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## The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts

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## THE PREVALENCE OF SOCIAL SCIENCE IN GAY RIGHTS CASES: THE SYNERGISTIC INFLUENCES OF HISTORICAL CONTEXT, JUSTIFICATORY CITATION, AND DISSEMINATION EFFORTS

PATRICIA J. FALK†

### *Table of Contents*

I.	INTRODUCTION.....	3
II.	RESEARCH ON COURTS' CITATION AND REFERENCE TO SOCIAL SCIENCE IN LEGAL OPINIONS INVOLVING GAY INDIVIDUALS.....	8
A.	<i>The Research Project</i> .....	8
1.	<i>Introduction and Methodology</i> .....	8
2.	<i>The Results</i> .....	13
a.	<i>Citations in the Four Substantive Areas</i> .....	13
b.	<i>The Effect of the Additional Case Factors</i> .....	15
c.	<i>The Qualitative Results</i> .....	15
3.	<i>Summary and Conclusion</i> .....	16

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B.	<i>Comparison of These Results to Other Research on Courts' Citation Patterns</i> .....	17
1.	<i>Studies on the Citation of Social Science</i> ...	17
2.	<i>Studies on the Citation of Secondary Authority</i> .....	19
III.	AN EXPLORATION OF THREE SYNERGISTIC FORCES CONTRIBUTING TO THE HIGH RATE OF CITATION TO SOCIAL SCIENCE INFORMATION IN GAY RIGHTS CASES .....	20
A.	<i>Introduction</i> .....	20
B.	<i>The Evolution of Modern Legal Culture and the Increased Acceptance of Social Science</i> .....	22
1.	<i>The Rapprochement of Law and Social Science on a Jurisprudential Level</i> .....	23
2.	<i>Modern Courts Are More Likely to Cite Social Science Than Their Predecessors</i> .....	24
3.	<i>Changes in the Rules of Evidence Have Facilitated Courts' Use of Social Science</i> .....	27
C.	<i>The Justificatory Functions of Social Science Citations in Gay Rights Cases in Light of The Controversial Nature of Homosexuality</i> .....	29
1.	<i>Information Recitation and Transmission: Social Science Used to Educate Others About Homosexuality</i> .....	30
2.	<i>The Substantive Impact of the Information: Social Science Used to Debunk Prevailing Myths and Stereotypes About Homosexuality</i> .....	36
3.	<i>The Authoritative Nature of the Information: Social Science Used to Apply A Scientific Veneer</i> .....	41
4.	<i>Shifting Responsibility for Decision Making: Social Science Used To Ornament a Decision</i> .....	44
5.	<i>Conflicting Information from the Social Sciences Regarding Homosexuality</i> .....	48
D.	<i>Litigants and Amici are Inundating the Courts With Social Science Information in Gay Rights Cases</i> .....	53
1.	<i>Individual Gay Litigants are Making Concerted Efforts to Provide Social Science to Courts</i> .....	56
2.	<i>The Participation of Gay and Civil Rights Organizations as Amici Curiae</i> .....	59

3. <i>The Participation of Scientific and Professional Associations, Such as the APA, as Amici Curiae</i> .....	61
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IV. CONCLUSION.....	67
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Homosexuality is an emotional and controversial issue in our society. It causes fear and disgust among many people. This may well result in condemnation of this decision—but, if so, the critics should at least have a clear understanding that this decision has little effect upon the general public.<sup>1</sup>

Wife, as well as the American Civil Liberties Union (A.C.L.U.), cite articles that indicate there are no significant differences among heterosexual parents and homosexual divorced parents and their children. Of course, the trial court has the authority to find the evidence presented not credible. Since it is our duty to protect the moral growth and the best interests of the minor children, we find Wife's arguments lacking. Union, Missouri is a small, conservative community . . . Homosexuality is not openly accepted or widespread.<sup>2</sup>

#### I. INTRODUCTION

Disjunctive legal change is often accompanied by a period of frantic activity as the competing forces of stasis and evolution vie for domination. Nowhere is the battle for legal change likely to be more sharply joined than when the findings of modern science, in their varied and multifarious forms, are pitted directly against prevailing moral or societal precepts. Some of the most far-reaching and consequential changes in modern legal doctrine have been produced by the clash between contemporary scientific insights and tradition-bound morality. Consider, for example, the issues of school desegregation, abortion, and the death penalty. In *Brown v. Board of Education*,<sup>3</sup> the United States Supreme Court overturned the separate-but-equal doctrine enunciated in *Plessy v.*

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1. *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982), *opinion supplemented*, 106 F.R.D. 526, *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

2. *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (footnote and citation omitted).

3. 347 U.S. 483 (1954), *supplemented by*, 349 U.S. 294 (1955).

*Ferguson*<sup>4</sup> based, inter alia, on “modern authorities” documenting the harm accruing to African-American children as the result of attending segregated schools.<sup>5</sup> In *Roe v. Wade*,<sup>6</sup> the Court affirmed the right of women to have abortions within a trimester framework heavily reliant upon medical knowledge of fetal development. In current death-penalty jurisprudence, social science has been implicated in a number of discrete contexts, including the deterrent role of capital punishment,<sup>7</sup> predictions of the future dangerousness of offenders,<sup>8</sup> the death-qualification of jurors,<sup>9</sup> racial discrimination in the imposition of the death penalty,<sup>10</sup> and the execution of minors,<sup>11</sup> although the Supreme Court continues to uphold its constitutionality.<sup>12</sup>

One of the latest incarnations of this trend is the current battle over the legal recognition of gay “rights.”<sup>13</sup> In recent history,<sup>14</sup>

4. 163 U.S. 537 (1896), *overruled by*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

5. Famous footnote 11 of that opinion provided the results of various pieces of social science research.

6. 410 U.S. 113 (1973).

7. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

8. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

9. *Lockhart v. McCree*, 476 U.S. 162 (1986); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

10. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

11. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

12. Acker has argued that the introduction of social science information in death penalty cases, while not directly affecting the final outcome of these cases, has had a significant impact upon the resulting opinions: “To be perceived as legitimate, the opinions cannot for long simply ignore or distort the underlying factual evidence. Social science findings may serve as a check, and perhaps ultimately as a corrective mechanism to assure the continued legitimacy of the Court’s death penalty decisions.” James R. Acker, *Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications*, 8 JUST. Q. 421, 439 (1991).

13. The word “rights” is used advisedly in this context because gay individuals have been unable to secure many legal protections. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986). *But see*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) (discussing the gay rights movement).

14. The legal system’s “recognition” of gay individuals as such appears to correspond roughly with the gay rights movement, which according to some commentators began in the 1960s. *See* Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: “Queer Baiting” from the Bench*, 3 POL. BEHAV. 31 (1981); Allan Spear, *The U.S. Constitution and Gay America*, 10 HAMLINE L. REV. 159 (1987). For a more expansive view of the gay rights movement, *see* Cain, *supra* note 13.

the courts have been inundated by gay litigants seeking the rights and protections already afforded other discrete groups within society.<sup>15</sup> In the resulting legal skirmishes,<sup>16</sup> gay individuals are resorting with increasing regularity to the sciences in an effort to overcome the moral opprobrium surrounding homosexuality.<sup>17</sup> As in the integration, abortion, and death penalty contexts, litigants lacking the weapons of legal doctrine, historical protection, or social consensus, have turned to the weapons<sup>18</sup> that are available—information provided by science and social science.

The judicial opinions which have resulted from the onslaught of gay litigants have not remained untouched by the scientific information adduced by them. To the contrary, these opinions reflect a heavy influx of science. Two recent examples from state supreme courts cogently illustrate the utilization of scientific or

15. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J. and Marshall, J., dissenting from denial of certiorari) (discussing a potential equal protection claim based on homosexuality).

First, homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect the deep-seated prejudice rather than . . . rationality." (citation omitted). State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.

*Id.* at 1014 (footnote omitted).

16. "What can be seen is that on all civil fronts, the courts are the battleground as gay men and women seek equal treatment and justice in the American system." Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 *DRAKE L. REV.* 311, 346 (1980-81).

17. Compare Justice Burger's concurring opinion in *Bowers*—"To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching," 478 U.S. at 197—with the approach taken by one scholar in the gay rights area—"Morality laws based on tradition rather than science do not withstand the test of time," Shirley A. Wiegand, *Using State Constitutions to Challenge Sodomy Laws: Commonwealth of Kentucky v. Wasson*, AALS meeting (Jan. 5, 1992).

18. See *Stanford*, 492 U.S. at 378, for Justice Scalia's characterization of social science as a "weapon" within the context of death penalty cases. Justice Scalia states: "The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon."

social science information in gay rights cases. In *Baehr v. Lewin*,<sup>19</sup> one justice of the Hawaii Supreme Court, in considering the right of gay individuals to marry, wrestled with the scientific question of whether homosexuality is biologically predetermined and thus is an immutable characteristic worthy of recognition under equal protection analysis. The Kentucky Supreme Court's decision in *Kentucky v. Wasson*,<sup>20</sup> striking down the state sodomy law under both right to privacy and equal protection analyses, explicitly referred to seven expert witnesses, ranging from a cultural anthropologist to a professor of medicine, and extensive amici curiae briefs.<sup>21</sup>

These are not isolated examples. Rather, as this Article will demonstrate, a disproportionately large number of gay rights opinions contain citations and references to social science information. These judicial opinions have become artifacts<sup>22</sup> of the battle between modern science and existing moral conceptions of homosexuality and provide a discrete microcosm within which to examine science's contribution to legal change. The lessons derived from gay rights cases may help to elucidate other contexts in which science and morality meet head-on.<sup>23</sup>

Part II.A. of this Article presents original empirical research on courts' citation and reference to social science in legal opinions

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19. 852 P.2d 44 (Haw. 1993). In response to *Baehr*, the Hawaii legislature recently passed a bill banning same-sex marriage. See 1994 Haw. Sess. Laws 217.

20. 842 S.W.2d 487 (Ky. 1992).

21. Two additional examples also illustrate the proliferation of social science information in increasingly diverse contexts involving gay litigants. The question of whether gay men and lesbian women should be permitted in the military has received extensive attention from social science scholars. See, e.g., *GAYS AND THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES* (Marc Wolinsky & Kenneth Sherrill eds., 1993) (including affidavits of seven social scientists on various topics). A second example concerns the question of security clearances for gay individuals. See, e.g., Gregory M. Herek, *Gay People and Government Security Clearances: A Social Science Perspective*, 45 AM. PSYCHOLOGIST 1035 (1990).

22. Murray Levine & Barbara Howe, *The Penetration of Social Science into Legal Culture*, 7 LAW & POL'Y 173 (1985) (arguing that published court opinions are important artifacts of legal culture).

23. As one author put it:

It may be a worthwhile enterprise to devote increased effort to understanding more precisely the nature of those situations which offer the greatest opportunities for the application of social science research. Only through understanding can there be a realistic appraisal of the place of social science in the legal process.

Philip R. Lochner, Jr., *Some Limits on the Application of Social Science Research in the Legal Process*, in LAW AND THE SOCIAL ORDER 847, 847 (1973).



involving gay individuals. It reports the results of a study comparing the frequency of social science citations in four substantive gay rights areas: child custody and visitation, employment discrimination, first amendment, and criminal sodomy cases. In addition to the substantive legal issue, the study also examines the impact of four other variables,<sup>24</sup> such as whether the court engaged in constitutional analysis, on courts' rates of social science citation. Finally, the study employs two qualitative measures, degree of detail and degree of reliance, in order to assess how the social science information was used when it was cited. Part II.B. compares the results of this research to extant research on the citation patterns of courts and concludes that social science is used in an unusually large number of gay rights cases.

Part III of this Article attempts to answer the question of why social science is cited so frequently in gay rights cases. The answer appears to lie at the intersection of three synergistic forces: (1) the recency of gay rights cases and the increased acceptance of social science information within modern legal culture; (2) courts' inclinations to cite social science in their opinions for various purposes, largely justificatory, (e.g., using social science to debunk prevailing myths about homosexuality) in light of the controversial nature of homosexuality; and (3) the concerted efforts of three distinct groups, gay litigants, civil rights organizations, and scientific associations, to systematically provide social science information to the courts. None of these explanations by itself is adequate to explain heightened use of social science in gay rights cases. Rather, it is only when they are viewed as interactive forces set in a larger explanatory framework that a satisfactory understanding is possible.

This Article concludes with a prediction about the future use of science and social science in gay rights litigation. Until legal change is achieved in this area, we can expect that litigants will continue to introduce, and courts will continue to incorporate in their opinions, social science information. The battle between traditional moral precepts and scientific notions of human behavior will continue within this controversial context. The very necessity of the citation of social science is inextricably interwoven in the failure of the U.S. Supreme Court to augur change in this area. Since an evolution in the legal doctrine regarding gay individuals has not occurred, it is likely that social science will continue to be the weapon of choice on the battlefield for legal change.

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24. See *infra* notes 41-45 and accompanying text.

## II. RESEARCH ON COURTS' CITATION AND REFERENCE TO SOCIAL SCIENCE IN LEGAL OPINIONS INVOLVING GAY INDIVIDUALS

### A. *The Research Project*

#### 1. *Introduction and Methodology*

This section presents the results of empirical research on the citation and reference to social science in gay rights cases. The present study continues a fairly long and well-developed research tradition<sup>25</sup> of systematically studying court's citation

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25. See THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* (1978); Robert D. Archibald, *Stare Decisis and the Ohio Supreme Court*, 9 CASE W. RES. L. REV. 23 (1957); Neil N. Bernstein, *The Supreme Court and Secondary Source Material: 1965 Term*, 57 GEO. L.J. 55 (1968); Wes Daniels, "Far Beyond the Law Reports": *Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940, and 1978*, 76 LAW LIBR. J. 1 (1983); Lawrence M. Friedman, et. al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); Thomas L. Hafemeister & Gary B. Melton, *The Impact of Social Science Research on the Judiciary*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH (Gary B. Melton ed., 1987); Robert A. Kagan, et. al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978); Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39 (1979); Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. BAR FOUND. RES. J. 227; John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977) [hereinafter *Citations*]; John H. Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954) [hereinafter *Authority*]; Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 7 KAN. L. REV. 477 (1959); William L. Reynolds, II, *The Court of Appeals of Maryland: Roles, Work and Performance—Part II: Craftsmanship and Decision-Making*, 38 MD. L. REV. 148 (1978); John Scurlock, *Scholarship and the Courts*, 32 U. MO. KAN. CITY L. REV. 228 (1964); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986); Mary A. Bobinski, Comments, *Citation Sources and the New York Court of Appeals*, 34 BUFF. L. REV. 965 (1985); William L. Turner, Comment, *Legal Periodicals: Their Use in Kansas*, 7 KAN. L. REV. 490 (1959); Thomas L. Hafemeister, *The Impact of Social Science Materials on the Judiciary: A Qualitative and Quantitative Analysis* (1988) (unpublished Ph.D. dissertation, University of Nebraska (Lincoln)), abstract in 49 DISSERTATION ABSTRACTS INT'L 2924B (1989); John W. Johnson, *The Dimensions of Non-Legal Evidence in the American Judicial Process; The Supreme Court's Use of Extra-Legal Materials in the Twentieth Century* (1974) (unpublished Ph.D. dissertation, University of Minnesota) abstract in 35 DISSERTATION ABSTRACTS INT'L 1132A (1974); Victor G. Rosenblum, *Report of the Uses of Social Science in Judicial Decision Making*, Unpublished research report to the National Science Foundation, Washington, D.C. (1977).

patterns.<sup>26</sup> Briefly, and without excessive methodological detail,<sup>27</sup> the study identified all available<sup>28</sup> legal opinions<sup>29</sup> involving gay

26. This study, like its predecessors, used judicial opinions or written decisions as the primary source of "observation," data collection, and analysis, and employed a basic citation count methodology. On the one hand, considerable information can be gleaned from studying the written decisions of judges:

Appellate court opinions, carefully indexed and preserved in law libraries, are a tremendous resource for historians and social scientists.

. . . [T]hese appellate opinions also are crucial documents for any study of judicial culture. The reasoning of the judges, over the years, reveals judges' notions of law and of the judicial role; it is an essential window into the legal culture of the judges. The style of opinions is as good an indicator as we have of what counts as sound legal reasoning for any given era.

Friedman et al., *supra* note 25, at 773.

On the other hand, although judicial opinions are quite valuable and informative, there are certain limitations inherent in their use as data:

[T]he judicial opinion is at best an imperfect instrument for revealing the data and premises considered by judges to have been important in reaching their decisions. The office of the opinion purportedly is to explain the thinking processes of judges, to give reasons in the language and logic familiar to lawyers for the decisions reached.

Arthur S. Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1192 (1975).

27. For a complete discussion of the methodology utilized in this study, see Patricia J. Falk, *Courts' Citation and Reference to Social Science in Legal Opinions Involving Gay Individuals* (1988) (unpublished Ph.D. dissertation, University of Nebraska (Lincoln)), *abstract in* 49 DISSERTATION ABSTRACTS INT'L 2923B (1989).

28. The study employed three basic steps in identifying the four populations of relevant cases: (1) analyzing law review articles, which had collected these cases, and extracting all case references, *see, e.g.*, Rivera, *Recent Developments*, *supra* note 16; (2) conducting LEXIS computer searches using key phrases (*e.g.*, "child custody and homosexual! or gay or lesbian! or sexual orientation or sexual preference or affectional orientation or affectional preference"); and (3) searching American Law Reports annotations, including the pocket part and later case service, *see, e.g.*, Wanda E. Wakefield, Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R. 4TH 1297 (1981). Also, with respect to the criminal area, which was broader than the other three areas, the author searched the Decennial Digests using West key number 357 Sodomy K1.

29. The author excluded six types of opinions from analysis: (1) opinions without text; (2) non-judicial opinions; (3) synopses and abridged opinions; (4) unpublished opinions; (5) purely procedural opinions; and (6) opinions involving transsexual persons or transvestites. In addition, the author also excluded certain opinions within the four substantive areas, such as criminal sodomy cases involving minors. *See* Falk, *supra* note 27, for a complete discussion of these exclusions.

individuals in four substantive areas—child custody and visitation (CC),<sup>30</sup> employment discrimination (ED),<sup>31</sup> first amendment (FA),<sup>32</sup> and criminal sodomy (CS)<sup>33</sup>—which were decided through 1987.<sup>34</sup> The study randomly selected<sup>35</sup> 191 cases for further analysis along a number of dimensions. First, the study counted the number of citations and references to social science in each of the four substantive areas and then compared the frequencies of citation across these contexts. The study defined the term “citation and reference to social science” to include three possible sources of information:<sup>36</sup> (1) citations to written works, legal or non-

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30. The central issue in this sample of cases was whether homosexual parents, either lesbian mothers or gay fathers, should be permitted to have custody of, or visitation rights with respect to, their children.

31. The basic issue in the employment discrimination sample was whether a private business or governmental entity (local, state, or federal) could discriminate against an employee based upon sexual orientation without offending constitutional or statutory principles.

32. This sample consisted of cases in which gay individuals and organizations asserted their rights under the free speech clause of the First Amendment.

33. Criminal sodomy cases involved the issue of a state's ability to criminally prosecute gay individuals for engaging in adult, consensual, same-sex, sexual conduct.

34. Since the study was conducted in 1988, 1987 was the last year for which opinions were selected for inclusion. Although not empirical, there is considerable anecdotal evidence that the citation of social science has continued, if not intensified, in more recent gay rights cases. *See, e.g.,* Marriage of Diehl, 582 N.E.2d 281, 292 (Ill. Ct. App. 1991), *leave to appeal denied*, 591 N.E.2d 20 (Ill. 1992) (CC); Blew v. Verta, 617 A.2d 31, 36 (Pa. Super. Ct. 1992) (CC); Collins v. Collins, 1988 WL 30173, at \*3, \*8 (Tenn. App. Mar. 30, 1988) (CC); Bottoms v. Bottoms, 444 S.E.2d 276, 283-84 (Va. Ct. App. 1994) (CC); Curran v. Mount Diablo Council of Boy Scouts of Am., 29 Cal. Rptr. 2d 580, 590-91 (Cal. Ct. App. 1994), *petition for review granted and opinion superseded by* 874 P.2d 901 (Cal. 1994) (ED); Buttino v. FBI, 1992 U.S. Dist. LEXIS 4659, at \*25 (N.D. Cal. 1992) (ED); Jantz v. Muci, 759 F. Supp. 1543, 1547-49 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 2445 (1993) (ED); Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 33-36 (D.C. Cir. 1987) (en banc) (FA); Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 662 (Cal. Ct. App. 1992) (FA); Equality Found. of Greater Cincinnati v. City of Cincinnati, 838 F. Supp. 1235, 1237 (S.D. Ohio 1993), 860 F. Supp. 417, 424-26 (S.D. Ohio 1994) (FA); Commonwealth v. Wasson, 842 S.W.2d 487, 489-90 (Ky. 1992).

35. Identification of the relevant populations of cases yielded 92 ED, 71 CC, 68 FA, and 41 CS opinions. *See* Falk, *supra* note 27, at app. A-D, for a complete list of these cases. Since the four substantive samples contained an unequal number of cases, the author randomly selected 50 cases in the first three samples, while using the entire population of 41 CS cases.

36. The present study, like previous research, counted all citations and references to social science, irrespective of whether the court approved of or disagreed with the information.

legal,<sup>37</sup> containing social science; (2) references to experts in the social sciences; and (3) references to generalized bodies of knowledge<sup>38</sup> within the social sciences (e.g., psychologists have found that . . .).<sup>39</sup> The study collected two types of frequency data: the number of individual citations (i.e., each different source of information cited) and the number of multiple citations (i.e., additional citations to the same source).<sup>40</sup>

Second, the study examined the impact of four other variables or case factors, aside from substantive area, on courts' citation and reference to social science.<sup>41</sup> More specifically, the study

37. Social science may appear in both "legal" and "nonlegal" publications. "By citing law reviews, a court can perhaps bootleg 'nonlegal' premises into its decisions, or deal with 'legal' considerations broader than those usually dealt with." Friedman et al., *supra* note 25, at 814.

38. An example of the third category found within the studied cases is as follows: "This court takes judicial notice that there is no consensus on what causes homosexuality, but there is substantial consensus *among experts* that being raised by a homosexual parent does not increase the likelihood that a child will become homosexual." *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (emphasis added).

39. The precise operationalization of "citations (and references) to social science," was as follows:

Any language in a judicial opinion which reflected a social scientific (i.e., social, psychological, psychiatric, quasi-medical, or non-natural scientific) fact (i.e., based upon or deduced from research) or opinion (i.e., based upon or deduced from theoretical or non-research writing) and was preceded, followed, or within close proximity of (i.e., within 25 words):

full (i.e., complete for the particular discipline) or partial (i.e., abbreviated or shorthand) citation to a social science or legal publication, (e.g., *Humans form interpersonal relationships*, 7 J. OF LOVE 393 (1985));

(2) a full or partial reference to an expert, authority, or professional association in a social science discipline (e.g., *Professor Love has found that humans form interpersonal relationships*); or

(3) any reference to the social science community or generalized body of knowledge (e.g., *The scientific community has established that humans form interpersonal relationships*).

40. If multiple citations to a single source appeared in the same paragraph or footnote, then those additional references were not scored separately, but were counted as one citation. This methodology was consistent with that of other researchers, *see Daniels, supra* note 25, at 3-4; *Hafemeister & Melton, supra* note 25, at 41. However, unlike these other researchers, the author only scored a subsequent reference as a multiple citation if it was separated from the original citation by unrelated text.

41. See *Falk, supra* note 27, for a discussion of the theoretical and/or empirical literatures supporting the potential impact that these characteristics might have on courts' citation of social science.

reanalyzed all 191 cases to determine whether the case concerned a minor,<sup>42</sup> the court engaged in constitutional analysis,<sup>43</sup> the court utilized a nexus approach (i.e., drew a connection between homosexuality and a given behavior),<sup>44</sup> or the court conceptualized homosexuality as a moral issue.<sup>45</sup> Then, for each of these four case factors, the study compared the frequency of social science citations in the cases possessing the characteristic (e.g., constitutional analysis cases) with those which did not (e.g., non-constitutional cases).

To supplement the foregoing quantitative analyses, the study also employed two rudimentary forms of qualitative analysis<sup>46</sup> with

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42. A "minor case" was defined for the study as any legal decision in which the welfare of a minor (someone under the age of majority) or group of minors was mentioned by the court as a relevant consideration in the determination of the case.

43. A "constitutional case" was defined for the study as any legal decision which explicitly referred to and actually decided an issue involving a constitutional provision or principle.

44. This analysis was first set forth in *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), an employment discrimination case in which the court held that an individual could not be dismissed simply because he was gay. Rather, the court held that it was necessary to establish a "nexus" between the employee's homosexuality and an inability to perform his job. *Id.* at 1167. Under a nexus analysis, the focus shifts from homosexuality per se to a consideration of the nexus or connection between sexual orientation and any given behavior, e.g., the ability to be a good employee. Thus, a "nexus analysis case" was defined for the study as any legal decision which either made explicit reference to the nexus analysis used in *Norton* or related cases or utilized implicit reasoning which suggested consideration of the relevance of a litigant's homosexuality to the behavior in dispute.

45. A "moral case" was defined for the study as any legal decision in which the court explicitly used the word "immoral" or a synonymous term to describe gay persons or made implicit or subtle statements concerning the morality of homosexuality or homosexual conduct.

46. While most of the empirical research on courts' use of social science has used quantitative methods, usually a citation count methodology, there have been several qualitative or content analysis studies. See, e.g., Peggy C. Davis, "There is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (analyzing the judicial use of psychological parent theory as espoused by Goldstein, Anna Freud, and Solnit); Levine & Howe, *supra* note 22 (operationalizing the "penetration of social science into legal culture" by tracing the impact of the California Supreme Court's decision in *Hovey*, a case involving juror qualification for death penalty cases, on other state courts); Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633 (1983-84) (identifying 15 social fact assumptions articulated in *Parham*, a case involving procedural protections for minors admitted to mental hospitals, and examining

respect to each citation or reference to social science discovered in the cases. These measures represented an attempt to assess *how* social science was being used, when it was used, by legal decision makers. The two qualitative measures were: (1) the degree of detail<sup>47</sup> and (2) the degree of reliance<sup>48</sup> the court employed in making the citation.<sup>49</sup>

## 2. The Results

### a. Citations in the Four Substantive Areas

Overall, a relatively high number of gay rights cases contained citations to social science. In actual and percentage terms, twenty-five (50%) of the child custody and visitation, fifteen (30%) of

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all reported appellate court decisions citing *Parham* to determine whether the assumptions had been accepted and used). For a survey study on the use of social science information, see Robert D. Felner, et. al., *Child Custody Resolution: A Study of Social Science Involvement and Impact*, 18 PROF. PSYCHOL. 468 (1987) (a survey of a group of randomly selected attorneys and Superior Court judges in a northeastern state, who specialized in family law). In addition, a few of the quantitative studies have also employed qualitative measures, see, e.g., Rosenblum, *supra* note 25 (measuring the Court's reliance on social science by rating the importance of the citation to the proposition for which it was invoked and the importance of such proposition to the outcome of the case); Bernstein, *supra* note 25 (examining the purpose for which the citation was being used).

47. The study assessed degree of detail using a seven-point scale ranging from "extremely detailed" to "extremely general." In arriving at this score, the author considered nine factors: (1) length of the court's discussion; (2) whether the court cited the social science source more than once; (3) whether the reference appeared in a string citation; (4) whether the opinion quoted directly from the material or expert; (5) whether the social science was adopted or quoted from another opinion; (6) whether the court specified the author, expert, or substantive area; (7) whether the court discussed the author's or expert's qualifications; (8) whether the court compared the social science to other social science; and (9) whether the court discussed the limitations of the social science.

48. The study assessed degree of reliance using a seven-point scale ranging from "extreme reliance" to "extreme rejection," with a midpoint reflecting neutrality. The following seven questions were used in determining this rating: (1) Did the court refer to the social science in its holding?; (2) did the court incorporate the social science into its reasoning?; (3) was the social science consistent with the results of the opinion? (4) did the court merely mention the social science without making an evaluation of it; (5) was the social science inconsistent with the opinion's results?; (6) did the court disparage or distinguish the social science?; and (7) did the court reject the social science?

49. The study also collected other types of descriptive data, such as opinion year, level of court, and opinion page length, but generally, these data are irrelevant to the present analysis.

the employment discrimination, fifteen (30%) of the first amendment, and nine (22%) of the criminal sodomy cases contained one or more citations or references to social science. Aggregating the data across the 191 opinions, sixty-four cases (33.5%) contained at least one citation to social science.

Contrary to the author's prediction that social science citation would vary by substantive area, the majority of comparisons across the four groups did not yield significant results, meaning that the samples were not statistically different in their frequencies of citation.<sup>50</sup> However, when the study compared the three samples of civil cases (i.e., CC, ED, and FA) with the CS sample, significant differences in terms of individual and multiple citations emerged; the civil cases cited more social science than the criminal cases.<sup>51</sup>

In addition, most of the comparisons across the four groups in terms of the type of social science cited (i.e., publications, experts, or generalized bodies of knowledge) were not significant.<sup>52</sup> The four categories of cases were more alike than different in the citation of various types of social science. The one exception was a statistically significant difference in the number of individual citations to experts, who were cited much more commonly in the CC cases than in the other three substantive areas.<sup>53</sup>

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50. In terms of the frequency of individual citations, the CC, ED, FA, and CS samples had 87, 82, 53, and 23 such citations, respectively. The frequencies of multiple citations in the four samples were: 107, 122, 83, and 33, respectively. When the author calculated the mean (i.e., average number of) citations per opinion in the four samples, the results were 1.74, 1.64, 1.06, and 0.56 mean individual citations and 2.14, 2.44, 1.66, and 0.80 mean multiple citations, respectively.

51. The mean individual citations per opinion for the civil cases was 1.48 and for the CS cases it was 0.56. This difference was significant at the 0.05 level. The mean multiple citations per opinion for the civil cases was 2.14 and for the CS sample it was 0.80. This difference was significant at the 0.025 level.

52. In the CC cases, there were 19 citations to publications, 66 references to experts, and two references to generalized bodies of knowledge (gbk). The ED sample contained 53 publication, 27 expert, and two gbk citations. In the FA cases, 21 publication, 25 expert, and seven gbk citations appeared. Finally, the CS citations were divided as follows: 10 publication, eight expert, and five gbk citations.

53. The mean individual citations to experts per opinion was 1.32 for the CC, 0.54 for the ED, 0.50 for the FA, and 0.195 for the CS samples. This finding was significant at the 0.01 level. Because this was the only significant result in terms of citation type, the author performed additional statistical tests comparing the state and federal cases in the four substantive areas along this variable. The state cases in the four groups differed significantly in the frequency of individual citations to experts as did the three samples containing federal cases (i.e., excluding the all-state CC sample).



*b. The Effect of the Additional Case Factors*<sup>54</sup>

There were significant differences in the frequency of individual and multiple citations between cases involving minors and those which did not. The minor cases contained more than twice as many citations to social science per opinion as the non-minor cases.<sup>55</sup> Second, the factor concerning court use of a nexus analysis also produced significant results in terms of both individual and multiple citations. Strikingly, the cases using a nexus analysis had almost four times as many social science citations per opinion as those which did not.<sup>56</sup> Finally, there were no significant differences in the frequency of citations based on whether the court engaged in constitutional analysis<sup>57</sup> or conceptualized homosexuality as a moral issue.<sup>58</sup>

*c. The Qualitative Results*

The ratings for degree of detail demonstrated that the courts utilizing social science in their opinions did so in a rather superficial fashion.<sup>59</sup> However, the four samples of cases significantly differed

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54. Before proceeding to a discussion of these results, one caveat is in order regarding the representativeness of these cases along the four case-factor dimensions. As noted above, the 191 sampled cases were randomly selected from individual populations in the CC, ED, FA, and CS contexts and were designed only to be representative of those substantive areas. Thus, because the samples of "minor" or "non-minor" cases, etc., were derived from these four substantive area samples, they are only representative of those samples and not the entire population of gay rights cases. For this reason, the results should be viewed with some caution.

55. Of the 191 cases, there were 79 "minor cases" and 112 opinions not involving a minor. For the minor cases, there were 2.02 mean individual and 2.86 mean multiple citations per opinion. The means were 0.76 individual citations and 1.06 multiple citations per opinion for the non-minor cases.

56. Courts in 73 cases utilized a nexus analysis as compared to 118 cases in which the courts did not. The mean individual citations for nexus cases was 2.38 and for multiple citations, the mean was 3.41. The means for non-nexus cases were 0.60 individual citations and 0.81 multiple citations.

57. Overall, 114 cases contained some form of constitutional analysis and 77 were decided on purely non-constitutional grounds. For the constitutional cases, the means for individual and multiple citations per opinion were 1.32 and 1.91, respectively. The non-constitutional cases had means of 1.23 for individual and 1.65 for multiple citations.

58. Only 50 out of the 191 cases contained language indicating that the court had conceptualized homosexuality as a moral issue. In the moral case sample, the mean for individual citations was 1.68 and the mean for multiple citations was 2.10. There were 1.41 mean individual and 1.70 mean multiple citations in the sample containing no moral analysis.

59. The most common rating on a scale, ranging from extremely detailed (1) to extremely general (7), was seven. The overall mean rating was 5.62.

in terms of degree of detail.<sup>60</sup> The CC sample, which had one of the highest overall frequencies of citations, was the most general. On the other hand, the CS cases, which contained the fewest number of citations, provided the greatest detail.<sup>61</sup>

The degree of reliance data tended to substantiate the fact that courts are not very adept at evaluating social science and that generally courts presented this information without an attempt to incorporate it into the reasoning or holding of the decision. Yet, the majority of the ratings did indicate that the cited social science was at least consistent with the decision in the case.<sup>62</sup> The data also showed that the four samples differed significantly in the degree to which courts "relied" upon the cited social science.<sup>63</sup> The courts in the FA sample relied the least upon the social science which they cited, while the CS cases, which had the lowest rate of citation, were remarkable for demonstrating the greatest degree of reliance.<sup>64</sup>

### 3. *Summary and Conclusion*

For the purposes of this Article, the most striking aspects of these data are twofold. First, fully one-third of the studied gay rights cases contained one or more citations or references to social science. The second related finding is that the use of social science in legal opinions involving gay individuals did not vary significantly in terms of the substantive area. Thus, the relatively high rate of citation was maintained across case contexts, rather than being relegated to isolated types of substantive inquiry. The question raised by these findings is how the rate of social science citation in gay rights cases compared to other studies of courts' use of social science, in particular, and secondary authority, in general.

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60. This result was significant at the 0.028 level.

61. The mean ratings for the CC, ED, FA, and CS samples were 6.03, 5.40, 5.58, and 4.96, respectively.

62. On a scale ranging from extreme reliance (1) to extreme rejection (7) and with the midpoint (4) as a neutral position, the mean ratings were 3.03, 3.33, 3.83, and 2.70 for the CC, ED, FA, and CS samples, respectively. Overall, the mean rating for degree of reliance was 3.27.

63. This finding was significant at the 0.01 level.

64. The fact that there were only 23 individual citations to social science in this sample and 12 of those occurred in one case which relied heavily upon social science influenced these results.

*B. Comparison of These Results to Other Research on Courts' Citation Patterns*

*1. Studies on the Citation of Social Science*

While there has been a growing body of empirical research on courts' citation patterns,<sup>65</sup> only a few of these studies have focused exclusively on the citation of social science information. In one of the most closely analogous studies, Rosenblum<sup>66</sup> examined 606 cases, decided by the U.S. Supreme Court in 1954, 1959, 1964, 1969, and 1974, and found that sixty-three (10.4%) contained social science data.<sup>67</sup> Rosenblum also discovered that there was increased usage over time; the Court cited social science information in 5.8% of its 1954 cases and in over 12% of its opinions in 1974.<sup>68</sup>

In an interesting series of studies, Acker examined the citation of "social science research evidence" by the U.S. Supreme Court in criminal and death penalty cases. In one study,<sup>69</sup> Acker looked at 200 randomly selected criminal cases decided between 1958 and 1982, fifty Fourth Amendment exclusionary rule cases decided through 1984, and seven jury cases<sup>70</sup> decided between 1970 and 1980. He found that 14% of the criminal, 32% of the exclusionary rule, and 71.4% of the jury cases contained citations to social science. In an additional study,<sup>71</sup> Acker found that 13.8% of 240 randomly selected criminal cases decided between 1958 and 1987 included at least one citation to social science.<sup>72</sup>

In two other studies, Acker investigated the Supreme Court's citation of social science in death penalty cases. First, Acker examined fifty-one capital punishment cases decided between 1963 and 1985.<sup>73</sup> He found that 46.8% of the cases decided with full opinions and 43.1% of the entire case sample included social science research citations.<sup>74</sup> Subsequently, Acker examined twenty-

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65. See *supra* note 25.

66. Rosenblum, *supra* note 25.

67. *Id.*

68. *Id.*

69. James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs*, 14 L.& HUMAN BEHAV. 25 (1990).

70. These cases involved issues of jury size and unanimous verdict requirements. *Id.* at 29.

71. James R. Acker, *Thirty Years of Social Science in Supreme Court Criminal Cases*, 12 LAW & POL'Y 1 (1990).

72. *Id.* at 4.

73. Acker, *supra* note 12.

74. *Id.* at 424-25.

eight death penalty cases which were decided between 1986 and 1989 and found that the justices cited social science in 35.7% of these cases.<sup>75</sup>

Although Rosenblum's and Acker's research efforts are the only existing examinations of courts' citation to social science per se, several investigators have looked at more discrete categories of information which fall under the rubric of social science, such as empirical, technical, or statistical studies, and found even smaller percentages of cases utilizing this information.<sup>76</sup>

75. James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 *LAW & SOC'Y REV.* 65, 69 (1993). Collectively, five cases accounted for 95% of the citations: *Lockhart v. McCree*, 476 U.S. 162 (1986); *McCleskey v. Kemp*, 481 U.S. 279 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Stanford v. Kentucky*, 492 U.S. 361 (1989); see also *supra* notes 9-11 and accompanying text.

76. See, e.g., Marvell, *supra* note 25. Marvell studied the supreme court of one unnamed, northern industrial state ("the focal court") and, less thoroughly, five other courts (the First and Sixth Circuit Courts of Appeal, the Rhode Island and Ohio Supreme Courts, and the Massachusetts Supreme Judicial Court.) *Id.* at 6. He analyzed five types of information used by these appellate courts: (1) issues, (2) legal authority, (3) case facts, (4) social facts, and (5) empirical data. With respect to empirical data, which he defined as "scientific, social science, behavioral science, statistical, or other technical information about what happens in the world," *Id.* at 186, Marvell found that only 7% of the opinions at the focal court used such data, generally in the form of a quick reference to one or two sources. *Id.* at 187. Marvell also discovered that only 1/6 of the cases containing social facts cited empirical data. *Id.*

See also Daniels, *supra* note 25, at 6 (nonlegal sources, including nonlegal periodicals, treatises, reference sources, government reports, and statistical reports accounted for 13.4%, 44%, and 28.2% of all secondary citations by the U.S. Supreme Court in its 1900, 1940, and 1978 cases, respectively); Levine & Howe, *supra* note 22, at 181 (reporting on an unpublished study by Feinberg and Straff that 4% of all federal district court decisions between 1960 and 1979 contained references to statistical issues); Friedman et al., *supra* note 25, who emphasize the conservative citation practices of 16 state supreme courts (SSCs):

We have gone into some detail, because one might have guessed that, over the years, citation patterns would broaden considerably, that judges would pay more attention to social science, and that they would take in a wider range of premises and more diverse knowledge as food for decisionmaking. . . . Our data, however, suggest that while the judges may be absorbing broad learning at the present time, any such learning is hardly reflected in citation patterns. . . . SSCs rarely go outside the law for authority. *Social science, economic, or technical studies were cited in only 0.6% of the 1940-1970 SSC cases.* Granted, judges read books and absorb ideas, values, and concepts from their reading, from everyday life, from movies, radio, and television. They are exposed to

## 2. *Studies on the Citation of Secondary Authority*

When the current data are compared to studies conducted on the citation of secondary authority<sup>77</sup> in general, the relative incidence of social science citations in gay rights cases appears to be high as well. Most of this other research indicates that 40-50% of the studied cases had at least one citation to some form of secondary authority.<sup>78</sup> While this percentage is higher than that discovered in the gay rights area, the category of "secondary authority" encompasses much more than social science information. Therefore, it would be necessary to determine what percentage of the secondary authorities, analyzed in these other studies, related to social science. In this context, Bernstein found that 75% of the secondary source citations in his sample were to legal authorities, such as law reviews, which contain limited social science, and only

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popular versions of scholarly findings, and sometimes to the findings themselves. These do not show up as such in the body of their opinions. Old habits of citation persist, no doubt, because judges still feel that only "legal" authorities are legitimate.

*Id.* at 816-17 (emphasis added) (footnotes omitted).

77. Briefly, a primary authority is the law, either in the form of a case, statute, or rule. A secondary authority is everything else and can include both legal and nonlegal sources. See *Authority*, *supra* note 25, at 619; Bernstein, *supra* note 25, at 56 n.6.

78. See, e.g., Bernstein, *supra* note 25, at 56-57 (46% of U.S. Supreme Court's 1965 cases had some reference to secondary authority); Daniels, *supra* note 25, at 5 (47.6% of 1978 U.S. Supreme Court opinions had citations to secondary authority; earlier cases had even less—22.5% in 1900 and 26.2% in 1940); Friedman et al., *supra* note 25, at 810-14 (40% of 16 state supreme court cases decided between 1870 and 1970 cited treatises and encyclopedias and less than 1% of the 1900-1930, 3.8% of the 1945-1955, and 11.9% of the 1960-1970 opinions cited law reviews); Hafemeister, *supra* note 25, at 210 (51.3% of a random sample of U.S. Supreme Court opinions decided between 1975 and 1984 contained citations to secondary source material); Hafemeister & Melton, *supra* note 25, at 42 (51.9% of the U.S. Supreme Court's cases from 1975 to 1984 and involving children and families referred to at least one secondary source).

To supplement his quantitative analysis, Bernstein examined the purpose for which the nonlegal citations were used. He found that the bulk of the secondary source citations were not authoritative in nature; 48% simply identified discussions or presented the positions of various persons. Bernstein, *supra* note 25, at 70. However, there were 53 citations (14% of the total secondary references) to secondary authority which were used to support nonlegal fact statements; 27 of these documented historical statements, leaving 26 which documented something else. *Id.* Bernstein emphasizes the paucity of these citations: "In only a minuscule number of instances was a factual assertion based on writings from other disciplines." *Id.* at 80.

25% were to nonlegal sources, such as social science journals.<sup>79</sup> Thus, the difference between the higher percentages of cases containing all types of secondary authorities found by other researchers and the percentage of cases utilizing only citations to social science in the present study can be reconciled. In fact, extrapolating from these data, cases involving gay persons had a higher overall citation frequency.

In summary, then, the present study found higher rates of social science in gay rights cases than in other cases. In fact, the use of social science in these cases is comparable to its use in other controversial contexts, such as death penalty decisions. This high incidence of social science citations in gay rights litigation is particularly noteworthy because much of this other research on courts' citation patterns focused on the U.S. Supreme Court, which has been shown to be a more frequent and sophisticated user of social science than other courts.<sup>80</sup> It was these provocative findings which motivated the author to further explore the causal factors or forces which have contributed to the frequent citation of social science in gay rights cases.

### III. AN EXPLORATION OF THREE SYNERGISTIC FORCES CONTRIBUTING TO THE HIGH RATE OF CITATION TO SOCIAL SCIENCE INFORMATION IN GAY RIGHTS CASES

#### A. Introduction

This Part presents and explores the interactive forces that have contributed to the high incidence of citations to social science in gay rights cases. These forces fall into three general categories: (1) the historical legal context in which such cases are being decided; (2) the justificatory functions which the citations serve within the opinions in light of the controversial nature of homosexuality; and

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79. *Id.* at 66. Similarly, Hafemeister found that legal secondary sources contributed three-quarters of all the secondary source citations. Hafemeister, *supra* note 25, at 211.

80. *See, e.g.*, Acker, *supra* note 71, at 12 ("The lower courts rarely cited social science materials in the cases that reached the Supreme Court, and made virtually no contribution to the justices' acquisition or evaluation of the research evidence.").

(3) the efforts of gay litigants, and their litigation allies, to provide social science information to the courts.<sup>81</sup>

First, this section explores the notion that the high frequency of social science in gay rights cases is partially attributable to a modern legal culture in which the citation of social science has become more routine.<sup>82</sup> That is, the courts cited more social science in the studied cases simply because the cases were relatively recent and it has become more common over time for courts to use social science in their opinions.

A second set of forces contributing to the high rate of citation in gay rights cases is the specific functions, justificatory in one form or another, which these citations performed within the written legal opinions. Courts used social science citations for at least four distinct purposes: (1) to gather and transmit information about homosexuality; (2) to debunk myths regarding gay individuals; (3) to apply a scientific veneer to a troublesome and controversial topic; and (4) to shift difficult decision making responsibility to social science findings. In addition to these four functions, the courts received conflicting information from the social sciences regarding homosexuality and this conflict arguably resulted in a higher rate of citation.

The third set of forces contributing to heightened social science citation is the systematic efforts of gay litigants to provide social science information to the courts. Litigants' dissemination efforts were complemented by two distinct types of organizational amici: gay and civil rights groups and scientific associations, such as the American Psychological Association. Since litigants and amici have aggressively used social science information, it could be expected

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81. Of course, an alternate explanation of the results is that they are simply an artifact of the study based upon the methodology employed. The study did not obtain a representative sample of all gay rights cases, but rather, it utilized representative samples in the four selected substantive areas. Thus, the results may not be generalizable to the entire population of gay rights cases, but may merely indicate that these substantive areas have an unusually large number of social science citations. However, it is important to note that the sampled cases did in fact comprise a significant percentage of the total population of gay rights cases; other areas of law involving gay individuals were considerably less developed.

82. Paul L. Rosen, *History and State of the Art of Applied Social Science Research in the Courts*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 3 (Michael J. Saks & Charles H. Baron eds., 1980), commented: "[D]uring the past twenty years the relationship between social science and law has become not only familiar but routinized." *Id.* at 12.

that courts are more likely to actually cite that information in their opinions.

While these are conceptually separate and distinct explanatory mechanisms, and therefore are considered seriatim, none of them can fully explain the high incidence of social science in gay rights cases. Rather, a complete explanation of this phenomenon is only possible by considering the interactive influence of these three sets of forces. Thus, for example, gay litigants may feel compelled to proffer social science findings to debunk prevailing myths about homosexuality and courts may be more receptive to this information because of broadening notions of legitimate authority in legal citation patterns.

### *B. The Evolution of Modern Legal Culture and the Increased Acceptance of Social Science*

The first synergistic force militating toward the high rate of social science citation in gay rights cases is the intellectual context within which these cases are being decided. The fight for gay rights in the legal system, which may be dated to the late 1960s or early 1970s,<sup>83</sup> coincided almost exactly with changes in the legal system's acceptance of information from the social sciences.<sup>84</sup> Because gay rights cases are of relatively recent origin—most of the studied cases were decided in the last two decades<sup>85</sup>—these opinions could be expected to contain more social science simply because courts have become more receptive to social science over time. Three aspects of modern courts' increased absorption of social science information merit closer analysis in this context: (1) the heightened coalescence of law and social science on a jurisprudential level; (2) judges' increased resort to citations of secondary authority,

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83. See Cain, *supra* note 13, at 1580; see also Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U. DAYTON L. REV. 575, 579 (1985).

84. The question of whether this is more than a coincidence is not easily answered. See Cain, *supra* note 13, for a discussion of gay rights activists' efforts to have homosexuality declassified as a mental illness.

85. The median opinion year (i.e., the number which lies at the midpoint of the cases) for all four samples was 1977 and the range was 1894 to 1987. The study employed the median because the usual measure of central tendency, the mean or mathematical average, is too heavily skewed by a few outlying cases. Breaking the data down by the four substantive areas, the median opinion years for the CC, ED, FA, and CS samples were 1980, 1975/76, 1979/80, and 1970, respectively. When the CS cases were excluded, the median opinion year rose to 1979 with a range of 1947 to 1987.



including social science, in their written legal opinions; and (3) changes in the rules of evidence which have facilitated the introduction of social science information, particularly expert testimony.

*1. The Rapprochement of Law and Social Science on a Jurisprudential Level*

Historical analyses of the interaction of law and social science indicate that there has been an increasing rapprochement between the two disciplines. Loh, in his four-part schemata of the interaction of law and psychology,<sup>86</sup> has designated the 1970s and beyond as the "coming of age" of this exchange.

The 1970s saw an explosive growth in social psychological research on the judicial process that continues unabated today. By the start of the 1980s, various institutional developments seemed to augur the "coming of age" of the field. These developments included an outpouring of articles and books, more in a few years than had been published in the preceding three-quarters of a century . . . ; the appearance of specialized journals (for example, *Law and Psychology Review*; *Law and Human Behavior*); the establishment of joint-degree training programs and interdisciplinary courses and professional societies (for example, Division 41 on "Psychology and Law" of the American Psychological Association, which has grown to over 1,000 members within three or four years of its establishment).<sup>87</sup>

Although the history of the interchange between law and social science has not been strictly linear,<sup>88</sup> in the last two or three

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86. Wallace D. Loh, *Psycholegal Research: Past and Present*, 79 MICH. L. REV. 659 (1981) [hereinafter *Psycholegal*]. Loh's four stages of development in the relationship between law and psychology are: (1) the pioneering stage (1900s); (2) the legal realist stage (1930s); (3) the forensic stage (1950s); and (4) the coming of age (1970s). See also WALLACE D. LOH, *SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT* 607 (1984) [hereinafter *SOCIAL RESEARCH*].

87. *SOCIAL RESEARCH*, *supra* note 86, at 607 (citations omitted); see also *Psycholegal*, *supra* note 86, at 659-60.

88. "A short history of the flirtation between law and [social] science can be written in terms of oscillation between simplistic optimism followed by chilling skepticism followed by a decade or so of silence and inaction, with the cycle then repeating." Harry Kalven, Jr., *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 58 (Geoffrey C. Hazard, Jr. ed., 1968). However, Bersoff asserted that this cycle does result in

decades, jurists have evinced an increased willingness to consider information provided by the social sciences. Two of the preeminent authorities in the field, John Monahan and Laurens Walker assert:

Three-quarters of a century have passed since an American court first invoked social science research to support its choice of a rule of law. Once heretical, the belief that empirical studies can influence the content of legal doctrine is now one of the few points of general agreement among jurists.<sup>89</sup>

Changes at the jurisprudential level have manifested themselves in several respects in the actual operation of the legal system.

2. *Modern Courts Are More Likely to Cite Social Science Than Their Predecessors*

In addition to the evolution in interdisciplinary collaboration between law and social science, there has been a change in what is considered legitimate authority in a written legal opinion. That

some progress in the interaction of the two disciplines. He adopted the term "spiral of history" to characterize this progression. A "spiral of history" means a recurrence of older conceptions (i.e., coming full circle) but at more sophisticated and complex levels. Donald N. Bersoff, *Psychologists and the Judicial System: Broader Perspectives*, 10 LAW & HUMAN BEHAV. 151, 151 (1986); see also *Psycholegal*, *supra* note 86, at 625-26 (arguing that the history of the interaction between law and psychology is "characterized by a succession of dialectical interchanges").

Some empirical studies have also noted the non-linear nature of the relationship between law and social science. For instance, Acker, *supra* note 69, found that the Supreme Court cited more social science in the 1968-1972 and 1978-1982 terms than in the 1973-1977 and 1983-1987 terms. See also Rosenblum, *supra* note 25; *Citations*, *supra* note 25.

89. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 477 (1986); see also Levine & Howe, *supra* note 22, for their analysis of the penetration of social science into legal culture:

Over the past 75 years, social science references in court decisions have changed from an anonymous footnote to an appendix to a brief (Muller v. Oregon, 1908) to extensive discussion of social science methods and results to changing a rule of law based on social science propositions (Hovey v. Superior Court, 1980). . . . Although earlier attempts to introduce social science into law were relatively unsuccessful, there is now a sufficient acceptance and a sufficient professional infrastructure to predict a growing influence of social science in law.

*Id.* at 173.

is, the heightened interaction between the disciplines of law and social science has translated into an overall loosening of the hegemony of primary authority citation in courts' written opinions. As Merryman noted:

Whether secondary authorities are or are not law depends on what the courts do with them. If the courts cite them then they are in some sense law as a result of citation; they become part of the judicial process. . . . The conclusion is that if law is to be viewed as a legal process, and if authority is regarded as the published matter that is actually relied on by a court in its part of that process, then authority varies in degree but not in kind, and statutes and cases are more authoritative than other legal and nonlegal writing, but are no more authority.<sup>90</sup>

The general trend has been for courts to broaden the sources of information<sup>91</sup> which inform their decisions and ultimately appear as citations.<sup>92</sup> This trend can be traced from an early increase in citations to general secondary authority, such as encyclopedias and annotations,<sup>93</sup> followed by an increased reliance on legal periodicals

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90. *Authority, supra* note 25, at 621.

91. Importantly, social science, in the form of research or general information, can be contained in either primary or secondary authorities. For instance, a court might cite a previous case for a factual proposition which is based upon social science research, without also citing the research. Thus, there is a recycling process by which social science information is disseminated in the legal system.

92. Daniels, *supra* note 25, at 4, found that there was a sharp increase in the use of secondary source citations by the U.S. Supreme Court in the 1900, 1940, and 1978 terms. There were 127 secondary source citations in cases decided in 1900 (0.651% per case) as compared to 921 citations in 1978 (7.140% per case.) Nonlegal citations increased from 17 in 1900 to 260 in 1978 (an increase of 1,429%).

93. *See* Daniels, *supra* note 25, at 6-7 (legal treatises, which dominated in 1900, fell noticeably in 1978 and legal finding tools and other research aids—restatements, encyclopedias, annotation, and others—fell from 7% of total secondary source citations to 3.2%); Friedman et al., *supra* note 25, at 811 (decline in citations to treaties, encyclopedias, restatements, etc. in past 30 years by 16 state supreme courts); *Citations, supra* note 25, at 405 (from 1950 to 1970, decrease in citations to Restatements, encyclopedias, and annotations matched with a sharp increase in citations to legal periodicals by California Supreme Court). *But see* Bobinski, *supra* note 25, at 996 (treatises are still a significant factor in 1983 cases of N.Y. Court of Appeals).

or law reviews,<sup>94</sup> and finally, over time, increased reference to social science sources.<sup>95</sup> In this connection, Melton noted: "Use of social science was a logical next step for courts."<sup>96</sup> Thus, what is legitimate authority in the context of a written legal opinion has changed as the overall interaction between the disciplines has altered.

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94. See Bobinski, *supra* note 25, at 998 (increased use of legal periodicals between 1963 and 1983 in opinions of the N.Y. Court of Appeals in selected group of cases); Daniels, *supra* note 25, at 6 (in 1900, 1940, and 1978 terms of Supreme Court, legal periodicals accounted for 0.8%, 15.6%, and 37.2%, respectively, of all secondary source citations); Friedman et al., *supra* note 25, at 812 and Kagan et al., *supra* note 25, at 991-93 (increase in law review citations by 16 SSCs by 1960-70 and by 1940-1970, respectively); Citations, *supra* note 25, at 405 (in 1950, 1960, and 1970 California Supreme Court opinions, approximately 20%, 33%, and 50%, respectively, of the total number of citations to secondary authority were to law reviews); Newland, *supra* note 25, at 478-80 (slow increase in Supreme Court's citation of legal periodicals in 1924-1938 and dramatic increase between 1939 and 1956; 17% of 1939-1943, 28% of 1944-1948, and 26% of 1949-1953 opinions contained legal periodical citations); Turner, *supra* note 25, at 499 (slight increase in Kansas Supreme Court's citation of legal periodicals). *But see* Sirico & Margulies, *supra* note 25, at 134 (decrease from 963 citations to legal periodicals in 1971-1973 to 767 citations in 1981-1983 period by U.S. Supreme Court). See also Thomas L. Hafemeister, *Comparing Law Reviews for Their Amenity to Articles Addressing Mental Health Issues: How to Disseminate Law-Related Social Science Research*, 16 LAW & HUM. BEHAV. 219 (1992) (a survey of law reviews for social science research on mental health issues); Hafemeister & Melton, *supra* note 25 (a survey of law reviews for developmental research); Maru, *supra* note 25 (an empirical examination of which law reviews were cited by other law reviews).

95. See Johnson, *supra* note 25, at 263 (approximately 20% of 1925-1938 U.S. Supreme Court cases cited non-legal materials as compared to 50% of the 1938-1970 cases); Rosenblum, *supra* note 25, at 16 (5.8% of U.S. Supreme Court's 1958 cases cited social science, while 12% of 1974 opinions did). Also, Acker found:

Both the justices and the brief-writers tended to cite traditional legal authorities that discussed social science findings instead of referring directly to social science periodicals and statistical reports. The justices . . . did not cite periodicals other than law reviews as social science authorities until the last five years of the study, the 1978-1982 Terms, when 21 NonILPs [i.e., journals not in the *Index to Legal Periodicals*] (14%) were cited for social science purposes.

Acker, *supra* note 69, at 31.

96. Gary B. Melton, *Bringing Psychology to the Legal System: Opportunities, Obstacles, and Efficacy*, 42 AM. PSYCHOLOGIST 488, 490 (1987); see also Peter W. Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280, 284 (1980): "The question is not *whether* to rely on scientific knowledge, but *when* and *how*."

### 3. *Changes in the Rules of Evidence Have Facilitated Courts' Use of Social Science*

Finally, shifting conceptualizations of the appropriate role of social science within the legal system have also manifested themselves in changes in the rules of evidence. Coincidentally, the Federal Rules of Evidence were adopted in 1975, the same time that the gay rights movement was getting under way and courts were turning with increasing frequency to social science information.

While not exhaustive, consideration of two rules of evidence should suffice to illustrate how the shift in the rules invited more social science. First, FRE 401,<sup>97</sup> which defines relevant evidence, was specifically designed to permit "broad admissibility":

The definition in Rule 401 is Thayerian: it includes within the compass of "relevant evidence" all that is logically probative. This definition has rightly been termed "generous," and one whose distinct cast is toward "broad admissibility." . . . [T]he Rule requires no more probative worth than that which reasonable persons would require in making thoughtful decisions in life outside the courtroom.<sup>98</sup>

Second, the adoption of FRE 702<sup>99</sup> governing expert testimony, and the recent U.S. Supreme Court opinion in *Daubert v. Merrell Dow Pharmaceuticals*<sup>100</sup> interpreting that rule, indicate an inclination to permit more social science evidence to be admitted. In discussing whether FRE 702 implicitly incorporated the more re-

97. "'Relevant Evidence' means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

98. DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 638-39 (Vol. 3 1979); see also JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 34 (1898): "We should have a system of evidence simple, aiming straight at the substance of justice, not nice or refined in its details, not too rigid, easily grasped and easily applied."

99. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

100. 113 S. Ct. 2786 (1993).

strictive *Frye v. United States*<sup>101</sup> “general acceptance” standard for the admissibility of expert testimony, the Court wrote:

The drafting history makes no mention of *Frye*, and a rigid “general acceptance” requirement would be at odds with the “liberal thrust” of the Federal Rules and their “general approach of relaxing the traditional barriers to ‘opinion’ testimony.” Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made “general acceptance” the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.<sup>102</sup>

While *Daubert* concerned one category of social science, expert testimony, it reinforced the trend toward broad admissibility and may affect the degree to which all social science is admissible. Thus, social science may be more prevalent in the final decision in a case because it is more likely to be admitted at the trial court level in the first instance.

In summary, then, the changing legal culture regarding social science’s contribution to judicial decision making, as manifested in citation patterns and rules of evidence, may be partially responsible for the heightened use of social science in gay rights cases. This explanation, however, does not completely account for why gay rights cases use more social science than other cases embedded in the same time frame.<sup>103</sup> Thus, while gay rights litigation’s coincidental arrival on the scene during a period of

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101. 293 F. 1013 (D.C. Cir. 1923).

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.* at 1014.

102. *Daubert*, 113 S. Ct. at 2794 (citation omitted).

103. See *supra* Part II.B. for a comparison of the use of social science in gay rights cases with its use in other contexts.

heightened interest by the legal system in social science is a necessary part of a causal explanation, it is not a sufficient one.

*C. The Justificatory Functions of Social Science Citations in Gay Rights Cases in Light of The Controversial Nature of Homosexuality*

The second major set of forces contributing to the high rate of social science citations in gay rights cases is the specific functions that these citations perform in the courts' written opinions. Obviously, it may be expected that judges will cite social science in gay rights opinions, as in any other type of case, simply as a necessary component of their decision making process.<sup>104</sup> However, the unusually large number of gay rights cases containing social science citations indicates that courts are utilizing this information for auxiliary purposes beyond those normally associated with judicial opinion writing. In large measure, the courts are employing these auxiliary citations (i.e., those not essential to the decision of the case) as justificatory devices when confronted with what one court characterized as "the sensitive and polemical issue of homosexual rights, an issue which has spawned nationwide debate and attention."<sup>105</sup> Thus, the controversy surrounding homosexuality has directly affected the content of the legal decisions rendered in this area.<sup>106</sup>

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104. For interesting discussions by judges on the use of social science, see, e.g., J. Braxton Craven, Jr., *The Impact of Social Science Evidence on the Judge: A Personal Comment*, 39 LAW & CONTEMP. PROBS. 150 (1975); George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39; Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978); Irving R. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1 (1984); James B. McMillan, *Social Science and the District Court: The Observations of a Journeyman Trial Judge*, 39 LAW & CONTEMP. PROBS. 157 (1975); John M. Wisdom, *Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases*, 39 LAW & CONTEMP. PROBS. 134 (1975).

105. *Gay Lib v. University of Mo.*, 558 F.2d 848, 860 (8th Cir. 1977) (en banc), cert. denied, 434 U.S. 1080, reh'g denied, 435 U.S. 981 (1978).

106. Legal opinions involving gay persons continue to constitute a highly polarized and controversial area. The law in this area has been variously described as "hotly contested," Delgado, *supra* note 83, at 575, and "fragmented," Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 947 (1979).

Even the language used in gay rights cases signals their controversial nature. Goldyn, *supra* note 14, examined 191 state and federal appellate cases decided after 1950 for gratuitous derogatory remarks about gay litigants, or what he

While the range of courts' justificatory uses of social science materials in gay rights cases is potentially unlimited, this section will focus upon the four most common uses. First, courts are using social science findings to educate various audiences about homosexuality and ultimately, in that effort, to persuade them of the legitimacy of their decisions. Second, courts are utilizing social science to debunk prevailing myths about homosexuality thus justifying their departure from anti-gay conceptions. Third, courts are exploiting the authoritative appeal of "science," in the guise of social science citations, as a means of desensitizing or even sanitizing, the troubling moral and political issues associated with homosexuality. Fourth, courts are using social science as window dressing<sup>107</sup> for decisions reached on other policy grounds, thereby shifting responsibility for difficult decision making. Finally, the fact that courts are receiving conflicting information from social scientists about homosexuality, due in part to its controversial nature, has also militated toward courts' heightened citation of social science in these cases.

*1. Information Recitation and Transmission: Social Science Used to Educate Others About Homosexuality*

One reason that social science is cited so heavily in gay rights cases is courts' efforts to educate and persuade other constituencies about a relatively unknown and not well-understood phenomenon in our society—homosexuality. Judicial opinions are not written in a vacuum. As published<sup>108</sup> documents emanating from the legal system, they are written for the benefit of at least three distinct audiences: the parties, other members of the judiciary both within

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terms "queer baiting." He asserted that the presence of unnecessary negative comments regarding homosexuality, such as calling gay individuals "perverted" or describing sodomy as "vile," "disgusting," or "depraved," was indicative of the legitimacy, or lack thereof, accorded gay litigants. Goldyn found that nearly one quarter of the cases contained such comments. In addition, Goldyn discovered that the incidence of gratuitous derogatory remarks fell from the 1950s to the 1970s, and he noted: "The decline in the use of abusive language indicates an increased willingness on the parts of courts to consider the claims of gay people in a rational and serious manner." *Id.* at 41.

107. Rosenblum, *supra* note 25, at 72.

108. *But see* Rivera, *supra* note 106, at 805 ("[T]here is some evidence that cases involving homosexual issues are unpublished more often than are cases involving other issues.").



and outside the court's jurisdiction,<sup>109</sup> and, finally, members of the general public. While factual recitation is part of almost any legal opinion, the recitation and transmission of information about homosexuality appears to be particularly important due to the controversy surrounding homosexuality. Also, the relative recency of gay rights cases and the concomitant dearth of precedent heightened courts' inclination to recite significant amounts of information for the guidance of subsequent courts.

First, with respect to the parties, it has been noted that courts often include in their opinions information supplied by the litigants simply to show that it had been carefully considered by them in reaching their ultimate decisions. "They wish to give the losing parties the impression that the court has considered their arguments—wishes them 'to feel they've had a good run for their money,' as one judge said."<sup>110</sup> Thus, the fact that gay litigants have made extensive efforts to provide available social science to courts has undoubtedly further inclined courts to include this information.

Second, in addition to writing for the litigants, courts also write for other members of the judiciary. Thus, judges write their opinions to transmit what they have learned about the phenomenon of homosexuality in order to apprise other courts about relevant information that might be useful in subsequent cases. Bernstein, in his study of the U.S. Supreme Court's use of secondary source citations, noted: "Most of the relevant citations were not made as justification for conclusionary statements at all, but were simply explanatory references. These citations appear to be designed to function as educational devices by apprising readers of the available literature on problems which come before the Court or on related questions."<sup>111</sup>

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109. Marvell, *supra* note 25, at 116, commented: "As a general rule, the information mentioned in opinions are factors in the opinion writer's decision, except to the extent that things are added solely for the benefit of other judges." See also Miller & Barron, *supra* note 26, at 1192, for a discussion of the internal bargaining process at the U.S. Supreme Court.

110. Marvell, *supra* note 25, at 110. Similarly, Bernstein, *supra* note 25, at 79, commented: "In addition, the Justices frequently took pains to set out the views and conclusions of various commentators, including law students, and to demonstrate that those views had been carefully considered."

111. Bernstein, *supra* note 25, at 79; see also William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976):

The normal function of the scholarly citation is not to adduce authority

In the sample of studied cases, many of the opinions contained exhaustive discussions of the social science literatures regarding various aspects of homosexuality.<sup>112</sup> However, one of the most interesting examples of a court's efforts to educate on the topic of homosexuality occurred in the majority opinion in *Gaylord v. Tacoma School District No. 10*.<sup>113</sup> There, the court cited and discussed fourteen social science publications and Webster's Dictionary to do nothing more than arrive at a definition of homosexuality.<sup>114</sup> The *Gaylord* dissent was critical of this approach: "For all the scholarly research done by the majority here, the most basic point has been missed; the respondent school board did not meet its burden of proof."<sup>115</sup> The *Gaylord* court's extensive use of social science citations is slightly reminiscent of the Supreme Court's decision in *Ballew v. Georgia*.<sup>116</sup> In that case, Justice Blackmun discussed the relevant social science at some length, causing commentators to compare his opinion with a social science article<sup>117</sup> and triggering a caustic concurrence by Justice Powell.<sup>118</sup>

While *Gaylord* is significant for the sheer number of citations to social science on a very basic proposition—the definition of

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for a proposition but to give credit for prior original work, to refer the reader to corroborative and collateral findings by other scholars, and as a method of incorporating by reference relevant theorems, proofs, etc. . . . [T]he second and third functions of scholarly citation have counterparts in judicial citation.

*Id.* at 251.

112. See, e.g., *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *opinion supplemented*, 106 F.R.D. 526, *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

113. 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

114. *Id.* at 1343-44. Similarly, the court in *McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), stressed that social science was critical to an appreciation of homosexuality: "No medical or other expert witnesses were called by either party to opine on the habits, proclivities, attitudes, and attributes of a homosexual person. The court is therefore left with but the dictionary definition of that term." *Id.* at 812.

115. *Gaylord*, 559 P.2d at 1348 (Dolliver, J., dissenting).

116. 435 U.S. 223 (1978). *Ballew* concerned the question of whether a five-member jury in a criminal trial is constitutional.

117. Bernard Grofman & Howard Scarrow, *Mathematics, Social Science, and the Law, in THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 117, 121 (Michael J. Saks & Charles H. Baron eds., 1980) ("Those who are familiar with the case know that Blackmun's opinion reads like a social science article, citing both empirical and theoretical studies.").

118. "[I] have reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies." *Ballew*, 435 U.S. at 246.

homosexuality—other courts took a more straightforward approach to the dissemination of information about homosexuality. In at least two cases, the courts self-consciously highlighted social science information for the educational benefit of other courts. In *S. v. S.*,<sup>119</sup> a child custody case, the court wrote:

We express our appreciation for the research by the parties into this matter and particularly commend the trial judge for his independent research. This Court would call attention to an article entitled "Children of lesbians: their point of view" contained in the *Journal of the National Association of Social Workers*, Vol. 25, Number 3, May, 1980, p. 198, et seq. This article points out the fact that the lesbianism of the mother, because of the failure of the community to accept and support such a condition, forces on the child a need for secrecy and the isolation imposed by such a secret, thus separating the child from his or her peers.<sup>120</sup>

The court's recitation of this acquired social science information did not go unnoticed by other courts; it reached the very audience it was intended to inform. Two subsequent cases, from separate states in different years, quoted directly from this portion of the opinion regarding the emphasized article.<sup>121</sup>

Similarly, in *Rowland v. Mad River Local School District*,<sup>122</sup> the Sixth Circuit also recited information of importance for other courts: "Careful studies of homosexuality have now established two facts of which the courts should be aware and should take judicial notice. The first is that homosexuality is not a mental disease, like insanity or a psychopathic personality. The second is the extent of homosexuality in the United States."<sup>123</sup>

Later in the opinion, the court commented: "In dealing with this type of case, this court (and others) should be aware and take judicial notice of the monumental works concerning the incidence

119. 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981).  
120. *Id.* at 66.

121. See *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) ("[W]e think it appropriate to refer to a recent Kentucky case of *S v. S . . .* where the facts were similar to the case at bar. . . .") (citation omitted); *Constant A. v. Paul C.A.*, 496 A.2d 1, 10 (Pa. Super. Ct. 1985).

122. 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985).

123. *Id.* at 454.

of homosexuality in males and females in the United States."<sup>124</sup> Again, the Sixth Circuit's efforts at information dissemination were rewarded. When *Rowland* was appealed to the U.S. Supreme Court, Justices Brennan and Marshall incorporated the social science information cited by the Sixth Circuit in their dissent to the denial of certiorari.<sup>125</sup>

Because gay rights cases are of relatively recent origin, these courts faced a heightened need to gather and recite information.<sup>126</sup> Without precedent, courts were more free to do more extensive investigation about, and exposition upon, the issue of homosexuality. In addition, because the case might have been one of first impression within the jurisdiction, courts may have felt compelled to provide information about homosexuality for the benefit of courts in their wake. Here, it is important to note that courts often borrow social science from other cases without resort to citation of the original materials.<sup>127</sup> Thus, in new and novel cases,

124. *Id.* at 455. The Sixth Circuit also digested the available social science for the benefit of other courts ("The following sentences represent cumulative summaries of Kinsey's authoritative works on homosexual incidence . . .") and signalled them where to locate this information. *Id.*

125. *Rowland*, 470 U.S. at 1014 n.7.

126. See *supra* notes 83-85 and accompanying text.

127. In the studied cases, several courts borrowed social science from previous opinions, even when the court was not invited to do so. For instance, in *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980), a clinical psychologist testified that: "[T]here is no evidence at all that sexual preference of adults in the home has any detrimental impact on children." This testimony was then quoted in three subsequent cases: *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 968 (Sup. Ct. 1986); *M.J.P. v. J.G.P.*, 640 P.2d 966, 967 (Okla. 1982); *Doe v. Doe*, 284 S.E.2d 799, 806 (Va. 1981).

Similarly, in *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980), the court reviewed testimony from an expert witness who stated that no harm occurred to the child by being raised by a lesbian mother, yet the court ultimately discounted this testimony by saying:

Allowing that homosexuality is a permissible life style—an "alternate life style", as it is termed these days—if voluntarily chosen, yet who would place a child in a milieu where she may be inclined toward it? She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness. Appellant Kathy stresses Dr. Buchanan's testimony that the child at this time—age 10—shows no ill effects from her present environment. Dr. Buchanan finds the child to be normal and well adjusted. The court does not need to wait, though, till the damage is done. If the child's situation is such that damage is likely to occur as her sexual awareness develops with the approach of young womanhood, the court may in a proper case remove her from the unwholesome environment.

*Id.* at 186. Subsequently, the court in *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982) quoted this entire passage from *N.K.M.*

courts may supply the social facts which are used later by other courts.<sup>128</sup>

Finally, the educative function of social science was also apparent in a few cases in which the courts appeared to be speaking to a larger audience, the general public.<sup>129</sup> Marvell comments:

A similar practice is keeping public reaction, especially press reaction, in mind when wording opinions (as opposed to when reaching decisions); judges may leave out language that could lead to attacks, or explain the holding with extra care so that the press does not misinterpret it. This does not happen often, though, since the press pays no attention to the vast bulk of cases decided by courts below the U.S. Supreme Court level.<sup>130</sup>

While Marvell may be correct that the majority of cases decided below the Supreme Court go unnoticed by the public, this is certainly not true with respect to gay rights cases. Rather, these are exactly the kinds of cases which attract media and public attention because of their controversial nature.

One of the prime examples of an opinion geared to the general public was *Baker v. Wade*,<sup>131</sup> which is quoted at the beginning of this Article. Similarly, in *Fricke v. Lynch*,<sup>132</sup> a case involving the issue of whether a male high school student could bring another male to the prom, the court ultimately held that preventing him from doing so would be a violation of his first amendment rights. While social science played a very minor role in this case, the

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128. One particularly interesting finding reported by Marvell was that at one court, 1/7 of the social facts in the majority opinions were quotations from a prior legal opinion. He notes: "Social facts found in opinions very likely have an aura of authenticity that leads judges to accept them more readily and that makes them more presentable in opinions." MARVELL, *supra* note 25, at 184. In addition, Marvell also discovered that at least one court sometimes used legal rules as evidence of human behavior. *Id.*

129. Bernstein, *supra* note 25, at 70, hypothesized that secondary source citations in majority opinions appeared to further educate the public, while these same citations in dissenting opinions appeared to further educate the other Justices.

130. MARVELL, *supra* note 25, at 111 (footnote omitted).

131. *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982), *opinion supplemented*, 106 F.R.D. 526, *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

132. 491 F. Supp. 381 (D.R.I. 1980).

court's self-justificatory language at the conclusion of its opinion is noteworthy:

As a final note, I would add that the social problems presented by homosexuality are emotionally charged; community norms are in flux, and the psychiatric profession itself is divided in its attitude towards homosexuality. This Court's role, of course, is not to mandate social norms or impose its own view of acceptable behavior. It is instead, to interpret and apply the Constitution as best it can. The Constitution is not self-explanatory, and answers to knotty problems are inevitably inexact. All that an individual judge can do is to apply the legal precedents as accurately and as honestly as he can, uninfluenced by personal predilections or *the fear of community reaction*, hoping each time to disprove the legal maxim that "hard cases make bad law."<sup>133</sup>

Thus, from the foregoing analysis, courts cite social science information in excess of what normally would be expected in order to educate their various audiences about the issue of homosexuality, thereby justifying their decisions. These educational efforts are particularly important because of the controversial nature of homosexuality; the same types of explanatory devices would be unnecessary in cases involving more settled issues.

2. *The Substantive Impact of the Information: Social Science Used to Debunk Prevailing Myths and Stereotypes About Homosexuality*

In addition to using citations as a mechanism to transmit information to others, courts used social science citations for a more particularized and substantive purpose—namely, to debunk

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133. *Id.* at 389 (emphasis added); see also *Lesbian/Gay Freedom Day Comm., Inc. v. United States Immigration and Naturalization Serv.*, 541 F. Supp. 569, 587 (N.D. Cal. 1982), *aff'd sub. nom.*, *Hill v. United States Immigration and Naturalization Serv.*, 714 F.2d 1470 (9th Cir. 1983) ("The fact that some American citizens find homosexuality morally repugnant, or the purposes of the Lesbian/Gay Freedom Day events abhorrent or offensive, cannot provide an important governmental interest upon which an impairment to First Amendment freedoms can be based."); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) ("This court cannot take into consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.").

common and pervasive myths about homosexuality. The prevalence of homophobia<sup>134</sup> and stereotypical conceptions of homosexuality within society as a whole, and within the legal system in particular, have been well-documented.<sup>135</sup> Recognizing the existence of mythical notions of homosexuality, gay litigants have made extraordinary efforts to provide information to the courts countering these myths. In the same way, courts frequently incorporate social science information in their opinions to disabuse their readers of myths regarding homosexuality.

Each of the substantive contexts contained cases in which the court used social science to demystify prevailing notions of homosexuality. One of the clearest examples of this was a child custody case, *M.A.B. v. R.B.*<sup>136</sup> There, the court explicitly acknowledged the existence of misconceptions about homosexuality:

One commentator has recently outlined the reasons why homosexual parents are denied custody. "The reasons given boil down to a few arguments: if gay parents have custody, they will molest the children; . . . they will turn the children into homosexuals; . . . they will perform sex acts in front

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134. For definitions of homophobia, see Mark F. Kohler, Comment, *History, Homosexuals, and Homophobia: The Judicial Intolerance of Bowers v. Hardwick*, 19 CONN. L. REV. 129, 130 (1986) ("Homophobia is an irrational fear of and intolerance toward homosexuals and homosexuality."); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133, 147-48 (1992) (footnote omitted) ("'homophobia' refers to a hatred of gay men and lesbians rather than a clinical fear of homosexuals. It should be understood as a 'prejudice, comparable to racism and anti-semitism, rather than an irrational fear similar to claustrophobia or agoraphobia.'"); see also Yvonne L. Tharpes, Comment, *Bowers v. Hardwick and the Legitimatization of Homophobia in America*, 30 HOW. L.J. 829 (1987) (discussing evolution of homophobia); Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986) (arguing that the better term is heterosexism); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 547-48 (1990) (distinguishing between homophobia and heterosexism).

For psychological treatments of homophobia, see Gregory M. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. HOMOSEXUALITY 1 (1984); Gregory M. Herek, *Attitudes Toward Lesbians and Gay Men: A Factor-Analytic Study*, 10 J. HOMOSEXUALITY 39 (1984).

135. See, e.g., Joshua Dressler, *Judicial Homophobia: The Gay Rights Biggest Roadblock*, 5 CIV. LIBERTIES REV. 19 (1979); Goldyn, *supra* note 14.

136. *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Sup. Ct. 1986).

of the children; . . . the children will be harmed because of the immoral environment."<sup>137</sup>

The *M.A.B.* court then went on to consider expert testimony that the homosexuality of a parent does not adversely affect his or her children.<sup>138</sup> Similarly, in *Bezio v. Patenaude*,<sup>139</sup> the court relied on "[u]ncontroverted expert testimony . . . to the effect that a parent's sexual preference per se is irrelevant to a consideration of that parent's ability to provide necessary love, care, and attention to a child."<sup>140</sup> Courts also cited social science to contradict stereotypical notions of homosexuality in employment discrimination, First Amendment, and criminal sodomy cases. For instance, several of the studied opinions, including *High Tech Gays*,<sup>141</sup> *Rowland*,<sup>142</sup> and *Baker*,<sup>143</sup> used social science to counteract one of the most popular myths about homosexuality—that it is the result of mental illness.

Several aspects of the data in the present study also substantiated the courts' use of social science to debunk prevailing myths. First, the commonality of these myths across substantive areas apparently contributed to the high incidence of citations to social science in all case contexts. As Rivera noted: "The common denominator in these cases is that sexual orientation of the individual involved has become dispositive of the outcome of the legal dispute."<sup>144</sup> Thus, once homosexuality is raised in any context, the

137. *Id.* at 964-65 (citation omitted).

138. *Id.* at 968-69.

139. *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980).

140. *Id.* at 1211; *see also* *Conkel v. Conkel*, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (being raised by a homosexual parent does not increase the likelihood that child will become homosexual); *In re Marriage of Cabalquinto*, 669 P.2d 886, 890 (Wash. 1983) (sexual preference is developed at an early age).

141. "For years the uncontroverted consensus of the American professional psychological community has been that homosexual orientation itself is not a psychological problem." *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990).

142. The dissenting judge in *Rowland* wrote: "My colleague's opinion seems to me to treat this case, *sub silentio*, as if it involved only a single person and a sick one at that—in short, that plaintiff's admission of homosexual status was sufficient in itself to justify her termination. To the contrary, this record does not disclose that she is subject to mental illness; nor is she alone." *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 454 (6th Cir. 1984) (Edwards, J., dissenting), *cert. denied*, 470 U.S. 1009 (1985).

143. *Baker*, 553 F. Supp. at 1129-30.

144. Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-*



use of social science to debunk myths concerning it becomes a threshold requirement before any other issue can be addressed. The present study's finding that the four substantive areas did not differ significantly in terms of the numbers of citations to social science bears out this point.

Second, it is also significant that the cases adopting a nexus analysis had four times as many citations and references to social science as those cases which did not. Courts adopting a nexus approach to gay rights cases used social science to debunk myths in order to arrive at decisions based less upon stereotypical conceptions of homosexuality and more upon the particular factual situation at issue. On the other hand, courts focusing exclusively on the issue of homosexuality per se ignored or downplayed the available social science.

On a more general level, the courts' use of social science citations to debunk prevailing myths in gay rights opinions may also demonstrate the inherent tension between courts' intuitive notions of human behavior<sup>145</sup>—often referred to as fireside inductions<sup>146</sup>—and social science information.<sup>147</sup> Since a sizable portion of the social science used in the sampled opinions was essentially counterintuitive, courts may have deemed it important to substantiate their decisions by citing the supporting social science. If the information had been intuitively obvious, the same type of documentation may not have been necessary. The importance of citing social science information when it contradicts common notions of human behavior is not unique to gay rights

*Eighties—Part I*, 10 U. DAYTON L. REV. 459, 461 (1985). As some commentators have noted, judges often act upon their preconceived notions of homosexuality rather than the facts in any particular case. See, e.g., Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U. L. REV. 451, 451 (1978-79).

145. See, e.g., Sperlich, *supra* note 96, at 281 (judges prefer to rely on common knowledge or personal experience rather than science).

146. Paul E. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 10, 10 (June L. Tapp & Felice J. Levine eds., 1977).

147. Elsewhere, the author has argued that courts err when they rely upon their own intuitive assumptions about lesbian mothers rather than obtaining empirical data. See Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941 (1989); Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases*, in REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT (Adele E. Gottfried & Allen W. Gottfried eds., 1994).

cases. In fact, it has been argued that social science is at its best when it does exactly that.<sup>148</sup>

While the use of social science information to debunk myths about homosexuality was quite common in the sampled cases, some courts rejected this counter-mythical information outright, possibly because of judicial homophobia or the triumph of intuitive notions of human behavior over empirical reality. One of the clearest examples of this sort of rejection occurred in a child custody/visitation case:<sup>149</sup> "The experts' testimony with respect to molestation of minors is likewise suspect. Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated."<sup>150</sup> Thus, social science usage often depended upon the success of the litigants in persuading the courts themselves that existing myths about homosexuality were indeed false.

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148. There are many examples of the uses of counterintuitive information from the social sciences outside the gay rights context. For instance, in *State v. Janes*, 822 P.2d 1238 (Wash. 1992), the court considered the admissibility of expert testimony on battered child syndrome. The court ultimately permitted the testimony, stating:

The testimony offered by the appellant's experts and a review of the materials cited by the appellant illustrate just how counterintuitive and difficult to understand the dynamics of the relationship between a batterer and his victim can be. . . . The impact of long-term abuse on a child's emotional and psychological responses is a matter that is thus beyond the average juror's understanding.

*Id.* at 1243.

Similarly, in *State v. Long*, 721 P.2d 483 (Utah 1986), the court held that a jury instruction regarding the unreliability of eyewitness testimony was necessary: "To guide trial courts, we note that a proper instruction should sensitize the jury to the factors that empirical research have shown to be of importance in determining the accuracy of eyewitness identifications, especially those that laypersons most likely would not appreciate." *Id.* at 492. *But see* *Lockhart v. McCree*, 476 U.S. 162 (1986): "The evidence [that death-qualification makes a jury more conviction-prone] thus confirms, and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials—judges, defense attorneys, and prosecutors." *Id.* at 188. (Marshall, J., dissenting).

Also, FED. R. EVID. 702 allows expert testimony when it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Thus, social science information may come in to allow judges to make better decisions in areas in which they are ignorant or in which intuitive notions do not satisfactorily explain the behavior.

149. *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982).

150. *Id.* at 869.

3. *The Authoritative Nature of the Information: Social Science Used to Apply a Scientific Veneer*<sup>151</sup>

A third auxiliary function which citations to social science performed within gay rights opinions was that courts cited this information to invoke the authority of science to support their conclusions. Thus, in addition to the substantive impact of the social science, the form of the information had considerable appeal as well. The fact that information came from empirical studies and expert testimony helped to make the court's decision more palatable than if the judge had simply asserted that she no longer believed that homosexuality was a mental illness. The courts used the social science to lend an air of scientific certainty or objectivity to a troubling and controversial issue.

In this connection, it is interesting to note that there were a number of courts in the sampled opinions that cited various professional, mental health, and quasi-medical organizations for the proposition that homosexuality per se is no longer considered a mental disease or disorder. One of the best examples of this strategy comes from the *Baker* case: "Indeed, homosexuality is not a 'disease' and is not, in and of itself, a mental disorder. *Although society—and courts—may still grapple with this question*, in 1973 the American Psychiatric Association removed homosexuality from its list of psychic disorders."<sup>152</sup> The *Baker* court seemed to be saying that although some of us may still disagree about the status of homosexuality as a mental illness, that issue has been firmly settled by the relevant scientific community.

Another example of the use of authoritative sources in the scientific community as persuasive ammunition in gay rights cases concerned the use of citations to the Surgeon General's position on homosexuality.<sup>153</sup> In *Rowland*,<sup>154</sup> for instance, the court quoted

151. "Sometimes the law's reference to science may merely provide a veneer of scientific determinism to decisions that really turn on policy considerations to which the scientific referent bears little relation." Harold L. Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1098 (1966).

152. *Baker*, 553 F. Supp. at 1129-30 (emphasis added) (footnote omitted).

153. See, e.g., *High Tech Gays*, 668 F. Supp. at 1375:

In *Hill*, the Ninth Circuit observed that the Public Health Service recognized that 'current and generally accepted canons of medical practice' do not consider homosexuality *per se* to be a psychiatric disorder. Furthermore, the Ninth Circuit noted that the Surgeon General in making this determination relied on the professional expertise of recognized medical organizations including the American Psychiatric Association,

from the Surgeon General's report that homosexuality is no longer classified as a mental disease or defect.<sup>155</sup> The court called the Surgeon General's memo an "authoritative statement of modern medical opinion concerning homosexuality."<sup>156</sup> In the same way, the opinion in *Lesbian/Gay Freedom Day*<sup>157</sup> emphasized the Surgeon General's report and noted that it was partially based on the authoritative Diagnostic and Statistical Manual of the American Psychiatric Association.<sup>158</sup> As these examples demonstrate, courts may employ social science as a means of avoiding or defusing the moral and ethical issues often inherent in gay rights decisions by infusing the opinions with an appearance of scientific objectivity.

The gambit of applying a veneer of science to an otherwise controversial decision is certainly well-documented outside the gay rights context as well as within it. As Lochner put it: "Dressing up an opinion with the language of social science in order to lend legitimacy to an otherwise questionable result may make the decision more palatable to the public or the legal profession."<sup>159</sup> The Supreme Court's opinions in two abortion cases, *Roe v. Wade*<sup>160</sup> and, more recently, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>161</sup> are instructive in this regard. The invocation of science adds to the overall persuasiveness and unassailability of the opinion; it imbues rational decision making with medical certainty and support.<sup>162</sup>

In an interesting twist on the phenomenon of shoring up an opinion with social science, several courts cast the issues in these cases as essentially empirical ones and found the absence of

the American Psychological Association, the American Public Health Association, the American Nurses' Association, and the Counsel of Advanced Practitioners in Psychiatric and Mental Health Nursing of the American Nurses' Association.

*Id.* (citations omitted).

154. *Rowland*, 730 F.2d at 454.

155. *Id.* at 454 (Edwards, J., dissenting).

156. *Id.* at 455 (Edwards, J., dissenting).

157. *Lesbian/Gay Freedom Day*, 541 F. Supp. at 572.

158. *Id.* at 572-73.

159. Lochner, *supra* note 23, at 835-36 (footnote omitted).

160. *Roe v. Wade*, 410 U.S. 113 (1973); see Laurence H. Tribe, Lecture, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 168 (1984) ("In its opinion [in *Roe*], the Court stressed the role of medical expertise.").

161. 112 S.Ct. 2791 (1992).

162. Tribe, *supra* note 160, at 168, describes this as an "illusion" of "inexorability."

scientific findings dispositive of the outcome. For instance, in *Doe v. Doe*,<sup>163</sup> the court wrote: "The petitioners introduced no evidence, scientific or otherwise, to establish this fact. Regardless of how offensive we may find Jane's life-style, its effect on her son's welfare is not a matter of which we can take judicial notice."<sup>164</sup> Similarly, in *Bezio*,<sup>165</sup> the court wrote: "In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record. This is not a matter about which the judge could take judicial notice."<sup>166</sup>

Not surprisingly, several of the courts in the studied cases rejected attempts to approach the issue of homosexuality from a scientific or empirical perspective. In one of the most scathing critiques of expert witness testimony found in the present study, the court in *L. v. D.*<sup>167</sup> wrote: "This evidence of the realities of appellant's life-style demonstrates that the testimony of her expert witnesses dealt with abstractions. It also strips the scientific literature of its facade of statistics and in its application to this case reduces it to nonsense."<sup>168</sup> Similarly, the court in *J.L.P.(H.) v. D.J.P.*,<sup>169</sup> in rejecting the expert testimony of two psychologists regarding the lack of harm to a child from associating with his homosexual father, stated: "In considering this record, it must be understood that the psychologists did not testify to scientific facts generally accepted in the scientific community. They were espousing only their opinions upon theories of causation, which they both

163. 284 S.E.2d 799 (Va. 1981).

164. *Id.* at 805.

165. *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980).

166. *Id.* at 1216; *see also Doe v. Commonwealth's Atty. for City of Richmond*, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting) (commenting that the defendants have failed to demonstrate that homosexuality causes harm to society and cited a law review article "for discussion on the lack of empirical data on adverse effect of homosexuals on the social system."), *aff'd* 425 U.S. 901 (1976); *People v. Onofre*, 424 N.Y.S.2d 566, 568 (N.Y. App. Div.) ("There are those who urge that homosexual conduct should be proscribed because even when conducted in private by consenting adults it is destructive of traditional principles of family and marriage. However, there is no empirical evidence to support that view."), *aff'd* 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981).

167. 630 S.W.2d 240 (Mo. Ct. App. 1982).

168. *Id.* at 244.

169. 643 S.W.2d 865 (Mo. Ct. App. 1982).

admitted were not subject to any demonstrable scientific proof."<sup>170</sup> Later in the opinion, the court quoted the following:

"In reality, scientific evidence does not by the mere appellation of the term acquire absolute verity but, like other evidence, it depends on qualitative factors which themselves tend to lend greater or lesser credence to the proof. In short, the scientific evidence depends on the methodology employed to obtain it and the skills of those who possess or claim to possess some expertise in the subject, all of which must be shown as essential to the proof."<sup>171</sup>

It is hardly coincidental that the opinions in *L. v. D.* and *J.L.P.(H.)* were ultimately decided against the gay litigant. In fact, the majority of the scientific evidence tends to favor gay individuals and thus, the courts seeking a contrary result must discount or minimize the impact of this information.<sup>172</sup>

#### 4. *Shifting Responsibility for Decision Making: Social Science Used to Ornament a Decision*<sup>173</sup>

A final, and perhaps the most unsatisfactory, justificatory use of social science citations in gay rights cases was to shift responsibility for difficult decision making onto authorities outside the legal system. It may be far easier for courts to deny gay individuals various rights if support for those decisions are mandated by an

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170. *Id.* at 868.

171. *Id.* (quoting *B.S.H. v. J.J.H.*, 613 S.W.2d 453 (Mo. Ct. App. 1981)); see also *supra* text accompanying note 2 (quoting *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987)).

172. This strategy seems comparable to that employed by Justice Rehnquist in *Lockhart v. McCree*, 476 U.S. 162, 168-73 (1986), where he systematically picked apart fifteen social science studies regarding the guilt-proneness of death-qualified juries although there was no evidence to the contrary. The existence of social science findings made it necessary for the Court to at least discuss them, although they were ultimately discounted. See Donald N. Bersoff, *Social Science Data and the Supreme Court: Lockhart as a Case in Point*, 42 AM. PSYCHOLOGIST 52 (1987). In the same way, courts in the gay rights context had to grapple with scientific information which might have been contrary to their desired result.

173. Writing about the Supreme Court's decision in *Ballew*, Loh commented: "The data were apparently used to ornament a decision reached on other legal and policy grounds." *Psycholegal*, *supra* note 86, at 694-95.

expert witness or other sources of social science information.<sup>174</sup> Or, alternately, it may be easier for a court to reach a politically loaded decision in favor of a gay litigant if it is armed with social science information.<sup>175</sup>

The stratagem of using social science to ornament a decision which is reached on other grounds is not unique to gay rights cases. In fact, it is particularly common in controversial areas such as segregation and abortion. To return to two examples used at the beginning of this Article, *Brown*<sup>176</sup> and *Roe*<sup>177</sup> have been severely criticized for their reliance upon scientific sources rather than confronting the more difficult legal principles upon which they ought to have been grounded. With respect to *Brown*, *Lochner* has argued:

Frequently, however, social science evidence is used simply as a make-weight argument, to lend credibility to the result reached by the court on other grounds. *Brown v. Board of Education* is an example of this technique. To reach the conclusion that segregation was constitutionally unlawful, the court need not have mentioned social science research at all, since a long and carefully developed line of cases had moved away from the doctrine that *Plessy v. Ferguson* had established at the turn of the century. None of these cases had required the use of social science data, nor need *Brown* have done so.<sup>178</sup>

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174. See, e.g., *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981).

175. See, e.g., *Baker*, 553 F. Supp. 1121, 1129-31. As discussed below, the fact that many courts received conflicting testimony regarding homosexuality exacerbated this problem. Since judges in these cases had a broad range of expert opinions from which to choose, they might have been tempted to decide based upon their own value system and recite the social science as a post-hoc rationalization. See *infra* notes 187-203 and accompanying text.

176. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *supplemented by*, 349 U.S. 294 (1955).

177. *Roe v. Wade*, 410 U.S. 113 (1973).

178. *Lochner*, *supra* note 23, at 835, (footnotes omitted). Similarly, *Wisdom*, *supra* note 104, at 142, pointed out that the information was relegated to a footnote. For an interesting discussion of homophobia in the *Bowers* decision and a comparison to *Plessy*, see Kohler, *supra* note 134. For a provocative analogy between gay rights and miscegenation see Polikoff, *supra* note 134:

Courts and legislatures have previously seized on discriminatory ideologies disguised as scientific truth to serve as the basis for judicial and

Writing about the decision in *Roe*, Tribe reached the same conclusion:

Indeed, the Court's elaborately medical trimesterization of pregnancy in *Roe v. Wade* involves the same kind of abdication to expertise. The Court says that the state does not have a compelling interest in protecting the fetus until it is "viable," and it defines "viable" in medical terms—i.e., in terms of capacity to survive in an incubator outside the woman's uterus. Why precisely does the magic moment of compelling interest occur just at viability and not before or after? The Court offers only this "reason": Because, after viability, the fetus can survive in a hospital, outside the uterus.

That's a definition, not a reason. But it's easier to offer a definition; to point to the medical profession and its consensus; in effect, to blame "science" for a definition and a decision which, if defensible (and I believe it was, although it's hardly an easy one), was defensible only because it helped to empower women in society by putting them on a more equal footing with men. Men don't have to be involuntary incubators, even for their own children. If *Roe v. Wade* was *right*, that's why it was *right*—*not* because of what doctors think or what medical science describes.<sup>179</sup>

Similarly, social science in gay rights cases might serve as a justification for legal decisions reached on other grounds.

There were a few cases in the studied opinions which eschewed social science and rested their decisions squarely on the legal doctrines involved. Interestingly, most of these come in the first

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statutory activism in the area of child rearing. . . .

As recently as 1966, Virginia argued in support of its antimiscegenation law that "[t]he available scientific materials are sufficient to support the validity of the [antimiscegenation] statute." The State quoted from various medical, scientific, and psychological experts to assert that interracial marriage posed a threat to the children's "welfare and to the welfare of society as well" . . . .

. . . .

It is now easy to recognize that the antimiscegenation laws were grounded in racist ideology, not scientific principles.

*Id.* at 545-47 (footnotes omitted).

179. Tribe, *supra* note 160, at 168-69 (footnotes omitted).



amendment context. For instance, in *Gay Lib v. University of Missouri*,<sup>180</sup> the court stated that even accepting the testimony of the experts at face value, it was insufficient evidence to justify a prior restraint.<sup>181</sup> In *Alaska Gay Coalition v. Sullivan*,<sup>182</sup> the court held that expert testimony used in *Gay Lib* was irrelevant to the First Amendment issue, and was equally irrelevant in its own case.<sup>183</sup> And finally, in *Aumiller v. University of Delaware*,<sup>184</sup> the court wrote that it would decline to consider expert testimony on the etiology of homosexuality and its psychological implications.<sup>185</sup>

While some of courts' uses of social science seem laudable, such as to debunk mythical images of homosexuality, the citation of social science to adorn an opinion reached on other grounds is troublesome because it obfuscates the underlying legal issue. When courts consider the issue of gay rights from a purely empirical perspective, they can avoid confronting the more difficult legal questions of whether homosexuality is protected under a right to privacy or equal protection analysis.<sup>186</sup> Thus, when courts cite social science as the primary justification for their decisions, they divert attention from the fact that gay rights need not turn on

180. 558 F.2d 848 (8th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1080 (1978).

181. *Id.* at 854.

182. 578 P.2d 951 (Alaska 1978).

183. *Id.* at 955 n.6.

184. 434 F. Supp. 1273 (D. Del. 1977).

185. *Id.* at 1290-91.

186. Justice Blackmun articulated a right to privacy analysis in his *Bowers* dissent:

"[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.' . . . The Court recognized . . . that the 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.'"

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human experience, central to family life, community welfare, and the development of human personality." The fact that individuals define themselves in a significant way through their intimate sexual relationships suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom of an individual to *choose* the form and nature of these intensely personal bonds.

*Bowers v. Hardwick*, 478 U.S. 186, 204-05 (1986) (citations omitted). For a possible equal protection argument see *Rowland*, 730 F.2d 444.

discrete empirical questions, but on whether gay individuals should have the same protections that other members of society enjoy.

### 5. *Conflicting Information from the Social Sciences Regarding Homosexuality*

A fifth reason for the relatively high incidence of citations to social science in gay rights cases is the fact that courts received conflicting information<sup>187</sup> from social scientists regarding homosexuality.<sup>188</sup> Cases in all four substantive contexts involved "battles of the experts"<sup>189</sup> on such diverse questions as: (1) whether being

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187. It is important to note in this connection that empirical social science is available on many of the issues litigated in gay rights cases. Thus, unlike some areas of the law in which courts cannot resort to social science because it does not exist, this is one context in which the dearth of information is not a threshold problem. *But see* Constant A. v. Paul C.A., 496 A.2d 1, 8 n.8 (Pa. Super. Ct. 1985) ("The testimony of the psychiatrist and the studies she cited are unpersuasive as they are of limited number and of recent origin and have not withstood the test of time.").

188. The mental health community continues to be divided on the issue of homosexuality although this disagreement seems to be abating. Slovenko provides this excerpt:

Dr. Jon K. Meyer commented, "At the moment, homosexuality is perhaps the most difficult subject in psychiatry to address. Few conditions affecting the psyche and behavior have been so intensely scrutinized, debated, and politicized. Conceptualization of homosexuality—as a life-style, a preference, an illness, a socio-political movement, a biological predisposition—is marked by a fundamental lack of consensus."

Ralph Slovenko, *Foreword: The Homosexual and Society: A Historical Perspective*, 10 U. DAYTON L. REV. 445, 450 (1985).

The fact that there is not total consensus among social scientists regarding homosexuality is not unusual in disciplines full of divergent viewpoints. However, the existence of inconsistent opinions within the social sciences has led to some resistance on the part of jurists to use social science information. Fahr points out that the social sciences often lack the unanimity attorneys expect in turning to specialized fields of knowledge: "[T]he state of uncertainty, doubt, and disagreement among social scientists themselves gives the lawyer reason to doubt and to reject what has been done as so speculative as to be dangerous to use unless meticulously safeguarded by familiar processes." Samuel M. Fahr, *Why Lawyers are Dissatisfied with the Social Sciences*, 1 WASHBURN L.J. 161, 175 (1961); *see also* Lochner, *supra* note 23; Miller & Barron, *supra* note 26; Rosen, *supra* note 82.

189. Most of the battles of experts did not occur over adjudicative facts (the facts of the particular case, e.g., whether Ms. Jones is a good parent), but rather over legislative facts (more broad-ranging facts, e.g., whether all lesbian women make good parents). For a fuller discussion of the distinction between adjudicative and legislative facts, see Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

raised by a homosexual parent has a detrimental affect on children;<sup>190</sup> (2) whether having a gay teacher would affect the sexual identity of his students;<sup>191</sup> (3) whether recognizing a gay student organization would increase the incidence of sodomy;<sup>192</sup> and (4) whether homosexuality is a mental illness within the context of decriminalizing sodomy.<sup>193</sup> This conflict within the social sciences may have engendered higher citation rates in several ways.

First, legal decision makers, faced with conflicting reports by "authorities," may have felt obliged to present all the information either to allow reviewing courts to understand the dilemmas faced by them or simply to highlight the fact that even the "experts" did not agree on this issue.<sup>194</sup> Thus, the fact that social scientists presented differing views of homosexuality may have fueled the fire of controversy and arguably led to higher rates of citation than in less controversial fields.

An additional reason that conflicting testimony among experts regarding homosexuality may lead to higher rates of citation than would normally be expected is that courts were unable to evaluate the information and therefore included it all.<sup>195</sup> In many of the

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190. See, e.g., *Dailey v. Dailey*, 635 S.W.2d 391, 393-94 (Tenn. Ct. App. 1981), L. v. D., 630 S.W.2d 240, 243 (Mo. Ct. App. 1982).

191. See, e.g., *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 847-49 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

192. See, e.g., *Gay Lib v. University of Mo.*, 558 F.2d 848, 854 (8th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1080 (1978); see also *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 164 n.3 (4th Cir. 1976) (parties stipulated, inter alia, that "medical authority is divided on the question of whether an opportunity to join and identify with a group such as the one proposed encourages people to make a homosexual identification who otherwise would not do so.").

193. See, e.g., *Baker*, 553 F. Supp. at 1129-32.

194. See, e.g., *Acanfora*, 359 F. Supp. at 847 (the theoretical determinants of homosexuality are still substantially a matter of controversy); *Fricke v. Lynch*, 491 F. Supp. 381, 389 (D.R.I. 1980) (psychiatric profession is divided on the issue of homosexuality).

195. Several commentators have noted the inability of courts to properly evaluate information from the social sciences. See, e.g., Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18; David L. Suggs, *The Use of Psychological Research by the Judiciary: Do the Courts Adequately Assess the Validity of the Research?*, 3 LAW & HUM. BEHAV. 135 (1979). Monahan & Walker propose four criteria for evaluating social science: (1) surviving the critical review of the scientific community; (2) employing valid research methods; (3) generalizable to the case at issue; and (4) supported by a body of other research. Monahan & Walker, *supra* note 89, at 499. Monahan and Walker's suggestion may have the effect of lessening the amount of social science which

opinions, legal decision makers were unable to reconcile the varying reports provided by social science experts or authorities, often reaching inconsistent and highly polarized conclusions.<sup>196</sup> One court apparently used a split-the-difference approach in assessing the

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appears in judicial opinions:

[W]e believe that if courts treat social science research as social authority, fewer judicial opinions will rely upon social science material, but the material that is used will be of much higher quality. Poor studies will be screened out, and exemplary research will become more apparent. In this way, the development of fair and efficient rules of law that rely in part upon empirical propositions will be facilitated.

Monahan & Walker, *supra* note 89, at 516-17; *see also* Daubert v. Merrill Dow Pharmaceutical, 113 S. Ct. 2786 (1993), which gives federal district court judges much discretion and a heavy burden in having to evaluate information from other disciplines.

196. Compare the approaches taken by two courts with respect to conflicting expert testimony in the child custody context. In *L. v. D.*, 630 S.W.2d 240, 244-45 (Mo. Ct. App. 1982), the court rejected the testimony of a social psychologist and a clinical psychologist to the effect that a lesbian mother is not harmful to her child in favor of a clinical psychologist presented by the husband with apparently little expertise regarding homosexuality: "Appellant contends this psychologist was not qualified because he stated that he had only average familiarity with scientific literature relating to homosexuality. His answer has reference to average familiarity for a psychologist." *Id.* at 243. In *Doe v. Doe*, 452 N.E.2d 293 (Mass. App. Ct. 1983), the trial court heard the testimony of four psychiatrists, three of whom opined that there was no adverse influence as the result of having a lesbian mother.

The fourth psychiatrist testified that mere association between a minor child and a homosexual parent was detrimental to the child. The trial judge, however, found that this witness's opinion was not credible because "he had no supporting studies and his exposure to single parent lesbians was limited." Moreover, the witness "never articulated good reasons for his opinion."

*Id.* at 296 n.2.

In *Gay Lib v. University of Mo.*, 558 F.2d 848, 860 (8th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1080 (1978), the majority and dissenting opinions came to very different conclusions regarding conflicting expert testimony at trial. In reversing the district court's decision, the majority opinion discounted two of the experts whose testimony was apparently relied upon by the court below: "Defendants urge that their experts are more worthy of belief because of their outstanding professional credentials. We need not pause here since defendants' evidence turns solely on Dr. Voth's conclusory 'inference' and Dr. Socarides' 'belief,' for which no historical or empirical basis is disclosed." *Id.* at 854. One dissenting judge, wishing to uphold the district court's findings, stated: "Lacking training in the psychiatric discipline, appellate judges are ill-prepared to conclude that these expert psychiatric opinions lack an historical or empirical basis." *Id.* at 860. (Gibson, J., dissenting).

social science.<sup>197</sup> One notable exception to this trend was the court in *Baker*,<sup>198</sup> which did an excellent job of evaluating the conflicting expert testimony.<sup>199</sup>

The general inability of courts to evaluate social science,<sup>200</sup> and particularly conflicting social science, may have caused them to present more information than necessary to decide the case. In more settled fields, courts may be more adept at sorting out the "good" from the "bad" social science and referring only to that

197. In *Acanfora*, 359 F. Supp. at 847-49, the court heard testimony from two experts who claimed that having a gay teacher might affect children's sexual orientation and three experts who stated that sexual identity was determined early in life. The court also received into evidence a number of publications which contained the same type of conflicting information. Noting the impressive credentials of one expert, the court nevertheless held that it would be "premature to state definitively that Acanfora's presence in the classroom will have no deleterious effect." *Id.* at 849. The court said that it could not ignore the danger noted by the other experts: "The danger does not seem as great or as likely as defendants have assumed, but it is not illusory." *Id.*

198. *Baker*, 553 F. Supp. at 1121.

199. The *Baker* opinion is remarkable for the extensive and detailed discussion of homosexuality and social science it contains. More than four full pages are devoted to an analysis of the expert evidence. The court weighed the testimony of a psychiatrist, Judd Marmor, and a sociologist, William Simon, against the testimony of another psychiatrist, James Grigson. The court noted that Marmor and Simon were experts in the field of homosexuality and determined that the testimony of Grigson was inferior:

This Court completely discounts Dr. Grigson's testimony and his opinions. These opinions are not based upon any independent research or supported by "any respected medical or psychiatric literature."

. . . Moreover, Dr. Grigson's opinions were directly contrary to those of plaintiff's experts—whose qualifications as experts in the field of homosexuality were outstanding and whose testimony was very credible—and to positions adopted by various medical and psychiatric associations.

*Id.* at 1131-32 (footnotes omitted).

Thus, the *Baker* court not only discussed social science in considerable detail, but assessed the credibility of competing expert witnesses by reference to other social science sources such as professional organizations and publications. This case, perhaps more than any other in the entire gay opinion sample demonstrated considerable sophistication with respect to the use and evaluation of social science. It also illustrated a criterion suggested by Monahan and Walker in evaluating social science, namely consensual support for a particular social science proposition. Monahan & Walker, *supra* note 89, at 499.

200. In the present study, the ratings for degree of detail and degree of reliance also indicated that the courts neither discussed the social science information to any substantial degree nor relied heavily upon the information which they cited. Rather, the courts tended merely to recite the social science, without substantive comment or attempt to appraise its value.

information which has been evaluated as worthy of inclusion.<sup>201</sup>

Finally, the conflict in the social science evidence may have had the collateral consequence of allowing the court to render a decision on other grounds, because it was supported by at least one side of the conflicting social science. Wasby emphasized the importance of this problem vis-a-vis legal decision makers: "Judges will use social science findings when they reaffirm the judges' positions. In this regard, we ought to be well aware of Don Horowitz's point that competing social science findings provide judges with the flexibility to do what they want to do."<sup>202</sup> Similarly, Rivera asserts: "Experts are relied upon, not based on the level of their knowledge, but based on how closely their prejudices conform to those held by the court."<sup>203</sup>

201. Of course, some of this "conflict" in the social sciences appears to be manufactured. In some cases, the court received a relatively one-sided presentation of information, but chose to characterize the information as less certain than was really the case. *See, e.g., J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865 (Mo. App. Ct. 1982), in which the court remained skeptical of certain expert psychological testimony despite any evidence to the contrary. *Id.* at 868-69.

For a similar case not contained in the present study, see Opinion of the Justices, 530 A.2d 21 (N.H. 1987), where the dissent wrote:

The legislature received no meaningful evidence to show that homosexual parents endanger their children's development of sexual preference, gender role identity, or general physical or psychological health any more than heterosexual parents. The legislature received no such evidence because apparently the overwhelming weight of professional study on the subject concludes that no difference in psychological or psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents.

*Id.* at 28 (Batchelder, J., dissenting) (citations omitted).

Even the same social science has been used by opposing sides to make their arguments. A prime example of this phenomenon is the research on the imposition of the death penalty on juveniles. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), Justice Stevens used Professor Victor Streib's research to argue against the imposition of the juvenile death penalty. *Id.* Justice Scalia used the same research in his dissent to argue for its imposition. *Id.* The social science was used similarly in *Stanford v. Kentucky*, 492 U.S. 361 (1989), a subsequent juvenile death penalty decision.

202. Stephen L. Wasby, *History and State of the Art of Applied Social Research in the Courts*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 16 (Michael J. Saks & Charles H. Baron eds., 1980) (citations omitted). This criticism of the social sciences is similar to one author's assertion that it is possible to write a Brandeis brief for almost any proposition. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 154 (1955). *See also* Arnold M. Rose, *The Social Scientist as an Expert Witness*, 40 MINN. L. REV. 205 (1956).

203. Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties—Part II*, 11 U. DAYTON L. REV. 275, 354 (1986).

In summary, the controversial nature of homosexuality contributes to the increased citation of social science in gay rights cases largely because courts feel compelled to justify their decisions to a greater extent than in less troublesome areas. These justificatory strategies take a number of forms, including educating others, like the public, about homosexuality in general or, more particularly, debunking mythical notions regarding gay individuals. There was also evidence that courts deployed more sophisticated means of justification, such as invoking the cover of science or shifting the burden of decision making onto non-legal "authorities," like social scientists. These strategies were aided, in part, by the availability of divergent viewpoints among social scientists regarding homosexuality. These reasons largely explain the courts' use of social science information, but one additional factor must be considered: the extensive efforts of gay litigants and organizational amici to provide courts with this information.

*D. Litigants and Amici are Inundating the Courts with Social Science Information in Gay Rights Cases*

While the legal climate must be hospitable to the introduction of social science and courts inclined to recite this information for justificatory purposes, social science must still come to the courts' attention in the first instance. One of the primary mechanisms through which courts obtain social science is its presentation by the parties or amici.<sup>204</sup> Thus, the third synergistic force contributing to the heightened citation of social science in gay rights cases is the cumulative impact of efforts by three separate contingents—individual litigants, gay and civil rights groups, and scientific and professional organizations—to provide social science to the courts deciding these cases.<sup>205</sup>

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204. At the trial court level, the litigants may introduce expert testimony or submit Brandeis-brief materials. At the appellate court level, social science information is usually provided through briefs by the parties or amici. See Elizabeth D. Tanke & Tony J. Tanke, *Getting Off a Slippery Slope: Social Science in the Judicial Process*, 34 AM. PSYCHOLOGIST 1130, 1136-38 (1979) (discussing various methods of introducing social science information).

205. Courts also obtain social science through independent research. Rosenblum found that some of the sources of social science used by the court and not cited by the parties were well-known works in the area. "It is plausible to interpret these data to support the proposition that citations at the Court's own initiative are frequently post hoc efforts by Justices or clerks to find whatever support might be available to bolster the position taken." Rosenblum, *supra* note 25, at 72. Some commentators have criticized the use of independent research by the court as being at variance with the adversary process. See, e.g., Miller & Barron, *supra* note 26, at 1189-90.

In the sample of studied cases, it was difficult to precisely gauge the actual contribution of litigants and amici since most of the opinions did not disclose the sources of the information included within them.<sup>206</sup> However, a few of the sampled cases demonstrated that concerted dissemination efforts had an effect on the court's citation of social science. In *S. v. S.*, the court thanked the parties for providing relevant social science research.<sup>207</sup> In *S.E.G. v. R.A.G.*, the court acknowledged that one of the parties and the American Civil Liberties Union had provided considerable social science evidence.<sup>208</sup> Finally, dissenting in *Bowers v. Hardwick*,<sup>209</sup> Justice Blackmun cited directly from an amicus curiae brief filed by two professional associations.<sup>210</sup>

Outside the context of gay rights cases, there is evidence that dissemination efforts by litigants and others encourage the citation of social science information by courts. Several researchers have compared the exposition of social science in the briefs of the parties or amici with the citation of this information in the resulting judicial opinions and found a considerable degree of correspondence.<sup>211</sup>

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206. As one author wrote about her own study, but with equal applicability here:

In general, however, this study suffers from the limitations inherent in virtually exclusive reliance upon judicial opinions. Chief among these limitations is the inability to determine the extent to which judges relying upon social science literature did so as a result of independent research or as a result of Brandeis briefs.

Davis, *supra* note 46, at 1547 n.35.

207. 608 S.W.2d 64, 66 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981).

208. 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

209. 478 U.S. 186 (1985).

210. "Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a 'disease' or disorder. See Brief for American Psychological Association and American Public Health Association as Amici Curiae 8-11." *Id.* at 203 n.2 (Blackmun, J., dissenting).

211. *See, e.g.*, Acker, *supra* note 71, at 11 (47.3% of social science citations came from the briefs in 1958-1987 U.S. Supreme Court criminal cases); Acker, *supra* note 69, at 30, 35 (47.3%, 30.6%, and 25% of social science sources were also in the briefs in a sample of U.S. Supreme Court criminal, exclusionary rule, and jury cases, respectively); Acker, *supra* note 12, at 436 (56.5% of social science references had been previously cited in the briefs in 1963-1985 U.S. Supreme Court death penalty cases); Acker, *supra* note 75, at 80 (67.9% of the social science references in 1986-1989 U.S. Supreme Court death penalty decisions came from the briefs).

*See also* Bernstein, *supra* note 25, at 71 (60% of the sources of empirical



In addition to these empirical studies, several commentators have remarked on the interactive effects of attorney and judicial behavior in the use of social science information. As courts use social science more frequently, attorneys are more likely to turn to social science sources and provide that information to the courts.<sup>212</sup> Complementarily, as attorneys use social science more often, courts are also more likely to use the proffered information in their opinions.<sup>213</sup> Thus, while there is not a simple isomorphic relationship between the litigants' introduction of social science information and the court's citation of that information in its opinion,<sup>214</sup> it can be expected that systematic and sustained efforts to provide courts with social science will ultimately affect the content of the legal decisions rendered.

data in the U.S. Supreme Court's 1965 majority opinions were in the briefs); Marvell, *supra* note 25, at 192 (1/3 of the references to publications containing empirical data were also cited in the briefs; 60% of the social facts supported by empirical data came from the record or the briefs); Rosenblum, *supra* note 25, at 68 (1/3 of the social science references in a sample of Supreme Court cases had been cited in the briefs); Turner, *supra* note 25, at 498 (40% of the legal periodicals cited in the opinions of the Kansas Supreme Court were in the briefs).

212. "Repeated uses of social science evidence in particular fields of law may over time create expectations among attorneys that—as a matter of course—social science data will be used in resolving legal issues." Lochner, *supra* note 23, at 824. "Moreover, when judges cite social science research or other scholarly work, lawyers are encouraged to introduce social science evidence in litigation, and to use social science sources in arguments in legal briefs." Levine & Howe, *supra* note 22, at 174.

213. Rosenblum found that "the more frequently a social science finding was cited in the briefs the greater was its chance of utilization by the Court." Rosenblum, *supra* note 25, at 66. "The more the parties relied on the social sciences and the more often they repeated citations to them, the more likely it was that the Court would use the materials." *Id.* at 69.

Similarly, Baron noted the educative role that attorneys play in using social science:

In addition, having lawyers write briefs and offer evidence using these materials seems to me to be the best way to educate judges. Of course, there are other ways as well—judicial conferences on subjects of this sort and so forth—but for the most part I think that the job of a practicing lawyer is that of an educator.

Charles H. Baron, *Overcoming Barriers to the Use of Applied Social Research in the Courts*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN COURTS* 154, 155 (Michael J. Saks & Charles H. Baron eds., 1980).

214. *Bowers v. Hardwick*, 478 U.S. 186 (1986) is a good example of the introduction of considerable social science to the court and a resulting opinion which was essentially devoid of that social science.

1. *Individual Gay Litigants are Making Concerted Efforts To Provide Social Science to Courts*

Undoubtedly encouraged by extensive commentary, gay litigants have made the introduction of social science information an integral part of the overall litigation strategy in gay rights cases,<sup>215</sup> especially those involving child custody.<sup>216</sup> As discussed above, litigants may feel compelled to provide social science information to courts in gay rights cases either to overcome judicial homophobia<sup>217</sup> or to counter existing myths about homosexuality.<sup>218</sup>

Individual litigants and their attorneys are assisted in their efforts to provide social science to courts in gay rights cases in several ways. First, social science has become more readily acces-

215. Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFF. L. REV.* 691, 727 (1976); Hitchens & Price, *supra* note 144, at 461-71; Rivera, *supra* note 203, at 330.

216. Whatever the sexual orientation of the parents, custody disputes often involve the testimony of social workers, psychiatrists, or other experts to assess the relative merits of the parents. *When one parent is gay, however, that parent must present additional expert testimony of a general nature to refute stereotypes about homosexuality.* Such testimony is particularly important in custody proceedings, because the stereotypes under attack often bear directly on the domestic life and child-rearing and lead many to conclude that gay people make poor or even dangerous parents. . . . Unless the misconceptions are dispelled through expert testimony, gay parents are bound to suffer unequal treatment before a judge who harbors stereotypical views and has the discretion to act upon them. (emphasis added).

Robert G. Bagnall, et. al., *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 *HARV. C.R.-C.L. L. REV.* 497, 537 (1984).

See also Rivera, *supra* note 203, at 370 ("The main task of litigators on behalf of their gay clients in custody cases has been to educate the court. The myths and stereotypes surrounding gay persons have pervaded the bench as well as the public."); Hunter & Polikoff, *supra* note 215, at 727 ("The expert witnesses for the lesbian mother may well form the most important part of her case.")

This trial strategy may have been at work in the studied cases since the one difference among the four substantive areas was the higher number of individual references to experts in the CC sample compared to the other three samples.

217. See, e.g., Dressler, *supra* note 135, at 26 (suggesting that attorneys conduct "sensitivity training" to combat judicial homophobia and that they "make the courtroom the forum for science, not superstition or preconception.")

218. See, e.g., Bagnall et al., *supra* note 216, at 497 ("When a gay person's sexual orientation is an issue in litigation, there is a need to address squarely popular misconceptions about homosexuality. Otherwise, judges and jurors, who are as susceptible to these misconceptions as the public, may discriminate in their decision-making.").

sible to lawyers trying these cases because: (1) social scientists have published more of their research in law reviews and other legal journals<sup>219</sup> and (2) the computerization of information sources has permitted lawyers to have direct access to social science journals.<sup>220</sup>

Second, litigants and their attorneys are being directly and indirectly supported in their efforts to obtain and present relevant

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219. The message is clear. If social scientists wish their work to reach legal commentators, they must learn to "think like lawyers" and write for a legal audience, or at least to collaborate with scholars who are skilled in legal analysis. Without an integration of the findings with legal questions, even very relevant research is unlikely to be noticed by its intended audience.

Hafemeister & Melton, *supra* note 25, at 54; *see also* Melton, *supra* note 96, at 493; Geoffrey W. Peters, *Overcoming Barriers to the Use of Social Research in the Courts*, in *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* 158, 161 (Michael J. Saks & Charles H. Baron eds., 1980); Tanke & Tanke, *supra* note 204, at 1136; Charles R. Tremper, *The High Road to the Bench: Presenting Research Findings in Appellate Briefs*, in *REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH* 199, 225 (Gary B. Melton ed., 1987). It has also been suggested that social scientists publish their research in practical or practitioner-oriented journals. *See, e.g.*, Melton, *supra* note 96, at 493; Peters, *supra*, at 168.

Legal materials regarding gay rights issues may also be more readily available. The Standing Committee on Lesbian and Gay Issues of the American Association of Law Libraries has begun publishing a selective bibliography on homosexuality and the law and "[a]t the 1987 annual convention of the [AALL], the membership passed a resolution urging libraries to acquire legal materials on the role of lesbian and gay people in society." *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969-1993*, 86 *LAW LIBR. J.* 1, 1 (1994).

220. *See* Acker, *supra* note 75, at 80:

Although it still may benefit social scientists to publish the results of their research in legal periodicals and books to attract the attention of lawyers and judges . . . , this practice no longer appears to be as important as it once may have been. Computerized data bases and other bibliographic indexing systems have made primary social science references widely accessible to law-trained library users.

*Id.*

Daniels, *supra* note 25, at 27-28:

In addition, legal researchers today can have easy and immediate (if not inexpensive) access to a large number of statistical and other information databases in a wide variety of disciplines. As this body of easily accessible data grows, the types and amounts of nonlegal sources cited by lawyers and judges inevitably will expand accordingly. Although the debate undoubtedly will continue to rage about the propriety and desirability of using such sources, it is difficult to believe that the practice will soon abate.

*Id.*

social science information by various organizations. For instance, the National Center for Lesbian Rights has published a Lesbian Mother Litigation Manual<sup>221</sup> which includes not only a discussion of the legal standards and strategic advice, but also considerable social science information.<sup>222</sup> This manual has been widely disseminated. "[O]ver 500 copies of the manual are in circulation and on hundreds of library shelves. It is cited in countless opinions and law review articles and accompanies lawyers to court whenever there is a lesbian or gay parent to be defended."<sup>223</sup> In addition to their direct participation through amicus briefs, organizations like Lambda Legal Defense and Education Fund (Lambda)<sup>224</sup> and the American Psychological Association (APA)<sup>225</sup> also provide materials, including relevant social science research,<sup>226</sup> to individual gay litigants.<sup>227</sup>

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221. LESBIAN MOTHER LITIGATION MANUAL (National Center for Lesbian Rights, 2d ed. 1990).

222. The LESBIAN MOTHER LITIGATION MANUAL, *supra* note 221, contains a sample direct examination of an expert witness regarding development of sexual identity, a "[b]ibliography of psychological and legal materials on lesbian and gay parenting," and three amicus briefs heavily laden with social science. One of the amicus briefs concerns "Adverse Impact and Nexus Argument," the second is entitled "Lesbian Custody: Disarming the Myths and Stereotypes," and the third relates to visitation restrictions.

223. LESBIAN MOTHER LITIGATION MANUAL, *supra* note 221, at preface.

224. Interview with Evan Wolfson, Lambda (May 19, 1994).

225. The APA, based in Washington, D.C., makes briefs filed in gay rights cases available to the public. In addition, the APA disseminates an annotated bibliography and copies of recent research papers. Interview with Clinton Anderson, APA (May 17, 1994).

226. Similarly, in the context of 1963-1985 death penalty cases, Acker found that the NAACP Legal Defense and Educational Fund, Inc. played a significant role in infusing the parties' briefs with social science. James R. Acker, *Seed to Root to Branch: Briefwriters' Contributions to Supreme Court Capital Punishment Doctrine*, 17 CRIM. JUST. REV. 20, 27 (1992).

227. The fact that litigants, supported by various organizations, are providing social science to courts in gay rights cases has some interesting implications for the dissemination efforts of social scientists. Instead of targeting the courts, social scientists could target certain litigant populations, such as gay individuals, for indirect dissemination efforts. *See* Tanke & Tanke, *supra* note 204, at 1136: "A second avenue for presentation of research to the courts is through the parties themselves. Parties may be willing to use social science research in support of their arguments but may be unaware of its existence." Thus, by providing plain label or generic briefs, publishing more of the existing amicus briefs, or furnishing copies of available studies to litigants, social scientists may affect the final content of judicial opinions in this area without participating directly in the cases. *See, e.g.,* Ronald Roesch, et. al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1 (1991); Michael J. Saks, *Improving APA Science Translation Amicus Briefs*, 17 LAW & HUM. BEHAV. 235 (1993).

2. *The Participation of Gay and Civil Rights Organizations as Amici Curiae*

While individual litigants and their attorneys have made remarkable efforts to provide social science to courts, these efforts may have been outstripped by the contributions of two distinct types of organizations that have filed amicus curiae briefs in gay rights cases: (1) organizations devoted to advocating for gay and civil rights and (2) professional scientific associations unconnected with the gay rights movement per se but possessing expertise in the relevant social science.

The gay rights movement has spawned not only a plethora of organizations devoted exclusively to the advancement of the interests of gay individuals, such as Lambda,<sup>228</sup> but has also resulted in the co-option of portions of other more broadly-based groups, such as the American Civil Liberties Union (ACLU).<sup>229</sup> While no empirical data exist regarding the extent of their participation, it appears that these organizations have been heavily involved as amici in gay rights litigation throughout the country.<sup>230</sup> The par-

228. See Cain, *supra* note 13, at 1584-87. Lambda was started in 1973. An earlier organization, the National Gay Rights Advocates (NGRA) is now extinct.

229. The ACLU officially recognized the principle of gay rights in 1966. In 1973, the ACLU created the Sexual Privacy Project to fight discrimination against gay individuals. In 1984, the ACLU instituted the Gay and Lesbian Rights Project. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 312-13 (1990). For interesting discussions of the evolution of the ACLU's participation in gay rights cases, see Vern L. Bullough, *Lesbianism, Homosexuality, and the American Civil Liberties Union*, 13 J. HOMOSEXUALITY 23 (1986); Cain, *supra* note 13, at 1583-84.

230. See THE LAMBDA UPDATE (Lambda Legal Defense & Education Fund, New York, N.Y.), a quarterly newsletter, for discussions of its ongoing litigation efforts. With respect to the ACLU, one of its brochures asserts: "The ACLU has represented lesbian and gay parents, or filed friend of court briefs on their behalf, in custody and visitation cases throughout the U.S." American Civil Liberties Union, Lesbian and Gay Rights Project. Another ACLU brochure claims: "With the [Lesbian and Gay Rights/AIDS] Project's guidance, the ACLU handles more legal work in behalf of lesbians and gay men and people with HIV/AIDS than any other organization in the country." American Civil Liberties Union, Friends: The Leadership Support Group of the ACLU's Lesbian and Gay Rights/Aids Project.

Also, many of the studied cases revealed the participation of various types of amici, including Lambda and the ACLU. In the CC sample, see *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (ACLU as amicus); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980) (Civil Liberties Union of Mass. and Gay & Lesbian Advocates & Defenders as amici); *Schuster v. Schuster*, 585 P.2d 130 (Wash. 1978) (ACLU as attorney); *Constant A. v. Paul C.A.*, 496 A.2d 1

ticipation of special interest amici in ground-breaking and controversial contexts is hardly unique to gay rights cases. In fact, there appears to be a long history of such participation:

Meltsner credited the legal arguments the National Association for the Advancement of Colored People (NAACP) made in briefs presented in death penalty cases for a favorable decision in the *Furman v. Georgia* case that suspended executions in the United States. O'Connor and Epstein found that the amicus briefs filed by organizations promoting the interests of women, labor, and conservatives contributed significantly to achieving those interest groups' objectives. Similar successes have been reported for amicus participation by organizations representing Blacks and members of fundamentalist religions.<sup>231</sup>

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(Pa. Super. Ct. 1985) (Women's Law Project, Office of Clinical Education of University of Pennsylvania Law School, American Civil Liberties Foundation, American Friends Service Committee, and Philadelphia Lesbian and Gay Task Force as amici—according to LESBIAN MOTHER LITIGATION MANUAL, *supra* note 221). In the ED sample, see *Rowland v. Mad River Local Sch. Dist.*, 730 U.S. 1009 (1985) and *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990) (NGRA as amici). In the FA sample, see *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alaska 1978) (ACLU as amicus); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981) (ACLU as attorney); *Lesbian/Gay Freedom Day Comm., Inc. v. United States Immigration and Naturalization Serv.*, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub. nom.*, *Hill v. United States Immigration and Naturalization Serv.*, 714 F.2d 1470 (9th Cir. 1983) (Gay Rights Advocates as attorney); *Pryor v. Municipal Court for Los Angeles Judicial Dist.*, 599 P.2d 636 (Cal. 1979) (National Committee for Sexual Civil Liberties (NCSCSL) as amicus). In the CS sample, see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Lesbian Rights Project, NGRA, APA, American Public Health Association, and many others as amici); *People v. Baldwin*, 112 Cal. Rptr. 290 (1974) (ACLU as amicus); *People v. Onofre*, 424 N.Y.S.2d 566 (N.Y. App. Div.), *aff'd* 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981) (NCSCSL as amicus); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (Special Committee on Sex and Law of the Association of the Bar of the City of New York, NCSCSL, New York Civil Liberties Union, and Lambda as amici).

231. Charles R. Tremper, *Organized Psychology's Efforts to Influence Judicial Policy-Making*, 42 AM. PSYCHOLOGIST 496, 496 (1987) (citations omitted). Similarly, Acker noted: "All in all, the brief writers in the death penalty cases did an exceptional job of apprising the justices about social science information relevant to case issues; the unusual contributions of briefs authored from the Legal Defense Fund in this regard cannot be denied." Acker, *supra* note 12, at 436 (citations omitted).

A common litigation strategy employed by various amici is the utilization of social science information in their briefs. For instance, empirical research has shown that amicus briefs use more social science than the parties' briefs<sup>232</sup> and also that much of the social science cited by courts has come from the amici rather than the parties.<sup>233</sup> One explanation for these findings is that while the parties must focus on the specific facts of the case, amici have more latitude to present broader types of factual information, such as social science. Similarly, in the gay rights context, there is evidence that gay and civil rights organizations have made extensive reference to the available social science information in their amicus briefs.<sup>234</sup> Furthermore, it might be expected that their successive participation as amici will result in these organizations developing greater expertise in social science information.<sup>235</sup>

### 3. *The Participation of Scientific and Professional Associations, Such as the APA, as Amici Curiae*

Finally, a number of scientific, professional, and medical organizations<sup>236</sup> have contributed to the tide of social science

232. Rosenblum, *supra* note 25, at 69; Acker, *supra* note 69, at 30-31. However, Acker cautions:

The amici's contributions to the Supreme Court's use of social science materials thus do not appear to be either as unique or substantial as might be expected from the generally greater citation and discussion of social science authorities that occurred in their briefs. This in part may be because the amicus briefs were prepared on behalf of organizations or entities with little apparent expertise in scientific methods or subject matter.

*Id.* at 33. *But see* Acker, *supra* note 226, at 25-26 (finding an equivalent amount of social science in the parties' and amici's briefs in 1963-1985 U.S. Supreme Court death penalty cases).

233. Marvell, *supra* note 25, at 192 (50% of the empirical data found in briefs and ultimately cited by the courts came from amicus briefs rather than the parties' briefs); Rosenblum, *supra* note 25, at 68-69 (43% of social science ultimately contained in the courts' opinions had been presented in amicus briefs).

234. *See, e.g.*, LESBIAN MOTHER LITIGATION MANUAL, *supra* note 221 (containing two briefs prepared by Lambda and one brief prepared by the Women's Law Project and others).

235. In the context of death penalty cases, Acker notes the efforts of the NAACP Legal Defense Fund:

This is a dramatic demonstration of the contribution that organizations can make in helping to call social science authorities to the Court's attention, a contribution that is no doubt facilitated by a combination of the expertise of the briefwriters and the experience and sense of continuity that are gained as organizations participate in a series of cases that share common issues.

Acker, *supra* note 226, at 27.

236. For instance, the American Psychiatric Association, the American Public

information provided to courts in gay rights cases. The participation of this group of amici is noteworthy in two respects. First, their motivation for submitting briefs is slightly different than either gay litigants or civil rights organizations. Gay litigants, seeking to win their particular case, and civil rights groups, wishing to advance the cause of gay rights, use social science instrumentally to achieve their litigation objectives. On the other hand, scientific organizations appear to be primarily motivated by the desire to inform courts of relevant scientific information and, secondarily, by the normative goal of achieving greater equality for gay individuals.<sup>237</sup> Melton emphasizes the importance of these dual missions with respect to psychology:

With the openness of some courts to consideration of such issues, the potential social consequences of their decisions, and the availability of a relevant body of psychological research, the social responsibility of psychology to bring its knowledge to the legal system is clear.

This duty is heightened by the fact that psychology and the other mental health disciplines historically have contributed to societal prejudice against lesbians and gay men.<sup>238</sup>

The participation of scientific organizations as amici in gay rights cases is also noteworthy because of their expertise in the social sciences.<sup>239</sup> That is, the dissemination of relevant social science research and theory is peculiarly within the province of

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Health Association, and the National Association of Social Workers have filed amicus briefs.

237. "The relationship between the social sciences and the lesbian and gay male civil rights movement has been a close one." Stephen F. Morin & Esther D. Rothblum, *Removing the Stigma: Fifteen Years of Progress*, 46 AM. PSYCHOLOGIST 947, 947 (1991).

238. Gary B. Melton, *Public Policy and Private Prejudice: Psychology and Law on Gay Rights*, 44 AM. PSYCHOLOGIST 933, 934-35 (1989) (citation omitted); see also Steve Susoeff, Comment, *Assessing Children's Best Interests When A Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 859 n.36 (1985): "Recognizing the impact of modern research, the American Psychological Association has encouraged mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexuality."

239. "Professional social science associations are a natural source for the neutral expertise the Court needs to assess competing social science claims." Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 153 (1993); see also Tanke & Tanke, *supra* note 204, at 1137 (advocating the use of amicus briefs to provide social science information to the courts.)



these organizations. Acker, noting the dearth of briefs filed by scientific organizations in criminal cases decided by the U.S. Supreme Court,<sup>240</sup> stressed the importance of the participation of these organizations:

The handful of amicus briefs submitted on behalf of scientifically competent organizations in the sample of randomly selected cases were laden with discussion of social science materials. They demonstrate dramatically that such organizations can make an important contribution to the transmission of social science information to the justices, and that social scientists need not serve only as after-the-fact critics of the Court's opinions.<sup>241</sup>

Thus, the appearance of scientific organizations as amici in gay rights cases increases the probability that courts will receive relevant social science information.

Since an exhaustive discussion of the contributions of all scientific organizations participating in gay rights cases is beyond the scope of this Article, the following discussion will focus on one such organization—the American Psychological Association (APA).<sup>242</sup> Beginning in 1984, the APA has filed amicus briefs in eight cases involving gay rights.<sup>243</sup> In 1985, the APA also “estab-

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240. After discussing the high incidence of social-science in briefs prepared by scientific amici, Acker comments: “These figures reflect the substantial potential that organizations with scientifically skilled memberships have for transmitting social science information to the justices through preparing and submitting amicus curiae briefs. The relative dearth of briefs prepared by scientifically competent organizations, however, also suggests that this potential is being vastly underutilized.” Acker, *supra* note 69, at 34.

241. *Id.* at 40 (footnote omitted).

242. Interestingly, Rustad & Koenig, *supra* note 239, at 153, n.307 did a LEXIS computer search of amicus briefs filed by various organizations in all U.S. Supreme Court cases from September 1979 to May 1993. They located numerous briefs by the APA, one brief by the American Sociological Association, and none by either the American Political Science Association or the American Economic Association.

243. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (in conjunction with the APHA); *New York v. Uplinger*, 467 U.S. 246 (1984) (in conjunction with the American Psychiatric Association and the APHA); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990); *Stover v. Georgia*, 350 S.E.2d 577 (Ga. 1986) (in conjunction with The Institute for Advanced Study of Human Sexuality, the American College of Sexologists,

lished the Society for the Psychological Study of Lesbian and Gay Issues, a major focus of which is research for amicus briefs in civil rights cases involving gay defendants and plaintiffs."<sup>244</sup> In addition to APA's direct dissemination efforts as amici, it has also contributed to the promulgation of social science information through indirect means.<sup>245</sup>

APA's participation as an amicus in gay rights litigation has not been without detractors both within and without organized psychology. For instance, Posner disparages the content of APA's

Society for the Scientific Study of Sex, and others; *Kentucky v. Wasson*, 842 S.W.2d 487 (1992) (in conjunction with Kentucky Psychological Association, Kentucky Psychiatric Association, Kentucky Chapter of the NASW, and Kentucky Society for Clinical Social Workers); *Texas v. Morales*, 869 S.W.2d 941 (1994) (in conjunction with the NASW and Texas Chapter of the NASW); *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994) (in conjunction with American Academy of Child and Adolescent Psychiatry, the NASW, and Virginia Chapter of the NASW).

244. Susoeff, *supra* note 238, at 859 n.36 (citation omitted).

245. First, some of the briefs have been used in other cases with APA's permission. For instance, in *Bowers*, the defendant attached the APA-APHA-American Psychiatric Association Supreme Court brief from *Uplinger* to his own appellate brief in the Eleventh Circuit case. A new brief was prepared by APA and APHA for the Supreme Court case. Second, at least one of the briefs has been published, see Melton, *supra* note 238, at 935-40 for the APA brief in *Watkins*. Others have been summarized in articles. See Donald N. Bersoff & David W. Ogden, *APA Amicus Curiae Briefs: Furthering Lesbian and Gay Male Civil Rights*, 46 AM. PSYCHOLOGIST 950 (1991) (discussing the first four cases and a fifth case, *Stover*, which involved a heterosexual man's alleged violation of the Georgia sodomy statute); Tori de Angelis, *Kentucky High Court Repeals Sodomy Law*, 23 AM. PSYCHOL. ASS'N MONITOR 1 (1992) (discussing the APA brief in *Wasson*). According to de Angelis, the brief made three points:

One elaborates on the right-to-privacy issue from a psychological standpoint, stating that homosexual intimacy doesn't hurt others and is necessary for gays' psychological health. . . . In its second point, the brief states that both social-science research and opinion support the courts' contention that the Kentucky statute violates Mr. Wasson's right to equal protection. . . . In its third point, the brief points out that the Kentucky law banning sodomy stymies public-health efforts to combat AIDS, and harms gay men's mental health.

*Id.* at 2. Third, as noted above, the APA makes these briefs available to interested parties. Therefore, copies of these briefs may be submitted to various courts without the APA's direct participation. Information from the APA also reaches the court by a number of very indirect and circuitous routes. For instance, in one child custody case, an expert wrote to the judge and emphasized that he agreed with the APA's recommendation that sexual orientation should not be the sole or primary consideration in deciding custody. *Doe v. Doe*, 284 S.E.2d 799, 803 (Va. 1981).

brief in *Bowers*.<sup>246</sup> Similarly, Cameron and Cameron assert that the APA misled the U.S. Supreme Court in its presentation of some of the research in *Bowers*.<sup>247</sup> While there has only been a modicum of criticism of the APA's participation in gay rights cases, there has been considerable discussion of the APA's briefs in other areas and some of the issues raised in those contexts have equal applicability to the gay rights area.<sup>248</sup>

246. RICHARD A. POSNER, *SEX AND REASON* 346 (1992):

But to see the Georgia statute in this light one must know something about the history of homosexuality and of attempts to repress it; and on the evidence of the briefs and opinions in *Bowers v. Hardwick*, what lawyers and judges mainly know is their own prejudices plus what is contained in judicial opinions. It is true that the American Psychological Association and the American Public Health Association filed an amicus curiae brief in *Hardwick* that contains many pertinent data on oral and anal sex, both heterosexual and homosexual, and on homosexuality generally. But it is full of sappy statements—or so at least they would seem to the justices—such as “oral-genital sex leads to better and happier relationships,” and it pretends that homosexuals and their relationships are just like heterosexuals and their relationships.

247. Paul Cameron & Kirk Cameron, *Did the American Psychological Association Misrepresent Scientific Material to the US Supreme Court?*, 63 *PSYCHOL. REP.* 255, 269 (1988): “Ostensibly, an association of psychologists should perform according to its standards when attempting to influence public policy. The American Psychological Association does not appear to have fulfilled this obligation in its *amicus curiae* brief to the Supreme Court.” However, Cameron's position on homosexuality has been the subject of considerable controversy. According to one news report:

In 1984, the American Psychological Association cancelled Paul Cameron's membership for violating its ethical principles. The same year, the Nebraska Psychological Association adopted a resolution disassociating itself from Dr. Cameron's writings and public statements on sexuality.

In 1985, the American Sociological Association said “Dr. Cameron has consistently misinterpreted sociological research on sexuality, homosexuality and lesbianism.” A judge in Texas referred to “evidence” provided by Cameron as an “expert” as fraudulent misrepresentation. Lauten's Sources Lack Credibility, *VANCOUVER SUN*, Nov. 15, 1994, at A12. *But see* Paul Cameron & Mark Pietrzyk, *I am Not a Sham*, 211 *THE NEW REPUBLIC* 6 (Oct. 312, 1994).

248. Thomas Grisso & Michael J. Saks, *Psychology's Influence on Constitutional Interpretation: A Comment on How to Succeed*, 15 *LAW & HUM. BEHAV.* 205 (1991) argues that the APA should write amicus briefs to inform the courts of relevant information about human behavior, not to advance their own policy and value preferences: “Psychology's true power, and its most important contribution to society, lies in its science, not in its interpretation of the Constitution.” *Id.* at 210. *See generally* Rustad & Koenig, *supra* note 239, for a discussion

In summary, the cumulative dissemination efforts of gay litigants, civil rights organizations, and scientific associations have ensured that courts deciding gay rights cases have at their disposal a wide variety of social science information. However, there are at least two reasons why this cannot be the sole explanation for the heightened citation of social science by these courts. First, as the data above indicate, information provided by litigants and amici form only a part of the total social science which is cited in these cases. Courts obtain additional social science through independent research, including "finding" it in prior cases. Second, the mere presentation of social science information does not guarantee that courts will ultimately include this information in their opinions or that all of the available information will be utilized. Thus, it is still necessary to consider the specific purposes for which the information is cited as well as the historical context of these decisions.

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of selective distortion in amicus briefs.

For a debate regarding the APA's brief in *Lockhart*, 476 U.S. 162 (1986), see Rogers Elliott, *Social Science Data and the APA: The Lockhart Brief as a Case in Point*, 15 L. & HUM. BEHAV. 59 (1991), Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77 (1991), Rogers Elliot, *Response to Ellsworth*, 15 LAW & HUM. BEHAV. 91 (1991); see also Bersoff, *supra* note 172; Samuel R. Gross, *Overruled: Jury Neutrality in Capital Cases*, 21 STANFORD LAW. 11 (1986); *In the Supreme Court of the United States: Lockhart v. McCree—Amicus Curiae Brief for the American Psychological Association*, 42 AM. PSYCHOLOGIST 59 (1987).

For competing views on the APA's brief in *Maryland v. Craig*, 497 U.S. 836 (1990), see Gail S. Goodman, et. al., *The Best Evidence Produces the Best Law*, 16 LAW & HUM. BEHAV. 244 (1992); Ralph Underwager & Hollida Wakefield, Comment, *Poor Psychology Produces Poor Law*, 16 LAW & HUM. BEHAV. 233 (1992).

For a discussion of the APA's brief in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), see Gerald V. Barrett & Scott B. Morris, *The American Psychological Association's Amicus Curiae Brief in Price Waterhouse v. Hopkins: The Values of Science Versus the Values of the Law*, 17 LAW & HUM. BEHAV. 201 (1993); Susan T. Fiske, et. al., *What Constitutes a Scientific Review?: A Majority Retort to Barrett and Morris*, 17 LAW & HUM. BEHAV. 217 (1993); Jane Goodman, *Evaluating Psychological Expertise on Questions of Social Fact: The Case of Price Waterhouse v. Hopkins*, 17 LAW & HUM. BEHAV. 249 (1993); Saks, *supra* note 227.

For opposing views on the APA's briefs in *Thornburgh v. American College of Gynecologists and Obstetricians*, 476 U.S. 747 (1986) and *Hartigan v. Zbaraz*, 484 U.S. 171 (1987) (two adolescent abortion cases), see William Gardner, et. al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895 (1989); Gary B. Melton, Comment, *Knowing What We Do Know: APA and Adolescent Abortion*, 45 AM. PSYCHOLOGIST 1171 (1990).

## IV. CONCLUSION

The extensive and broad-ranging litigation efforts of gay individuals and organizations to impel revolutionary legal change are likely to continue until the United States Supreme Court recognizes some form of civil rights for gay citizens. In the interstitial legal skirmishes, fought in state and lower federal courts across the country,<sup>249</sup> gay litigants will continue to wield social science as a weapon, and at least some courts will continue to rely on this information as justificatory ammunition in their opinions. In the absence of supportive legal doctrine, factual issues, illuminated by social science information, assume paramount importance.

In some senses, the utilization of social science in the gay rights context is most closely akin to the ongoing debate about the death penalty. Since the Supreme Court has steadfastly refused to declare the death penalty unconstitutional *per se*, litigants have resorted to collateral attacks on capital punishment, e.g., its discriminatory application, aided by the available social science. The social science information keeps bubbling up in different contexts because the most direct avenue of legal change has been closed. The same analysis can be used for gay rights cases. Since no overarching doctrinal shift has occurred, it could be expected that social science will keep coming to the fore to promote change.

In the final analysis, social science information may affect the legal position of gay individuals in a more circuitous fashion, by influencing public opinion about homosexuality. If social science has an ameliorative effect on public opinion regarding gay individuals,<sup>250</sup>

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249. Gay rights advocates can also take their message to the legislatures. "[C]ourts are not the only means for redressing grievances. Lesbian and gay male citizens have the right to petition their state and federal governments for laws protecting intimate sexual behavior or for repeal of current laws." Bersoff & Ogden, *supra* note 245, at 955.

250. The APA has "sponsored research and public education programs to help dispel anti-gay stereotypes" Susoeff, *supra* note 238, at 872 n.127. Educational efforts have also been launched at schools:

Increasingly, gay advocates see school and youth programs as critical not only for gay youngsters, but the gay movement. "I really think it is the most explosive, fastest developing front in terms of lesbian and gay activism," said Al Kielwasser, coordinator of Project 21, a national alliance promoting the inclusion of information about gays in curricula and textbooks. "What many groups realize," he said, "is that if we are fighting hate crimes or challenging bigoted legislators—so much of that stems from the fact that as children, people are not given *fair and*

then this may translate into legal change.<sup>251</sup> "In the long run, then, social science research affects the legal process because many social science findings become part of the conventional culture which all parties—clients, lawyers, and judges—accept and agree upon."<sup>252</sup> If the Supreme Court perceives that social consensus requires the recognition of gay rights, then it may reconsider its analysis.<sup>253</sup> The Supreme Court may be reluctant to precede social change,<sup>254</sup> given

*accurate information* about who we are. . . . It's just practical for our community to make sure another generation is not raised to hate."

Tammerlin Drummond & Bettina Boxall, *Gay Rights Fight Moves on Campus*, L.A. TIMES, Jan. 10, 1994, at A1 (emphasis added); see Maria E. Odum, *Topic of Homosexuality Shows Diversity in Sex Education*, WASH. POST, Dec. 27, 1992, at b1, for a discussion of the "Children of the Rainbow" and other curricula regarding homosexuality.

251. Dressler also emphasizes the importance of judicial education: Frankfurter again has the answer: "Experience attests that . . . habits and feelings will yield, gradually though this be, to law and education." However, the law today is as much the cause of the problem as it is the possible cure. Education, therefore, not only without but also within the legal profession—and within the courtroom—must be attempted.

Dressler, *supra* note 135, at 26.

252. Lochner, *supra* note 23, at 847; see also Levine & Howe, *supra* note 22, at 190 (social science is deeply embedded in the mass culture). A poignant example of the penetration of social science information regarding homosexuality into mass culture comes from *People Magazine*:

Sharon Bottoms, 24, of Richmond, Va., the openly gay mother who lost custody of her son, Tyler, 2, last year after a judge ruled her conduct "immoral" (People, 9/27/93), won it back on June 21 when a Virginia Court of Appeals overturned that decision, noting that "*the social science evidence showed that a person's sexual orientation does not strongly correlate with that person's fitness as a parent.*"

Sabrina McFarland, *Passages*, PEOPLE, July 4, 1994, at 54 (emphasis added); see also Johnson v. Schlotman, 502 N.W.2d 831 (N.D. 1993), a child custody case in which the concurring opinion included social science information from a newspaper article:

Generally, there are no particular developmental or emotional problems for children raised by gay or lesbian parents. Dr. Michael E. Lamb, Chief, Section on Social and Emotional Development, National Institute of Child Health and Human Development, quoted in Daniel Goleman, *Gay Kids Not Psychologically Disadvantaged*, *Studies Say*, MIAMI HERALD, Jan. 1, 1993.

502 N.W.2d at 838.

253. See *Bowers v. Hardwick*, 478 U.S. 186 (Blackmun, J., dissenting), in which Justice Blackmun expresses the hope that the Court will soon reconsider its position on homosexuality.

254. "[T]he *Hardwick* Court sought shelter from charges of judicial activism at the expense of a vulnerable homosexual minority." Kohler, *supra* note 134, at 141 (footnotes omitted).

its experience in the segregation and abortion contexts, but should such change occur the Court may be willing to follow. Writing about the use of social science in death penalty cases, but with eerie similarity to gay rights issues, Justice Scalia commented:

The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the “evolving standards of decency”; to determine, not what they *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society’s apparent skepticism.<sup>255</sup>

Thus, ironically, gay individuals may have to take their case to the public before they can win their day in the Supreme Court.

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255. *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989).

