

PSYCHOLOGY AND THE POLITICS OF SAME-SEX DESIRE IN THE UNITED STATES: An Analysis of Three Cases

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Psychological science has assumed an increasingly explicit role in public policies related to same-sex desire in the United States. In this article, we present a historical analysis of the relationship between policy discourse and scientific discourse on homosexuality produced within U.S. psychology over the 20th and early 21st centuries through the lens of three cases: *Bowers v. Hardwick* (1986), *Lawrence v. Texas* (2003), and *Perry v. Schwarzenegger* (2010). Our analysis suggests that, for the majority of its disciplinary history, psychology produced knowledge that supported a status quo of legal and cultural subordination for same-sex-attracted individuals. The discipline's shift in understanding of homosexuality, reflected in a 1975 policy statement of the American Psychological Association, reversed this relationship and opened up space for advocacy for social and political change regarding homosexuality. Our analysis of policy decisions rendered by the courts reveals the increasingly important role psychological science has assumed in challenging the legal subordination of same-sex-attracted individuals, though the basis upon which psychological science has sought to inform policy remains limited. We conclude with a critical discussion of the type of knowledge claims psychologists have traditionally used to advocate for gay and lesbian rights, suggesting the vitality of a narrative approach which can reveal the meaning individuals make of legal subordination and political exclusion.

Keywords: homosexuality, public policy, law, marriage, lesbian/gay/bisexual

Everything that diverges from the normal may to a certain extent be called unnatural, genius and beauty among them. (Lord Alfred Douglas, quoted in Cory, *The Homosexual in America*, 1951, p. 32)

What exactly have psychological experts done? Have they spoken the truth or manufactured deception? Have they expanded the realm of freedom or perfected the means of control? (Ellen Herman, *The Romance of American Psychology*, 1995, p. 10)

Over the course of its disciplinary history, psychology has sought to produce knowledge that might inform public policy. In the United States, the growth of the discipline occurred in a century of pressing need for knowledge that would serve to protect and advance national interests, facing such issues as immigration, race relations, and warfare (Herman, 1995). As public policies

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were debated and crafted to address these issues, psychology was among the scholarly disciplines to seek to influence the cultural and political context.

In this article, we consider the role of psychological science in informing public policy related to one area of considerable cultural and political contention over the 20th and early 21st centuries: same-sex desire. Fusing analysis of both policy texts and texts produced by psychological scientists, we offer a critical historical perspective on the relationship between scientific and policy discourse related to same-sex desire and behavior.

To what extent has psychological science, either directly or indirectly, assumed a role in particular policies related to same-sex-attracted individuals?¹ Our analysis centers on three cases that address two specific areas of public policy contention in the United States: the right of same-sex-attracted individuals to (1) engage in private consensual sexual activities as adults and (2) form legally recognized unions equivalent to opposite-sex marriage. Two cases we review (*Bowers v. Hardwick*, 1986; *Lawrence v. Texas*, 2003) deal with the former issue (i.e., sodomy laws) and have now been definitively decided in favor of the Constitutional protection of private, consensual, same-sex behavior. The third case we review (*Perry v. Schwarzenegger*, 2010) deals with the latter issue (i.e., marriage laws) and remains unresolved at present, on appeal as of our writing in 2011.

With regard to psychological science, we limit our analysis explicitly to empirical texts produced within the discipline of psychology in the United States from 1890 to 2010. We recognize that empirical texts produced in related disciplines, especially psychiatry, bear considerable relevance for our analysis. But our primary concern is the relationship between psychology as a distinct discipline, seeking to establish its epistemological particularity in the 20th century by focusing on distinct questions and practices (e.g., intelligence and personality testing), and public policy regarding same-sex desire. Thus we exclude empirical studies produced in psychiatry and empirical studies produced in psychology outside of the United States to limit the scope of our analysis. Our analysis is not intended to offer a comprehensive history of the legal subordination of same-sex-attracted individuals (see Mogul, Ritchie, & Whitlock, 2011) or of the relationship between science and policy regarding same-sex desire (see Minton, 2001; Terry, 1999). Rather, we aim to link policy texts and texts produced by psychological scientists to examine the interrelationship between policy and “expert” knowledge produced in psychology.

Our analysis suggests that the vast majority of empirical work produced within U.S. psychology over the 20th century supported a status quo of legal and cultural subordination for same-sex-attracted individuals. This work was characterized by an understanding of homosexuality as a form of “abnormality” or “sickness,” primarily with regard to gender expression (Hegarty, 2007a; Minton, 1986). This scientific narrative supported state sodomy laws (i.e., laws that explicitly criminalized same-sex behavior)—the major focus of political struggle

¹ Given the diversity of labels individuals with same-sex desire currently employ (e.g., gay, lesbian, bisexual, queer, spectrum), we follow other scholars by referring to this population using the most inclusive term possible (e.g., Savin-Williams, 2001, 2005).

for same-sex-attracted individuals over the 20th century (Eskridge, 2008). A dramatic shift occurred in the discipline, however, with its formal resolution adopted in 1975 (Conger, 1975) which repositioned the scientific narrative of homosexuality from *sickness* to *species* (Hammack, Mayers, & Windell, in press; see Foucault, 1978)—a shift from the idea that same-sex desire is indicative of psychopathology to the idea that it is indicative of a legitimate minority identity akin to race and ethnicity (though the latter narrative obviously relied upon the former as a way of understanding sexual desire). The psychological science which ultimately sought to inform the three cases we consider assumed this minority narrative of homosexuality.

While the forms of psychological knowledge designed to advocate for gay and lesbian rights shifted from a *reproductive* to a *transformative* mode (Sampson, 1993), we conclude the paper with a critical analysis of their underlying arguments and call for greater use of underutilized epistemological approaches which possess powerful possibilities for social and political advocacy (Frost & Ouellette, 2004; Hammack & Cohler, in press). Following the growing momentum of narrative psychology, which spans subfields of the discipline to examine the way in which thought, feeling, and action are *storied* as individuals make meaning of experience (e.g., Bruner, 1990; Hammack, 2008; McAdams, 1996), we advocate for epistemological approaches that shed light on the lived experience of legal and cultural subordination. We suggest that such approaches both provide voice to the historic silence that accompanies subordination (Fivush, 2010) and compelling evidence of injustice which might influence public policy and legal debate (Nussbaum, 2010). A key empirical aim in this approach is to consider the interrelationship between *master narratives* of sexual desire and identity, constructed in particular scientific and cultural contexts, and *personal narratives* of the meaning individuals make of their desire and sexual subjectivity (Hammack, 2005; Hammack & Cohler, in press).

The intent of our analysis is to interrogate the relationship between policy discourse and scientific discourse produced within the discipline of psychology, with the aim to understand whether the “experts” historically, as Herman (1995) says, “expanded the realm of freedom or perfected the means of control” (p. 10). This kind of critical historical analysis is not new (e.g., Fox, Prilleltensky, & Austin, 2009), but it has never been undertaken with regard to same-sex desire through the lens we attempt here (cf. Herek, 2007, 2010). Though the discipline of psychology has consistently struggled to integrate sufficient consideration of history and historical time in its conceptual frameworks and interpretations of empirical findings, a vibrant conversation has occurred within the discipline since at least the 1970s about the historical and political basis of psychological knowledge (e.g., Cushman, 1990; Gergen, 1973). We view the current analysis as part of this effort to inspire greater reflexivity about the interrelationship among history, politics, and the construction of psychological science.

Our analysis is organized according to two key questions raised about same-sex desire from the late 19th to early 21st centuries in the United States. First, should same-sex sexual behavior be legally permissible? This question was addressed through a lengthy legal debate about state sodomy laws, resolved definitively in 2003 when the U.S. Supreme Court rendered all such laws unconstitutional (*Lawrence v. Texas*, 2003). Second, should same-sex couples be

allowed to form legally recognized unions on par with opposite sex couples? This question remains the most actively debated in contemporary policy and cultural discourse on same-sex desire, and it remains unsettled.

Should Same-Sex Sexual Behavior Be Legally Permissible?

In the United States, the oldest public policy issue regarding same-sex desire has centered on the legal status of same-sex sexual behavior itself. That is, is private, consensual sex between adults of the same sex legal? Laws criminalizing nonvaginal sexual activity (either heterosexual or homosexual) had existed since the colonial period, inherited from England's "buggery" statutes (Oaks, 1979). In colonial Connecticut, sodomy was termed "carnal copulation" and punishable by death (Conn. Gen. Laws, 1672, p. 9).

Independence from Britain did not immediately affect the legal context of same-sex behavior. In New York, sodomy was prohibited as the "vice of buggery" and punishable by death (New York Laws, Chap. 21, 1787). By 1868, 38 states had explicitly outlawed homosexual acts as sodomy. Eventually, all 50 states had passed legislation criminalizing same-sex sexual contact. Illinois was the first to overturn its sodomy law in 1961, adopting the Model Penal Code recommended by the American Law Institute (ALI). The Model Penal Code stated that the issue of private sexual behavior between two consenting adults "fell under the provenance of spiritual authorities rather than civil authorities" (Andersen, 2004, p. 20), suggesting that these were issues of morality which should not be regulated by the law (see Eskridge, 2008).

The basis of early statutes prohibiting same-sex activity relied upon notions of certain sexual acts as more "natural" than others. Georgia's law, initially passed in 1833, read: "Sodomy is the carnal knowledge and connection against the order of *nature* by man with man, or in the same *unnatural* manner with woman" (Ga. Gen. Laws, 1838, §35, p.152; emphasis added). The punishment for engaging in such acts was severe, but less so when compared with the death penalty of earlier statutes: "The punishment of sodomy shall be imprisonment at labor in the penitentiary *for and during the natural life* of the person convicted of this detestable crime" (Ga. Gen. Laws, 1838, §35, p.152; emphasis added). Such acts were considered to violate notions of "natural" sexual behavior. The fact that many of the statutes explicitly referred to same-sex activity as a "crime against nature" (e.g., Cal. Stat., 1850, Chap 99 §48; Ala. Code, 1852, §3235) reveals the rationale underlying the policies.

A key conceptual issue was thus at stake in the legal question of homosexual behavior as state sodomy laws began to be challenged in the late 20th and early 21st centuries: Does homosexual behavior violate the "natural" order of human sexuality? This question speaks directly to the fundamental *meaning* of same-sex desire for behavior and human development, and it raises the question of whether sexual mores (or mores in general) constitute part of a universal "natural" order. The discipline of psychology produced knowledge that directly addressed this question and hence sought to inform public policy regarding same-sex sexual behavior. We review knowledge produced and disseminated in peer-reviewed outlets in psychology in relation to the two most significant policy decisions regarding sodomy laws in the United States—*Bowers v. Hardwick* (1986), in

which the U.S. Supreme Court upheld the constitutionality of Georgia's state sodomy law (thereby maintaining the legitimacy of criminalizing homosexual behavior), and *Lawrence v. Texas* (2003), in which the Supreme Court reversed its prior decision and ruled that all state sodomy laws violated the U.S. Constitution.

Prelude to *Bowers v. Hardwick*: Psychology of Homosexuality to 1975

The rhetoric of state sodomy laws assumed an enduring normative order with regard to sex and explicitly framed homosexual practices as “unnatural” acts. The rationale for prohibiting such behavior thus relied upon a notion of penal-vaginal intercourse as the only form of sexual behavior meant to exist in nature, with historical and cultural variations representing aberrations of “natural law.” The regulation of homosexuality thus relied on a static concept of *normativity*—a concept which psychology, in fact, helped to create.

In its early years, U.S. psychology was captivated by the idea of the norm. Following ideas about intelligence heavily influenced by Sir Francis Galton (1909/2004) and other proponents of eugenics, psychologists developed tests that might indicate an individual's placement on some ideal spectrum of performance, personality, or adjustment. The logic underlying this idea was that psychological categories like intelligence, personality, and development represented timeless indices with standard, idealized forms, awaiting the mapping of psychological scientists, all in the interests of creating a superior “breed” of individuals or groups. A key aim of eugenics, adopted by political regimes like Nazi Germany, was to eliminate the “abnormal” or “feeble,” since such individuals were perceived as somehow “defective” and thus “contaminating” the group. Though not taken to the extreme as in Nazi Germany, the underlying ideas of eugenics were also common in U.S. science and policy rhetoric and were linked to ideas of national identity and citizenship as the United States dealt with massive immigration in the late 19th and early 20th centuries (Canaday, 2009; Ordover, 2003).

The history of psychology's adoption of this line of thinking has been well-charted, particularly with regard to race and intelligence, where scientific racism was quite explicit (see Richards, 1997). Psychology's treatment of gender and sexuality was equally complicit in promoting a hierarchical view of normativity (Hegarty, 2007a), thus producing knowledge that supported the underlying rationale of the state sodomy laws of the 19th and 20th centuries. The clearest example within the discipline occurred with Terman and Miles' (1936) classic study of sex and personality.

Lewis Terman, a professor of psychology at Stanford University, was well-known for his pioneering work on intelligence testing and his commitment to the eugenics movement and the ideas of Francis Galton (Minton, 1988). Terman and Miles hoped to do for the concept of gender what they and others had achieved with the concept of intelligence—to establish conceptual normativity (what we may now call in hindsight *reification*) through quantification. They expressed an explicit desire to develop norms and instruments that could detect deviations from norms with regard to masculinity and femininity, thus producing an ahistorical, decontextualized notion of normativity with regard to gender.

Terman and Miles had hoped to use a sample of homosexual men to validate

their instrument. Operating on the assumption that the desire to engage in homosexual behavior indicated an *inversion* of gender (Ellis, 1925), they expected homosexuals (all of whom were recruited from institutions such as prisons) to present profiles similar to women on the M-F scale. When they discovered that this finding did not emerge for all the men who identified as homosexual, they argued for two distinct “types” of homosexuals—the “true inverts” (“passive homosexuals”) versus “perverts” (“active homosexuals,” whose scores were actually higher on masculinity than heterosexual-identifying subjects). Rather than interpreting their data through a lens that might have challenged the status-quo thinking within psychology at the time, Terman and Miles appear to have unquestioningly (and rigidly, in the face of disconfirming evidence) assumed the gender inversion view of homosexuality.

Using the tool of the psychological test, with its scientific authority, Terman and Miles began a tradition within the discipline of seeking to construct a profile of “the homosexual” that would aid clinicians and legal officials.

If it should turn out that young men with such scores are in fact potential homosexuals, preventive measures might be found that would direct their sexual development into normal channels. The “I” scores may also be found useful in the legal disposition of the cases of homosexuality continually coming before the courts. . . . [I]t seems reasonable that different types of treatment should be accorded those found guilty of homosexual acts on the basis of whether they are true homosexuals or mere perverts. (p. 264)

For Terman and Miles, the “true” homosexual is the “passive” homosexual—an individual who clearly violates the norms of gender: “The passive male homosexual . . . takes advantage of every opportunity to make his behavior as much as possible like that of women” (p. 248). A test related to gender, then, might prove key to the detection and control of such individuals.

The narrative of gender inversion promulgated in this early psychological research was not merely a question of individual differences on a particular trait (i.e., masculinity-femininity). Rather, it was part of a narrative of *sickness* and *abnormality* that had emerged in Europe in the late 19th century to argue that same-sex desire was indicative of a particular “type” of person, and that such desire may be beyond conscious control (see Bullough, 1979; Bullough & Bullough, 1997; Foucault, 1978). These ideas emerged initially not from European psychology or psychiatry but from the new discipline of “sexology,” particularly in Germany (e.g., Hirschfeld, 1922/2000; Krafft-Ebing, 1886). There is evidence to suggest that this scientific narrative actually emerged in an attempt to ensure compassionate treatment—rather than criminal condemnation—for individuals with same-sex desire (Brennan & Hegarty, 2009; Bullough & Bullough, 1997).

Regardless of its perhaps more benevolent intent, the narrative of sickness supported the underlying rationale of state sodomy laws by suggesting that homosexuality represented a form of abnormality. Writing in the *Journal of Personality*, a leading outlet in U.S. psychology, Moore (1945) reviewed the existing literature on homosexuality at the time, concluding:

[A]ny displacement of the sexual drive which renders impossible the attainments of the essential end of the sexual function must by its very nature be abnormal.

Homosexuality and its fruitless acts must therefore be a pathological condition . . . (p. 50)

Commenting directly on laws against homosexuality and whether the sickness narrative would suggest repeal of such prohibitions, Moore (1945) is clear:

Homosexuality is to a very large extent an acquired abnormality and propagates itself as a morally contagious disease. . . . It tends to bring about more and more unfruitful unions that withdraw men and women from normal family life, the development of homes, and the procreation of children. The growth of a homosexual society in any country is a menace . . . to the welfare of the state. . . . [I]t is . . . a matter of importance to control the spread of homosexuality . . . (p. 57)

Speaking from a place of scientific authority, in a highly respected outlet in the discipline, Moore's (1945) direct commentary on homosexuality and the law strongly supported a conception of certain forms of sexual activity as more natural than others. This scientific rationale directly mirrored the rationale in support of sodomy laws at the time.

The literature produced in U.S. psychology in the 1930s and 1940s was primarily concerned with the use of established psychological tests to "detect" homosexuality. For example, Geil's (1944) study suggested that the Goodenough human figure drawing test could be used to "reveal cases of undetected homosexuality and possibly even latent homosexuality" (p. 307). The assumption was that homosexuals "would draw a man with noticeable feminine characteristics" (p. 307).

The majority of studies conducted in the 1940s and 1950s focused on the use of the Rorschach test to detect same-sex desire (see Hegarty, 2003). Due and Wright (1945) argued that the Rorschach responses of homosexuals revealed signs of "feminine identification" and "confusion and evasiveness with respect to the identification of the gender" (p. 170) in the ink blots. Wheeler (1949) developed particular "signs" of homosexuality in the Rorschach for detection and constructed a profile of the male "homosexual" as "a somewhat paranoid individual with derogatory attitudes toward people, especially women, which is accompanied by a feminine identification" (p. 123). The primary empirical work conducted by U.S. psychologists in this era, then, was concerned foremost with constructing a profile of "the homosexual" as a clinical type, with the underlying assumption of gender inversion entirely unquestioned. This line of scientific rhetoric supported the idea that homosexuality represented an "unnatural" phenomenon—the precise logic underlying state sodomy laws at the time.

While Kinsey's famous study seriously challenged the narrative of homosexual desire and behavior as "abnormal" in popular and scientific discourse (Kinsey, Pomeroy, & Martin, 1948), the first challenge to the sickness narrative explicitly situated within the discipline of psychology occurred with the work of Evelyn Hooker in the late 1950s. Hooker was a research associate in psychology at the University of California, Los Angeles (UCLA) when she received a grant from the National Institute of Mental Health (NIMH) to study "nonpatient, nonprisoner homosexuals" (Hooker, 1993). An experimental psychologist turned clinician, Hooker was inspired by one of her students and by a number of gay men whom she befriended in the Los Angeles area. Using her contacts, she successfully

recruited matched samples of 30 gay and 30 heterosexual men. She administered a battery of projective tests and a life history interview and then asked three well-known clinicians to determine which subjects were homosexual. The expert raters were unable to distinguish the tests of the two groups of men in terms of general adjustment or psychopathology, and the results were published in the *Journal of Projective Techniques* (Hooker, 1957)—an outlet highly regarded among clinical psychologists and psychiatrists at the time. Hooker (1957) offered three key conclusions based on the study:

- (1) Homosexuality as a clinical entity does not exist. Its forms are as varied as those of heterosexuality.
- (2) Homosexuality may be a deviation in sexual pattern which is within the normal range, psychologically.
- (3) The role of particular forms of sexual desire and expression in personality structure and development may be less important than has frequently been assumed. (p. 30)

Hooker's research represented a significant challenge to the paradigm of homosexuality conventionally accepted by psychological science at the time. With a single study, Hooker began to alter the discourse within the discipline on the meaning and consequences of same-sex desire. Perhaps even more important, though, her work represented a form of sophisticated scientific activism in which she sought to use the tools of science for transformative ends in the interest of a subordinated group—a radical move at a time in which psychological and psychiatric science was almost exclusively called upon to support a status quo of legal, social, and cultural subordination for same-sex-attracted individuals. Hooker (1959) also challenged the conventional wisdom of research concerned with detection of homosexuality using psychological tests:

I am not greatly disturbed by the fact that projective techniques are not demonstrably valid means for diagnosing homosexuality. In fact I am rather encouraged by this, because I hope it will force us to reexamine the much oversimplified picture we have had and encourage us to remind ourselves that the first goal of science is understanding, with prediction and control as secondary to it. (pp. 280–281)

Hooker's work thus forced psychologists at the time to reconsider the meaning of homosexuality and its conceptualization as a form of abnormality to be subject to "prediction and control."

In spite of Hooker's (1957) challenge to both the sickness narrative and the idea that certain forms of sexuality are more "natural" than others, the vast majority of empirical work produced within psychology in the 1960s continued to support the underlying rationale of the sodomy statutes. Advocates of the continued utility of psychological tests to detect homosexuality used the discourse of abnormality with regard to homosexual research subjects. For example, a study of the Thematic Apperception Test (TAT) by Gardner Lindzey, one of the 20th century's most respected figures in social and personality psychology, and colleagues (1958) attempted to construct a personality profile of homosexuals in contrast to "normals." They derived a profile markedly similar to Wheeler's

(1949), which was based on responses to the Rorschach and relied heavily on ideas of gender inversion (Lindzey, Tejessy, & Zamansky, 1958). Lindzey and colleagues, like many psychologists before and many after, produced knowledge that supported a vision of homosexuality as linked to problems of mature psychological development, even when disconfirming evidence existed to counter this conception (e.g., Hooker, 1957, 1958).

In this period of the discipline's history, from approximately the 1930s to the early 1970s, it is difficult to see Hooker's work as anything but a dramatic exception to the rule. The cultural and legal backdrop to this period is significant, for it was in this era that a social movement for civil rights for same-sex-attracted individuals began to crystallize and make political gains (see D'Emilio, 1983; D'Emilio & Freedman, 1998). The primary aim of this movement was to challenge the very concept of "normality" and cultural-moral absolutism underlying state sodomy laws and supported—either explicitly or implicitly—by psychological research (Minton, 2001). Thus the discipline was positioned, with the primary exception of Hooker, as an instrument to maintain cultural and legal subordination.

In contrast to disciplines such as anthropology and sociology, which argued for cultural and historical relativism with regard to human behavior (e.g., Benedict, 1934), psychology promulgated a vision of human nature characterized by concepts of "normativity" and moral absolutism—the very concepts that rationalized the state sodomy laws. Yet Hooker's work paved the way for a shift in disciplinary practices and perspectives that would eventually culminate in the removal of homosexuality as a diagnosable mental illness from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1973. In 1975, the American Psychological Association (APA) followed suit and issued a statement which formally rebuked the narrative of sickness that had dominated the discipline throughout the 20th century:

Homosexuality, per se, implies no impairment in judgment, stability, reliability, or general social or vocational capabilities. Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.

The American Psychological Association deplores all public and private discrimination in such areas as employment, housing, public accommodation, and licensing against those who engage in or who have engaged in homosexual activities and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons. Further, the American Psychological Association supports and urges the enactment of civil rights legislation at the local, state, and federal level that would offer citizens who engage in acts of homosexuality the same protections now guaranteed to others on the basis of race, creed, color, and so forth. Further, the American Psychological Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private. (Conger, 1975, p. 633)

With this resolution, the sickness narrative was formally abandoned by the discipline's leading authority in the United States, and the idea that homosexual

practices constituted “unnatural” acts was no longer supported by scientific authority. The discipline had opened up the conceptual space for a new narrative of same-sex desire, from sickness and abnormality to a normative form of identity diversity, precisely as Hooker (1957) had advocated.

The 1975 resolution dramatically altered the relationship between policy rhetoric and the rhetoric of psychological science. While the majority of psychological research prior to 1975 had supported (and, in fact, helped to construct) a master narrative of abnormality with regard to homosexual behavior and identity, thus upholding the rationale of the sodomy statutes, the discipline now became positioned to serve as a force for social and political transformation for same-sex-attracted individuals. A new emphasis on antihomosexual views as indicative of *prejudice* emerged in the discipline (e.g., Bierly, 1985)—critically linking the struggles of same-sex-attracted individuals with other subordinated groups.

From Complicity to Liberation: Psychological Science in *Bowers v. Hardwick* (1986)

The shift in understanding of same-sex desire within the discipline appears to have had a dramatic effect upon the knowledge produced in peer-reviewed outlets in the years immediately preceding *Bowers v. Hardwick*. With a new view of homosexuality as indicative not of pathology but of a legitimate form of identity diversity, research now became concerned with documentation of the unique psychological experience of same-sex-attracted individuals.

In a major paper published in the *American Psychologist*, Morin (1977) argued that psychological research on homosexuality had been characterized by heterosexual bias and called for new programs of research that emphasize questions relevant to the lives of gay men and lesbians, such as the “dynamics of gay relationships; the development of positive gay identity; the positive and negative variables associated with self-disclosure to significant others . . . ; aspects of aging in the gay subculture . . .” (p. 636). In other words, Morin (1977) suggested the need to study gay and lesbian lives on their own terms, to accept the idea of nonheterosexual identities as legitimate and nonpathological, and to chart the unique social, clinical, and developmental needs of this population.

This paradigm shift within psychology—a move toward seeking to understand the lived experience of gay men, lesbians, and bisexuals on their terms—resulted in a complete reorientation of theory and research, from pathology to the construction of identity development theories and models (e.g., Cass, 1979; Coleman, 1981; McDonald, 1982). An issue of the *Journal of Social Issues (JSI)*, the flagship of APA’s Division 9 (Society for the Psychological Study of Social Issues; SPSSI), outlined a new vision for the potential role of the discipline in the study of homosexuality (Morin, 1978). Topics included the coming out process and its distinction between men and women (de Montefiores & Schultz, 1978), aging and the gay and lesbian life course (Kimmel, 1978), and the nature of lesbian relationships (Peplau, Cochran, Rook, & Padesky, 1978). Hooker (1978) summarized the significance of the issue of *JSI* for the discipline in her epilogue:

The publication of an issue of *JSI* devoted exclusively to theory and research by psychologists on social concerns of lesbian and gay persons is a notable event. It constitutes evidence that research devoted to the concerns of this sexual minority

is recognized as a legitimate social-psychological inquiry into an important social issue, and that these concerns are important for the dominant or majority culture as well as for the minority. (p. 131)

Hooker acknowledged the epistemological turning point at play within the discipline—one that she herself could claim credit for initiating over two decades prior. The shift from clinical concerns to basic questions of psychological experience and development, marked by the semantic shift from the study of “homosexuality” as a phenomenon to “gay and lesbian persons” as a minority, represented a narrative shift from *sickness* to *species* within the discipline (Hammack et al., in press).

Psychological science no longer supported, as it had throughout most of the 20th century, the idea that homosexual behavior represented an “unnatural” form of sexual conduct. Empirical work conducted in the years immediately preceding *Bowers v. Hardwick* was characterized largely by the kind of agenda for which Morin (1977) had argued. Studies published in both mainstream psychology journals and the *Journal of Homosexuality* focused on issues like identity development (e.g., Cass, 1979), disclosure (e.g., Gross, Green, Storck, & Vanyur, 1980), self-esteem (e.g., Jacobs & Tedford, 1980), aging (e.g., Kimmel, 1980), same-sex relationships (e.g., Falbo & Peplau, 1980; Kurdek & Schmitt, 1985; Peplau & Cochran, 1981), the effects of stigma (e.g., Fein & Nuehring, 1981; Malyon, 1981), and the unique experience and development of lesbians (e.g., Califia, 1979; Shachar, & Gilbert, 1983). A growing line of empirical work also focused on homophobia and homonegativity among heterosexuals, framing the phenomenon as a form of prejudice which harms the same-sex-attracted individual (e.g., Herek, 1984a, 1984b; Hudson & Ricketts, 1980; Krulewitz & Nash, 1980; Mosher & O’Grady, 1979; Wright & Storms, 1981).

In sum, in the period between APA’s major policy shift in 1975 and the Supreme Court’s consideration of the constitutionality of Georgia’s sodomy law in *Bowers v. Hardwick* (1986), knowledge produced in the discipline revealed a dramatic shift in scientific understanding of homosexuality. Empirical work no longer promulgated a narrative of same-sex desire as indicative of “abnormality” in the realm of gender or sexual expression. Rather, studies increasingly appropriated a *species* narrative of homosexuality (Hammack et al., in press)—that same-sex desire is indicative of a legitimate form of identity diversity, akin to race or ethnicity. It is precisely this scientific narrative which the APA sought to mobilize in order to influence policy change with regard to the criminalization of homosexual behavior, thus abandoning its historic complicity in supporting the underlying rationale of legal subordination for same-sex-attracted individuals.

The constitutionality of state sodomy laws, which remained in effect though largely unenforced in 24 states and the District of Columbia as of 1986, was called into question with the U.S. Supreme Court’s decision to hear the case of *Bowers v. Hardwick* in 1986. Revealing the dramatic turn in the relationship between psychological science and the legal subordination of same-sex-attracted individuals, the APA filed a brief of *amici curiae* in which it presented a compelling argument for a ruling which would strike down the sodomy laws (Brief of American Psychological Association & American Public Health Association, 1985).

The APA brief explicitly challenged the idea that homosexual acts were either “unnatural” or “uncommon,” dismissing decades of empirical work in the discipline that had promulgated just such a notion. The core argument of the brief was that acts criminalized as sodomy represented frequent forms of sexual practice among both heterosexuals and homosexuals and presented no evidence of association with compromised mental health. This claim relied upon dismissal of a considerable amount of empirical work within the discipline prior to 1975, which had *assumed* that homosexuality represented a form of psychopathology.

Consistent with the idea that same-sex-attracted individuals represented *sexual minorities* who experience stigma and discrimination in similar ways as racial and ethnic minorities, the brief also argued that “[t]he threat of criminal punishment actually has harmful psychological consequences for people who wish to engage in the proscribed conduct” (p. 3). The brief suggested that the criminalization of homosexual behavior contributed to the stigma that same-sex-attracted individuals experience, thus potentially compromising positive mental health and development:

[H]omosexuals become stigmatized as “deviants” and are viewed in terms of undesirable stereotypes. This process results in prejudice—called homophobia—against homosexuals by many heterosexual people. (p. 29)

This emphasis in the brief on the negative psychological consequences not of homosexuality itself but of its criminalization reflects the culmination of many empirical studies in the 1970s and 1980s that shifted the lens from understanding homosexuals themselves to understanding those who stigmatize them (e.g., Herek, 1984a, 1984b). This empirical and discursive shift within the discipline was vital to establishing the association between homosexual “practices” (i.e., sodomy) and an enduring, legitimate social identity in need of cultural recognition and potentially legal protection.

The Supreme Court seems to have largely dismissed the brief filed by APA in reasoning its decision to uphold the constitutionality of state sodomy laws in *Bowers v. Hardwick*. Writing for the majority in a 5–4 decision, Justice White argued that “[p]roscriptions against [homosexual] conduct have ancient roots” (p. 192) and that the presumption that the majority of Georgia residents were morally opposed to homosexuality was sufficient to deem the law constitutional. Justice White’s opinion thus relied upon the idea that the law is designed to follow the moral order of the majority, explicitly rejecting the notion that homosexuals represent members of a minority group in need of legal recognition and/or protection, as the APA brief suggested.

Justice Burger filed a concurring opinion in the case, arguing more explicitly from a place of moral absolutism with regard to same-sex behavior:

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching. (pp. 196–197)

Justice Burger thus rejected the new narrative being promulgated by psychology and other scientific disciplines about the normality of homosexuality, in favor of

a narrative of abnormality that characterized the majority of scientific work on homosexuality in the 20th century.

The dissenting opinion written by Justice Blackmun and joined by Justices Brennan, Marshall, and Stevens challenged the underlying rationale of the majority decision, including its basis in historical “condemnation” of homosexual acts. The APA brief was cited in a footnote of the dissenting opinion:

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a “disease” or disorder. . . . Homosexual orientation may well form part of the very fiber of an individual’s personality. . . . Georgia’s exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement . . . (p. 203)

The minority thus integrated consideration of the new narrative of homosexuality as a legitimate form of identity diversity, rather than a form of psychopathology, promulgated in the APA brief as they constructed their dissenting opinion. And they considered the notion that enforcement of sodomy laws represented a form of discrimination based on sexual orientation—a key element of the APA brief. In fact, the minority seemed to appreciate the extent to which the majority opinion reflected *heterosexism* in its rationale (Herek, 2007).

Justice Stevens, joined by Justices Brennan and Marshall, also authored a separate dissenting opinion in which he equated the case with miscegenation (i.e., interracial marriage):

[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. (p. 216)

Justice Stevens thus drew an important parallel between laws prohibiting interracial marriage, which the Court struck down as unconstitutional in *Loving v. Virginia* (1967), and laws prohibiting same-sex sexual conduct. The implication was that moral proscriptions against certain behaviors must be viewed as at times irrationally constructed and in violation of the basic rights put forth in the Constitution.

At issue in considering the conflicting basis upon which the majority and minority opinions were filed was the very meaning of same-sex sexual behavior. Is it indicative of a personal choice in violation of historical codes of morality, as the majority view suggests? Or is it indicative of an expression of identity now understood by science as “part of the very fiber of an individual’s personality” (p. 203)? In other words, the *Bowers* case clearly revealed the dramatic schism in scientific understanding of homosexuality which occurred in the late 20th century—a schism resolved formally within the discipline of psychology in 1975. This understanding involved a contest of interpretation of homosexual behavior as either “unnatural” (supported by the sickness narrative constructed by psychology and related disciplines through most of the 20th century) or “natural” (supported by the species narrative which emerged in the 1970s and 1980s). In *Bowers v. Hardwick*, the majority of the Court appropriated the former narrative to legitimize the continued legal subordination of same-sex-attracted individuals,

but the role of psychological science clearly had shifted from one of complicity in that subordination to challenging the status quo.

Bending the Arc Toward Justice: Psychological Science in *Lawrence v. Texas* (2003)

It would take 17 years for the Supreme Court to revisit the constitutionality of state sodomy laws in *Lawrence v. Texas* (2003). As it has for *Bowers v. Hardwick* (1986), the APA prepared a brief of *amici curiae* in which it largely reiterated the arguments developed in the 1985 brief dismissed by the majority at that time. In the 17 years that had passed, though, the brief could now cite countless empirical studies to support its argument.

Decades of research and clinical experience have led all mainstream mental health organizations in this country to the conclusion that *homosexuality is a normal form of human sexuality*. . . . There is no sound basis in social science for Texas' attempt to deny gay men and lesbians the opportunity to participate in [sexual intimacy, a] basic constituent of human happiness. . . . [Homosexual] relationships manifest the same kinds of psychological dynamics as do heterosexual relationships, and sexual intimacy plays an important role in both [heterosexual and homosexual] partnerships. . . . The mental health professions do not associate oral and anal sex with any psychopathology and do not view them as "deviate." [The Texas sodomy law] reinforces prejudice, discrimination, and violence against gay men and lesbians. (Brief of American Psychological Association et al., 2003, pp. 1–3, emphases added)

The italicized portions of the excerpt reveal three key elements of the argument developed in the APA brief: (1) homosexuality represents a normative form of desire, identity, and behavior; (2) same-sex relationships and forms of intimacy are similar in nature to opposite sex partnerships; and (3) laws seeking to regulate the fulfillment of same-sex desire represent forms of stigma which create psychological burdens for individuals.

The *normality* argument of the brief reiterated what in 1985 had actually been a fairly recent reformulation of the disciplinary narrative. By 2003, the species narrative of homosexuality—that same-sex-attracted individuals constitute a normative variation in sexual identity (Hammack et al., in press)—represented by far the dominant paradigm within the discipline. Empirical work between the *Bowers* decision and the *Lawrence* brief had continued along the trajectory suggested by Morin (1977) to examine the social and psychological lives of same-sex-attracted individuals on their own terms. Thus the other two components of argument in the 2003 brief reflected two very productive lines of empirical work within the discipline.

The *equivalency* argument of the brief—that homosexual couples are similar to heterosexual couples in most respects—encapsulated a significant line of empirical work on same-sex relationships that had become prominent in the discipline. In the 1970s and 1980s, psychological scientists began to publish studies which focused on gay and lesbian couples (e.g., Kurdek, 1988a, 1988b; Kurdek & Schmitt, 1985; Marecek, Finn, & Cardell, 1982; Peplau et al., 1978; Peplau & Cochran, 1981; Peplau, Padesky, & Hamilton, 1982) or which explicitly compared same-sex and opposite sex couples on numerous dimensions (e.g.,

Kurdek & Schmitt, 1986a, 1986b, 1986c, 1987; Kurdek, 1987; Schneider, 1986). Much of this research discovered more similarities than differences between same-sex and opposite-sex couples, suggesting the basic psychological “equivalency” of these types of partnerships, which would problematize laws regulating one form of sexual relationship over another. Importantly, this line of research and this argument were not relevant just for the issue of sodomy laws but also laws that denied legal recognition of same-sex relationships (i.e., antimarriage laws).

The *stigma* argument of the brief summarized decades of research which emphasized antigay attitudes and sentiments as forms of prejudice in need of eradication (e.g., Bierly, 1985; Herek, 1984a, 1984b, 1998). The change in scientific understanding within the discipline from *sickness* to *species* shifted the lens of pathology away from the same-sex-attracted individual and toward the individual who holds ill will toward her or him. Thus the brief was able to conceptualize the Texas sodomy law as an instrument of stigma (Herek, 2007) by singling out individuals who engage in homosexual behavior—individuals whose desires represent a normal variant of the spectrum of human sexuality—as criminals. Though homosexuality itself was no longer conceived as pathology within the discipline at this point, researchers agreed that same-sex-attracted individuals experienced high levels of *minority stress* as a consequence of social identity stigma (Meyer, 2003). Hence the legal proscription against fulfillment of same-sex desire represented a form of state-sanctioned discrimination which likely contributed to general levels of prejudice and victimization in society (Brief of APA et al., 2003).

To what extent did the justices rely upon the argument of the APA brief, or any psychological science for that matter, in crafting the opinion that ultimately struck down all state sodomy laws and reversed the *Bowers* decision? At legal issue in the case was whether the Texas sodomy law explicitly prohibiting only homosexual conduct violated the Due Process Clause of the Fourteenth Amendment of the Constitution. Justice Kennedy delivered the opinion of the Court’s majority in a 6–3 decision.

The rationale of the *Lawrence* decision centered on the protection of “liberty” enshrined in the Fourteenth Amendment: “[No] state [shall] deprive any person of life, liberty, or property, without due process of law” (U.S. Constitution, Amendment XIV, §1). As Justice Kennedy argued,

The statutes [that prohibit sodomy] do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. (p. 567)

In the view of the majority, then, the regulation of sexual intimacy between members of the same sex represented a violation of their basic rights related to liberty enshrined in the Constitution. Kennedy went on to write, “The liberty protected by the Constitution allows homosexual persons the right to make this choice” (p. 567).

The *normality* and *equivalency* arguments of the APA brief appear to have been indirectly relevant in Justice Kennedy’s reasoning of the decision—the existence of “homosexual persons” is recognized, suggesting acceptance of the species narrative, and the choice to engage in homosexual behavior is not pathologized. Briefs filed by other organizations, however, appear to have assumed a more explicitly influential role, particularly in the majority’s stinging

critique of the *Bowers* decision and its underlying historical argument (the “ancient roots” argument promulgated by Justices White and Burger). Justice Kennedy explicitly cited the *amicus* briefs filed by other organizations (e.g., the American Civil Liberties Union) to challenge the historical argument of *Bowers* as informing their own critique of that decision.

Rather than looking “backward” at history for guidance in judgment, the majority of justices considered the present context and argued for “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” (p. 572). In making this claim, they appear to have considered the arc of legislation prohibiting sodomy in general and homosexual conduct in particular, finding that the vast majority of states no longer considered such acts criminal as of 2003. The *Bowers* decision, by contrast, argued for the legitimacy of state sodomy laws on the basis that such conduct had long been criminalized.

The more explicit area in which the APA brief appears to have assumed a role in the majority opinion was in the *stigma* argument:

When homosexual conduct is made criminal by law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons. The stigma this criminal statute imposes, moreover, is not trivial. . . . *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled. (pp. 575, 578)

This aspect of the rationale used by Justice Kennedy reflects the stigma argument presented in the APA brief: that legal condemnation of homosexual behavior fosters a culture of prejudice and discrimination toward the homosexual person. In explicitly including this rationale in their decision, which is more related to psychology than to history or particular legal doctrine, the Court appears to have integrated an appreciation for the role of psychological science in informing the law.

In sum, psychological science contributed, in increasingly direct ways, to the public policy debate about whether same-sex sexual behavior ought to be legally regulated. Prior to 1975, the vast majority of psychological research either implicitly or explicitly supported the underlying rationale of the sodomy laws, which framed same-sex behavior as “unnatural” and a form of pathology. From 1975 on, however, the discipline dramatically shifted its role in public policy toward homosexuality, as its formal policy statements and *amicus* briefs filed in the two Supreme Court cases examined here reveal. While the *Bowers* majority opinion appears to have relied upon an understanding of homosexuality as unnatural and pathological, more consistent with the pre-1975 narrative constructed within psychology, the minority dissent clearly considered the APA brief in its opinion. And while the rationale underlying the *Lawrence* decision only explicitly integrated one of the three central elements of the argument presented in the APA brief, the role of psychological science had clearly assumed a prominent position in advocacy for the rights of same-sex-attracted individuals by the early 21st century, predicated on a species narrative in which such individuals

were framed as members of a distinct minority identity in need of recognition and legal protection.

Should Same-Sex Unions Be Legally Recognized as Marriage?

The second key policy question to which psychology has increasingly contributed centers on the right of same-sex couples to form unions legally recognized by the state as marriage. Unlike the legal question of same-sex behavior, this issue remains unresolved at the federal level as of 2011, though some states explicitly allow same-sex couples to marry (Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont).

The issue of legal recognition of same-sex relationships emerged in the early 1970s at the height of the gay and lesbian social movement. In *Baker v. Nelson* (1971), the Minnesota Supreme Court ruled that marriage is limited to opposite-sex couples. In 1974, the Washington State Supreme Court declined to hear a case involving the petition of a same-sex couple to marry. Gradually, alternative legal forms of recognition began to emerge, such as the enactment of the first “domestic partner” law to recognize same-sex couples in Berkeley, California, in 1984. San Francisco followed suit, passing a domestic partner ordinance in 1991. But in 1992 Colorado voters passed Amendment 2, which prohibited the enactment of “special protections” for gay men, lesbians, and bisexuals (Walzer, 2002). In 1996, this amendment was struck down by the U.S. Supreme Court, which ruled that it violated the Constitution (*Romer v. Evans*, 1996). In 1993, the state of Hawaii made history with their State Supreme Court’s decision that prohibiting same-sex couples from marrying violated the State’s Constitution.

The 1996 Defense of Marriage Act (DOMA), signed by President Clinton at the very last minute, likely as a gesture of his reluctance, ruled that no state was required to give same-sex couples the right to marry and defined marriage as “only a legal union between one man and one woman” (DOMA, 1996). In 1998, Hawaii voters passed a Constitutional amendment giving the legislature full authority to define the basis of marriage—an act that eliminated the right of same-sex couples to marry (Walzer, 2002). Finally, at the end of the decade, the state of Vermont became the first to grant same-sex couples virtually identical rights to opposite sex couples, though same-sex unions were termed “civil partnerships” rather than marriages (*Baker v. State of Vermont*, 1999; see Richards, 2009).

In the same year as the landmark *Lawrence* decision, the Massachusetts State Supreme Court issued a ruling in *Goodridge v. Department of Public Health* (2003) declaring the unconstitutionality of denying same-sex couples the right to marry. The state began to issue marriage licenses in 2004 and continues today to be one of the few U.S. states in which same-sex couples can legally wed. Other states now allow same-sex marriage either by legislative action (e.g., New Hampshire and New York) or judicial decisions of unconstitutionality in prohibiting marriage (e.g., Connecticut, Iowa, Vermont).

This background to the third case we analyze in detail (*Perry v. Schwarzenegger*, 2010) reveals the extent to which policy discourse was extremely divided over the issue of same-sex marriage from the early 1970s to 2010. The origins of the *Perry* case, decided by the U.S. District Court for the Northern

District of California in 2010, can be traced to 2008, when the Supreme Court of California ruled that denying same-sex couples the right to marry violated the State Constitution. While some 18,000 couples took advantage of the ruling, its standing was called into question with the passage of Proposition 8 later in the year. The Proposition, which passed with 52% of the vote, enacted a Constitutional amendment limiting marriage to heterosexual unions. A major legal battle ensued, and in 2010, Vaughn Walker, the Chief Justice of the U.S. District Court, Northern District of California, overturned Proposition 8, on the grounds that it violated the U.S. Constitution. A higher court issued a stay of the ruling, which denied the right of same-sex couples to marry in the interim. The case remains on appeal as of our writing in 2011.

Embodying Scientific Activism: Psychological Science in *Perry v. Schwarzenegger*

More than both *Bowers* and *Lawrence*, the role of psychological science in the decision of Judge Walker was quite prominent. Like *Lawrence*, the Constitutional basis on which the challenge was brought in the case centered on the Fourteenth Amendment. Unlike *Lawrence*, though, both the Due Process and Equal Protection Clauses of the Amendment were invoked. The Equal Protection Clause reads: “[The State shall not] deny to any person within its jurisdiction the equal protection of the laws” (U.S. Constitution, Amendment XIV, §1). Thus the issue at hand was not just whether same-sex couples were denied liberty without due process of the law but also whether they were being considered a “suspect class” and thus discriminated against with regard to marriage. (It is noteworthy that Justice O’Connor’s concurring opinion in *Lawrence* actually argued for the unconstitutionality of the Texas sodomy law on the basis of the Equal Protection, rather than Due Process, Clause.)

In his opinion, Judge Walker outlined the three broad questions at hand in the case:

- (1) Whether any evidence supports California’s refusal to recognize marriage between two people because of their sex;
- (2) Whether any evidence shows California has an interest in *differentiating between same-sex and opposite sex unions*; and
- (3) Whether the evidence shows Proposition 8 enacted *a private moral view* without advancing a legitimate government interest. (*Perry v. Schwarzenegger*, 2010, p. 932, emphases added)

While all three questions possess broad relevance to psychological research, the second and third speak particularly to the knowledge psychological scientists had produced since the 1975 APA policy statement. Specifically, the idea that same-sex and opposite sex couples ought to be treated differently with regard to the law called the question of whether there were significant differences between these types of relationships in terms of social and psychological functioning—a question which decades of psychological research had, in fact, addressed (Herek, 2006; Peplau & Fingerhut, 2007). The idea that Proposition 8 might have imposed a particular *moral view* not necessarily in the interest of the state required a

framing of antigay sentiment as a form of prejudice—a process of placing members of one group in a place of lesser value than another.

In no case of such high profile were established psychological scientists seemingly more visibly involved than in *Perry*. Among the expert witnesses called to testify for the plaintiffs were three prominent scholars who had contributed to the questions at hand. Gregory Herek, whose work within social psychology established homophobia and antigay sentiment as a form of prejudice on par with race prejudice (e.g., Herek, 1987), testified that

[H]omosexuality is a normal expression of human sexuality; the vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual's sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual. (*Perry*, pp. 934–935)

Herek's testimony also spoke to the issue of Proposition 8 as a form of structural stigma:

Structural stigma provides the context and identifies which members of society are devalued. It also gives a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society. Proposition 8 is an instance of structural stigma. (p. 974)

Herek relied upon decades of empirical research within the discipline which had firmly established the existence of antigay prejudice as a social problem related to the harassment and victimization of same-sex-attracted individuals (see Herek, 2009a, 2009b).

The second social psychologist called as an expert witness in *Perry* was Letitia Anne Peplau, one of the early pioneers in the study of same-sex relationships (e.g., Peplau et al., 1978). In his opinion, Judge Walker explicitly discussed Peplau's testimony regarding the nature of same-sex relationships and their similarity to opposite-sex unions (Peplau & Fingerhut, 2007):

Peplau pointed to research showing that, despite stereotypes suggesting gays and lesbians are unable to form stable relationships, same-sex couples are in fact indistinguishable from opposite sex couples in terms of relationship quality and stability. . . . Peplau testified that the ability of same-sex couples to marry will have no bearing on whether opposite sex couples choose to marry or divorce. (p. 935)

Peplau's testimony appears to have been particularly informative regarding the question of whether domestic partnerships represented sufficient recognition of same-sex couples in place of marriage. Judge Walker cited Peplau's testimony in his conclusion that

The availability of domestic partnerships does not provide gays and lesbians with a status equivalent to marriage because the cultural meaning of marriage and its associated benefits are intentionally withheld from same-sex couples in domestic partnerships. (p. 971)

Walker cited Peplau directly in informing this conclusion:

There is a significant disparity between marriage and domestic partnerships; a domestic partnership is “not something that is necessarily understood or recognized by other people in your environment.” (p. 971)

Peplau's testimony was thus critical to Judge Walker's conclusion that (a) same-sex and opposite sex relationships are similar and thus ought to be recognized with equivalence according to the law (i.e., the state has no rational interest in differential legislation), and (b) domestic partnerships are not equivalent to marriage in social and cultural terms.

The third social psychologist to testify in the case was Ilan Meyer, who has argued that same-sex-attracted individuals experience *minority stress* (similar in some ways to racial and ethnic minorities) as a consequence of societal stigma, and this stress has direct consequences for physical and mental health (see Meyer, 2003). Denial of the right to marry, he testified, contributes to minority stress and has potentially adverse effects for gay men and lesbians.

Meyer explained that Proposition 8 stigmatizes gays and lesbians because it informs gays and lesbians that the State of California rejects their relationships as less valuable than opposite sex relationships. . . . According to Meyer, Proposition 8 increases the likelihood of negative mental and physical health outcomes for gays and lesbians. (p. 935)

Judge Walker's opinion ultimately concluded that

Proposition 8 places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society. (p. 973)

Walker directly cited testimony from Meyer in this conclusion:

"Proposition 8, in its social meaning, sends a message that gay relationships are not to be respected; that they are of secondary value, if of any value at all; that they are certainly not equal to those of heterosexuals."; "Laws are perhaps the strongest of social structures that uphold and enforce stigma." (Meyer, cited in *Perry*, pp. 973-974)

Meyer's testimony, then, appears to have directly influenced the decision that Proposition 8 violates the U.S. Constitution and is not grounded in a rational state interest.

Judge Walker ultimately concluded that Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The testimony of social psychologists Herek, Peplau, and Meyer clearly informed his decision. He ultimately concluded that:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional. (p. 1003)

The rationale underlying Judge Walker's decision appears to have strongly considered the basic premises regarding homosexuality, same-sex couples, and

stigma outlined in APA's 2003 *amicus* brief for *Lawrence* and as presented persuasively by Herek, Peplau, and Meyer.

The *Perry* case thus illustrates the use of psychological science for transformative ends, rather than to reproduce the status quo of legal and cultural subordination for same-sex-attracted individuals. It is difficult to imagine a more direct relation between knowledge produced within the discipline and a policy decision than that which seems to have occurred in *Perry*. Unfortunately, in spite of this momentary confluence of scientific and legal rhetoric with regard to same-sex marriage, the *Perry* decision remains unenforced as of 2011, pending appeal by the defendant-intervenors in the case.

History, Psychology, and the Politics of Knowledge: Concluding Perspectives

Since its emergence in the late 19th century, psychology has sought a place of social, cultural, and political relevance with regard to the knowledge it produces. The early period of the discipline was captivated by many of Galton's ideas about intelligence, which suggested an intrinsic hierarchy of human groups. As the discipline gradually came to reject many of these ideas following World War II, psychological scientists continued to produce knowledge which upheld the legal and cultural subordination of same-sex-attracted individuals. With few exceptions (e.g., Hooker, 1957), empirical work in U.S. psychology remained guilty of heterosexual bias and heterosexism more broadly until the late 1970s (Herek, 2007, 2010; Morin, 1977).

The shift in scientific understanding of homosexuality within the discipline that began to occur with Hooker's pioneering work and was codified in APA's 1975 policy statement dramatically reconfigured the paradigm of homosexuality and, subsequently, the relationship between the discourse of psychological science and public policy. Specifically, psychological science could no longer uphold the basic tenets of cultural heterosexism which were pervasive in American society throughout the 20th century and which remain enshrined today (Herek, 1990, 2007). The three cases considered in this article reveal the increasingly *emancipatory* role psychology has assumed in public policies that affect same-sex-attracted individuals.

In spite of psychology's shift from a *reproductive* to a more *transformative* stance with regard to public policy regarding same-sex desire, identity, and behavior, the basis upon which the discipline seeks to inform public policy remains limited because of epistemological limitations and disciplinary proclivities toward ahistoricism and the reification of social categories (see Hegarty, 2007b; Reicher & Hopkins, 2001). We conclude by briefly outlining three aspects of the discipline's current approach which preclude its ability to effect public policy to the extent possible. In addition, we provide examples of new approaches within the discipline which may address some of these limitations.

The first problem with the current approach within psychology is that it relies upon a quest to *expand* the concept of normality to include same-sex attraction, behavior, and identity, rather than to challenge the very idea of *normality* itself (Warner, 1999). This characteristic of the discipline is hardly surprising; as noted, establishing the concept of the "norm" was key to the establishment of disciplin-

ary identity (Hegarty, 2007a; Hegarty & Pratto, 2004). But discourses of normality by their definition exclude concepts of diversity in thought, feeling, behavior, and identity. They are, in a way, antithetical to the very idea of history, except to say that we might find a broad consensus in a given social context about beliefs, sentiments, actions, and social categories. The equivalency argument between same-sex and opposite-sex relationships (Kitzinger & Wilkinson, 2004), which formed the basis of the discipline's advocacy in all three of the cases considered here, does little to challenge master narratives of normativity (of which *heteronormativity* is a part) and probably understates the extent to which same-sex relationships are unique (Stacey & Biblarz, 2001).

It is interesting that the equivalency argument is not only fundamentally conservative vis-à-vis the concept of social and psychological normativity, it is also largely irrelevant to the law. The second problem within the current advocacy approach within psychology is thus that there is a disconnect between the rhetorical basis of psychological arguments and the rhetoric considered seriously in the law. As Kitzinger and Wilkinson (2004) argue, the two key arguments that came to comprise the psychological advocacy position—the “no difference” (i.e., equivalency) argument with regard to same-sex couples and the “psychological damage” argument with regard to the impact of the law—appropriated a discourse with no direct relevance to the law. While psychological discourse emphasizes “mental health,” legal discourse is more concerned with the issue of “rights,” which policymakers, legal scholars, judges, and political scientists call upon to formulate their arguments. This discursive division, in part, likely explains why we see so little evidence of psychology's explicit influence in *Bowers* and *Lawrence*, in spite of very concerted and well-intentioned efforts of psychologists and the APA. While we see considerable evidence of the influence of psychologists' testimony in the *Perry* decision, Judge Walker ultimately based his decision most explicitly on a discourse of rights enshrined by the Constitution and on a historical understanding of the institution of marriage informed by expert witness testimony from historians.

Finally, the current psychological advocacy position is problematic because it is grounded in an epistemological perspective that eschews issues of history and assumes an ontogenetic, rather than sociogenic, conception of human development (Hammack, 2005). In contrast to an ontogenetic approach, the dominant paradigm within developmental psychology, a sociogenic approach conceives of human development as a process largely defined by the confines of history, politics, and economics (see Dannefer, 1984). This paradigm, akin to a *life course* approach (Cohler & Galatzer-Levy, 2000; Elder, 1974, 1998; Hammack, 2005; Hammack & Cohler, 2009), seeks to document lives as they unfold in a given social and political matrix of social identities. Hence social categories are always considered suspect, and the empirical project is to chart an individual's engagement with the rhetoric of social categorization—often through their own personal narratives (Cohler, 1982; Hammack & Cohler, in press; Hammack, Thompson, & Pilecki, 2009). As opposed to a life course approach, which seeks to fully contextualize same-sex desire, behavior, and identity in its sociopolitical context, the mainstream of the psychological advocacy approach has tended to reify the social categories of sexual identity as reflective of an enduring, natural order, much in the same way that the “heterosexual” was itself invented (Katz, 2007).

Thus even the “new psychology” of same-sex desire mobilized for advocacy has the power to dangerously support political domination by failing to challenge the basis on which categories of persons are constructed (see Reicher & Hopkins, 2001).

Far from delegitimizing the incredible efforts of psychologists to assume a role in greater rights and recognition for same-sex-attracted individuals, our intent as we conclude this article is to foster a more critical stance toward the advocacy position that has developed within the discipline since 1975. What, though, would this more critical stance prescribe in terms of the role of psychologists? How can psychological science simultaneously advocate for gay and lesbian rights while it challenges conceptions of normativity?

For one, we are inclined to agree with Frost and Ouellette (2004), who argue that psychologists have much to contribute through historically underutilized theoretical and methodological approaches, such as a life-story narrative approach. Such an approach has recently received widespread support within the discipline as a valuable source of data (e.g., McAdams & Pals, 2006; McLean, Pasupathi, & Pals, 2007) and, more important, a means through which to consider the relationship between sociopolitical rhetoric and personal meaning-making (Cohler & Hammack, 2007; Hammack, 2008, 2011; Hammack & Cohler, 2009, in press; Hammack et al., 2009). Because they provide access to the way in which individuals navigate social and political domination (Hammack & Cohler, in press), narrative approaches can form a basis upon which psychologists advocate for social and political change. As Frost and Ouellette (2004) suggest,

This kind of evidence can be usefully employed in courtroom arguments. Legal battles for equal rights and inclusion require challenging the predominant societal ideologies underlying policy that are often built on unsubstantiated assumptions. Armed with knowledge of meaning that points out flaws in these assumptions, those campaigning for social justice in the courtroom will be better equipped to challenge exclusionary social policy and argue for equal rights. (p. 224)

Evidence that directly accesses the meaning individuals make of sexual discourses and ideologies reveals *subjectivity* in the twin sense that Foucault (1982) suggested: “subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to” (p. 781).

It is noteworthy, for example, that Nussbaum’s (2010) recent analysis of sexual orientation and constitutional law gives considerable weight to the work of Ritch Savin-Williams, whose pathbreaking work on gay adolescence and gay identity development among young men made extensive use of narrative methods (Savin-Williams, 1998). The life stories of same-sex-attracted individuals, it turns out, sufficiently expose the dubious basis upon which discriminatory laws are founded. Though Judge Walker relied extensively on the expert testimony of psychologists in rendering his decision in *Perry*, his opinion also cites the testimony of plaintiffs—personal narratives of the meaning they make of their same-sex desire and of their relationships in relation to society. There is evidence, then, that narrative data has a significant influence on legal scholars and policymakers.

Far from accepting the “natural” status of sexual identity categories, inherited

as they are from the medical-legal discourse on same-sex desire of the 19th century (Foucault, 1978), a narrative approach seeks to uncover the means by which individuals navigate the discursive waters of social categorization and its concurrent forms of political subordination. This is a different type of psychological knowledge than that generally produced to challenge the legal subordination of same-sex-attracted individuals. Yet, in our view, such knowledge has the potential to advocate for social and political rights even as it disrupts the significance of ideas of “normality” and “psychological damage” by bracketing those concepts in favor of the revelation of meaning and the power of lived experience.

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