Gay Rights and American Law

DANIEL R. PINELLO
John Jay College of Criminal Justice of the City University of New York

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1

Introduction

This is a book about how American appellate courts dealt with the struggle for lesbian and gay civil rights during the last two decades of the twentieth century. The volume also uses that conflict as a lens to scrutinize judicial behavior beyond the scope of homosexual rights.

The research is grounded on an exhaustive database of court cases about gay rights and of the personal attributes of the judges who decided them, as well as the ideological, institutional, and legal environments in which the decisions were situated. The empirical findings are striking, and I summarize some notable ones at the start.

First, a bench that is diverse with regard to age, gender, race, and religion is important to securing lesbian and gay rights. Judges who are female, African American, Latino, Jewish, or young (i.e., in their thirties or forties) are more likely than those who are male, white, Protestant, or older to recognize sexual minority rights and to treat lesbians and gay men as equal citizens whose distinctive interests and concerns merit judicial recognition. More generally, diversifying the bench to include groups that experience invidious discrimination creates sensitivity to the legal claims of other such communities. Heterogeneity among judges substantially helps to secure rights, and not just for the groups immediately represented. Moreover, this finding presumptively applies to all public officeholders.

The flip side of the coin is that other categories of jurists – for example, Roman Catholics and those with prior career experience in elective public office – have been far less hospitable to the civil rights of homosexuals.

Second, the law – both judge-made and legislatively enacted – also matters. If legal precedents supporting gay rights are won, that case law

makes it significantly more likely that later tribunals, even those staffed with antigay jurists, will uphold those rights. Further, courts in jurisdictions with consensual sodomy statutes are less prone to back lesbians and gay men, while those where legislatures have adopted gay civil rights laws are more likely to embrace gay rights across the board. Thus, homosexual activists and their supporters should strive for further decriminalization of consensual sodomy in the nation, even though the offense is virtually unenforced. At the same time, successful political action for legislative passage of gay civil rights statutes will likely reverberate in the judicial arena.

Third, unlike the experience of the civil rights movement, the federal judiciary is not the most promising battle ground for the gay rights struggle. After more than three decades in which Republican presidents predominately selected federal judges, there are now numerous state courts more receptive to the legal claims of lesbians and gay men than the federal bench as a whole. Those groups pursuing litigative strategies to secure rights are best advised to work at the state level, even though participation by gay interest groups as counsel or *amicus curiae* has enhanced the likelihood of victory in federal tribunals.

Finally, the success of homosexuals in appellate courts generally has improved over time, especially with regard to gay family issues. In particular, judges have been increasingly more supportive of parental rights for gay people. Time appears to be on their side.

The Context of the Study

Lesbian and gay rights have received substantial attention in legal and political science research. For example, Koppelman (2000) reports that a "February 2000 search of articles listed under 'sexual orientation discrimination' in the *Index of Legal Periodicals* found 96 articles written on the subject from 1989 to 1994. From 1995 to the date of the search, there were 540 articles." In addition, many notable books have appeared,[1] contributing to a rich understanding of the place of lesbians and gay men in American law and politics.

[1] Important titles include Button, Rienzo, and Wald (1997), Strasser (1997), Keen and Goldberg (1998), Bailey (1999), Eskridge (1999), Gerstmann (1999), Halley (1999), Richards (1999), Riggle and Tadlock (1999b), Blasius (2000), Cain (2000), Rimmerman, Wald, and Wilcox (2000), Badgett (2001), Koppelman (2002), and Rimmerman (2002).

The scholarship on gays and the law, however, has been overwhelmingly normative or qualitative, with very few systematically statistical or otherwise quantitative investigations of legal issues relevant to gay people.[2] This dearth of quantitative empirical inquiry – as opposed to qualitative empirical research (Epstein and King 2002) – into the civil rights of homosexuals is in stark contrast to the wealth of statistical information on lesbian and gay politics.[3]

The comparative lack of quantitative empirical legal scholarship is not surprising, because such investigation often dismays legal academics. As Friedman (1986: 774) observes,

> empirical research is hard work, and lots of it; it is also nonlibrary research, and many law teachers are afraid of it; it calls for skills that most law teachers do not have; if it is at all elaborate, it is team research, and law teachers are not used to this kind of effort; often it requires hustling grant money from foundations or government agencies, and law teachers simply do not know how to do that.... Prestige is a factor too. Law schools ... tend to exalt "theory" over applied research. Empirical research has an applied air to it, compared to "legal theory."[4]

In short, extended quantitative studies by legal academics are rare. This book is a sample of their worth.

Moreover, law professors and political scientists generally have neglected each other's contributions. Rosenberg (2000: 267) notes,

> The academic disciplines of law and political science were once closely entwined under the rubric of the study of government. At the start of the twentieth century, to study government was to study law.... But as the century developed, and particularly after mid-century, the distance between the two disciplines grew. Today, legal academics and political scientists inhabit different worlds with

[2] The books by law professors (Cain, Eskridge, Halley, Koppelman, Richards, and Strasser) in note 1 have no consequential quantitative components; nor do most gay rights articles in law reviews and journals. Indeed, the only legal scholarship on lesbians and gay men informed by noteworthy data is Posner (1992) and Halley (1993). Examining countries tolerating homosexuality far more than the United States, Posner concludes there is no empirical evidence that elevating the social and legal status of gay people will increase their numbers. Halley reviews primary sources on the Georgia sodomy statute upheld in *Bowers v. Hardwick* (1986) and discovers that the Supreme Court's historical interpretation of the law is mistaken.

[3] Books such as Button et al. (1997), Bailey (1999), Gerstmann (1999), Riggle and Tadlock (1999b), Rimmerman et al. (2000), and Badgett (2001), as well as articles such as Sherrill (1993, 1996), Haeberle (1996), Haider-Markel and Meier (1996), Wald, Button, and Rienzo (1996), and Gamble (1997), are substantially empirical.

[4] For further explication of the paucity of empirical legal scholarship, see Schuck (1989), Nard (1995), Schlegel (1995), and Heise (1999).

little in common. If they communicate at all, they can barely hear each other; they stand on opposite sides of a great divide, and they are looking in opposite directions.[5]

Most law professors and other legal academics endorse variations of legal formalism (Cross 1997: 255–63; Gillman 2001: 466). Termed the "legal model" by political scientists, this scholarly approach to understanding judicial decision making "postulates that decisions are based on the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of societal interests" (Segal and Spaeth 1993: 32). Case characteristics, such as whether police in search-and-seizure appeals have prior justification or intrude on the home or business (Segal 1984, 1986), have a direct impact on court decisions, and judges faithfully observe the doctrine of *stare decisis* (Segal and Spaeth 1993: 44–49).

In contrast, many political scientists recommend the "attitudinal model," which "holds that [courts] decide disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the [judges]" (Segal and Spaeth 1993: 65). Individuals' values guide judicial votes to achieve policy preferences. For example, using seven personal attributes, Tate (1981) accounted for 70 to 90 percent of the variance in Supreme Court justices' voting in nonunanimous decisions concerning civil rights and liberties as well as economics.

Advocates of these models typically brook no compromise and take no prisoners. For example, Segal and Spaeth are inflexible attitudinalists:

We believe we have sensitively analyzed the relevant internal and external nonattitudinal factors. Their impact on the decisions appears to be minimal. The eminently testable role of judicial activism and restraint effectively masks behavior; it doesn't explain it.... Such highly plausible external influences – such as the Solicitor General, Congress, public opinion, and interest groups – come up empty

[5] Graber (2002: 315) supplies some particulars:

None of the fifty most cited law reviews as of 1985 [citation omitted] engage at any length with a work written by any political scientist who studied or studies public law. Thirty of those works do not cite any work by a political scientist on courts.... The citation patterns in those works that cite political science scholarship on courts is best described as random. Even when articles are classified by subject matter, there does not appear to be any political scientist or work on courts that the legal community from 1947 until 1985 felt obliged to read or cite.

With [a few exceptions,] contemporary law professors are no more inclined to cite [the more than 500] members of the law and courts section of the American Political Science Association when they write books.

for the most part. . . . [W]e are simply unable to demonstrate that these forces cause the justices to behave in any *systematic* way. (1993: 363; emphasis in original)[6]

Six years later, concluding a book-length empirical investigation of legal precedent's impact on Supreme Court justices, Spaeth and Segal write:

Stare decisis is the lifeblood of the legal model, and the legal model is still the lifeblood of most legal scholars' thinking about law. Yet there has been virtually no real testing of the model, perhaps because creating falsifiable hypotheses about precedent and the legal model is not an easy task. . . . [W]e have attempted the first falsifiable, systematic test of the influence of *stare decisis* on the behavior of U.S. Supreme Court justices . . . [and find that] in the realm of *stare decisis*, minority will does not defer to majority rule. (1999: 314–15)

Critics of rigid devotion to monolithic judicial behavior models argue that scholars such as Segal and Spaeth have toppled only a straw person, because no fully articulated legal model exists to warrant meaningful fidelity (Canon 1993; Caldeira 1994; Rosenberg 1994; Smith 1994; Brisbin 1996). Caldeira (1994: 485), for example, offers a different formulation of the attitudinal model's antithesis: "[The] real foes [of Segal and Spaeth] are the many political scientists and lawyers who would belittle the analysis of [judicial] votes and say that we have to look at [court] opinions as a whole." Smith (1994: 8) proposes "legalist" targets like Ronald Dworkin and Bruce Ackerman, who – while "acknowledg[ing] the impact of judicial values on decisions" – "still try to minimize the significance of judicial values in ways that may well be vulnerable to the Segal and Spaeth critique."

This book bridges these fields of scholarly inquiry through an accessible and coherent quantitative empirical study of how state and federal appellate courts dealt with lesbian and gay rights claims over twenty years. The work identifies relevant court decisions from the 1980s and '90s and diligently investigates them using multiple factors explaining appellate court handling of the civil rights of homosexuals. Integrated models of judicial behavior harmonize the attitudinal and legal approaches. Although the volume is not a traditional doctrinal legal analysis, neither is it a quantitative enterprise wedded to just a few attitudinal variables. The survey performs statistical probes of case votes, but incorporates much more of court opinions than the scholarship of unreconstructed attitudinalists such as Segal and Spaeth. The book addresses the implications of a carefully

[6] Segal (1999: 238–40) provides a more nuanced view of the attitudinal model.

constructed – and unique – database, viewed through sophisticated statistical lenses, to study nascent legal doctrine.

Chapter 2's narrative overview of judicial decisions elaborates on the subject matter of the collected cases, supplies human drama behind legal battles for lesbian and gay rights in the United States, and introduces analytic concepts that permeate the research.

Chapter 3's quantitative review systematically explains why juridic struggles for homosexual rights either succeeded or failed. It examines the effects of variables from the two judicial behavior models, placed in appropriate institutional, environmental, temporal, and interest group configurations: precedent and case facts, judges' personal attributes, institutional characteristics of courts, jurisdictional environment, a period control, and interest group participation. The statistical findings are applied to specific cases to exemplify how variables had an impact on civil rights claims. The complementary qualitative and quantitative vistas furnish a comprehensive picture of the American judicial system's treatment of lesbian and gay people.

Using its gay rights models, the book next expands the quantitative investigation to far more broadly based legal concerns. Chapter 4 addresses judicial federalism, the sharing of judicial power between the fifty states and the federal government. Legal scholars have argued against trusting allegedly institutionally incompetent state courts with the vindication of individual rights. Yet despite an abundance of theory in the debate over judicial federalism and state court competence, comparatively little purposeful empirical investigation of the topic has been achieved. The volume uses its fully integrated models of judicial decision making to examine the parity dispute in a fresh way. Lesbian and gay rights are a particularly suitable vehicle for studying judicial federalism since they are an issue domain prompting strongly held positions, at both the mass and the elite levels. As noted later, judges are not indifferent to homosexual rights claims and are more disposed to vote their attitudes there than in other, less controversial areas, simply because the topic is so emotionally charged. Accordingly, federalism variables in the integrated models, as well as other methodological techniques, probe whether federal judges acted more dispassionately than state colleagues in adjudicating this minority's rights.

Introducing a highly innovative research design, Chapter 5 rigorously inspects the effect of *stare decisis* on appellate decision making, far surpassing in scope all current quantitative empirical legal scholarship on the topic. The chapter's noteworthy findings have wide import because the doctrine of precedent is central to traditional jurisprudential explanations

of decision making in American courts. Moreover, *stare decisis* undergirds the Langdellian case method, dominant for more than a century in American legal education.

Concerning both judicial federalism and *stare decisis*, the book's research design conceives a "crucial case study" (Eckstein 1975: 113–23).[7] Regarding Chapter 5, for instance, if precedent holds in the arena of lesbian and gay rights, then it must work in other subject matters, given the volatile character of homosexual rights claims in American public policy making.[8] The decisive suppression by *stare decisis* of judicial preferences in the ideologically cloven terrain of gay rights would indicate it could arrest the effect of attitudes and other nonlegal forces elsewhere as well.

The same applies to Chapter 4's judicial federalism investigation. If federal judges, institutionally insulated by life tenure from public hostility to unpopular decisions, protected the constitutional rights of gay people significantly more than state colleagues, then an inference that federal courts are better equipped than state tribunals to defend minority rights is reasonable.

In sum, the book's comprehensive quantitative examination of appellate response to an emergent minority's legal claims affords an empirically sound explication of that judicial action, as well as a pathway to more general – and telling – commentary on judicial policy making, wholly independent of the lesbian and gay context. The work both explains how diverse factors influenced the adjudication of civil rights claims during a vital era of the homosexual rights movement and formulates promising methodologies for the meaningful quantitative empirical study of law, a substantially neglected field of scholarship.

The Cases

The qualitative and quantitative analyses here rest on an exhaustive collection of the published appellate court decisions in the United States adjudicating lesbian and gay rights claims during the last two decades of the twentieth century. Appendix 1.1 explains how decisions were identified,

[7] For a rebuttal to Eckstein, see King, Keohane, and Verba (1994: 209–12).

[8] Wald (2000: 4) ("[f]ew issues in American politics ... inspire as much passion as the struggle over civil rights for gays and lesbians. Whether it is about gays and lesbians being allowed to serve openly in the military, to marry, to adopt children, to receive partner benefits, or to gain legal protection from discrimination in housing and employment, the debate is often heated and intense").

and Appendix 1.2 lists them. The 468 cases represent a wide array of subjects. Indeed, some observers may not agree that all the decisions truly deal with legal issues that have direct impacts on the rights of homosexuals. In that regard, I have assigned cases to two broad categories: those essential to lesbian and gay rights, and those that are not. Appendix 1.2 identifies the 393 decisions in the former category by posting their names in bold.

Allocating topics between essential and nonessential categories best manifests the distinction between the two. During the 1980s and 1990s, the principal subject categories essential to homosexual rights were (in descending order of frequency): (1) lesbian and gay family matters (including same-sex marriage and its approximation; the custody, visitation, adoption, and foster care (hereafter CVAF) of children by lesbian and gay parents; and the rights of domestic partners); (2) sexual orientation discrimination in the workplace, public accommodations, and housing; (3) gays in the military; (4) the constitutionality and enforcement of consensual sodomy and solicitation laws; and (5) the free speech and free association rights of gay people. Nineteen miscellaneous cases include immigration issues, the constitutionality of hate crimes statutes covering sexual orientation, jury selection and other tangential topics in criminal prosecutions, and privacy disputes. Also, since CVAF cases represent more than three-quarters of lesbian and gay family decisions, I treat them as a separate subset.

The two principal topics not essential to lesbian and gay rights are same-sex sexual harassment and defamation involving accusations of homosexuality. Each of these legal issues arguably concerns gay people. If a man is sexually harassed on the job by another man – or a woman by another woman – that conduct may have significant homoerotic content. Likewise, determining whether statements with lesbian or gay subject matter are libelous or slanderous reflects on gay civil rights. Nonetheless, these two causes of action may principally protect heterosexuals. If judges view same-sex sexual harassment as gay men seducing straight men, or lesbians luring heterosexual women, interpreting Title VII of the Civil Rights Act or comparable state statutes to include the prohibition of same-sex harassment does not really shield gay men or lesbians. Similarly, if heterosexuals are concerned about false accusations of homosexuality, then per se defamation rules again do not principally safeguard gays. If falsely identifying someone as lesbian or gay is defamation per se, that legal rule fails to handle heterosexuals and homosexuals equally since false accusations of heterosexually are not actionable.

The book excludes AIDS law topics. Moreover, inasmuch as judicial policy making occurs principally at the appellate level (Baum 1998: 8–9), the research here is not concerned with trial court decisions.

The volume's quantitative analysis relies on the dependent variable **outcome**. I coded court decisions as 1 if decided in favor of the lesbian or gay claim asserted or defended and as 0 if against. For most cases, the coding process was forthright, in that a homosexual litigant clearly won or lost. However, when there was no such litigant, but a decision nonetheless affected the rights of gay people as a class, the coding rule became whether the court treated homosexuals as the legal equals of heterosexuals. For example, if a court determined that same-sex sexual harassment violated a jurisdiction's (theretofore only heterosexually applied) sexual harassment policy, its action was coded as favorable. In the exceptional instance where all litigants were lesbian or gay (e.g., *Thomas S. v. Robin Y.* NY 1994[9]), I determined whether the court honored the domestic relationships there in order to code the cases as 1.

Case Outcome Variation by Court System and Subject Matter

Table 1.1 reports the mean of **outcome** by court system[10] and subject matter, revealing substantial differences across both dimensions. For example, state courts decided cases essential to lesbian and gay rights more than twice as favorably, on average, as federal courts (i.e., **outcome** means of .572 vs. .256, respectively). Among essential nonmiscellaneous cases, First Amendment claims involving free speech and free association rights were decided the most favorably (.583), while cases involving gays in the military were the least successful (.241).

A nonessential subject (same-sex sexual harassment) had the highest mean (.742) of all nonmiscellaneous topics, supporting the theory that judges viewed the issue as a protection of heterosexual men from homosexual harassers. Likewise, the low mean (.308) for defamation cases tends to shield heterosexuals from false accusations of homosexuality. More on this appears in the next chapter.

[9] Text citations to cases listed in Appendix 1.2 use the format [case name] [jurisdiction] [year], while citations to decisions appearing in the book's References section (and not included in an appendix) use just the case name and year.

[10] The four decisions listed in Appendix 1.2 from the District of Columbia Court of Appeals are not included in Tables 1.1 and 1.2 because the district is not a state, nor are its courts comparable to federal appellate tribunals. The four cases are omitted from subsequent analysis for the same reason, as well as another indicated in Chapter 3.

TABLE 1.1 *Summary of **Outcome** by Court System and Subject Matter*

Case subject matter	**N**	**Mean of outcome**
All cases	456	.519
All cases essential to lesbian and gay rights	393	.503
All federal cases	108	.315
Federal cases essential to lesbian and gay rights	86	.256
All state cases	348	.582
State cases essential to lesbian and gay rights	307	.572
Cases essential to lesbian and gay rights	**N**	**Mean of outcome**
CVAF	163	.522
Sexual orientation discrimination	77	.416
Non-CVAF lesbian and gay family cases	71	.556
Gays in the military	29	.241
Constitutionality of sodomy/solicitation laws	22	.546
Free speech and free association	12	.583
Miscellaneous cases	19	.790
Cases not essential to lesbian and gay rights	**N**	**Mean of outcome**
Same-sex sexual harassment	31	.742
Defamation	13	.308
Miscellaneous cases	19	.632

Geographic Variation

Table 1.2 disaggregates cases by region.[11] Surprisingly, courts in the Midwest were the least supportive of lesbian and gay rights, with judges in the socially conservative South even voting more favorably, on average, than in the Midwest. Tribunals in the West and Northeast were the most hospitable.[12]

Table 1.3 further breaks down the cases geographically, listing jurisdictions producing at least ten decisions during the twenty-year period. Again, federal courts generally were more negative to homosexual rights claims than state tribunals. Yet substantial variation existed across states. Of the twelve with sufficient numbers of cases to make meaningful comparisons, Missouri won the dubious distinction of having appellate

[11] I follow Walker's (1972) assignment of states to regions.

[12] Lewis and Rogers (1999: 135) (the Northeast and West are the most supportive regions of the country for passing gay rights laws).

TABLE 1.2 *Regional Variation in **Outcome***

	Federal circuit and state cases combined							
	All cases		Essential cases only		All family cases		CVAF cases only	
Region	**N**	**Mean**	**N**	**Mean**	**N**	**Mean**	**N**	**Mean**
Northeast	95	.526	88	.546	64	.563	35	.600
South	126	.504	105	.519	70	.550	53	.491
Midwest	128	.484	108	.417	67	.478	56	.482
West	92	.620	79	.595	33	.546	19	.579

	State cases only							
	All cases		Essential cases only		All family cases		CVAF cases only	
Region	**N**	**Mean**	**N**	**Mean**	**N**	**Mean**	**N**	**Mean**
Northeast	85	.565	78	.590	64	.563	35	.600
South	99	.551	89	.545	69	.544	53	.491
Midwest	97	.536	84	.500	66	.485	56	.482
West	67	.716	56	.696	31	.581	19	.579

Note: Federal circuits and states were assigned to regions in the following manner: **Northeast**: Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and First, Second, and Third Circuits. **South**: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Fourth, Fifth, and Eleventh Circuits. **Midwest**: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin, and Sixth, Seventh, and Eighth Circuits. **West**: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, and Ninth and Tenth Circuits.

courts that were the least validating of gay rights, followed by Virginia and Ohio. In contrast, Massachusetts courts were the most favorably disposed, with Florida, Minnesota, Colorado, and California close behind.

These state-specific findings help explain why the Midwest was the daunting region of the country for gay rights. Missouri's last-place finish tilted the Midwestern average downward, while Florida's strong support boosted the Southern mean. In fact, removing Missouri from the Midwestern data and Florida from the Southern switches those regions' relative positions in family and CVAF decisions, with the South now coming in last.[13] Indeed, further removing Maryland and West Virginia

[13] In all family cases, the new Midwestern mean is .554 and the Southern, .526. In CVAF decisions, .565 and .489, respectively.

TABLE 1.3 *Variation in* **Outcome** *Among Jurisdictions with Ten or More Cases*

	All cases		Essential cases only	
Jurisdiction	**N**	**Mean**	**N**	**Mean**
Fourth Circuit	10	.200	5	.200
Fifth Circuit	11	.273	6	.333
Sixth Circuit	13	.154	12	.083
Ninth Circuit	21	.381	19	.368
California	30	.667	26	.654
Colorado	10	.800	6	.667
Florida	17	.706	14	.714
Illinois	10	.600	10	.600
Massachusetts	10	.800	9	.778
Minnesota	18	.722	13	.692
Missouri	13	.154	11	.091
New York	44	.477	38	.526
Ohio	23	.435	19	.368
Pennsylvania	12	.500	12	.500
Texas	10	.500	9	.556
Virginia	10	.300	10	.300

(states with strong Northern ties) from the Southern fold and adding Missouri (with substantial Southern influence) afford an even more dramatic comparison. The appellate courts of Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia decided 47 lawsuits involving CVAF with gay parents. Less than a third of those decisions (15, or 31.9 percent) favored homosexual litigants. In contrast, the appellate tribunals of the other 37 states backed lesbian and gay parents 60.3 percent of the time (70 of 116 cases) – virtually twice as frequently as in the redefined South.[14]

Temporal Variation

Table 1.4 investigates trends over time. The graphic displays decennial and quintennial changes in the mean of **outcome** for all cases essential

[14] Ellison and Musick (1993) (four decades of research indicate that Southerners are less tolerant of unpopular groups than the rest of the country); Lewis and Rogers (1999: 135) (three decades of Gallup and CBS/*New York Times* polling data demonstrate the American South is the least supportive region of the country for passing gay rights laws).