturbing to contemplate the state—acting through judges—telling an organization what its expressive purpose is; yet if judges reflexively defer to the organization, then almost any exclusionary practices will be sustained.

Things don't get any easier when we try to weigh the harms inflicted by exclusion from voluntary associations. What kinds of harm should we protect an individual against? Many would agree that exclusions that mark people as second-class citizens should be

outlawed. But what exclusions are markers of second-class citizenship? One answer would be that exclusion denotes second-class citizenship when it involves denying equal access to public establishments. Although helpful, this answer doesn't relieve us of the need to make contentious judgments about what counts as a public establishment.

Laws banning discrimination in "places of public accommodations" date back to the post–Civil War era. These laws typically targeted racial discrimination in privately owned businesses that served the public, such as railroads, theaters, and inns. Today, almost everybody accepts that government can and should bar restaurants and hotels from refusing to serve people based on their race—though the US Supreme Court infamously concluded otherwise in 1883, when it invalidated the public accommodations provisions of the Civil Rights Act of 1875 on the grounds that the Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth) were aimed only at discrimination by the federal government, not discrimination by private entities. Although there is broad agreement today that the Supreme Court got it wrong in 1883, courts and scholars disagree sharply about how broadly to construe public accommodation statutes. Is Little League a place of public accommodation? How about privately run day camps or swim clubs, or membership organizations such as the Jaycees or the Rotary Club? Even more difficult is reaching agreement on whether the Boy Scouts of America are a place of public accommodation. Some judges say "yes," others "no."

Even if we reach agreement that a group qualifies as a place of public accommodation under state (or federal) law—and the precise standards are different in different states—that should not necessarily absolve us from evaluating the extent of the harm caused by an exclusion, nor does it settle the level of harm that warrants state intervention. Even if we were to decide—as the New Jersey courts did in the early 1970s—that Little League is a place of public accommodation, it does not necessarily follow that excluding girls would mark them as second-class citizens (unless, of course, we make it true by definition). What makes an exclusion a mark of second-class citizenship may have less to do with whether a given entity is a place of public accommodation and more to do with the basis on which a group is being excluded. Exclusion on the basis of race may create

second-class citizenship in a way that exclusion based on other immutable characteristics might not.

Perhaps, though, the standard of second-class citizenship sets the bar too high. Others have suggested that the proper standard is injury to a person's sense of self-worth and the perpetuation of harmful stereotypes. Exclusions may stigmatize even while not relegating a group to the rank of second-class citizens. Stuart White suggests that if this measure is not to become "overly subjective," then the reasonableness of such claims has "to be tied to the background pattern of status inequality in the community." The weaker the group, the stronger the claim against exclusion. However, as the political theorist Nancy Rosenblum notes, if white-only or male-only or straight-only organizations are singled out for compelled association, those groups will almost certainly see themselves as "victims of powerful, hostile social forces." Certainly the Boy Scouts of America see themselves this way. Can we say they are entirely wrong?

Faced with the difficulty of adjudicating between the competing values of freedom of association and freedom from discrimination, it is perhaps tempting to take refuge in absolutism. Some liberals say that my right to be free from discrimination should invariably trump your right to exclude, particularly if you are powerful and I am weak. The state should have "zero tolerance" for exclusion because even apparently minor exclusions stigmatize and subordinate vulnerable groups. In a democracy, righteous liberals contend, equality (or equal freedom) must win out. Some conservatives, on the other hand, warn of a very different slippery slope. Allow the state to decide which groups are powerful and which are weak, which need protection against discrimination and which do not, and you are on "the road to serfdom." Like the hypersensitive liberal, the libertarian conservative warns that there is no principled stopping point once one sets out to balance equality and liberty. In a free country, the libertarian insists, private associations must be free to exclude whomever they wish.

Against these absolutisms stands the political philosophy of Isaiah Berlin, who teaches that in a liberal democracy "we must engage in what are called trade-offs—rules, values, principles must yield to each other in varying degrees in specific situations." According to Berlin, "The concrete situation is almost everything. There is no

escape: we must decide as we decide. . . . To force people into the neat uniforms demanded by dogmatically believed-in schemes is almost always the road to inhumanity."

Law, of course, is all about the concrete situation. In the *Boy Scouts of America v. James Dale*, the concrete situation pitted a gay assistant Scoutmaster against an iconic American institution. Judges had to decide how to balance the harm done to James Dale by his exclusion from the Boy Scouts against the harm done to the Scouts by having to admit somebody whose presence, the organization's leaders said, would be inconsistent with their core principles. In doing so, they had to decide whether to privilege the freedom of association or the freedom from discrimination.

For those who believe that judges are like umpires, the notion of judges weighing harms and balancing rival values is anathema. Balancing seems too subjective, not at all like calling balls and strikes or a runner out. Some will insist that Dale's case is an easy call if judges simply follow the law or do as the Constitution commands. In some cases, of course, the law or the Constitution will be sufficiently clear and precise so that virtually all jurists will reach the same conclusion. But Dale's case is not one of those unambiguous cases. To start with, no public accommodation statute mentions the Boy Scouts of America. And, of course, the Constitution nowhere mentions the freedom of association. Certainly there is no precise formula that can tell us the relative values a judge should attach to voluntary association and the freedom from discrimination.

Uncomfortable with the idea that they are ranking rival values, judges—like the litigants—often obscure the depth of the conflict by exaggerating the harms done to one side and minimizing the harms inflicted on the other side. But we do better in a difficult case like Dale's to acknowledge honestly and fully the trade-offs between competing values: what we gain and what we lose through the choices we make. Dale's case has an enduring fascination precisely because it requires us to weigh liberty against equality, to balance the freedom to live as we like against the right to be treated with equal dignity. In law, as in life, choosing between values is inescapable.

PART ONE

The Scouts Take Their Stand

CHAPTER 1

The Model Boy Scout

The story ran on page 11 in the Health and Fitness section of the Sunday edition of the *Newark Star-Ledger*, nestled among reports of a New Jersey doctor's trip to a remote Guatemalan village to treat needy children, a state clinic that cared for multiple sclerosis patients, and the advisability of testing children for high cholesterol. Under an earnest, low-key headline, "Seminar Addresses Needs of Homosexual Teens," the story told of a one-day conference hosted by Rutgers University that addressed how New Jersey's social service system could better respond to the pressures and challenges facing gay and lesbian adolescents. Neither the *Star-Ledger*'s reporter nor its editor could have suspected that this run-of-the-mill story would spark a legal conflict that would be carried all the way to the US Supreme Court.

The bulk of the article related the words and thoughts of one of the seminar's main speakers, Mary Leddy, director of community and counseling services at the Planned Parenthood League of Middlesex County. Leddy spoke of the confusion and insecurity that inevitably accompanied teen sexuality. These feelings, she noted, were often intensified for homosexual teenagers, who sometimes felt cut off from their peers and believed that their sexual preferences were abnormal, hateful, or sick. Leddy recited a few harrowing statistics about gay teens: anywhere from one-fifth to one-third attempted suicide and at least one-half of homeless teenagers in cities were gay. By failing to foster an honest dialogue about sex, Leddy argued, schools and other institutions in society frequently drove teenagers, gay and straight, "underground" to find out about sex, with dangerous results, most notably the spread of Acquired Immune Deficiency Syndrome (AIDS) and other sexually transmitted diseases. Some of Leddy's comments may have offended a few readers—such as her

characterization of "family life curriculums" as little more than "courses in plumbing"—but none of her remarks had anything to do with the controversy that unfolded after the article's publication.

Instead, the controversy centered around three sentences in the middle of the article that related the teenage experiences of James Dale, the nineteen-year-old co-president of the Rutgers University Lesbian/Gay Alliance. Together with his fellow co-president, Sharice Richardson, Dale had been invited to speak about the experience of being a gay teen. Dale told of the "double life" he had led in high school, pretending to be straight, suspecting he was gay. He recalled dating girls and laughing at homophobic jokes to disguise his homosexuality from his peers, and perhaps even from himself. Only during the past year, his second at Rutgers, had Dale finally found the acceptance and community of support to give him the courage to come out as a gay man. A picture of Dale conversing with Leddy and Richardson accompanied the story.

Although Dale had recently told his mother and father that he was gay, most people in the community of Port Monmouth, less than one hour's drive from the Rutgers campus, still did not know. Dale's father, a military man, was not immediately accepting, and his parents had certainly not broadcast the news to friends and neighbors. So when the *Star-Ledger*'s reporter, Kinga Borundy, approached Dale at the conference and asked if she could quote him, Dale was initially reluctant and asked that she please not identify him by name. Borundy pressed Dale. His comments, after all, had been made at a public event about teen homosexuality. Had Dale pushed back, emphasizing the harm and upset that might be caused by divulging his name, Borundy says that she "probably" would not have identified Dale by name or used his picture in the story. Dale, however, relented, without necessarily thinking through the repercussions of coming out in a newspaper with the largest circulation in New Jersey.

The morning the story appeared on July 8, 1990, James Kay began getting phone calls. Kay was the head of Monmouth Council of the Boy Scouts of America (BSA), one of fourteen councils in New Jersey and one of four hundred BSA councils nationwide. As the executive of Monmouth Council, Kay oversaw more than two hundred Scouting units—seventy-seven of which were Boy Scout

troops—that included about eight thousand boys and nearly three thousand adults. To Kay, who had been in his post only two years, the *Star-Ledger* story would have meant little. Kay would not have recognized Dale by sight or name, and the *Star-Ledger* story made no mention of Dale's affiliation with the Scouts. But Dale was sufficiently well known to the old hands in the Monmouth Scouting community that the story would not go unnoticed. Volunteer Scout leaders who knew Dale contacted Kay to inform him of what they had read: there in black and white in the state's most read newspaper was the assistant Scoutmaster of Monmouth Council's Troop 73 admitting that he was gay. A number of *Star-Ledger* readers even cut out the article and mailed it to Kay.

A professional Scout since 1965, the forty-eight-year-old Kay had essentially spent his entire adult life working for the Scouts. Kay was well aware that the Boy Scouts' policy was not to admit those who openly professed their homosexuality, and that the Scouts were currently in litigation over precisely this issue. Knowing that he could not ignore the *Star-Ledger* story—especially now that other Scouts had brought it to his attention—Kay notified BSA headquarters in Irving, Texas. The national office instructed Kay on the action that needed to be taken and the letter to be used—the same form letter the Scouts used in every case of dismissal.

On July 19, Kay wrote to Dale to inform him that after "careful review" the Scouts had decided to terminate Dale's involvement with the Scouts. Membership in the Boy Scouts was "a privilege," explained Kay. And the Scouts reserved the right not to extend that privilege "whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth." The letter also informed Dale that he could have the decision reviewed by a BSA regional review committee, and that if he wished to do so he had sixty days to write to the BSA regional director "explaining [his] version of the facts."

The letter stunned Dale. A few friends had congratulated him on the *Star-Ledger* story, but he had thought little more about it. Certainly he had never considered the possibility that his minor role in a back-page article could rupture his relationship with the Scouts, a relationship that had begun when he joined Cub Scout Pack 242 at the age of eight.

Dale was no casual Scout. He came from a family that was deeply invested in Scouting, and from the time he was eight until he turned eighteen Dale had immersed himself in the activities of Scouting. It was the Scouts who first provided this sometimes "insecure and fearful kid" with a sense of belonging and acceptance in a group. Dale recalls trying "soccer, band, karate—all the activities that little boys growing up in my middle-class New Jersey suburb were supposed to enjoy," but found that he "spent most of [his] time on the sidelines." Scouting, in contrast, gave him "positive reinforcement, a direction, shared goals." Dale remembers that his "fellow Cub Scouts didn't judge me because I couldn't hit a home run. We were taught to appreciate each other's strengths because each of us was a unique and necessary part of a larger whole."

Many adolescents leave the Scouts when they hit their teenage years. Not James Dale. If anything, his involvement in the Scouts only intensified. His teenage life revolved around the Boy Scouts. He earned thirty merit badges and became an Eagle Scout at seventeen. Dale was also elected to the Order of the Arrow (OA), the BSA's national honor society, which recognizes "Scouts and Scouters [a "Scouter" is a registered adult member of BSA] who best exemplify the Scout Oath and Law in their daily lives." So exemplary was Dale's conduct that he was awarded the Vigil Honor, a "high mark of distinction . . . reserved for those Arrowmen who, by reason of exceptional service, personal effort, and unselfish interest, have made distinguished contributions" to the Scouting community. A model Scout, Dale was asked to chair his local Vigil Honor selection committee and was regularly tapped by his elders to represent the Scouts at civic and fund-raising events. Upon turning eighteen, Dale was asked to continue his association with the Scouts as an assistant Scoutmaster. Although college-bound, Dale agreed to volunteer his time to aid an organization that he adored—and that he thought adored him.

Now that organization was rejecting him, and without providing any information about what he had done wrong or why he had been expelled. Dale could not quite believe it. He felt "very, very betrayed." Dale explained: "When they wrote me that expulsion letter saying basically they want nothing to do with me, I took all my Scouting stuff, my merit badges, my uniform, knapsack, every bit of

paraphernalia and put it in a box, and put the box in the attic." On August 8 (Kay's letter from July 19 did not reach Dale until August 5), a devastated Dale wrote to Kay seeking an explanation. Kay's response, dated August 10, was immediate. "The grounds for this membership revocation," Kay explained, "are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals."

The first letter had felt like a sucker punch; it had come without warning and without explanation and had left Dale feeling confused and betrayed. The organization that had given him "a sense of belonging" no longer wanted him. Now that he had his answer, though, Dale felt the blow even more keenly. Confusion gave way to outrage and anger at a policy he regarded as profoundly unjust. He could see no rational reason why being gay should make him unfit to be a Scout leader. The Scouts, he told people, had taught him "to stand up for what is right," and he was determined to fight back against what he deeply believed was an injustice and a perversion of the true teachings of the Boy Scouts.

Dale knew those teachings as well as anyone and nowhere did he find anything to suggest that being gay was inconsistent with being a Scout, nor was he aware of any written policy that forbade homosexuals from being Boy Scouts. Like every other Scout, Dale had been required to memorize the Scout Oath:

> On my honor, I will do my best
> To do my duty to God and my Country and to obey the
> Scout Law;
> To help other people at all times;
> To keep myself physically strong, mentally awake, and
> morally straight.

To ensure that every young Scout knew the meaning of their solemn promise, the Scouts instructed boys on the meaning of each part of the oath. In the tenth edition of the *Boy Scout Handbook*, published in 1990, youth were taught the meaning of the pledge to be "morally straight": "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be

clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant." The ninth edition of the *Handbook*, in circulation between 1979 and 1990, included a two-page explication of the meaning of "morally straight" that ended with the solemn injunction: "Let your conscience be your guide. Know what is right. Do what is right." In none of the many editions of the *Handbook* dating back to 1911 did the explanation of "morally straight" make any mention of sexual orientation. Nor had anyone in the Scouts ever suggested to Dale that the words referred to sexual orientation. In openly acknowledging his homosexuality, Dale believed that he was following the Scouts' teachings to follow one's conscience and "not to lie about who we are."

In taking the Scout Oath, Dale pledged to obey the Scout Law, which the *Handbook* described as "the foundation on which the whole Scouting movement is built." The moral credo by which all Scouts are expected to live, the Scout Law consists of twelve commandments. Boy Scouts are famously required to be trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent. Again Dale found nothing in these words to suggest that a Scout must be heterosexual.

The 1990 edition of the *Handbook* explained that the Scout Law's injunction to be clean meant that a boy must avoid the "kind of dirt . . . that shows up in foul language and harmful thoughts." To be clean in "body and mind" meant avoiding the use of "swear words, profanity, and dirty stories" because they were "weapons that ridicule other people and hurt their feelings." For the same reason, the clean Scout must avoid "racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations." Knowing that "there is no kindness or honor in such mean-spirited behavior," a Scout not only avoids this type of insulting behavior in "his own words and deeds" but also actively "defends those who are targets of insults." Nowhere did the *Handbook* suggest that a gay person lived an unclean life.

Nor did Dale find any hint of an antigay policy in the venerable Scout Motto (Be Prepared!) or Scout Slogan (Do a Good Turn Daily!), which were the other principal components of the Scouting code that every "true Scout" was required to understand and live by.

On Dale's reading, the Scouting code that he had been taught had nothing to say about homosexuality but a great deal to say about personal and collective responsibility and about standing up for oneself and helping others.

Although Dale believed that he had been wronged, it was less clear what he could do about it. The Scouts were a private organization. And in the summer of 1990, New Jersey—like almost every other state in the nation—had no law that forbade discrimination on the basis of sexual orientation, even by public entities. Moreover, the US Supreme Court had never held that sexual orientation was a suspect classification subject to heightened judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment. It was unclear that the Scouts had done anything illegal in terminating Dale's membership.

It also wasn't clear that it was worth the fight. This was the *Boy* Scouts, after all, and Dale was now a man. The Boy Scouts had been an integral part of his adolescent development, but the Scouts needed volunteers like Dale more than he needed them. Some friends urged him to forget the matter. If the Scouts wanted to deny themselves the services of a model Scout and citizen, then it was their loss. A lawsuit would also be expensive, and Dale was a full-time college student with few resources. His mother and father shared their son's sense of outrage, but they were of modest means too.

Challenging his expulsion would also mean broadcasting his homosexuality to the nation. As a youth, Dale remembered "hoping to God [he] wouldn't be gay," and it had taken all his courage to finally come out to his family and close friends. Was he ready for the whole world to know he was gay? This would be a daunting prospect for any young man. But imagine how much more difficult for someone whose conservative upbringing had included graduating from a military high school—the Marine Academy of Science and Technology (MAST) in Sandy Hook, New Jersey—at a time when the military did not permit gays to serve in the military. And like all his high school classmates, Dale had been required to be a member of Naval Junior Reserve Officer Training Corps. (Dale was no ordinary cadet; he was selected as one of a handful of "company commanders" at the school.)

Dale was also an unlikely candidate for gay "activist." As a teen he had largely been politically quiescent. He had not even been "a news junkie." For Dale, the phrase "gay activist" conjured up stereotypical images of AIDS protesters chanting slogans, waving signs, confronting police, marching on buildings. Dale had been trained—by family, schooling, and the Scouts—to think of himself as a leader and dutiful citizen, not as a defiant protester or angry activist.

Nonetheless, Dale decided that he needed to do something to protest a policy that he believed was profoundly unfair and incompatible with the true spirit of Scouting. After all, the first and most famous point of the Scout Law demanded that a Scout be "trustworthy." The Boy Scouts had long taught that this meant that "a Scout tells the truth" and that honesty is "a part of his code of conduct." Yet now the Scouts were terminating Dale for having told the truth about who he really was, for having followed the Scout Law as every Boy Scout pledged to do. Dale felt that the Scouts had not only wronged him but were doing an injustice to every gay Scout by requiring them to lie in order to remain a Boy Scout or a Scout leader.

Dale decided to seek legal counsel and was advised that before proceeding with legal action against the Scouts, he would need to exhaust the internal appeal procedures offered by the Boy Scouts. Kay's initial letter dated July 19 had included a copy of the procedures for requesting a review of the decision by the BSA's regional review committee. Those procedures included the opportunity for Dale to attend the review hearing. At the end of September, Dale wrote to the director of the northeast region—one of the BSA's four administrative regions—to request a review of the expulsion decision and to indicate that he wished to attend the review hearing, as was his right under the Scouts' procedures that he had been sent. Dale also requested that the regional director send him a copy of the BSA's "standards for leadership" that Kay had invoked in his letter from August 10.

A week later Dale received a brief letter from the assistant regional director Charles Ball that acknowledged receipt of Dale's request and notified him that a review committee had been appointed to review his file. No mention was made as to when or where the review hearing would be held. And no copy of the requested "stan-

dards for leadership" was forthcoming. Dale wrote again, reminding Ball that he wished to attend the hearing and therefore needed to know when and where the meeting would be held. Dale heard nothing from the Scouts for six weeks. Finally, at the end of November, Dale received a letter, again from Ball, informing him that the regional review committee had affirmed the decision to terminate Dale's registration with the Scouts.

Clearly the appeals process was getting Dale nowhere. Indeed the Scouts weren't even following their own procedures. The only way forward was legal action. Back in August, Dale had sought advice about legal representation from an acquaintance at the New Jersey Lesbian and Gay Coalition. Dale was given the names of two brilliant young lawyers in the gay and lesbian community: Ruth Harlow of the American Civil Liberties Union of New Jersey and Evan Wolfson of the New York City–based Lambda Legal Defense and Education Fund. Dale talked first with Harlow, whom he had met before. Harlow was sympathetic to Dale's plight, but she had only recently begun work at the ACLU and thought that Lambda Legal would be better suited to helping Dale. So Dale drove to New York City to meet with Wolfson in hopes of persuading Lambda Legal to take the case of a gay Boy Scout.