

Chapter 1

Social Jurisprudence

ABSTRACT

This chapter provides a brief history of law and the role of social science in courtroom battles, further reviewing the use of social science in marriage equality cases. One of the more striking features in marriage equality litigation was the prominent role of social science in addressing issues germane to the legal arguments on both sides. The chapter concludes by discussing how social science may have influenced litigation and whether such influence was appropriate.

INTRODUCTION

This chapter begins with a short discussion of the history of law and the role of social science in courtroom battles as well as a review of the general literature on social science in the courts and the nascent social science literature on marriage equality cases. This review focuses on the role of social science in the courtroom battles over same-sex marriage and provides a descriptive review of social science in several key marriage equality cases: three state and federal trials and three U.S. Supreme Court cases decided from 2013 to 2015.

One of the more striking features of same-sex litigation in the United States was the prominent role of social science in addressing factual issues germane to the legal arguments on both sides. The chapter concludes by discussing how social science may have influenced litigation and whether such influence was appropriate.

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JURISPRUDENCE

Courts

To understand the concept of jurisprudence, you must begin with an understanding of what courts do. The simplest answer is that courts hear lawsuits. They decide cases in which individuals, organizations, or government officials argue about their rights, obligations, and responsibilities under the law. A lawsuit is a type of dispute. Thus, what courts do is to try to decide between or among those who have some sort of disagreement, and in doing so the court produces a decision. Unless overruled by a higher court, this decision is binding on the parties to the dispute.

The authoritative character of these judicial decisions results because judges make policy. Policymaking involves choosing among alternative courses of action, in which the choice binds the behavior of those subject to the policymaker's action (Segal & Spaeth, 1993). These decisions allocate resources among the parties to a lawsuit, but at the Supreme Court level, these decisions affect persons other than the litigants. These decisions are supported by opinions that apprise others of the reasoning and the fate that may befall them if they engage in similar actions.

Because judges' decisions adjudicate the legality of contested matters, by necessity judges make both policy and law. Only those who believe in fairy tales think otherwise. Even so, Americans find it unsettling at times to admit that judges make policy except, of course, when there is disagreement about a decision. However, the essence of the fairy tale is that the judges and their decisions are objective, impartial, and dispassionate.

Actions or decisions of courts do not fully terminate the social problems brought before them, because the conflicts that come before a court are rarely simple (Yngvesson & Hennessey, 1975). To initiate a court case requires a substantial investment of time and money, an investment that ensures that people whose disputes are decided have an intense commitment to their cause that will not easily dissipate once the decision has been rendered. These decisions represent the legal termination of a dispute but not the end of the underlying cause of the problem.

Disagreement is the case with many of the Supreme Court rulings. It is not a stretch to draw a straight line from the most recent marriage equality decision, in which the Supreme Court decided marriage is a fundamental right (*Obergefell v. Hodges*, 2015), to the election results of 2016, which

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