

SETTING THE RECORD “STRAIGHT”: COMMUNICATING FINDINGS FROM SOCIAL SCIENCE RESEARCH ON SEXUAL ORIENTATION TO THE COURTS

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This chapter describes some of the ways in which social science knowledge about sexual orientation and sexual stigma has been applied to social justice issues through federal and state courts. The author draws examples from his own experiences as an expert witness in cases such as Perry v. Schwarzenegger, the landmark 2010 federal case that ultimately overturned Proposition 8, California’s voter-enacted constitutional ban on marriage for same-sex couples. The chapter also provides some general background information on what being an expert witness in cases such as Perry entails. Suggestions are offered for social scientists who wish to communicate empirical research findings to the courts, legislators, and policymakers.

The behavioral and social sciences have a long history of trying to foster informed decision making and promote social justice by contributing to policy and legal debates. For example, when the Society for the Psychological Study of Social Issues (SPSSI) was founded in 1936 as a division of the American Psychological Association (APA), part of its stated mission was “to encourage research upon those psychological problems most

vitality related to modern social, economic and political policies.... [and] to help the public and its representatives to understand and to use in the formation of social policies, contributions from the scientific investigation of human behavior (Krech & Cartwright, 1956, p. 471; see also Kimmel, 1997).

Racial prejudice and discrimination were high on the list of social problems addressed by SPSSI in its earliest years. During the 1950s, for example, psychologist Kenneth B. Clark, who later would serve as SPSSI president, worked closely with NAACP attorneys who were challenging racial segregation in schools, briefing them on the social science data relevant to their cases. Numerous psychologists and other social scientists, many of them SPSSI members, provided expert testimony in court cases around the country dealing with racial segregation (Clark, 1953). This effort culminated in the submission of a statement signed by 32 social scientists as an appendix to the appellants' brief to the U.S. Supreme Court in the 1954 cases that were collectively titled *Brown v. Board of Education of Topeka* (1954, hereafter *Brown*; Clark, 1979; Clark, Chin, & Cook, 2004).

The research discussed in what came to be known as the Social Science Brief was cited by Chief Justice Earl Warren in the Court's unanimous ruling that racially separate educational facilities are inherently unequal and violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. According to psychologist Otto Klineberg, Chief Justice Warren later told him that "the members of the Court would probably have come to the same conclusion in any case, but they (and he in particular) felt their position was strengthened by the clear support of the present generation of psychologists" (Klineberg, 1986, p. 54).

In the six decades since the *Brown* decision, social scientists have communicated empirical research findings to the

courts in cases related to other social justice arenas. For example, as an expert witness in *Price Waterhouse v. Hopkins* (1989), social psychologist Susan Fiske described the psychological research literature on sex stereotyping and explained its application to the facts of that case. Her testimony, coupled with an *amicus* brief submitted by the APA when the case reached the U.S. Supreme Court, represented the first application of psychological research on sex stereotyping to a legal case involving sex discrimination (Fiske, Bersoff, Borgida, & Deaux, 1991).

Discrimination based on sexual orientation is another issue for which social scientists have shared their research findings with the courts. The legal situation of sexual minority individuals and couples has changed dramatically in recent years. Since 2011, openly lesbian, gay, and bisexual individuals have been able to serve in the U.S. military. Federal hate crime laws have applied to crimes based on a victim's perceived sexual orientation or gender identity since 2009. Two key Supreme Court rulings – in the 2013 *Windsor* case and the 2015 *Obergefell* case – struck down state laws barring same-sex couples from marrying and required the federal government to recognize those marriages.

However, it would be incorrect to conclude that sexual minorities no longer face discrimination and inequality. In many states, for example, an individual who marries a person of the same sex can legally be fired from her or his job for being gay or lesbian. No federal law prohibits employment or housing discrimination on the basis of sexual orientation, and the passage of such a law doesn't appear imminent at the time of this writing. In both the commercial and government arenas, individuals have invoked their religious beliefs as a basis for claiming the right to discriminate against sexual minorities. In addition, the parental rights of same-sex couples and sexual minority individuals

(including the right to adopt and to serve as a foster parent) vary across states.

Psychological research has special relevance to law and public policy affecting sexual minorities for at least two reasons. First, as discussed below, psychologists and other social scientists have collected extensive data describing the experiences of lesbian, gay, and bisexual people, as well as reactions to them by heterosexual individuals and by society's institutions. Those data also address common assumptions and stereotypes about sexuality and sexual minorities. By sharing these findings, we can give judges* information they may otherwise lack about social and psychological phenomena related to sexual orientation.

A second reason why behavioral research has particular relevance to this arena is that the fields of psychology and psychiatry played important roles in promoting the stigmatization of homosexuality during much of the 20th century (Herek, 2010). Historically, homosexual behavior has long been condemned as sinful by the Catholic Church and most other major religions (e.g., Boswell, 1980; Jordan, 1997), and was criminalized under sodomy laws in the United States and many other countries (e.g., Katz, 1976). By the end of the 19th century, however, psychiatry and psychology began to claim jurisdiction over sexuality in its many manifestations. "Deviant" sexualities, including homosexuality, were labeled illnesses. This development could be considered progressive insofar as it promoted treatment and cure rather than condemnation and punishment. Attempts to "cure" homosexuality, however, often were barely distinguishable from punishment. They included aversive conditioning with nausea-inducing drugs,

* For the most part, my comments are intended to apply to Supreme Court justices as well as judges in lower courts. For the sake of readability, I use the term "judge" to refer to all of them.

hormone injections, castration and clitoridectomy, lobotomy, and electroshock treatments (Katz, 1976).

During World War II, when psychiatrists and psychologists participated in the U.S. military's war effort, the view that homosexuality is a form of psychopathology became wedded to official U.S. government policies. New recruits were subjected to psychological screening, one purpose of which was to keep homosexuals out of the military. Nevertheless, during the war's early years, when the need for personnel was greatest, military examiners often looked the other way when a gay man or lesbian enlisted or was drafted. As the end of the war neared, however, the military conducted a series of witch hunts that resulted in large numbers of homosexual personnel being dishonorably discharged (Bérubé, 1990).

In 1952, the first *Diagnostic and Statistical Manual of Mental Disorders* (DSM) compiled by the American Psychiatric Association, included *homosexuality* as a diagnosis (American Psychiatric Association, 1952). Over the next two decades, however, the illness model grew increasingly untenable in light of new empirical research, clinical observations, and cultural and political changes (Bayer, 1987; Herek & Garnets, 2007). In 1973, the American Psychiatric Association's Board of Directors voted to remove homosexuality from the DSM. The APA soon endorsed the psychiatrists' actions, passing a resolution that stated, in part:

“Homosexuality per se implies no impairment in judgment, stability, reliability, or general social and vocational capabilities; further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations” (Conger, 1975, p. 633).

Like the psychiatrists, the APA also went on record calling for legislation to protect the rights of gay people and urging “the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private” (p. 633).^{*} With these actions, the mental health profession began its historic shift from helping to justify the stigmatization of sexual minorities to instead promulgating the idea that homosexuality is a normal variant of human sexual expression and is no more inherently associated with psychopathology than is heterosexuality (Herek, 2007). This shift also set the stage for the behavioral and social sciences to take an active role in challenging the stigma they had long helped to promote. In the four decades since the APA passed its resolution, for example, it has worked to end sexual orientation discrimination in areas such as military service, civilian employment, child adoption and foster care, and marriage.

In this chapter, I describe some of the ways in which social science knowledge and research about sexual orientation has been applied to social justice issues. A thorough discussion of such applications could easily fill an entire volume, so I narrow the focus to court cases that have addressed the constitutionality of laws treating sexual minorities differently from heterosexuals. I draw examples from my own experiences as an expert witness, especially my work in *Perry v. Schwarzenegger* (2010; hereafter *Perry*), the landmark 2010 federal case that ultimately overturned Proposition 8, California’s voter-enacted constitutional ban on marriage for same-sex couples. Because the presiding judge’s

^{*} All of the states had so-called sodomy laws until 1961, when Illinois repealed its statute. Beginning in the 1970s, some other states followed suit. At the time of the APA’s resolution, however, private sexual acts between consenting adults of the same sex were illegal in the vast majority of the states. Many of those laws also applied to heterosexual behavior in certain circumstances.

written opinion made extensive use of courtroom testimony by social and behavioral scientists, *Perry* provides a good example of how social science data can be applied to a civil rights case. After discussing *Perry*, I provide some general background information about what being an expert witness in such a case entails. Finally, I offer suggestions for behavioral and social scientists who wish to contribute their expertise to the legal and policy arenas.

My discussion describes only one of the many ways in which psychologists and social scientists interact with the courts. I do not address, for example, the ways in which clinicians and behavioral scientists provide expert testimony to establish facts specific to a particular case. They might be asked to evaluate the psychological functioning of a defendant or another party to a case, or to inform the court about scientific knowledge with relevance to the case, such as research on the reliability of eyewitness testimony. Instead, the present chapter focuses mainly on the use of expert opinion and scientific research to address the constitutionality of laws and policies that treat sexual minorities differently from heterosexuals.

SOME BACKGROUND

Most social scientists lack legal training and expertise. Consequently, we have little to say to the courts about questions of law. We may have personal opinions as to whether a particular statute is fair or just but those opinions do not distinguish us from other concerned members of the public. We are different from other groups, however, by virtue of our insights into social and behavioral phenomena derived from systematic observation using the scientific method. This information can assist judges in their decision making and can serve generally to enlighten the courts about such phenomena. It also can be directly relevant to specific legal questions, including what type of judicial scrutiny should be

applied to laws affecting sexual minorities. Before discussing the specifics of the *Perry* case, I provide some basic background information about this last type of question.

Sexual Orientation and Equal Protection

As noted above, the Supreme Court's decision in *Brown* declared that state laws establishing separate schools for white and black children violated the 14th Amendment to the U.S. Constitution. That amendment requires that no state "deny to any person within its jurisdiction the equal protection of the laws." Cases challenging the constitutionality of laws that disadvantage sexual minorities have also argued that those laws violate the equal protection clause, and social science data have been used to support their arguments. Not all legal cases related to sexual orientation have been framed in terms of equal protection. However, a discussion of equal protection provides a useful example of how social science research data can support or falsify factual assertions relevant to legal questions. This section provides a brief introduction to the concept of equal protection.

Many laws treat people who belong to a particular group or category differently from other individuals. Depending on the nature of the classifications and groups involved, such discrimination may or may not be constitutional. Various court rulings have established standards for addressing this question. In general, the courts tend to be highly deferential to the legislative process, deeming discriminatory laws constitutional if the State has some plausible reason, or *rational basis*, for enacting them. For example, laws that establish a minimum age for driving an automobile or purchasing alcoholic beverages clearly discriminate on the basis of age. Such laws are constitutional, however, because the State's interest in public health and safety provides a rational basis for the differential treatment, even though some individuals

younger than the minimum may be capable of safely operating a vehicle or drinking responsibly. The law's rationale can be imperfect but it must not be arbitrary.

For some laws, however, the courts use more rigorous standards of review. *Strict scrutiny* is applied to laws that infringe on fundamental rights, such as those guaranteed under the First Amendment to the U.S. Constitution. It is also the standard for reviewing laws that explicitly prescribe differential treatment for or have a differential effect on certain societal groups that have historically been politically powerless because they were targets of prejudice and discrimination. *Suspect classifications* – those based on race, religion, or “alienage” (noncitizenship) – are evaluated by the standard of strict scrutiny. The courts presume that laws discriminating on the basis of suspect classifications are invalid unless they serve a compelling governmental interest. Few discriminatory laws have met that standard.

Other group memberships – including those defined by gender and the marital status of one's parents (i.e., “legitimacy”) – are labeled *quasi-suspect* classifications. They are subject to an *intermediate* level of scrutiny, which requires that any differential treatment based on the classification must be directly related to an important governmental interest and must not depend on irrelevant generalizations or stereotypes.* Thus, when the courts deem a

* For a discussion of judicial standards of review for equal protection cases, see the summary in the Iowa Supreme Court's marriage decision, *Varnum v. Brien* (2009), pp. 887 ff. [*Varnum v. Brien*, 2009], which was cited by Judge Walker in his own discussion of standards for reviewing the constitutionality of Proposition 8. Arguments against the application of heightened scrutiny to sexual orientation can be found in the Intervenors' Motion for Summary Judgment (*Perry et al. v. Schwarzenegger et al.: Defendant-intervenors' notice of motion and motion for*

group to be a suspect class, laws explicitly prescribing or effectively creating differential treatment for its members are much less likely to be adjudged constitutional than if those laws are subject only to rational basis review.

In reviewing laws that discriminate on the basis of sexual orientation, most courts historically have applied a rational basis standard. Relatively recently, however, heightened scrutiny has sometimes been applied in this domain. In 2008, for example, the California Supreme Court declared sexual orientation to be a suspect class under the California constitution (*In re Marriage Cases*, 2008). In 2009, the Iowa Supreme Court found that a state law prohibiting same-sex couples from marrying required some level of heightened scrutiny. Because it determined that the law could not survive even intermediate scrutiny, however, it did not rule on whether strict scrutiny was warranted (*Varnum v. Brien*, 2009). By contrast, the Connecticut Supreme Court subjected that state's marriage law to intermediate rather than strict scrutiny, finding that sexual orientation is, like gender, a quasi-suspect classification (*Kerrigan v. Commissioner Of Public Health*, 2008).

At the federal level, the United States Second Circuit Court of Appeals applied intermediate scrutiny in striking down a section of the federal Defense of Marriage Act (DOMA) in 2012 (*Windsor v. United States*, 2012).^{*} More recently, in a case concerning the

summary judgment, and memorandum of points and authorities in support of motion for summary judgment, 2009). Arguments that heightened scrutiny should be applied to cases involving sexual orientation discrimination can be found in the *amicus* Brief of Constitutional Law Scholars submitted to the US Supreme Court in *Hollingsworth v. Perry* and *U.S. v. Windsor*.

<http://38.106.4.56/Modules/ShowDocument.aspx?documentID=1219>

^{*} *Windsor v. United States*, 12-2335-cv(L), October 18, 2012.

right of lawyers to disqualify jurors solely because they are gay or lesbian, the Ninth Circuit Court of Appeals ruled that sexual orientation is a suspect classification (*Smithkline Beecham v. Abbot Laboratories*, 2014). As this chapter goes to press, however, the U.S. Supreme Court has not explicitly adopted any of these standards in its rulings on laws related to sexual orientation.*

The variability across cases and courts highlights the fact that the exact criteria for determining whether a classification is suspect are subject to judicial interpretation. In general terms, they include whether the group has historically experienced unfair discrimination, whether group membership affects an individual's ability to perform or contribute to society, whether group members have distinguishing or immutable characteristics that define them as a discrete group, and whether the group lacks sufficient power to effectively protect itself through participation in the political process.† The application of these criteria has varied across cases and courts, and the courts have not required all four of them to be met in order for a group to constitute a suspect class. My purpose here is not to consider these legal arguments but rather to illustrate how social science data can be relevant to assessing the extent to which a group meets equal protection criteria.

California's Proposition 8: A Brief History

In 1999, California first granted limited rights to same-sex couples who registered with the state as domestic partners. These included, for example, hospital visitation rights and the right to

* However, the Ninth Circuit's finding that sexual orientation is a suspect class was based on its interpretation of the Supreme Court's reasoning in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

† For discussion of these criteria, see the *amicus* brief filed by legal scholars _____ in _____ Windsor. (<http://38.106.4.56/Modules/ShowDocument.aspx?documentID=1219>)

health insurance coverage for domestic partners of public employees. The number of rights associated with domestic partnerships was expanded incrementally during the next few years until, in 2003, legislation was enacted that gave domestic partners nearly all of the same rights and responsibilities as (heterosexual) married couples. Meanwhile, in 2000, California voters passed Proposition 22 by a substantial majority, thereby requiring the state to recognize only marriages between a man and a woman. Supporters of Prop. 22 unsuccessfully challenged the domestic partnership laws in court and then mounted unsuccessful attempts to place another initiative on the ballot, one that would amend the California constitution to eliminate domestic partnerships and prohibit same-sex couples from marrying.

In 2004, San Francisco Mayor Gavin Newsom defied Prop. 22 by ordering the San Francisco County Clerk's office to issue marriage licenses to same-sex couples, beginning on Valentine's Day. More than 4,000 couples obtained licenses before the California Supreme Court ordered a halt and subsequently nullified the marriages (Murphy, 2004). Several couples who had married in San Francisco prior to the Supreme Court's intervention filed lawsuits challenging the constitutionality of Prop. 22. Those challenges were consolidated into a single case titled *In re Marriage Cases*.

In May of 2008, the California Supreme Court struck down Prop. 22, declaring that it impermissibly discriminated on the basis of sexual orientation and that same-sex couples have a constitutional right to marry (*In re Marriage Cases*, 2008). Soon afterward, same-sex couples began exercising this right. Earlier that year, however, petitions had once again been circulated for a statewide initiative and this time one of them garnered the necessary number of valid signatures to qualify for the November ballot. It became Proposition 8. Whereas Prop. 22 had merely

created a statute, which could be (and was) overturned by the courts on constitutional grounds, Prop. 8 would bar marriage for same-sex couples by amending the state's constitution. The chances of a state court striking down a voter-approved constitutional amendment were widely assumed to be considerably smaller than for a statute.

In the same election that elevated Barack Obama to the Presidency, Prop. 8 passed, winning approximately 52% of the votes. It was immediately challenged in state court, but in 2009 the California Supreme Court ruled that it could not be overturned except by another popular vote. Prop. 8 opponents then challenged it in federal court on the grounds that it violated the U.S. Constitution. The case, *Perry v. Schwarzenegger*, was assigned to Vaughn Walker, Chief Judge for the U.S. District Court for the Northern District of California.

The attorneys challenging Prop. 8 anticipated that the case would move through the courts on a fast track and reach the U.S. Supreme Court fairly quickly. However, Judge Walker surprised many observers by announcing that he would conduct a trial to consider the evidence in support of each side's arguments before ruling on the case. Of relevance to the present chapter, he identified several factual questions that he considered key to making his decision about Prop. 8's constitutionality, many of them related to equal protection considerations. This was an important development insofar as his findings of fact were likely to be influential in subsequent appeals to higher courts. In June of 2009, he directed the attorneys for both sides to produce evidence supporting their positions on these questions.* Much of that

* *Perry v. Schwarzenegger*: Intervention and case management conference order, June 30, 2009.

evidence would be conveyed to the court by social scientists serving as expert witnesses.*

PERRY V. SCHWARZENEGGER:
**EQUAL PROTECTION CONSIDERATIONS AND SOCIAL
SCIENCE DATA**

My discussion of *Perry* focuses on the three equal protection criteria for which I provided testimony in court: whether group membership bears upon an individual's ability to perform or contribute to society, whether members have distinguishing or immutable characteristics that define them as a discrete group, and whether the group has historically experienced unfair discrimination. (Other expert witnesses also testified on these criteria.) I did not testify about research related to the fourth criterion discussed above – lack of sufficient power to change discriminatory laws through the political process. However, political science Professor Gary Segura addressed that criterion in his trial testimony, which was cited by Judge Walker in his Findings of Fact. †

* The other social scientists who served as expert witnesses for the opponents of Prop. 8 included Anne Peplau, Michael Lamb, Gary Segura, Lee Badgett, and Ilan Meyer. Historians George Chauncey and Nancy Cott also testified. The proponents of Prop. 8 ultimately called only two experts: David Blankenhorn, president of the Institute for American Values, and Kenneth P. Miller, a political scientist and Associate Professor at Claremont McKenna College. Judge Walker later disqualified Blankenhorn as an expert and ruled that despite Miller's knowledge about ballot initiatives, he lacked expertise about lesbian, gay, and bisexual issues and thus his opinions in this area were accorded "little weight" (*Perry* decision, 2009, p. 54).

† This criterion was also addressed in the *amicus* Brief of Constitutional Law Scholars submitted to the US Supreme Court in *Hollingsworth v. Perry* and *U.S. v. Windsor*.

Does Being Lesbian or Gay Negatively Affect One's Ability to Contribute to Society?

One of Judge Walker's equal protection questions concerned "whether the characteristics defining gays and lesbians as a class might in any way affect their ability to contribute to society" (Walker, 2009, p. 7). The Prop. 8 proponents conceded in advance of the trial that "same-sex sexual orientation does not result in any impairment in judgment or general social and vocational abilities" (Plaintiffs' Request For Admission No. 21, p.7).^{*} They did not concede, however, that "sexual orientation bears no relation to a person's ability to perform or contribute to society" (Plaintiffs' Request For Admission No. 19, p. 6).

As one of the expert witnesses addressing this question, I explained in my written report and courtroom testimony that homosexuality was once considered a mental illness but this view had been abandoned by mainstream mental health professionals more than 35 years earlier. I further explained that homosexuality's initial inclusion in the DSM's first edition reflected untested assumptions based on then-prevalent social norms, as well as clinical impressions drawn from unrepresentative samples of patients seeking therapy and individuals whose conduct brought them into the criminal justice system. Once researchers began using the scientific method with samples of non-patient, nonincarcerated individuals to empirically test the hypothesis that homosexuality is an illness, these assumptions were shown to be unwarranted (e.g., Gonsiorek, 1991). I described the previously noted 1973 vote by the American Psychiatric Association's Board of Directors to remove homosexuality from the DSM and its

^{*} Defendant-Intervenors' Response To Plaintiffs' First Set Of Requests For Admission. Trial Exhibit 707. (Sept. 11, 2009) Downloaded from <https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/PX0707.pdf>

assertion that “homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities,” as well as the APA’s endorsement of this position (Conger, 1975).^{*} These policy statements documented the consensus view among mainstream mental health professionals that homosexuality is not an illness but rather is viewed, like heterosexuality, as a normal variant of human sexual orientation.

Is Sexual Orientation An Immutable Characteristic?

Another equal protection criterion concerns the nature of the group targeted for differential treatment. Before considering data in this domain, however, a more fundamental argument must be addressed, namely whether sexual orientation can even be considered the basis for a social group. This question will strike many readers as odd insofar as they would not think to challenge the fact that “homosexual,” “gay,” and “LGB” people exist in the world and constitute an actual group that historically has been stigmatized. This is not to say that social and behavioral scientists do not continually scrutinize the definitions we use for key constructs, identifying their limitations and qualifications. Our questioning and debate about terms such as *sexual orientation*, however, do not mean that we deny the existence of “gay and lesbian people” any more than critical discussions of race and ethnicity (e.g., Haynes & Smedley, 1999) mean that we deny the existence of, for example, “African American people.”

^{*} The text of the 1975 APA resolution can be found at <http://www.apa.org/about/policy/discrimination.aspx>. The APA’s other resolutions addressing issues related to sexual orientation are posted at <http://www.apa.org/pi/lgbt/resources/policy/index.aspx>. The American Psychiatric Association’s official positions on those issues are posted at <http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx>.

In legal proceedings, however, academics' strivings for intellectual rigor can be misconstrued and taken out of context. In their motion for summary judgment, for example, the attorneys defending Proposition 8 argued that, "unlike classifications deemed by the Supreme Court as suspect, there is no objective way by which to identify a person as having a particular sexual orientation. *This difficulty is reflected throughout the scholarly literature, which recognizes the lack of any settled definition for sexual orientation*" (Proponents' Motion for Summary Judgment, p. 38, my emphasis). Sexual orientation defies definition, they claimed, and thus homosexuality does not qualify as a classification for equal protection considerations.

To support this argument, they cited numerous "well-respected researchers"* throughout the trial. In their opening brief, for example, they quoted a chapter written by Professors Lisa Diamond and Ritch Savin-Williams:

"There is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual (rather than confused, curious, or maladjusted). The more carefully researchers map these constellations...the more complicated the picture becomes because few individuals report uniform correlations among these domains" (Diamond & Savin-Williams, 2002, p. 102).

* Opening brief, Defendant-Intervenors-Appellants' Opening Brief, *Perry v. Schwarzenegger*, No. 10-16696 (9th Cir. filed Sept. 17, 2010), p. 71. available at http://www.ca9.uscourts.gov/datastore/general/2010/09/22/10-16696_openingbrief.pdf

While being cross-examined about the nature of sexual orientation, I was asked whether this is a “reasonable” statement. The same question was posed to me about numerous other quotations extracted from the research literature, including the following from the Institute of Medicine’s (IOM) 1999 report on lesbian health:

“Lesbians do not constitute an identifiable homogeneous population for research study” (Institute of Medicine, 1999, p. 23).
“...[T]here is no one ‘right’ way to define who is a lesbian” (p. 33).

Were these statements intended to mean that there is no such thing as sexual orientation? The authors, no doubt, would take issue with that characterization of their work, based as it was on quoting isolated passages out of their original context. The very existence of the 1999 IOM report, which emerged from a National Institutes of Health workshop whose purpose was “to examine the need for future research on the health of lesbians” (pp. viii-ix), is an acknowledgement that “lesbians” exist as a group. The authors’ recognition of this fact is readily evident from even a superficial reading of the report. Its Preface, for example, refers to lesbians as “a subgroup of women” (p. vii), and in the same section as the passage cited by the Prop. 8 proponents the report characterizes women who “self-identify as homosexual, have only female sex partners, and find sex with women only to be very desirable” as “*clearly lesbian*” (Institute of Medicine, 1999, pp. 26-27, my emphasis). Acknowledging that a group is diverse, as the IOM report did, does not negate its existence.

To counter misconstruals and distortions of her work, Professor Diamond, a coauthor of the first passage quoted above (and of several others cited by opponents of marriage equality in

different court cases), submitted her own expert declaration in *Windsor v. US*, the District Court case that successfully challenged the constitutionality of a section of the federal Defense of Marriage Act (DOMA), a ruling later affirmed by the U.S. Supreme Court (*US v. Windsor*, 2013). In it she stated, “If the question is whether gays, lesbians and bisexuals are a group of people with a distinct, immutable characteristic, my scientific answer to that question is yes. The fact that a characteristic expresses itself in different ways across the group does not mean that the group itself does not exist” (Diamond, 2011, p. 4).*

Contrary to the assertions of Prop. 8 supporters, the fact that social scientists discuss the complexity of sexual orientation and the challenges associated with defining and measuring it for research purposes does not mean it cannot be defined. As I explained in my own testimony, a common theme running through different researchers’ definitions is that sexual orientation comprises multiple components, or dimensions, all of which involve sexual or romantic relationships, whether realized or desired. These dimensions include patterns of sexual, affectional, or romantic attractions to people of one or both sexes; patterns of behaviors expressing those desires and attractions; and a sense of identity based on these patterns in oneself or on affiliation with a community of others who share them (*Perry v. Schwarzenegger*, 2010, Findings of Fact; see also Institute of Medicine, 2011). Depending on the research question, different scientific studies have focused on different dimensions.

Proposition 8 supporters argued that sexual orientation is a meaningless term because many people are “inconsistent” across the dimensions of desire, behavior, and identity. For example, some men engage in homosexual behavior but do not label

* Diamond, 2011, Expert declaration in *Windsor v. US*.

themselves gay or bisexual. Such discrepancies, they argued, make sexual orientation ineligible for the status of suspect classification. They used the National Health and Social Life Survey (NHSLS; Laumann, Gagnon, Michael, & Michaels, 1994) as a primary basis for their argument:

“[It] found that among individuals who reported some degree of same-sex behavior, attraction, or self-identity, only for 15% of women and 24% of men did all three categories overlap. In this respect, the proposed class of gays and lesbians clearly differs from other classifications... that the Supreme Court has singled out for heightened protection. [*Hollingsworth v. Perry*, Prop. 8 supporters’ opening brief, pp. 71-72, citations omitted]

This argument is invalid for several reasons. It ignores the individuals in Laumann et al.’s sample who fit unambiguously into the categories of gay, lesbian, or bisexual, that is, those who reported same-sex attraction and a sexual minority identity and, in most cases, same-sex sexual experiences. It also leaves out more than 90 percent of the participants in the Laumann et al. study, namely, those whose sexual orientation would be categorized as heterosexual. When the latter are included, fewer than ten percent of the entire NHSLS sample exhibited “inconsistencies” among their sexual behavior, attraction, and identity. The vast majority were “consistent” across all three dimensions, most of them reporting exclusively heterosexual experiences, desires, and identity. Thus, although some individuals do not fit neatly into one category (just as with other social classifications such as race, ethnicity, and gender), sexual orientation defines meaningful and recognizable groups.

Accepting the fact that lesbians, gay men, and bisexuals exist as a group, another consideration in equal protection arguments is whether they can escape discrimination by simply removing themselves from the class. Courts have not required that leaving the class be completely impossible in order to qualify for heightened scrutiny. A person's sex can be changed through medical procedures, one can convert to different religious denomination, and a resident alien can become a citizen. Nevertheless, discrimination based on sex, religion, or alienage remains subject to heightened scrutiny because group membership in these domains is so fundamental to individuals' sense of self that change should not be required even though it might be possible.

One of Judge Walker's questions to both sides concerned "whether sexual orientation can be changed, and if so, whether gays and lesbians should be encouraged to change it." Responses to this question focused on three interrelated issues: the origins of sexual orientation; whether people perceive their own sexual orientation to have been a choice; and whether people can deliberately change their sexual orientation through, for example, therapy or counseling.

Origins of Sexual Orientation

Proposition 8 proponents argued that sexual orientation (specifically homosexuality) is not immutable because there is no conclusive evidence that it is biologically determined at birth:

"...Heightened scrutiny is also reserved for groups defined by 'an immutable characteristic determined solely by the accident of birth.' But according to the American Psychiatric Association, 'there are no replicated scientific studies supporting any

specific biological etiology for homosexuality.” [Hollingsworth v. Perry, Prop. 8 supporters’ opening brief, pp. 73-74, citations omitted].

Although many scientists and much of the lay public hold strong opinions about the origins of sexual orientation – whether heterosexual, homosexual, or bisexual – scientific consensus is currently lacking in this area. Some scientists argue that it is strongly influenced – if not determined – by biological factors prior to birth (Wilson & Rahman, 2005) and is thus immutable for purposes of equal protection arguments (Hamer & Rosbash, 2010). However, considerable controversy persists about the interpretation of findings from biological studies (Byne, 2007; Jordan-Young, 2010). As scientists continue to gain new insights into the complex ways in which the influences of genes, the environment, individual experience, and culture interact to shape human sexuality, casting this debate in terms of a simplistic nature-nurture dichotomy has increasingly come to be recognized as counterproductive (Byne, 2007; Hammack, 2005; Tolman & Diamond, 2001). Nor is it certain that all people follow a single developmental path in establishing their sexual orientation (e.g., Peplau, 2001). For these reasons, the argument that sexual orientation is biologically determined is a shaky foundation for equal protection arguments, at least within the limits of current scientific knowledge.

Moreover, establishing the cause or determinants of sexual orientation is not necessary to establish that it is immutable for equal protection purposes. Two other research findings strongly support the validity of the immutability argument. First, most gay, lesbian, and bisexual adults in the United States do not experience their own orientation as a choice. Second, interventions intended to change sexual orientation from homosexual to heterosexual have

not been shown to be effective. If gay, lesbian, and bisexual individuals do not experience their sexual orientation as a choice, do not believe they can change it, and have not been successful when they attempted to change, these facts would be consistent with regarding sexual minorities as a suspect class.

Sexual Orientation and Choice

I addressed the question of perceived choice in my expert report and testimony by describing some of my own empirical research. In one study, conducted with a community sample of 2,259 gay, lesbian, and bisexual adults in the greater Sacramento area (Herek, Gillis, & Cogan, 2009), we asked “How much choice do you feel that you had about being lesbian/bisexual?” (For men the wording was “gay/bisexual.”) Five response options were provided: *no choice at all*, *very little choice*, *some choice*, *a fair amount of choice*, and *a great deal of choice*. An overwhelming majority of the gay men (87%) reported they experienced no choice at all or very little choice about their sexual orientation. Women perceived having more choice than men but, even so, most lesbians (nearly 70%) reported having little or no choice. Bisexuals reported feeling they had more choice about their sexual orientation but, nevertheless, nearly 59% of bisexual men and 45% of bisexual women said they experienced little or no choice. Another 15% and 20%, respectively, said they had only “some choice.”

I subsequently assessed the generalizability of these findings when I surveyed a national probability sample of self-identified lesbian, gay, and bisexual adults (Herek, Norton, Allen, & Sims, 2010). Responses to the “choice” question by gay men and lesbians were strikingly similar to those in the community sample: 88% of the gay men reported “no choice at all” about being gay, with another 6.9% saying they experienced “a small

amount of choice.” Only 5% reported they experienced “a fair amount” or “a great deal” of choice.* Among lesbians, 68.4% reported no choice, and another 15.2% reported experiencing a small amount of choice; only 16% experienced a fair amount or a great deal of choice. Thus, 95% of gay men and 84% of lesbians reported experiencing little or no choice about their sexual orientation. A majority of bisexuals similarly reported having little or no choice about their sexual orientation: 60.7% of bisexual men and 55.8% of bisexual women.†

I presented these data to the court to make the point that, regardless of the origins of sexual orientation, most gay, lesbian, and bisexual people do not experience their sexuality as a choice and are unlikely to perceive it as something they can change.

Can People Change Their Sexual Orientation?

The latter point leads to the body of research on whether or not people can change their sexual orientation through either their own efforts or a psychological or religious intervention.‡ If they

* In contrast to the community study, this questionnaire provided 4 response options for the choice question.

† Because the survey question did not explicitly define *choice*, we do not know whether respondents interpreted it as referring to their pattern of attractions, their sexual behaviors, their identity, or some other facet of sexual orientation. Other research, however, suggests that most respondents probably were referring to the amount of choice they experience in their sexual attractions and desires (Whisman, 1996).

‡ This question is often conflated with the changes that some people experience spontaneously in their patterns of sexual attraction over the life course. Some lesbians and gay men, for example, report having considered themselves heterosexual at one time in their life. Some identified and functioned as heterosexual, and even married a person of the other sex. Many of those individuals subsequently report that they were always homosexual but were unaware of their true feelings, were afraid to acknowledge them, or were consciously attempting to pass as

can do so, it has been argued, this is proof that sexual orientation is not immutable and thus should not be regarded by the courts as a suspect classification. The desire to establish that people can change their sexual orientation – or at least to make this possibility appear plausible – has been a driving force behind large-scale media campaigns promoting the idea of “ex-gays.” For example, the goal of a 1998 national campaign sponsored by conservative religious groups that promoted the view that gay people can and should change their sexual orientation was, according to its lead organizer, “to strike at the assumption that homosexuality was immutable and that gay people therefore need protection under anti-discrimination laws” (Goodstein, 1998, p. A10).

Proponents of this view have cited research findings concerning the “fluidity” of human sexuality to argue that being gay or lesbian is ephemeral, something that changes over time and can be likened to a fad. (They rarely, if ever, apply this idea to heterosexuality.) For example, in an expert declaration filed in 2004 when the San Francisco marriage cases were first being litigated, psychiatrist Jeffrey Satinover cited the previously mentioned IOM report on lesbian health to support his assertion that homosexuality “is not so much a true characteristic of an

heterosexual to avoid being stigmatized. Some, however, report feeling they truly were heterosexual during an earlier part of their life but now are gay or lesbian. Others report that, without their sexual orientation changing, they nevertheless have found themselves attracted to or sexually involved with a specific individual of the “wrong” sex – i.e., inconsistent with their self-labeled sexual orientation (Diamond, 2008). Thus, the question of whether individuals’ perceptions of their own sexual orientation can spontaneously change or evolve over the course of the life span does not seem to be highly controversial. For present purposes, the important question is whether an intervention can be effective in bringing about such change.

individual ... but rather a collective trend or fashion that waxes or wanes with the times” (Satinover, 2004, p. 19).

“[T]he self-report of a homosexual or bisexual ‘identity’ varies strongly... in consequence of external cultural factors – e.g., ‘what’s cool,’ what’s on TV, what is taught in sex education class, what shibboleth a Supreme Court Justice repeats in her ruling without first confirming in the scientific evidence. This expectation of cultural and ethnic variability has been directly confirmed by the [Institute of Medicine Committee on Lesbian Health Research Priorities].” (Satinover, 2004, p. 8)

Labeling homosexuality a popular fad ignores the stigma that sexual minorities have long endured. It also fails to acknowledge the large numbers of gay men and lesbians who have struggled unsuccessfully to become heterosexual (e.g., American Psychological Association, 2009a; Shidlo & Schroeder, 2002; Shidlo, Schroeder, & Drescher, 2001).

As I testified, the research literature fails to show that interventions intended to change sexual orientation are either safe or effective.* I described the report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation which, after conducting an extensive review of the relevant research literature, found “serious methodological problems in this area of research” (American Psychological Association, 2009a, p. 2). Focusing on the relatively few studies that “met the minimal

* The standards for concluding that an intervention is effective include that it has consistent positive effects and does not have serious harmful side effects (Flay et al., 2005)

standards for evaluating whether psychological treatments, such as efforts to change sexual orientation, are effective” (p. 2), the Task Force concluded:

“enduring change to an individual’s sexual orientation is uncommon. The participants in this body of research continued to experience same-sex attractions following SOCE [sexual orientation change efforts] and did not report significant change to other-sex attractions that could be empirically validated, though some showed lessened physiological arousal to all sexual stimuli. Compelling evidence of decreased same-sex sexual behavior and of engagement in sexual behavior with the other sex was rare. Few studies provided strong evidence that any changes produced in laboratory conditions translated to daily life. Thus, the results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE” (pp. 2-3).

I noted that the Task Force also found evidence that some individuals experienced harm or believed they had been harmed by these interventions. For example, data from questionnaire studies and therapists’ reports indicate that patients who “fail” to change their sexual orientation may experience shame, a general sense of failure, guilt, depression, intimacy avoidance, sexual dysfunction, or even suicidality (Haldeman, 2001; Schroeder & Shidlo, 2001; Shidlo & Schroeder, 2002).

In light of the many reports of harm, the lack of rigorous studies demonstrating effectiveness, and the fact that homosexuality is not a psychological disorder that requires “cure,”

the major mental health professional associations in the United States have adopted policy statements warning the professions and the public about treatments that purport to change sexual orientation (e.g., American Psychiatric Association, 2000; American Psychological Association, 2009b). Concerns about harm resulting from SOCE have also informed the positions of the other major professional organizations, including the American Academy of Pediatrics, American School Counselor Association, American School Health Association, National Association of School Psychologists, and School Social Work Association of America (American Psychological Association & Just The Facts Coalition, 2008). In my testimony, I described the stance toward SOCE taken by these mainstream professional associations. As with the American Psychiatric Association and APA resolutions declaring that homosexuality is not an illness, these policy statements and endorsements were important because they established that my testimony about the lack of effectiveness of SOCE reflected not only my own opinion, but also the views of the mainstream mental health profession.

Do Sexual Minorities Have A History of Being Stigmatized?

Another question raised by Judge Walker was whether Prop. 8 stigmatized sexual minorities. This issue was part of a larger equal protection question concerning whether the class historically has experienced discrimination and has been accorded second-class citizenship, questions that were addressed in my own testimony as well that of psychologist Ilan Meyer and historian George Chauncey.

In my testimony, I explained that stigma reflects “an undesired differentness” (Goffman, 1963, p. 5) whose significance and status are socially constructed, and that *sexual stigma* is the

stigma attached to any nonheterosexual behavior, identity, relationship, or community (Herek, 2009). I further explained that, like other forms of stigma, sexual stigma is fundamentally about power, and that stigma-based differentials in power and status are legitimated and perpetuated by society's institutions and ideological systems in the form of *structural stigma*. The latter "is formed by sociopolitical forces and represents the policies of private and governmental institutions that restrict the opportunities of stigmatized groups" (Corrigan et al., 2005, p. 557). Structural stigma – in the form of laws and state policies that treat same-sex couples differently from heterosexual couples – ensures that sexual minority individuals have less power than heterosexuals (Herek, 2009).

I explained that Proposition 8, by definition, was an example of structural stigma because it singled out a stigmatized group for differential treatment. Its only basis for prohibiting same-sex couples from marrying was that their relationships are homosexual rather than heterosexual. Thus it restricted the opportunities of sexual minorities relative to heterosexuals. It conveyed the State's judgment that a same-sex couple is inherently less deserving of society's full recognition through the status of civil marriage than are heterosexual couples. Thus, it devalued and delegitimized the relationships that are at the core of a homosexual orientation.

I further testified that California's institution of domestic partnerships for same-sex couples was not the same as marriage, nor did society consider it or civil unions to be equal to marriage. In support of this argument, I cited polling data revealing that a substantial proportion of the public, both nationwide and in California, supported civil unions or domestic partnerships but simultaneously opposed marriage for same-sex couples, demonstrating that they perceived important differences between

the institutions (e.g., DiCamillo & Field, 2009; Pew Research Center for the People and the Press, 2009, May 21). I also noted that many of the same-sex couples who married during the months before Prop. 8 passed were already registered domestic partners, indicating that they perceived a difference between the two statuses. I suggested that the intense level of public debate and controversy surrounding the question of whether marriage rights should be granted to same-sex couples was itself an indication of the special status accorded to marriage as a social institution and the widespread belief that it confers unique benefits.

In addition, I explained that social norms did not discourage the dissolution of a domestic partnership in the same way that they discourage marital divorce. This difference was dramatically illustrated in 2004, when a new law expanded the benefits and obligations accorded to California's domestic partners. In advance of the law taking effect, the California Secretary of State sent letters to registered domestic partners, warning them to consider the possible desirability of legally dissolving their partnership before the statute took effect (Marech, 2004, September 20), advice that many couples followed (Gates, Badgett, & Ho, 2008). I pointed out that it is difficult to imagine a parallel situation in which the State would encourage married couples to consider obtaining a divorce, another indication that California domestic partnerships were not viewed as equivalent to marriage in terms of barriers to their dissolution.*

* The Supreme Court's 2013 *Windsor* ruling that DOMA Section 3 is unconstitutional led the federal government to grant benefits to legally married same-sex couples but not to couples in a registered domestic partnership or civil union. This outcome made it even more apparent that the latter institutions accord a status that is inferior to marriage.

Judge Walker's Decision

Judge Walker's written opinion in *Perry v. Schwarzenegger* was noteworthy for its extensive use of social science data – most of which had been provided in courtroom expert testimony – to establish the facts underlying his legal decision. He concluded that the evidence “fatally undermines the premises underlying proponents’ proffered rationales for Proposition 8” (*Perry et al v. Schwarzenegger et al*, 2010, p. 24). Walker was respectful of the voters’ right to enact ballot initiatives, acknowledging that “The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters.” Yet, he continued,

“when challenged, however, the voters’ determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.” (*Perry et al v. Schwarzenegger et al*, 2010, p. 24).

Explaining his standard of review, Judge Walker concluded that the trial evidence indicated that “gays and lesbians are the type of minority strict scrutiny was designed to protect” (p. 121) and that “strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation” (p. 122). But he also concluded that strict scrutiny was not even necessary here because “Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest” (p.123).

Judge Walker cited the expert witnesses extensively to support each of his conclusions. He rejected the Prop. 8 proponents' argument that sexual orientation cannot be defined as "contrary to the weight of the evidence" (Finding of Fact #44). Rather, he concluded, "Sexual orientation is fundamental to a person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group" (Finding of Fact #44). Relevant to the question of immutability, he concluded that "individuals do not generally choose their sexual orientation" and that the assertion that "an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation" was not supported by any credible evidence (Finding of Fact #44).

Concerning stigma, Judge Walker found that "gays and lesbians have been victims of a long history of discrimination" (Finding of Fact #74) and that such discrimination continues to occur in California and elsewhere in the United States (Finding of Fact #74). He further accepted the argument that Proposition 8, as a manifestation of structural stigma, singled out gay men and lesbians for unequal treatment and legitimated that discrimination (Finding of Fact #67). He also found that it perpetuated negative stereotypes, including "that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents" (Finding of Fact #67), and that it "places the force of law" behind stigmatizing attitudes, including that "gays and lesbians are not as good as heterosexuals" and "gay and lesbian relationships do not deserve the full recognition of society" (Finding of Fact #58).

Judge Walker's ruling did not end Prop. 8's journey through the courts. It was appealed to the Ninth Circuit Court of Appeals, where the case for Prop. 8 was argued by the initiative's proponents because the defendants named in the lawsuit, Governor

Arnold Schwarzenegger and California Attorney General Jerry Brown, both considered it unconstitutional and declined to defend it. The Ninth Circuit struck down Prop. 8 but on narrower grounds than those cited by Judge Walker.

The Ninth Circuit ruling was appealed to the U.S. Supreme Court, which heard arguments about Prop. 8 in conjunction with *United States v. Windsor*, which challenged the provision of DOMA that prohibited the federal government from recognizing legal marriages between two people of the same sex. The Supreme Court struck down the DOMA provision (*US v. Windsor*, 2013) but declined to rule on the constitutionality of Prop. 8, finding that the initiative's proponents had lacked the necessary legal standing to appeal the District Court's decision in the first place. Thus, although it did not set a national legal precedent as did the *Windsor* case, Judge Walker's ruling took effect and same-sex couples regained the right to marry in California.

SERVING AS AN EXPERT WITNESS: SOME OBSERVATIONS

I have detailed some of the substantive issues raised during the *Perry* trial that could be addressed by social science findings. Serving as an expert witness, however, requires more than mastery of the relevant research literature (although such knowledge is essential). This section describes some of what a social scientist may experience in the role of expert witness in a case challenging a law's constitutionality. This is an idiosyncratic account in which I draw mainly upon my own experiences.

A social scientist can be involved with a case in various ways. Sometimes that involvement is largely behind the scenes. For example, social scientists might be asked to play a consulting role by explaining the relevant research findings to attorneys, commenting on another expert's report or brief, or suggesting other

researchers who could provide expert testimony on specific topics. Scientists can also play more visible roles without actually testifying in court. For example, I have provided expert declarations or affidavits in numerous court cases and administrative proceedings. Those declarations are, in essence, focused literature reviews that summarize the available research that is relevant to factual questions raised in the case before the court and explain its implications.

When a case is at the trial level, an expert witness is often asked to testify. Getting to the courtroom involves numerous steps. In the *Perry* case, for example, I first met with the plaintiffs' attorneys* in September of 2009 to discuss the topics and questions I could potentially address in my testimony. Soon after, I was asked to prepare a report that detailed my professional background (to enable the court to evaluate my credibility as an expert for the case) and summarized the relevant research findings about which I could testify if asked to do so. In writing that report, and throughout my involvement with the case, I was careful not to make assertions unless I could support them with data. I note this fact to emphasize how important it is for a social scientist expert witness to anticipate that any statement he or she makes will be

* The plaintiffs were represented by Ted Olson, a former US Solicitor General during the George W. Bush administration, and David Boies, whose many high-profile cases included *US v. Microsoft*, in which he represented the Justice Department in their antitrust lawsuit. Olson and Boies were the lead attorneys for the opposing sides in *Bush v. Gore*, the case that effectively determined the outcome of the disputed 2000 presidential election. For the *Perry* case, they were assisted by a small army of attorneys from their respective law firms. In addition, the City and County of San Francisco was allowed to join the case and its attorneys participated. Throughout my involvement with the case, I worked mainly with two highly skilled lawyers, Sarah Piepmeier (from Olson's law firm) and Danny Chou (from the San Francisco City Attorney's office).

challenged during a deposition or cross-examination. When such a challenge is made, the witness must be able to cite supporting empirical research in order to maintain credibility.

I submitted my report in early October. During the first week of November, I was deposed by an attorney representing the supporters of Proposition 8.* Depositions are part of what is known as the discovery process. They provide the attorneys with an opportunity to question the other side's witnesses about their background, the range of their expertise, their research methods, their planned testimony, sources they have consulted in reaching their opinion, and other potentially relevant topics. A deposition can also give attorneys a sense of how the witness will perform under the pressure of courtroom cross-examination and in response to various types of questioning. Inconsistencies between a witness' deposition statements and her or his courtroom testimony can be used to cast doubt on the witness' accuracy or truthfulness. The judge is not present during the deposition but the witness is under oath and the entire proceeding is transcribed and often videotaped. My own deposition in the *Perry* case lasted roughly 9 hours and yielded a 315-page transcript.

Different attorneys have different styles of questioning. The attorney who deposed me for the *Perry* case, for example, was cordial and respectful. Around that same time, I happened to be serving as an expert witness for another case, one in which the deposing attorney's approach was hostile, confrontational, and angry, even bullying. Regardless of their demeanor and interaction style, the attorneys' goal is to obtain information that will help them win their case. This can include information that could disqualify the witness as an expert, such as inconsistencies and

* The law firm of Cooper and Kirk represented the Prop. 8 proponents because Gov. Arnold Schwarzenegger and Attorney General Jerry Brown refused to defend the proposition.

factual errors in the witness' testimony or expert report. In advance of the deposition, it is likely that the deposing attorneys have conducted extensive research on the witness' background and work. They may have enlisted their own experts to review and critique the witness' expert report. They have probably read some or all of the witness' professional publications as well as blog entries and other available works. The witness might be asked to comment on the accuracy of a statement without first being told that the statement was taken from one of her or his own publications. For example, I was asked to comment on a brief quotation whose author was not identified by the deposing attorney. It was taken from a paper I myself had written more than 25 years earlier.

Consequently, the expert witness must prepare extensively for the deposition.* For the *Perry* case, I not only wrote my expert report (and carefully checked the accuracy of every statement in it) but also reread all of my own potentially relevant publications, double-checked that my vita was accurate, and met with the plaintiffs' attorneys to anticipate questions I might possibly be asked. I also prepared for questions that might be asked about any of my published articles, web pages, blog entries, and other public statements. Because of my preparations, I recognized as my own the 25-year old statement mentioned above, and I knew the context in which it had appeared.

The questioning that an expert witness undergoes during a deposition or trial differs considerably from the style of communication to which academics are accustomed. Our discussions with colleagues and students typically have the cooperative goal of furthering knowledge. We speculate, think

* A sample of the sort of questions asked in an expert deposition can be found online at:

http://www.daubertontheweb.com/Deposition_Checklist.htm

aloud, and suggest untested hypotheses. We generally speak in probabilistic terms. Cross-examinations, however, are not cooperative. They are adversarial. The attorney's goal is to cast doubt on the testimony's credibility or relevance by challenging the research on which it is based or by impeaching the expert's professional qualifications. The attorney will often demand yes-or-no answers to questions that the expert knows are more correctly framed in terms of probabilities. Unlike conversations in academic and professional settings, an expert must be careful to answer only the specific question that was posed without volunteering unrequested information. Whereas we are accustomed to providing extended explanations and qualifications when we answer questions, a cross-examining attorney can cut a response short as soon as the witness has uttered the word "yes" or "no." How an expert witness deals with these challenges will depend on the case, the cross-examining attorney, and the specific questions being asked.

I mentioned above that the deposition is part of the discovery process. Expert witnesses should be aware that the opposing side has the legal right to demand copies of any materials upon which they relied in preparing their report. Discovery can also extend to written communications between the expert and the attorneys (including e-mails) and the expert's notes from meetings, phone calls, and review of materials related to the case. The nature of discovery differs from one case to another. In *Perry*, both sides agreed not to demand background materials from the other side's expert witnesses. In the other case mentioned above, however, I was asked to submit copies of all of my notes and e-mails related to my involvement with the case. Anticipating such demands, attorneys may suggest that experts minimize their note-taking and written communications.

Not all witnesses who are deposed subsequently testify at trial. In the *Perry* case, the Prop. 8 proponents offered at least six expert witnesses for deposition but called only two of them at the trial. Their reasons for withdrawing the others were disputed. The Prop. 8 proponents cited the witness's concerns about privacy. The plaintiffs' attorneys attributed it to their poor performance during their depositions, which indicated they were unlikely to be convincing in court.

The trial was held in San Francisco in January. My testimony, like that of the other witnesses, comprised three parts. First, the direct examination was conducted by Ethan Dettmer, a member of the plaintiffs' legal team. In the course of this testimony, I was able to explain many of the key points in my expert report. This was followed by the cross-examination, in which a lawyer for the defenders of Prop. 8 attempted to undermine my testimony. He also attempted to elicit statements from me that would support the defense's own arguments about the scientific data. Insofar as many of the questions I was asked during cross-examination seemed to focus on the nature of sexual orientation, for example, the attorneys may have been seeking support for their argument that gay men and lesbians do not constitute a discrete social group that warrants legal protection. After the cross-examination came the redirect examination by Mr. Dettmer, in which he asked some additional clarifying questions. He also took the opportunity to present excerpts from the deposition testimony of an expert for the pro-Prop. 8 side who was withdrawn before the trial. In these excerpts, their witness effectively corroborated key points in my own testimony. For example, he agreed that sexual orientation is not readily subject to change and that enduring change of one's sexual orientation as a result of therapy is not common.

Finally, Mr. Dettmer concluded the redirect examination with two questions:

Q. ...[T]his goes to defining gay men and lesbians. If two women want to marry each other, is it a reasonable assumption that they are lesbians?

A. I think it's a reasonable assumption, yes.

Q. And if two men want to marry each other, is it a reasonable assumption that they are gay?

A. Yes.

MR. DETTMER: I have no more questions, your Honor.

I first took the stand at approximately 8:40 am and was dismissed around 4:45 pm (with a 1-hour recess for lunch and brief breaks in the mid-morning and mid-afternoon). In thanking me for my testimony, Judge Walker commented, "I think you win the long distance award."

APPLYING SOCIAL SCIENCE DATA: SOME ADVICE FOR GETTING INVOLVED

Although my account of the *Perry* trial is necessarily truncated and highly selective, I hope it illustrates some of the types of issues that can be addressed by scientific data in one "real world" arena related to social justice, that of constitutional law. What I have not yet discussed here is the process of becoming involved in the first place. My own path in this regard has been so idiosyncratic and embedded in a particular historical era that I

wouldn't presume to suggest that others try to follow it. In this final section, however, I recount some of my experiences and offer general reflections and suggestions that some readers may find useful, regardless of the specific area of law or social policy to which they hope to contribute.

A first step, of course, is to select an area of study and develop broad expertise about it. Ideally, this leads one to formulate specific research questions and to conduct and publish original empirical studies addressing them. Having a record of publishing empirical research in a field – even if it does not directly address the facts of a particular court case or policy – is likely to enhance one's credibility in legal and policy arenas. Firsthand knowledge of research methodology, data analysis, and the logistical issues involved in studying a particular topic or population is important not only in its own right, but also because it provides one with a deeper understanding of the research literature, including its strengths and limitations.

The initial focus of my own research was heterosexuals' negative attitudes toward homosexuality and sexual minorities, which I now refer to as sexual prejudice. My choice of this topic when I was still an undergraduate student resulted from the confluence of several factors. I was keenly interested in social movements and the political process. I had taken my first course in social psychology and was impressed by its integration of psychological and sociological knowledge as well as its rich history of research on social problems, including racial prejudice and antisemitism. In addition, I had recently read George Weinberg's (1972) *Society and the Healthy Homosexual*, which introduced the concept of homophobia (and the term itself; Herek, 2004). Given this background, perhaps it is not surprising that when the time came for me to conduct a senior research project, I decided on an empirical study of heterosexuals' attitudes toward

homosexuality. That project provided a foundation for my doctoral dissertation and the research program I have pursued throughout my career.

As my own story illustrates, personal values and life experiences are likely to play a role in a social scientist's selection of an area of study and formulation of specific research questions, especially when the research addresses social justice concerns. Once researchers begin the task of designing and conducting empirical studies, however, their focus should be on theoretical and methodological rigor. In the legal and policy arenas in which I have worked, the credibility of empirical studies and the researchers who conduct them has rested mainly on the quality of the research and the replicability of the findings. The researcher need not disavow her or his personal values or opinions, but the research should stand on its own independently of the researcher's gender, race, sexual orientation, religious beliefs, or political ideology.

One standard by which empirical studies are often judged in legal and policy settings is the quality and prestige of the outlet in which they are published. Researchers who are studying new topics with potentially controversial implications may face challenges in publishing their work in top journals, especially if they are at an early stage of their career and have not yet established their reputation and publication history. Unfortunately, editors and reviewers do not always evaluate manuscripts solely on their theoretical and methodological strengths. Their skepticism and personal discomfort with a topic may also affect editorial decisions. Over time, however, as the larger culture evolves and more studies find their way into the literature, this is likely to change. In the course of my own publishing efforts and those of my colleagues over the past three decades, I have observed this progression for research addressing questions related to sexual

orientation and gender identity. It is now far more likely to be evaluated on its merits and much less likely to be greeted with immediate skepticism or considered to be addressing a “fringe” topic than was the case in the not-so-distant past.

Being highly knowledgeable about one’s own specific research area is of critical importance but is not necessarily enough. In addition, having a more general mastery of related research literatures is of considerable value in addressing the broader questions that often arise in the legal and policy arenas. When I began my research on sexual stigma and prejudice, the scientific literature included only a handful of empirical studies. The lack of an established body of previous research created challenges in that I had to break new ground in my empirical inquiry, often borrowing methodologically and theoretically from other areas of research (e.g., the large body of research on racism and antisemitism). On the plus side, the fact that relatively few empirical studies had been published meant it was possible to read everything (literally) that appeared in print, not only in psychology but also in sociology, anthropology, political science, and related fields. And it was possible to read not only all of the new research about sexual prejudice and stigma, but also the work being conducted on same-sex relationships, lesbian and gay parenting, identity development, and a host of other topics. Eventually the volume of research began to grow too rapidly for this to be feasible. Nevertheless, the broad foundation of knowledge that I developed early in my career has aided me in my efforts to keep up with the research literature on numerous topics in multiple disciplines.

How does a social scientist identify specific research questions that have legal or policy relevance? Doing so is a challenging task because such questions typically demand immediate answers whereas a research program requires months or

years to get started, not to mention the additional time required for it to produce peer-reviewed publications. By the time the findings of a study are published in a scientific journal, the specific research question's policy relevance may have diminished or disappeared. For this reason, researchers should select questions for study not only because of their potential policy relevance, but also because they are inherently interesting, theoretically important, and likely to lead to findings that enrich the scientific literature.

One strategy for identifying research questions that are both interesting and potentially policy-relevant is to extract empirically testable assertions from public debates. In debates about policies affecting sexual minorities over the last few decades, several empirical questions have been raised repeatedly. For example, is a child's well-being and adjustment affected by her or his parents' gender or sexual orientation? Do people choose their sexual orientation? Can interventions reliably change a person's sexual orientation? Identifying such questions requires not only tracking the scientific literature but also staying informed about legislation, court rulings, new reports from think tanks, and public statements by prominent figures on all sides of the debate. Being a news junkie helps enormously in this regard. So does attending conferences, briefings, and meetings where attorneys, legislators, activists, and others active in the debate will be speaking and, ideally, available for conversations. In other words, it is important to pay attention and to show up.

I first began to understand this process in the early 1980s, when I was still in graduate school. An advisory measure appeared on the local ballot that, if passed, would have directed the city council to take steps toward drafting an ordinance prohibiting discrimination based on sexual orientation. Even though the measure was nonbinding, it evoked intense debates that commonly featured assertions of negative stereotypes about lesbians and gay

men, e.g., that they molest children or entice them to become homosexual. After a long and polarizing campaign, the measure was defeated by a 2-to-1 margin. For me, the experience was an object lesson in the importance of knowing what testable claims were being made on both sides of the debate and being able to cite and explain empirical studies addressing them. During the campaign, I spoke at a public meeting to counteract the disinformation that was being circulated by some of the ballot measure's opponents and I compiled a fact sheet summarizing the research findings that were available at the time. After the election, I continued to keep track of scientific research addressing antigay stereotypes and eventually published an article to assist lawyers and other nonacademics confronting them (Herek, 1991).

Legal briefs can also be useful sources of research questions. It is usually too late to begin conducting research that is relevant to a specific case once briefs are being written and submitted. As noted above, however, sometimes the same questions keep arising in new cases. In the course of contributing to various APA *amicus* briefs, for example, I became aware of the lack of demographic, psychological, and social data from representative samples of sexual minorities. For example, what proportion of the adult lesbian and gay population is currently in a committed relationship or is raising children? Until fairly recently, the research literature addressing these questions relied entirely on nonprobability samples. Knowing about our gaps in knowledge was useful when I was selecting questions for inclusion in a national survey I conducted with a probability sample of lesbian, gay, and bisexual adults (Herek, et al., 2010).

Another relevant example is my own previously described study of the extent to which lesbian, gay, and bisexual people perceive their sexual orientation as a choice. This research had its genesis in the 1990s, when the argument that homosexuality is a

sinful choice was being widely promulgated by religious conservatives. Empirical research showed that public opinion reflected this dimension of the culture wars. Heterosexuals' attitudes toward lesbians and gay men were (and continue to be) reliably correlated with their beliefs about choice. Antigay heterosexuals are likely to assert that homosexuality is a choice, whereas unprejudiced heterosexuals are likely to believe that sexual orientation is inborn or otherwise not chosen (e.g., Haider-Markel & Joslyn, 2008). (The question of whether *heterosexuals* perceive that they chose their orientation is rarely asked.)

Empirical research, including my own, had focused on variables that predict sexual prejudice in heterosexuals, including their beliefs about choice. But the question of whether sexual minorities perceive their own sexual orientation as chosen or not is also interesting and generates several plausible hypotheses. For example, sexual minorities might manifest a pattern comparable to that of heterosexuals, holding more negative attitudes toward themselves (i.e., greater self-stigma) to the extent that they perceive they chose their own sexual orientation. Alternatively, perceiving one's own homosexual or bisexual orientation as a choice might be associated with rejection of self-stigma. Or beliefs about choice may be entirely unrelated to self-stigma.

I was surprised to find that empirical data in this area were generally lacking. Some ethnographic and anecdotal accounts noted that gay men did not perceive their own sexual orientation as a choice (e.g., Cory, 1951; Hooker, 1965). As best I could tell, however, no large-scale studies had posed questions about choice to people of any sexual orientation – hetero-, homo-, or bisexual. The lack of quantitative data prompted me to begin asking about choice in my own research. As discussed earlier, most gay men,

lesbians, and bisexuals reported that they experienced little or no choice.*

I encountered some raised eyebrows when I initially shared my findings about perceptions of choice with other researchers – not so much because of the numbers, but merely because I had asked the question. Some colleagues assumed that documenting how people perceive their sexual orientation suggests implicitly that being lesbian, gay, or bisexual is a defect but shouldn't be a basis for persecution because "it's not their fault" – they never chose to be "that way." I was sensitive to these concerns, but I was also aware that unproved assertions about choice were being made in public debates and warranted empirical scrutiny. And some courts considered the results to be important. In addition to Judge Walker's discussion of it in his findings of fact, the research was also cited by the Seventh Circuit Court of Appeals in upholding lower court rulings that marriage prohibitions for same-sex couples are unconstitutional (*Baskin v. Bogan*, 2014). And, in a sense, Justice Kennedy cited it indirectly in his majority opinion in the 2014 *Obergefell* case, which established a constitutional right for same-sex couples to marry.†

* Returning to the hypotheses mentioned earlier, gay and lesbian respondents who believed they had some degree of choice tended to manifest lower levels of self-stigma than those who believed they had little or no choice. The strength of the relationship, however, was fairly weak and, as noted above, relatively few respondents reported experiencing a high degree of choice. Self-stigma did not differ significantly among bisexual respondents according to beliefs about choice.

† On page 8 of the majority opinion, Justice Kennedy wrote, "Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable." He cited the relevant section of the amicus brief submitted by the American Psychological Association and other professional

I described these studies on my blog, *Beyond Homophobia* (Herek, 2014). I mention this to make the point that social scientists who want to contribute to policy and the law should not only publish in academic journals. They should also consider communicating their work to a broader audience through, for example, websites, blogs, and other forms of social media. I first launched my own website in 1996 and have used it over the years to make my publications and research findings widely available. It has also enabled me to disseminate information that addresses various myths and stereotypes, and to rebut antigay claims made by purveyors of what is often called “junk science” (e.g., Herek, 1998). For example, the myth that gay people molest children remains widespread throughout the world. My website includes a section addressing this claim which consistently draws a large number of viewers. As I complete this chapter, for example, that page had more than 6,000 visitors from more than 100 countries during the previous month.

Returning to my earlier comment about the importance of showing up, an important setting in which to be available is one’s own professional associations. Becoming involved in the policy work of the APA and other professional organizations gave me a crash course in legal and policy issues. The fact that I learned about them in a context where their relevance to psychology was salient was especially valuable. Because I was also conducting empirical research related to some of those issues, I was able to contribute at multiple levels. For example, when I testified on behalf of the APA and several other professional associations at the first congressional hearings on antigay hate crimes (United States Congress House Committee on the Judiciary, 1987), my

organizations (2015) which, in turn, described my findings about choice as a key part of its immutability argument.

testimony summarized my own empirical research findings as well as the concerns and policy positions of the APA.

Another part of showing up is to make oneself available, recognizing that legal and policy matters often require a rapid response, have short deadlines, and can disrupt one's life. When I was invited to assist with preparation of the APA's *amicus* brief in the 1986 *Bowers v. Hardwick* case, for example, the time available for meeting the Court's filing deadline was very limited and happened to coincide with the Christmas holiday. I was traveling, but ended up spending much of my time during the trip working on the brief: having phone conferences with attorneys, checking references, and faxing draft sections of the brief back and forth (this was in the days before e-mail was in widespread use). None of this was convenient, but participating in the process was exciting.

CONCLUSION

Social scientists' efforts to communicate research findings about sexual orientation in *Perry*, *Windsor*, *Obergefell*, and similar cases continues a tradition that extends back to SPSSI members' early involvement in litigation challenging racial segregation. A common theme spanning the decades has been social scientists' conviction that empirical research data can promote social justice and foster informed decision making in the courts by setting the record "straight," that is, debunking negative stereotypes and exposing the unwarranted assumptions and prejudices that often underlie structural stigma.

Even as we act on this belief, we must be modest in our expectations about the extent to which our efforts will influence the courts. Although Judge Walker based many of his findings of fact in *Perry* on social scientists' expert testimony, other courts have ignored or rejected empirical research in reaching their

decisions. And sometimes our contributions may not directly affect the outcome of a case but may instead provide judges or Justices with support for a decision they have already reached, consistent with Chief Justice Warren's characterization of the Social Science Brief's influence in *Brown v. Board of Education*.

My discussion here has focused on only one of the many arenas in which social scientists can bring our knowledge to bear on social issues, and it has been based almost entirely on my own experiences. Nevertheless, I hope it gives interested readers some ideas they can use in forging their own unique strategies for integrating their work as scientists with their concerns for social justice.

LEGAL SOURCES CITED

- Baskin v. Bogan* (2014).
Brown v. Board of Education of Topeka, 483 U.S. 347 (1954).
In re Marriage Cases, 384, 76 Cal. Rptr. 3d 683 (Supreme Court of California 2008).
Kerrigan v. Commissioner Of Public Health, 2008
Obergefell v. Hodges, 576 U.S. _____ (2015). [No. 14-556, slip op.]
Perry et al v. Schwarzenegger et al (United States District Court For The Northern District Of California 2010). Findings of fact and conclusions of law.
Perry et al. v. Schwarzenegger et al.: Defendant-intervenors' notice of motion and motion for summary judgment, and memorandum of points and authorities in support of motion for summary judgment (U.S. District Ct., N. Cal. 2009).
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)
Satinover, J. (2004). *Declaration of Jeffrey B. Satinover in support of Proposition 22's motion for summary judgment/summary adjudication*.
United States v. Windsor, 133 S. Ct. 2675 (2013)

Varnum v. Brien, 763, N.W.2d 862 (Supreme Court of Iowa 2009).

References

- American Psychiatric Association. (1952). *Mental disorders: Diagnostic and statistical manual* (1st ed.). Washington, DC: Author.
- American Psychiatric Association. (2000). *Therapies focused on attempts to change sexual orientation (reparative or conversion therapies)*. Washington, DC: American Psychiatric Association.
- American Psychological Association. (2009a). *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*. Washington, DC: Author. Retrieved from <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>
- American Psychological Association. (2009b). *Resolution on appropriate affirmative responses to sexual orientation distress and change efforts*. Washington, DC: Author. Retrieved from <http://www.apa.org/about/governance/council/policy/sexual-orientation.aspx>
- American Psychological Association, & Just The Facts Coalition. (2008). *Just the facts about sexual orientation and youth: A primer for principals, educators, and school personnel*. Washington, DC: American Psychological Association. Retrieved from <http://www.apa.org/pi/lgbc/publications/justthefacts.pdf>
- Baskin v. Bogan (2014).
- Bayer, R. (1987). *Homosexuality and American psychiatry: The politics of diagnosis* (Rev. ed.). Princeton, NJ: Princeton University Press.
- Bérubé, A. (1990). *Coming out under fire: The history of gay men and women in World War Two*. New York: Free Press.
- Boswell, J. (1980). *Christianity, social tolerance, and homosexuality: Gay people in Western Europe from the beginning of the Christian era to the fourteenth century*. Chicago: University of Chicago Press.
- Brown v. Board of Education of Topeka No. 483, 347 (U.S. Supreme Court 1954).
- Byne, W. (2007). Biology and sexual minority status. In I. H. Meyer & M. E. Northridge (Eds.), *The health of sexual minorities: Public health perspectives on lesbian, gay, bisexual, and transgender populations* (pp. 65-90). New York: Springer.

- Clark, K. B. (1953). The social scientist as an expert witness in civil rights litigation. *Social Problems*, 1(4), 5-10.
- Clark, K. B. (1979). The role of social scientists 25 years after Brown. *Personality and Social Psychology Bulletin*, 5, 477-481. doi: <http://dx.doi.org/10.1177/014616727900500408>
- Clark, K. B., Chein, I., & Cook, S. W. (2004). The effects of segregation and the consequences of desegregation: A (September 1952) social science statement in the Brown v. Board of Education of Topeka Supreme Court case. *American Psychologist*, 59(6), 495-501. doi: <http://dx.doi.org/10.1037/0003-066X.59.6.495>
- Conger, J. J. (1975). Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the annual meeting of the Council of Representatives. *American Psychologist*, 30, 620-651.
- Corrigan, P. W., Watson, A. C., Heyrman, M. L., Warpinski, A., Gracia, G., Slopen, N., & Hall, L. L. (2005). Structural stigma in state legislation. *Psychiatric Services*, 56, 557-563.
- Cory, D. W. (1951). *The homosexual in America: A subjective approach*. New York: Greenberg.
- Diamond, L. M. (2008). *Sexual fluidity: Understanding women's love and desire*. Cambridge, MA: Harvard University Press.
- Diamond, L. M. (2011). *Supplemental Declaration of Lisa M. Diamond: Windsor v. United States*, United States District Court Southern District Of New York.
- Diamond, L. M., & Savin-Williams, R. C. (2002). Gender and sexual identity. In R. M. Lerner, F. Jacobs & D. Wertlieb (Eds.), *Handbook of applied developmental science* (Vol. 1, pp. 101-121). Newbury Park, CA: Sage.
- DiCamillo, M., & Field, M. (2009). *Voters very sharply divided if asked to decide on a new constitutional amendment to allow same-sex marriages*. San Francisco: Field Research Corporation. Retrieved from <http://www.field.com/fieldpollonline/subscribers/RIs2301.pdf>
- Fiske, S. T., Bersoff, D. N., Borgida, E., & Deaux, K. (1991). Social science research on trial: Use of sex stereotyping research in Price Waterhouse v. Hopkins. *American Psychologist*, 46, 1049-1060.
- Flay, B. R., Biglan, A., Boruch, R. F., Castro, F. G., Gottfredson, D., Kellam, S., . . . Ji, P. (2005). Standards of evidence: Criteria for

- efficacy, effectiveness and dissemination. *Prevention Science*, 6(3), 151-175.
- Gates, G. J., Badgett, M. V. L., & Ho, D. (2008). *Marriage, registration and dissolution by same-sex couples in the US*. Los Angeles: The Williams Institute, University of California, Los Angeles. Retrieved from <http://escholarship.org/uc/item/5tg8147x>
- Goffman, E. (1963). *Stigma: Notes on the management of spoiled identity*. Englewood Cliffs, NJ: Prentice-Hall.
- Gonsiorek, J. C. (1991). The empirical basis for the demise of the illness model of homosexuality. In J. C. Gonsiorek & J. D. Weinrich (Eds.), *Homosexuality: Research implications for public policy* (pp. 115-136). Newbury Park, CA: Sage.
- Goodstein, L. (1998, August 13). The architect of the 'gay conversion' campaign, *New York Times*, p. A10. Retrieved from <http://www.nytimes.com/1998/08/13/us/the-architect-of-the-gay-conversion-campaign.html>
- Haider-Markel, D. P., & Joslyn, M. R. (2008). Beliefs about the origins of homosexuality and support for gay rights: An empirical test of attribution theory. *Public Opinion Quarterly*, 72, 291-310. doi: 10.1093/poq/nfn015
- Haldeman, D. C. (2001). Therapeutic antidotes: Helping gay and bisexual men recover from conversion therapies. *Journal of Gay and Lesbian Psychotherapy*, 5(3-4), 117-130.
- Hamer, D., & Rosbash, M. (2010, February 23). Genetics and Proposition 8 [OP-ED], *Los Angeles Times*. Retrieved from <http://articles.latimes.com/2010/feb/23/opinion/la-oe-roshash23-2010feb23>
- Hammack, P. L. (2005). The life course development of human sexual orientation: An integrative paradigm. *Human Development*, 48, 267-290.
- Haynes, M. A., & Smedley, B. D. (Eds.). (1999). *The unequal burden of cancer: An assessment of NIH research and programs for ethnic minorities and the medically underserved*. Washington, DC: National Academies Press.
- Herek, G. M. (1991). Myths about sexual orientation: A lawyer's guide to social science research. *Law and Sexuality*, 1, 133-172.
- Herek, G. M. (1998). Bad science in the service of stigma: A critique of the Cameron group's survey studies. In G. M. Herek (Ed.), *Stigma and sexual orientation: Understanding prejudice against*

- lesbians, gay men, and bisexuals* (pp. 223-255). Thousand Oaks, CA: Sage.
- Herek, G. M. (2004). Beyond "homophobia": Thinking about sexual stigma and prejudice in the twenty-first century. *Sexuality Research and Social Policy*, 1(2), 6-24.
- Herek, G. M. (2007). Confronting sexual stigma and prejudice: Theory and practice. *Journal of Social Issues*, 63, 905-925.
- Herek, G. M. (2009). Sexual stigma and sexual prejudice in the United States: A conceptual framework. In D. A. Hope (Ed.), *Contemporary perspectives on lesbian, gay and bisexual identities: The 54th Nebraska Symposium on Motivation* (pp. 65-111). New York: Springer.
- Herek, G. M. (2014, September 16). Choice, immutability, and the 7th Circuit marriage equality decision Retrieved November 16, 2014, from <http://www.beyondhomophobia.com/blog/choice-and-sexual-orientation/>
- Herek, G. M., & Garnets, L. D. (2007). Sexual orientation and mental health. *Annual Review of Clinical Psychology*, 3, 353-375.
- Herek, G. M., Gillis, J. R., & Cogan, J. C. (2009). Internalized stigma among sexual minority adults: Insights from a social psychological perspective. *Journal of Counseling Psychology*, 56, 32-43. doi: 10.1037/a0014672
- Herek, G. M., Norton, A. T., Allen, T. J., & Sims, C. L. (2010). Demographic, psychological, and social characteristics of self-identified lesbian, gay, and bisexual adults in a U.S. probability sample. *Sexuality Research and Social Policy*, 7, 176-200.
- Hooker, E. (1965). Male homosexuals and their "worlds". In J. Marmor (Ed.), *Sexual inversion: The multiple roots of homosexuality* (pp. 83-107). New York: Basic Books.
- In re Marriage Cases*, 384, 76 Cal. Rptr. 3d 683 (Supreme Court of California 2008).
- Institute of Medicine. (2011). *The health of lesbian, gay, bisexual, and transgender people: Building a foundation for better understanding*. Washington, DC: National Academy Press.
- Institute of Medicine (Ed.). (1999). *Lesbian health: Current assessment and directions for the future*. Washington, DC: National Academy Press.
- Jordan-Young, R. M. (2010). *Brain storm: The flaws in the science of sex differences*. Cambridge, Mass: Harvard University Press.

- Jordan, M. D. (1997). *The invention of sodomy in Christian theology*. Chicago: University of Chicago Press.
- Katz, J. N. (1976). *Gay American history: Lesbians and gay men in the U.S.A.* New York: Thomas Y. Crowell Company.
- Kimmel, P. R. (1997). A history of Division 9 (Society for the Psychological Study of Social Issues) *Unification through division: Histories of the divisions of the American Psychological Association, Vol. 2.* (pp. 9-53): American Psychological Association, Washington, DC.
- Klineberg, O. (1986). SPSSI and race relations, in the 1950s and after. *Journal of Social Issues, 42*(4), 53-59.
- Krech, D., & Cartwright, D. (1956). On SPSSI's first twenty years. *American Psychologist, 11*, 470-473.
- Laumann, E. O., Gagnon, J. H., Michael, R. T., & Michaels, S. (1994). *The social organization of sexuality: Sexual practices in the United States*. Chicago: University of Chicago Press.
- Marech, R. (2004, September 20). Gays cautious about new partners law; some opt out, fearing legal or financial troubles, *San Francisco Chronicle*, pp. A-1. Retrieved from <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/09/20/MNGSL8ROMN1.DTL>
- Murphy, D. E. (2004, March 18). San Francisco married 4,037 same-sex pairs from 46 states, *New York Times*, pp. A-26. Retrieved from <http://www.nytimes.com/2004/03/18/national/18MARR.html>
- Peplau, L. A. (2001). Rethinking women's sexual orientation: An interdisciplinary, relationship-focused approach. *Personal Relationships, 8*, 1-19.
- Perry et al v. Schwarzenegger et al* (United States District Court For The Northern District Of California 2010). Findings of fact and conclusions of law.
- Perry et al. v. Schwarzenegger et al.: Defendant-intervenors' notice of motion and motion for summary judgment, and memorandum of points and authorities in support of motion for summary judgment* (U.S. District Ct., N. Cal. 2009).
- Pew Research Center for the People and the Press. (2009, May 21). Independents take center stage in Obama era: Section 4: Religion and social values: Attitudes about homosexuality and same-sex marriage Retrieved November 15, 2014, from <http://www.people-press.org/2009/05/21/section-4-religion-and-social-values/>
- Price Waterhouse v. Hopkins*, No. 228 490 (U.S. Supreme Court 1989).

- Satinover, J. (2004). *Declaration of Jeffrey B. Satinover in support of Proposition 22's motion for summary judgment/summary adjudication*. Retrieved from D:\Library\Main_Library\Main_Library5\Satinover_2004_SF-Declaration.pdf
- Schroeder, M., & Shidlo, A. (2001). Ethical issues in sexual orientation conversion therapies: An empirical study of consumers. *Journal of Gay and Lesbian Psychotherapy*, 5(3-4), 131-166.
- Shidlo, A., & Schroeder, M. (2002). Changing sexual orientation: A consumers' report. *Professional Psychology: Research and Practice*, 33, 249-259.
- Shidlo, A., Schroeder, M., & Drescher, J. (2001). *Sexual conversion therapy: Ethical, clinical, and research perspectives*. New York: Haworth Medical Press.
- Tolman, D. L., & Diamond, L. M. (2001). Desegregating sexuality research: Cultural and biological perspectives on gender and desire. *Annual Review of Sex Research*, 12, 33-74.
- United States Congress House Committee on the Judiciary. (1987). *Anti-gay violence: Hearing before the Subcommittee on Criminal Justice of the Committee on the Judiciary House of Representatives: Ninety-ninth Congress second session on anti-gay violence* (1996 ed.): U.S. Government Printing Office.
- US v. Windsor*, 133 S. Ct. 2675 (U.S. Supreme Court 2013).
- Varnum v. Brien*, 763, N.W.2d 862 (Supreme Court of Iowa 2009).
- Weinberg, G. (1972). *Society and the healthy homosexual*. New York: St. Martin's.
- Whisman, V. (1996). *Queer by choice: Lesbians, gay men, and the politics of identity*. New York: Routledge.
- Wilson, G. D., & Rahman, Q. (2005). *Born gay: The psychobiology of sex orientation*. London: Peter Owen.