

FIVE

Sodomy Reform from *Bowers* to *Lawrence*

Bowers v. Hardwick constituted an enormous legal defeat for advocates of sodomy reform in particular and gay rights more generally. By a 5–4 margin, the Supreme Court rejected the claim that the federal constitutional right of privacy encompassed same-sex sexual relationships. In so doing the Court torpedoed a previously potent legal argument in the arsenal of gay rights litigators, forcing Lambda and its allies to develop new rationales for a host of gay rights claims. Moreover, the tone of Justice White’s majority opinion was contemptuous, while Justice Burger’s concurrence crossed over into downright hostility toward lgb people: condemnation of sodomy, he wrote, was based on “millennia of moral teaching.” Lambda’s executive director, Tom Stoddard, believed that the tone of the decision was actually more damaging to lgb people than the content. “The most important judicial body in the United States has expressed a certain distaste for gay men and women and suggested they may be treated differently from other Americans” (quoted in Clendenin and Nagourney 1999, 537).

But while *Bowers* did indeed have a measurably negative impact on the rights of lgb people, one early fear never came to pass. Not a single state recriminalized sodomy in response to *Bowers*. In fact, efforts to eradicate sodomy laws began gaining traction within a few years of the Supreme Court’s decision. In 1992, Kentucky became the first post-*Bowers* state to invalidate its sodomy law, inaugurating a new period of sodomy law reform (stage 4). Kentucky’s repeal was followed in short order by Nevada, the District of Columbia, Tennessee, Montana, Georgia (ironically), Rhode Island, Maryland, Arizona, Minnesota, Massachusetts, and Arkansas. The repeal was accomplished legislatively in four instances (the District of Columbia, Nevada, Rhode Island, and Arizona). In the other eight, repeal was accomplished via legal challenge.

This renaissance of sodomy reform culminated in 2003, when the U.S. Supreme Court invalidated all remaining state sodomy laws as impermissibly infringing on the right of privacy (*Lawrence v. Texas*). *Lawrence* was a landmark decision in several respects. For Lambda and other gay

rights advocates, it marked the final victory in a decades-long battle to decriminalize consensual same-sex relations. *Lawrence* also signified the potential revitalization of privacy as a fundamental right, a doctrine much weakened by the Court in the 1980s and 1990s. Finally, in *Lawrence* the Supreme Court did something truly exceptional: it explicitly repudiated a decision less than twenty years old. Said the Court: “*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” (*Lawrence*, 2484). What explains this reversal of fortune for sodomy law reformers in the years after *Bowers*? Why did states begin again to decriminalize sodomy (stage 4) after a period of retrenchment in the 1980s (stage 3)? And ultimately, why were Lambda and other gay rights advocates able to mobilize the law successfully in *Lawrence* when they had failed so spectacularly in *Bowers*? In this chapter I continue my examination of the long campaign to eradicate sodomy laws waged by Lambda and other gay rights litigators. I begin by describing the emergence, progress, and outcomes of new litigation strategies designed to get around the damaging precedent established by *Bowers*. I then turn my attention to *Lawrence*, seeking to understand why it succeeded when *Bowers* failed. As in chapter 4, my primary aim is to understand the circumstances in which rights claims about same-sex sexuality have been more or less likely to prevail in court. Ultimately, I argue, the reinvigoration of sodomy reform in stage 4 was stimulated by shifts in the structure of legal opportunities and the strategic responses of Lambda and other organized litigators to those shifts.

Litigating in the Shadows of *Bowers*

Bowers's outcome disheartened Lambda and the other members of the Ad-Hoc Task Force. Shortly after the decision was announced, the task force met to consider *Bowers*'s implications for the future of sodomy reform and of gay rights litigation more generally. Some members felt that the shift in climate presaged by *Bowers* would make any further legal challenges to the constitutionality of sodomy laws counterproductive.

[C]ourt challenges of sodomy laws in state courts will simply consume our collective skills, time, and creative energy. We believe that our time would be much better spent organizing and/or working with local political coalitions to get gay rights and privacy

rights on the political agenda. Not only do we believe that courts will be most reluctant to throw out sodomy laws at this time, but by continuing to focus on the courts, we would perpetuate the myth (which is believed by many people in the gay community) that the court system is the place to vindicate our rights. It is important that we educate our own community that the courts are part of the problem, not part of the solution.¹

Despite these concerns, exiting the litigation process with respect to sodomy law reform was not seriously contemplated by Lambda or most other task force participants. The reason for this seems to have been at least partly occupational. Lawyers are, after all, trained to think of problems in terms of legal solutions. But the decision was also influenced by the structure of the American legal system. There are multiple constitutions in effect in the United States of America: in addition to the federal Constitution, each state has one (as does the Commonwealth of Puerto Rico). All things being equal, social reform litigators generally prefer to bring cases in federal rather than state court. This preference is largely based on cost-benefit calculations. It consumes fewer resources for groups such as Lambda to become experts on federal law than it does to become experts on fifty different bodies of state law. Moreover, a win in the U.S. Supreme Court encompasses the entire country, while a win in a state's supreme court extends only to that state's borders. State-by-state litigation, in short, is a longer and more cumbersome tactic.

But when constitutional litigation in the federal courts seems unwise or is inapposite, state-based litigation often remains a viable option. This is because the federal Constitution functions as a floor rather than a ceiling. State courts and constitutions may not deprive their citizens of federal constitutional rights. They may, however, afford additional rights to their citizenry. Consequently, while the *Bowers* court found that sodomy laws did not run afoul of the federal constitutional right of privacy, state courts were still free to void sodomy laws based on state constitutional provisions. A second benefit of cases based on state constitutional claims is that they are generally insulated from Supreme Court review. In order for the U.S. Supreme Court to hear a case, that case must present a claim based on federal law. Cases raising claims strictly limited to a state's own laws end at that state's high court. A decision striking down a sodomy law based on a state's constitution, then, would not be subject to review from a hostile U.S. Supreme Court.

The potential utility of a state-by-state approach to eradicating

sodomy laws was highlighted for the task force by the early success of *Kentucky v. Wasson*. *Wasson* involved the 1985 arrest and prosecution of a gay man for solicitation, in violation of a Kentucky law that prohibited “deviate sexual intercourse with another person of the same sex.”²² The case began while *Bowers* was still pending before the Supreme Court. It was not brought under the auspices of the task force (it was litigated by attorneys in private practice), although the task force was well aware of its inception and progress.

Wasson’s attorneys initially argued that Kentucky’s law violated his federal constitutional rights to privacy and equal protection (the law criminalized only same-sex sodomy). When the Supreme Court’s subsequent ruling in *Bowers* foreclosed this legal argument, at least insofar as privacy was concerned, Wasson’s attorneys reformulated his defense strategy to argue that the law violated Wasson’s rights under Kentucky’s constitution. Cluing into Justice Powell’s concurrence in *Bowers*, they also argued that Kentucky’s sodomy law violated federal and state protections against cruel and unusual punishment. On October 3, 1986, a mere three months after *Bowers*, the trial court in *Wasson* struck down the state’s sodomy law, finding that the Kentucky Constitution afforded Wasson a greater right to privacy than did the U.S. Constitution, though it rejected Wasson’s equal protection and cruel and unusual punishment claims. Although the state of Kentucky immediately appealed, the trial court ruling in *Wasson* made it clear that *Bowers* had not entirely foreclosed the possibility of achieving sodomy reform through litigation. Members of the task force turned their attention to litigation based on state constitutional claims, compiling a database of constitutional provisions and pertinent case law for each of the twenty-four states with sodomy laws still on the books.

Despite the hope dangled by *Wasson*’s early success, the initial round of state constitutional challenges to sodomy laws faltered. In 1987, for example, a state challenge to Georgia’s sodomy law based on equal protection grounds failed (*Gordon v. State*). That same year, two courts in Louisiana upheld the constitutionality of that state’s sodomy law (*State of Louisiana v. Mills* and *State of Louisiana v. Neal*). All three cases were brought by private litigators operating independently of the task force.

Lambda’s first post-*Bowers* foray into sodomy reform litigation was somewhat more successful. In 1988 it filed suit in conjunction with the Michigan Organization for Human Rights (MOHR), a local gay rights group, and the Michigan affiliate of the ACLU, alleging that a handful of statutes criminalizing sodomy violated the right to privacy under Michi-

gan's constitution (*MOHR v. Kelly*). The trial court agreed and in 1990 found those laws unconstitutional insofar as they applied to consensual sexual conduct in the home. This auspicious start was stymied, however, by an unorthodox move on the part of the state's attorney general, the named defendant in the case. He refused to appeal the adverse ruling of the trial court, without indicating agreement with the decision. His (in)action threw the status of Michigan's sodomy laws into confusion. The trial court's ruling applied to only one county; the other eighty-two counties fell outside the court's jurisdiction. Lambda maintained, however, that since the attorney general did not challenge *MOHR*, the ruling bound all prosecutors throughout the state of Michigan. A series of subsequent criminal cases (none involving any organized gay rights litigators) failed to resolve the confusion.³

Lambda took a different tack in its second post-*Bowers* sodomy case but was frustrated in this approach as well. Mica England was a lesbian who had applied for a job with the Dallas police department. During the interview process she was asked about her sexual orientation and replied truthfully. Because Texas had a sodomy law, the police department determined that she was a criminal and, citing department regulations precluding the hiring of criminals, refused to consider her application further. In 1990, Lambda sued the city of Dallas, its police chief, and the state of Texas on England's behalf, arguing that the police department's employment policy was predicated on an unconstitutional law. Texas's sodomy law, it said, violated the right of privacy and equal protection under the state's constitution.

The trial court agreed with Lambda's argument, finding Texas's sodomy law unconstitutional and enjoining the city of Dallas and its police chief from enforcing the law or making employment decisions based on it. Frustratingly, though, the court ruled that Texas's sovereign immunity precluded it from being sued given the procedural posture of the case. Both sides appealed the trial court's ruling, Lambda arguing that the dismissal of the state as a party to the suit was incorrect and the city of Dallas and its police chief arguing, among other things, that England lacked standing to challenge the sodomy law and that the law itself was constitutional under *Bowers*.

A three-judge appellate court unanimously upheld the trial court's ruling. Texas's sodomy law, it said, violated the right of privacy under Texas's constitution. Unfortunately for Lambda, it also agreed that the state itself was not an appropriate party to the suit (*City of Dallas v. England*, 1993). Both sides appealed to the Texas Supreme Court, which

declined to hear the case, citing a procedural irregularity in the appeals process. Ultimately, Lambda's inability to include the state as a party in *England* greatly limited the case's reach. *England* carved out a sort of "free" zone in Dallas but did not apply to the rest of the state.

While *MOHR* and *England* ultimately failed to overturn the sodomy laws of Michigan and Texas, respectively, they revealed great judicial openness to sodomy reform claims. All five judges in the two cases had agreed that their state's sodomy law violated state constitutional rights of privacy, notwithstanding *Bowers*.

The state-by-state strategy was finally vindicated in Lambda's third post-*Bowers* effort. While Lambda was developing its own cases, *Kentucky v. Wasson* had been winding its way through the courts. In 1990, the state's intermediate court of appeals partially affirmed and partially overturned the trial court's decision. It agreed with the lower court that the statute violated the right of privacy guaranteed by the Kentucky Constitution, notwithstanding *Bowers*. But it also found that the statute violated state constitutional guarantees of equal protection, a claim the trial court had denied. The state of Kentucky immediately appealed to the state's supreme court. Recognizing the opportunity offered by the case, Lambda offered its assistance to Wasson's private attorneys. It penned an amicus brief presenting psychological and sociological information about lgb people on behalf of the American Psychological Association. More important is the fact that it helped coordinate strategy for organizations submitting amici curiae briefs on Wasson's behalf.⁴ Lambda's actions were designed to ensure that the judges on the Kentucky Supreme Court were presented with a panoply of information about the value of lgb people and the harms caused by sodomy laws.

In 1992, Kentucky became the first post-*Bowers* state in the nation to void its sodomy law. By a bare 4–3 majority, the high court ruled that the statute violated both Wasson's right to privacy and his right to equal protection under the state constitution. The court explicitly rejected *Bowers*'s conclusion that majoritarian morality justified laws prohibiting consensual, private acts of sodomy.

We view the United States Supreme Court decision in *Bowers v. Hardwick* as a misdirected application of the theory of original intent. To illustrate: as a theory of majoritarian morality, miscegenation was an offense with ancient roots. It is highly unlikely that protecting the rights of persons of different races to copulate was one of the considerations behind the Fourteenth Amendment.

Nevertheless, in *Loving v. Virginia* (1967), the United States Supreme Court recognized that a contemporary, enlightened interpretation of the liberty interest involved in the sexual act made its punishment constitutionally impermissible. (*Wasson*, 498)

Ultimately, the court concluded that Kentucky's sodomy law lacked any rational basis at all, dismissing as "simply outrageous" Kentucky's suggestion that the law was a rational effort to limit promiscuity, pedophilia, and public sex (*Wasson*, 501). Two dissenting opinions were filed, each emphasizing the immorality of homosexuality and the long history of prohibitions against sodomy.

Armed with the victory in *Wasson*, gay rights litigators turned their attention to other states with sodomy laws. In the eleven years between *Wasson* and the U.S. Supreme Court's decision in *Lawrence*, Lambda, the ACLU, and a handful of smaller gay rights groups challenged the constitutionality of sodomy laws in thirteen states and Puerto Rico.⁵ Every challenge raised a state constitutional privacy claim. In states where sodomy laws applied only to same-sex situations litigators also raised equal protection claims, usually based on state constitutional guarantees but sometimes based on federal constitutional guarantees as well.⁶ Occasionally they made cruel and unusual punishment claims as well.

As table 9 shows, these challenges were not uniformly successful. Indeed, appellate courts in four states deflected constitutional attacks against sodomy laws before gay rights litigators garnered their next legal victory. Of the four, only the Rhode Island Supreme Court actually considered the merits of the arguments for and against the constitutionality of sodomy laws before issuing its ruling (*State of Rhode Island v. Lopes*, 1995). The other three ducked the issue, invoking procedural hurdles in two cases (*State of Texas v. Morales*, 1994, and *State of Louisiana v. Baxley*, 1994) and deciding the case on alternate grounds in the third (*Sawatzky v. City of Oklahoma City*, 1995). It is intriguing that the Rhode Island legislature voted to eradicate its sodomy law in 1998, partly in response to the court's decision in *Lopes*.

It took sodomy law reformers four years after *Wasson* to secure their next judicial victory. *Campbell v. Sundquist* (1996) involved five lgb plaintiffs who claimed that Tennessee's Homosexual Practices Act violated their state constitutional rights of privacy and equal protection. The case was litigated by former Lambda legal director Abby Rubinfeld. Lambda and the ACLU filed amici curiae briefs. In 1995, the trial court did something that had never before happened in a sodomy law chal-

lenge. It granted the plaintiffs' petition for summary judgment. *Summary judgment* means that the court found that there was no material question of fact at issue and that the law clearly supported the plaintiffs' claims. Basically, it meant that the court found the Homosexual Practices Act to be so patently unconstitutional that it saw no need for a trial. Same-sex sexual activity between consenting adults, said the court, clearly fell within the state constitution's right of privacy. The state appealed, but the Tennessee Court of Appeals upheld the lower court's decision. The Tennessee Supreme Court refused to hear the state's appeal, thereby ending litigation in the case.

The pace of sodomy law eradication quickened after *Campbell*. Although courts in three states—Kansas, Louisiana, and Virginia—deflected constitutional challenges in the years between *Campbell* and *Lawrence*, courts in five states—Montana, Maryland, Minnesota, Arkansas, and Massachusetts—held that statutes criminalizing private

TABLE 9. Breakdown of Post-Bowers Sodomy Law Challenges

	Case (state)	Basis	Sodomy Law
1992	<i>Kentucky v. Wasson</i> (KY)	Arrest for solicitation	Struck down
1993	<i>Dallas v. England</i> (TX)	Police department refusal to hire lesbian	Struck down but limited to Dallas
1994	<i>State v. Morales</i> (TX)	Facial challenge	Upheld
1994	<i>Louisiana v. Baxley</i>	Arrest for solicitation	Upheld
1995	<i>Sawatzky v. Oklahoma City</i>	Arrest for solicitation	Upheld
1996	<i>State v. Lopes</i> (RI)	Heterosexual	Upheld
1996	<i>Campbell v. Sundquist</i> (TN)	Facial challenge	Struck down
1996	<i>Christensen v. Georgia</i>	Arrest for solicitation	Upheld
1997	<i>Gryczan v. State</i> (MT)	Facial challenge	Struck down
1998	<i>Topeka v. Movsovitz</i> (KS)	Arrest for solicitation	Upheld
1998	<i>Powell v. State</i> (GA)	Heterosexual	Struck down
1999	<i>Williams v. Glendening</i> (MD)	Combination: facial challenge and arrest for solicitation	Struck down
2000	<i>State v. Smith</i>	Combination: arrests for sodomy and heterosexual	Upheld
2000	<i>DePriest v. Virginia</i>	Arrests for solicitation	Upheld
2001	<i>Fishers v. Virginia</i>	Heterosexual	Upheld
2001	<i>Doe v. Ventura</i> (MN)	Facial challenge	Struck down
2002	<i>Jegley v. Picado</i> (AR)	Facial challenge	Struck down
2002	<i>Doe v. Reilly</i>	Facial challenge	Struck down ^a
2002	<i>LEGAL v. State</i> (LA)	Facial challenge	Upheld
2002	<i>Sanchez v. Puerto Rico</i>	Facial challenge	Upheld
2003	<i>Lawrence v. Texas</i>	Arrests for sodomy	Struck down

^aThe Massachusetts Supreme Judicial Court dismissed the case for lack of standing. However, it clarified that the state's two sodomy laws could not be applied to private, consensual acts.

consensual sodomy violated state constitutional guarantees of privacy and/or equal protection (see table 9). The supreme court of a sixth state, Georgia, initially ruled that the right of privacy did not preclude sodomy laws (*Christensen v. Georgia*, 1996) but two years later reversed course and ruled that the right of privacy did preclude such laws (*State v. Powell*, 1998).

What accounts for the varied ability of sodomy reform litigators to mobilize the law successfully in these states? Why the increasing willingness of courts to strike down sodomy laws as the twentieth century segued into the twenty-first? In the following pages, I suggest that shifts in several aspects of the structure of legal opportunities contributed to the increased ability of Lambda and its allies to litigate successfully in the context of sodomy reform. These shifts included changes in the legal frames surrounding privacy and homosexuality, changes in the cultural framing of homosexuality and AIDS, a reduction in access-related constraints, and shifting elite alignments.

Privacy and Standing

Just as each state has its own constitution, with language diverging to a greater or lesser extent from the U.S. Constitution, so does each state have its own unique body of case law concerning privacy. Task force members compiled a database of constitutional provisions and pertinent case law for the twenty-four states with sodomy laws after *Bowers* failed because they recognized that the law in some states would be more favorable to sodomy law reform claims than would the law in others. And indeed, the Kentucky Supreme Court supported its decision in *Wasson* in part by noting that “Kentucky cases recognized a legally protected right of privacy based on our own constitution and common law tradition long before the United States Supreme Court first took notice of whether there were any rights of privacy inherent in the Federal Bill of Rights” (493). It seems reasonable to suggest that the extant body of state law concerning privacy rights played at least some role in shaping judicial outcomes.

It is clear, however, that the existence of constitutional provisions and case law, standing alone, did not entirely structure the ability of gay rights litigators to mobilize the law successfully on behalf of sodomy law reform. For one thing, the articulation of privacy rights in the Louisiana Constitution is among the broadest in the nation. (Kentucky, in contrast, has no explicit constitutional guarantee of privacy.) Article I, Section 5 of

the Louisiana Constitution of 1974 expressly guarantees security against unreasonable invasions of privacy to every individual. Yet the Louisiana courts repelled three different privacy-based challenges to the state's sodomy law in the years between *Wasson* and *Lawrence*.

The contradictory decisions issued by the Georgia Supreme Court in *Christensen* and *Powell* provide more evidence that the legal frames surrounding privacy rights do not suffice to explain the divergent outcomes of sodomy law challenges. *Christensen* involved a gay man who had been arrested for soliciting sodomy in a police sting. More specifically, Christensen and an undercover officer struck up a conversation in a rest area. During that conversation, Christensen indicated that he desired to engage in oral sex and agreed to follow the officer to a nearby motel. En route to the motel in his car, Christensen was pulled over and arrested. The ACLU, which represented Christensen, argued that Georgia's sodomy law was an unconstitutional violation of the right of privacy under the state constitution and that consequently laws against soliciting sodomy were also unconstitutional.⁷ The state supreme court rejected this analysis by a vote of 5-2. The majority construed the right of privacy in the following way.

When a privacy interest is implicated, the state must show that the legislation has a "reasonable relation to a legitimate state purpose." In the exercise of its police power the state has a right to enact laws to promote the public health, safety, morals, and welfare of its citizens. There is also a concomitant interest in curtail- ing criminal activities wherever they may be committed. As was acknowledged in *Bowers v. Hardwick* the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." We hold that the proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public. Our constitution does not deny the legislative branch the right to prohibit such conduct. Accordingly, O.C.G.A. § 16-6-2 does not violate the right to privacy under the Georgia Constitution. (*Christensen*, 190, footnotes and citations omitted)

Powell involved a heterosexual man who had been convicted of engaging in consensual oral sex with his wife's niece. He had been originally charged both with rape and with aggravated sodomy but at trial

had been acquitted of the former charges. He appealed his conviction, claiming that the statute violated his right to privacy under the Georgia Constitution. The Georgia Supreme Court agreed, by a vote of 6–1. This time they construed the right of privacy in the following fashion.

Today, we are faced with whether the constitutional right of privacy screens from governmental interference a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act. . . . We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity. We conclude that such activity is at the heart of the Georgia Constitution's protection of the right of privacy.

Having determined that appellant's behavior falls within the area protected by the right of privacy, we next examine whether the government's infringement upon that right is constitutionally sanctioned. As judicial consideration of the right to privacy has developed, this Court has concluded that the right of privacy is a fundamental right and that a government-imposed limitation on the right to privacy will pass constitutional muster if the limitation is shown to serve a compelling state interest and to be narrowly tailored to effectuate only that compelling interest. (*Powell*, 332–33, footnotes and citations omitted)

The court then went on to conclude that the only purpose of the sodomy statute was to regulate the private sexual conduct of consenting adults, a purpose that exceeded the permissible police powers of the state because it provided no benefit to the public while unduly oppressing individuals (334).

The divergence of *Christensen* and *Powell* is notable because no significant changes in privacy law occurred between the two cases. If anything, the precedent established by *Christensen* should have weighed against the court's ruling in *Powell*. Yet the Georgia Supreme Court utilized a much more stringent legal standard for reviewing the constitutionality of Georgia's sodomy law in the latter case than in the former. Under the standard utilized in *Christensen*, Georgia needed only to show a reasonable relation to a legitimate state purpose. The presumption was that the law was constitutional. Under the standard utilized in *Powell*, Georgia needed to show that the law was narrowly tailored to further a

compelling interest. The presumption here was that the law was unconstitutional.

The high court did make a half-hearted effort to distinguish *Christensen* from *Powell* by noting that the state's police powers legitimately extended to "shielding the public from inadvertent exposure to the intimacies of others, . . . protecting minors and others legally incapable of consent from sexual abuse, and . . . preventing people from being forced to submit to sex acts against their will" (*Powell*, 333). Yet none of these circumstances matched *Christensen*. Although the solicitation occurred in a public place (with no showing that anyone but Christensen and the police officer was privy to the conversation), consummation was designed to take place in private.

Clearly something other than the application of black-letter law was at play in the two cases. One obvious possibility, a shift in the membership of the court, cannot account for the divergent outcomes of *Christensen* and *Powell*. The same seven-member court heard both cases. In the absence of additional information, it seems most likely that the justices were influenced by the different facts of the two cases. Christensen was a gay man who had approached another man he believed was gay (but probably was not) and propositioned him. Powell was a straight man convicted of having consensual oral sex. The justices may simply have seen the privacy interests at stake more clearly in the latter instance than in the former.

The symbolic insult the two cases posed to lgb people should not go unremarked. The activity for which Christensen had been arrested bore no tint of coercion. Powell, on the other hand, had originally been charged with rape as well as aggravated sodomy and had been convicted of the latter only because consent is not a defense. Thus a gay man involved in a clearly consensual activity with another man found that his actions did not fall within the right to privacy, while the same act when performed by a heterosexual man with a possibly nonconsenting partner was encompassed by the right to privacy.

Lambda was well aware of this irony but saw in *Powell* both a promise and a threat. It might serve as the mechanism to eradicate a particularly despised sodomy statute. At the same time, even if the Georgia courts threw out the sodomy statute, they might limit the ruling only to heterosexual sodomy, leaving the law intact with respect to same-sex sodomy. Faced with these possibilities, Lambda became involved with the case, submitting an amicus brief arguing that the sodomy law should

be struck in toto. Its argument was evidently persuasive; the Georgia Supreme Court decision closely paralleled Lambda's analysis.

The different outcomes of *Christensen* and *Powell* underscore the importance of finding litigants with stories that judges "get." As we saw in chapter 4, though, a major problem facing Lambda and other sodomy law reformers was that arrests for private, consensual same-sex sodomy were exceedingly rare.⁸ In an effort to jump the standing hurdle some litigators used arrests and/or convictions for noncommercial solicitation (that is, where money was not involved) as a means to attack the constitutionality of sodomy laws. The legal argument was straightforward. It is generally not illegal to discuss, advocate, or solicit a legal activity.⁹ If same-sex sodomy is permissible, then asking another adult to engage in it must also be permissible.

Lambda never developed a sodomy law challenge centered on solicitation, although on a few occasions it filed an amicus brief in a case already in progress. The ACLU, on the other hand, brought several such challenges.¹⁰ To a one, they failed. *Sawatzky v. City of Oklahoma City* (1995) is instructive here. The facts of *Sawatzky* basically paralleled *Christensen*, except that Sawatzky's challenge was based on his conviction for solicitation, while Christensen's was based on his arrest. The ACLU of Oklahoma used Sawatzky's conviction to challenge Oklahoma's same-sex-only sodomy law, arguing that it violated state constitutional guarantees of privacy and equal protection and also violated federal constitutional guarantees of equal protection—the first post-*Bowers* sodomy challenge to raise a federal equal protection claim. Ultimately, though, the Oklahoma Court of Criminal Appeals ducked the issue, upholding Sawatzky's conviction on the basis of the state's ability to regulate speech in public spaces. Said the court,

In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable. (*Sawatzky*, 787)

Rather than building cases around arrests and/or convictions for solicitation, Lambda chose to assemble cases utilizing multiple plaintiffs

asserting real, but indirect, harm from the existence of sodomy statutes. For example, in *Jegley v. Picado* (2002) Lambda attacked the constitutionality of Arkansas's sodomy law on behalf of seven lgb people, none of whom had ever been arrested for violating the law. Nevertheless, Lambda contended, they suffered real harm because of the law's existence. One plaintiff, illustratively, was the mother of two children. Because Arkansas courts had previously relied on the law's prohibition of same-sex sexual conduct to deny lesbian mothers custody, she lived in fear of losing her children. Another plaintiff was a nurse. Under Arkansas law, any violation of criminal law could result in the loss of his nursing license.

Other litigators assembled similar cases. The ACLU's *Williams v. Glendening* (1998) involved five plaintiffs. One, a federal employee, had been arrested for solicitation in the past; his arrest record made it difficult for him to obtain a security clearance when he was promoted. None of the others had arrest records, but they could potentially lose their occupation licenses and/or jobs because of their violation of the state's sodomy laws. The Texas Human Rights Foundation's *State of Texas v. Morales* (1994) had five plaintiffs. *Gryczan v. State of Montana* (1997)—litigated by the Women's Law Center with amicus support from Lambda, the ACLU, and several other organizations—boasted six plaintiffs.

Unlike the solicitation-based challenges, these kinds of multiparty facial challenges were generally successful. Of the eight such cases decided between *Wasson* and *Lawrence*, six resulted in the eradication of the state's sodomy law.¹¹ What is particularly interesting is that these cases by and large did not stumble over the standing hurdle that had bedeviled many earlier sodomy challenges.¹² Part of the reason for this has to do with the difference between state and federal law. State standing requirements are often more relaxed than their federal counterpart. But the legal concept of standing also has a subjective element to it. For example, under Minnesota law a litigant has standing when "he or she has suffered an actual injury or otherwise has a sufficient stake in a justiciable controversy to seek relief from a court."¹³ Just what constitutes an "actual" injury or a "sufficient" stake? Existing case law and statutes may offer guidance, but judges often have a fair amount of discretion in construing the parameters of standing. It seems clear that in the years since *Bowers*, judges—even in states not traditionally known for their liberal bent—had become more sensitive to the impact of sodomy laws on the lives of lgb people. The reason for this, I suggest, is that judges were responding to shifts in the larger cultural framing of both homosexuality and AIDS.

The “Normalization” of AIDS

As we saw in chapter 4, emergence of the AIDS epidemic in the early 1980s radically shifted the LOS surrounding sodomy reform by giving opponents of such reform a documented public health issue to support their long-standing “homosexual danger” claims. As the 1980s turned into the 1990s, AIDS began to lose much of its patina of homosexual threat, becoming both medically and legally normalized.

Congress, for example, passed a number of bills designed to protect people with AIDS from discrimination. The first major bill to do so was the federal Fair Housing Act, which was amended in 1988 to include disability among the list “protected” characteristics; the regulations governing the implementation of the act specified HIV disease as a condition included within the definition of disability. A more important legislative enactment—the Americans with Disabilities Act (ADA)—followed in 1990. When the ADA took effect in the summer of 1992, it changed the legal frames surrounding AIDS in significant ways. Among its myriad provisions, the ADA prohibited discriminatory treatment of employees based on HIV disease (unless such workers posed a significant risk to others), required employers to take reasonable steps to accommodate employees with AIDS, and also prohibited discriminatory treatment of employees who associated with HIV-positive individuals.

As AIDS became normalized its utility as a signifier of the dangers of homosexuality for opponents of sodomy reform decreased. In 1992, AIDS was still threatening enough that one of the dissents in *Wasson* invoked it.

The record in this case contains undisputed testimony by experts presented by [the State of Kentucky] that homosexuals are more promiscuous than heterosexuals; that infectious diseases are more readily transmitted by anal sodomy than by any other form of sexual copulation; and that homosexuals account for 73 percent of all AIDS cases in this country. Clearly the interests of all Kentuckians in protecting public health, safety and morals are at issue. The necessity for controlling such behavior prevails over any equal protection challenge. (*Wasson*, dissent by Justice Wintersheimer, 511)

The majority, however, flatly rejected this justification for Kentucky’s sodomy law.

The Commonwealth has tried hard to demonstrate a legitimate governmental interest justifying a distinction [between criminalizing same-sex sodomy but permitting opposite-sex sodomy], but has failed. Many of the claimed justifications are simply outrageous: that “homosexuals are more promiscuous than heterosexuals . . . that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public.” The only proffered justification with superficial validity is that “infectious diseases are more readily transmitted by anal sodomy than by other forms of sexual copulation.” But this statute is not limited to anal copulation, and this reasoning would apply to male-female anal intercourse the same as it applies to male-male intercourse. The growing number of females to whom AIDS . . . has been transmitted is stark evidence that AIDS is not only a male homosexual disease. The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS. The act of sexual contact is not implicated, per se, whether the contact is homosexual or heterosexual. In any event, this statute was enacted in 1974 before the AIDS nightmare was upon us. (*Wasson*, 501)

States continued to invoke AIDS as a justification for their sodomy statutes, but Wintersheimer’s dissent in *Wasson* marks the last time a judge found the claim persuasive. The court in *Campbell v. Sundquist* (1996) found Tennessee’s asserted interest in preventing the spread of infectious disease to be compelling but concluded that the Homosexual Practices Act was not narrowly tailored to advance that interest because it prohibited all sexual contact between people of the same sex, including contact incapable of spreading disease (263). The *Gryczan* court was equally unpersuaded by Montana’s AIDS argument.

The State’s assertion that the statute protects public health by containing the spread of AIDS relies on faulty logic and invalid assumptions about the disease. To begin with, § 45-5-505, MCA, was enacted in 1973, almost ten years before the first AIDS case was detected in Montana. . . . Moreover, the State’s rationale assumes that all same-gender sexual conduct contributes to the spread of the disease. This is grossly inaccurate. . . . Sexual contact between women has an extremely low risk of HIV transmission.

On the other hand, heterosexual contact is now the leading mode of HIV transmission in this country. . . . [T]he inclusion of behavior not associated with the spread of AIDS and HIV and the exclusion of high-risk behavior among those other than homosexuals indicate the absence of any clear relationship between the statute and any public health goals. (*Gryczan*, 123–24)

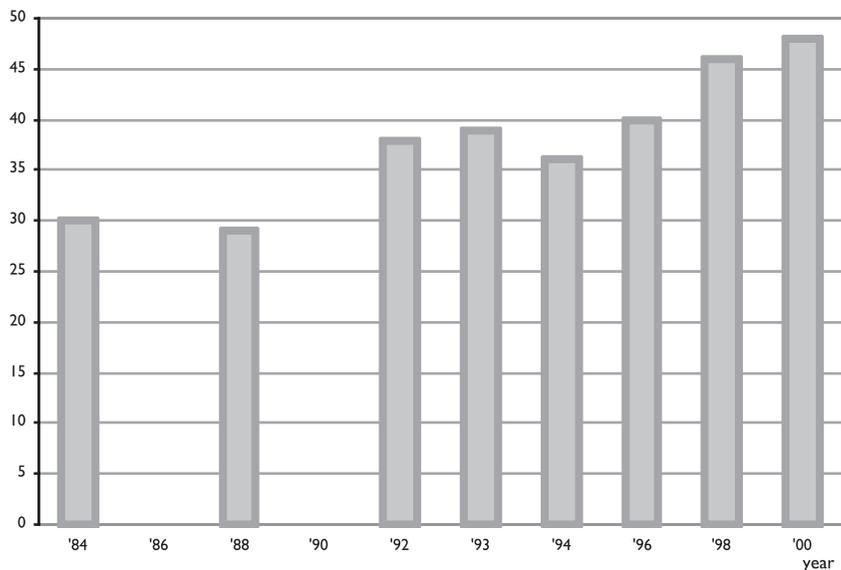
By the time *Lawrence v. Texas* was litigated the specter of “homosexual threat” surrounding AIDS had receded so much that the state made no reference to it as a justification for the constitutionality of its sodomy statute. Only one of the myriad amici supporting Texas even mentioned it.¹⁴ The AIDS fear that had so dominated the cultural framing of (male) homosexuality during the latter part of the 1980s had all but entirely lost its persuasive power.

The Cultural Framing of Homosexuality

Just as the cultural framing of AIDS shifted in the 1990s, so did the cultural framing of homosexuality. Trends in public opinion data show that beliefs about homosexuality and gay rights grew significantly more supportive. The American National Election Study (ANES) traditionally asks respondents to rate individuals and groups on a “feeling thermometer” running from 0 to 100, where 0 indicates great coldness of feeling and 100 indicates great warmth. Figure 3 shows that feeling thermometer scores for lesbian and gay men rose by 19 degrees between 1988 and 2000. Moreover, the percentage of respondents awarding lesbians and gay men the lowest possible score (0) dropped dramatically, from 35 percent in 1988 to 12 percent in 2000.

It should be noted here that lesbians and gay men continue to rank among the least liked social groups. By way of illustration, blacks (68 degrees), Hispanics (64), feminists (55), people on welfare (52), and Christian fundamentalists (51) all had higher mean feeling thermometer ratings in 2000. (They also had smaller percentages of respondents scoring them at 0.) Yet it is clear that public chilliness toward lgb people thawed considerably as the 1980s turned into the 1990s and the 1990s into the new millennium.

Shifts in public opinion can also be seen in longitudinal data from the General Social Survey. The public became far more tolerant of sexual intimacy between members of the same sex as the 1990s progressed (fig. 4). Some three-fourths of the American public maintained that same-sex

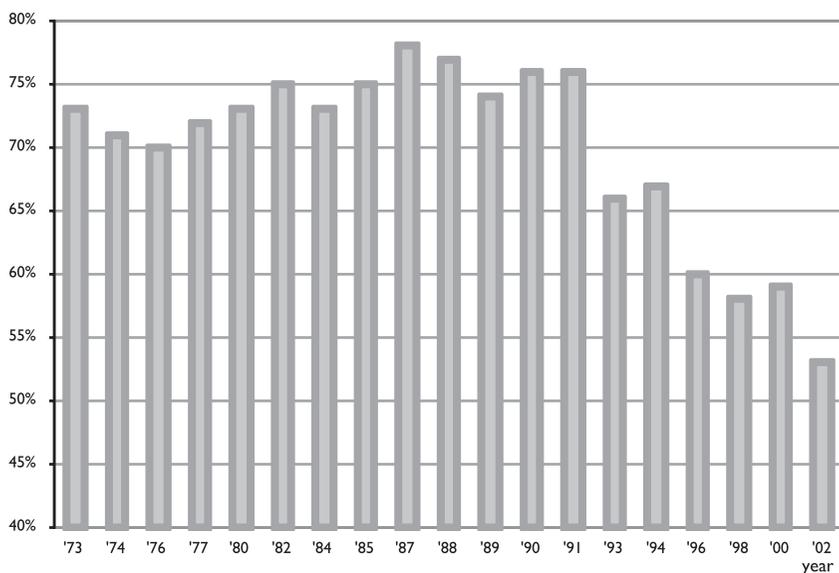


Question: "Still using the feeling thermometer (where 50–100 means you feel favorable and warm, between 0–50 means you don't feel favorable and don't care too much for), how would you rate the following groups . . . gay men and lesbians, i.e., . . . homosexuals?" Scores represent mean responses by year.

Fig. 3. Feeling thermometer ratings for lesbians and gay men, 1984–2000. (Data comes from the National Election Study and were provided for analysis by the Inter-University Consortium for Political and Social Research.)

sexual relations were "always wrong" up through 1991. At that point, attitudes began to shift. By 1993, only about two-thirds believed such conduct was always wrong. By 2002, the number had dropped to slightly more than one-half. These numbers indicate a persistent discomfort with issues of same-sex sexuality, of course. At the same time, they show a very real attitude change about homosexuality.

Other survey data bolster the contention that cultural frames surrounding homosexuality became more favorable in the 1990s than they had been in the 1980s. In 1988, the ANES first asked the following question: Do you favor or oppose laws to protect homosexuals against job discrimination? Forty-seven percent of the respondents said they favored such laws (fig. 5). By 1992, support had shot up by fourteen points, to 61 percent. By the mid-1990s, the number crept up to 64 percent, where it leveled off.¹⁵ Support for the right of lgb people to serve in the military

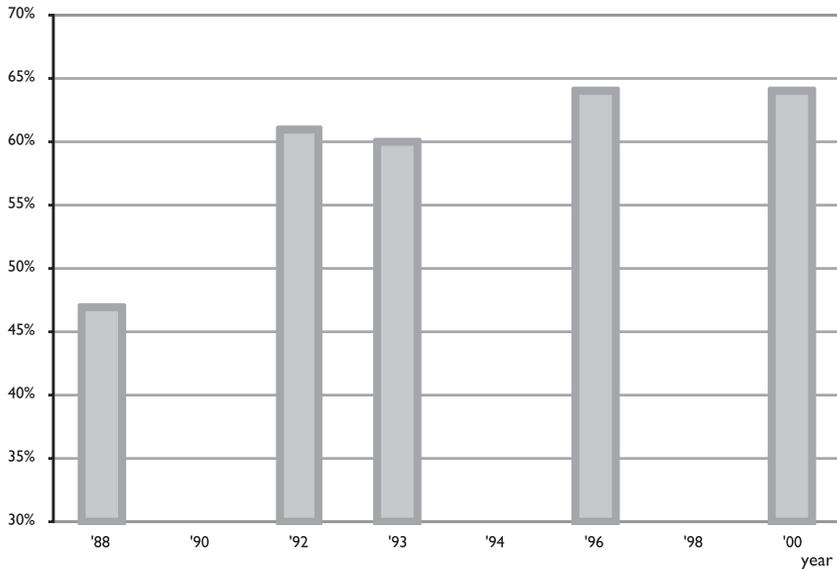


Question: "What about sexual relations between two adults of the same sex? Do you think it is always wrong, almost always wrong, wrong only sometimes, or not wrong at all?" Percentages represent those respondents choosing "always wrong."

Fig. 4. Attitudes about same-sex sexual relations, 1973–2002. (Data comes from NORC General Social Survey and were provided for analysis by the Inter-University Consortium for Political and Social Research.)

increased during this time period as well. By 2000, 71 percent of ANES respondents agreed that lgb people should be allowed to serve in the military, up from 58 percent in 1993.¹⁶

Attitudes about homosexuality in the context of familial relationships also eased significantly. Twenty-nine percent of respondents believed that same-sex couples should be legally permitted to adopt children when the ANES first asked the question in 1993. By 2000, the percentage supporting legal adoption rights had risen to 41.¹⁷ Willingness to accord legal recognition to same-sex couples likewise increased. In 1996, when the Gallup Organization first began polling on the subject, only 28 percent of respondents favored laws allowing same-sex couples to enter into legal relationships that would give them some of the rights traditionally associated with marriage. By May 2003, support for such rights had increased to 49 percent (fig. 6). It is worth noting that, although support for same-sex marriage also grew during this time period, respondents appeared to

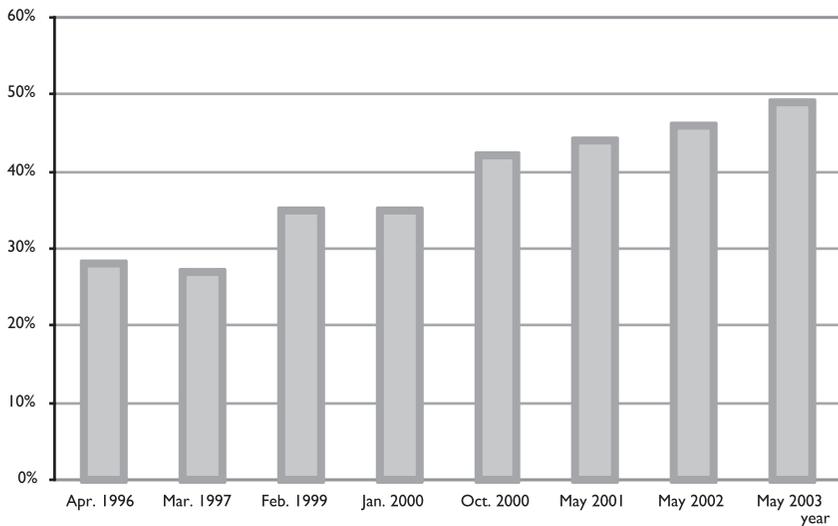


Question: "Do you favor or oppose laws to protect homosexuals against job discrimination?"
Scores represent percentage favoring such laws.

Fig. 5. Support for employment rights, 1988–2000. (Data comes from the American National Election Study and were provided for analysis by the Inter-University Consortium for Political and Social Research.)

be more comfortable with the concept of civil unions than they did with the concept of same-sex marriage. That is, survey respondents were more willing to grant same-sex couples the substantive rights that come with being married than they were to grant them the social status of being married. Once again, these findings suggest a persistent discomfort with issues of same-sex sexuality while simultaneously they show a significant increase in support for gay rights.

It is difficult to say for certain why the cultural framing of homosexuality became more positive as the twentieth century drew to a close. It is clear, though, that the subject of gay rights became much more visible in the early 1990s than it had been previously, a subject discussed at some length in chapter 3. Among the most prominent and fractious topics were whether openly lgb people should be allowed to serve in the military, whether laws designed to discriminate against lgb people were constitutional, whether the Boy Scouts should be required to accept gay scout-



Question for April 1996, October 2000, May 2002, and May 2003 surveys: "Would you vote . . . for or against a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples?"

Question for May 2001 survey: "Would you favor or oppose a law that would allow homosexual couples to legally form civil unions, giving them some of the legal rights of married couples?"

Question for March 1997, February 1999, and January 2000 surveys: "Do you think marriages between homosexuals should or should not be recognized by the law as valid, with the same rights as traditional marriages?"

Fig. 6. Support for legal recognition of same-sex couples, 1996–2003. (Data comes from Gallup polls administered between April 1996 and May 2003.)

masters, and whether same-sex couples should be allowed to marry.¹⁸ While all these disputes show the increasing centrality of gay rights in public discourse, the battle over same-sex marriage most symbolizes the shifting cultural frames surrounding same-sex sexuality.

Consider this: when the Supreme Court decided *Bowers*, the notion of same-sex marriage was not even a blip on the public radar screen. By the time it decided *Lawrence*, same-sex marriage was at the center of the debate over gay rights, so much so that all three opinions made specific reference to it. Justice Kennedy's majority decision specifically noted that *Lawrence* did not involve the question of "whether the government must

give formal recognition to any relationship that homosexual persons seek to enter” (2478). Justice O’Connor’s concurring opinion specifically cited the preservation of marriage as a legitimate state interest while concluding that Texas had no legitimate interest in criminalizing same-sex sexual activity between consenting adults. Justice Scalia’s dissent opined that the decision in *Lawrence* opened the door to same-sex marriage.

The Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. . . . Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between hetero-sexual and homosexual unions, insofar as formal recognition in marriage is concerned. (*Lawrence*, 2498)

Chapter 7 details the reasons why same-sex marriage came to assume such a prominent role in the cultural conversation about gay rights. For the purpose at hand, let me simply highlight the enormity of the shift in the cultural frames surrounding same-sex sexuality. In 1986, when the Supreme Court decided *Bowers*, the prevailing public conversation about same-sex sexuality concerned fears of AIDS contagion. The notion of a right to same-sex marriage would have been laughable. By 1992, when the Kentucky Supreme Court decided *Wasson*, the public terror over AIDS had begun to recede and new conversations about the sociopolitical implications of homosexuality (e.g., gays in the military) were emerging. By 1997, when *Gryczan* disabled Montana’s sodomy law, the public debate over same-sex marriage had become prominent enough to warrant Congress’s attention: the 1996 Defense of Marriage Act (DOMA) specifically limited marriage to opposite-sex couples for all federal purposes and also permitted states to refuse recognition to same-sex marriages performed by other states.¹⁹ By 2003, when the Supreme Court decided *Lawrence*, the cultural panic over AIDS had long since subsided. Thirty-seven states had passed legislation banning same-sex marriage within their borders. Vermont, however, recognized same-sex couples as spouses for all state-level purposes. And in Canada, Ontario had just begun to permit same-sex marriage; its lack of residency requirements meant that American couples could cross the border to marry if they wished, although the validity of those marriages in the United States had yet to be determined.

In short, the cultural framing of homosexuality in the *Bowers* era

emphasized lgb people, especially gay men, as “others”—promiscuous vectors of contagion existing in opposition to the sphere of hearth, home, and family. By the time *Lawrence* was decided the notion of homosexuality as existing in opposition to family was collapsing. Emerging in its place was an awareness of the families that same-sex couples created.

That this shift in the cultural framing of homosexuality entered the courtroom can be seen in a new judicial willingness to treat same-sex marriage claims respectfully in the 1990s (see chap. 7). It can also be seen in the increased judicial willingness of judges to consider lgb people as fit and proper parents (see chap. 3).

The increased willingness of the American public in general, and the judiciary in particular, to see same-sex relationships as constituting families rather than threatening them altered the context of sodomy reform litigation. Modern privacy jurisprudence developed in the context of familial decision making. As discussed in chapter 2, *Griswold v. Connecticut* (1965) established that the state could not prohibit the use of contraceptives by married couples because such laws impermissibly interfered with the “intimate relationship of husband and wife” (482) and the “notions of privacy surrounding the marriage relationship” (486). *Eisenstadt v. Baird* (1972) extended *Griswold* to unmarried people: “If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child” (453).

The majority in *Bowers* had been able to dismiss Michael Hardwick’s privacy claim in part because they framed his sexual activity as existing outside the bounds of familial decision making. As Justice White wrote, “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by [Hardwick]” (*Bowers*, 190–91). The reframing of same-sex sexuality that occurred in the 1990s undermined White’s assertion and made the privacy claims raised by gay rights litigators more compelling, both in a cultural and in a legal sense.

In sum, the public conversation about same-sex sexuality changed markedly in the years after *Bowers v. Hardwick* was decided. Fears about AIDS contagion receded, and new conversations about the sociopolitical implications of homosexuality emerged. Support for gay rights increased in a wide range of contexts. Most notably, Americans became more tolerant of same-sex relationships and more willing to treat same-sex couples as legitimate families. This shift in the cultural framing

of homosexuality in turn made the privacy claims raised by gay rights litigators more resonant to judges.

Challenging *Bowers*

Lambda made a series of consequential choices around the dawn of the new millennium. First, it decided to alter its post-*Bowers* strategy for attacking sodomy laws; both Arkansas's *Jegley v. Picado* and Texas's *Lawrence v. Texas* included federal as well as state constitutional claims. By making this change, Lambda signaled that it was contemplating a return to the U.S. Supreme Court. Second, Lambda decided to pursue a writ of certiorari to the Supreme Court when presented with the opportunity in *Lawrence*. And third, it decided to make two different arguments before the Court. It asked the Supreme Court to find that sodomy laws violated the guarantee of equal protection of the laws. It also asked the Court to overturn *Bowers v. Hardwick* and to find that sodomy laws violated the right of privacy. This latter decision was audacious; the Supreme Court has rarely overturned a precedent less than twenty years old. It was also, in retrospect, wise. The Supreme Court's ruling in *Lawrence* was everything Lambda could have hoped for and more. Not only did it explicitly overrule *Bowers*, but it did so in sweeping terms that recognized the dignity and worth of lgb people. Lambda gambled in *Lawrence*, just as the ACLU had gambled in *Bowers*. This time, though, the gamble paid off.

In the following pages, I show that the choices Lambda made were influenced by several factors, including litigator preferences, the mechanics of the judicial process, and changes in the underlying structure of legal opportunities surrounding sodomy reform.

The Reemergence of Federal Constitutional Claims

Lambda's decision to incorporate federal constitutional claims into its sodomy cases was the product of years of discussion, both within the organization and with gay rights litigators across the nation. The Litigators' Roundtable, successor to the Ad-Hoc Task Force, played an important role in facilitating this discussion and establishing an eventual consensus around the "new federal" strategy.

Lambda's underlying motivation in returning to federal constitutional arguments was simple enough. It wanted to dismantle—or at least

defang—the legacy of *Bowers v. Hardwick*, a goal it could only partially accomplish via the state-by-state strategy. The problem was that lower courts were relying on *Bowers* to permit discrimination against lgb people in a plethora of different contexts, employing the rationale articulated by the U.S. Court of Appeals for the Federal Circuit in *Woodward v. United States* (1989): “After [*Bowers v.*] *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm” (*Woodward*, 1076). The specter of *Bowers* thus hung over every gay rights case Lambda litigated. One Lambda attorney analogized the case to a “hammer opponents used in court” over and over again, no matter what the specific legal issue at hand.

On a more emotional level, Lambda wanted to erase a decision it viewed as profoundly insulting and homophobic. Noted gay rights attorney Mary Dunlap (1994, 7) encapsulated the feelings of many when she wrote about *Bowers*: “we ‘came out’ legally at a highly visible level, and we got bashed legally at a highly visible level.” In the words of one Lambda litigator, “we wanted vindication.”

There were also resource-based reasons for returning to federal constitutional claims. Litigating state by state is more time-consuming and more expensive than litigating at the federal level, all things being equal. The right federal constitutional challenge could conceivably knock out all remaining sodomy laws with one blow. Moreover, some litigators thought that the only way to bring down sodomy laws in a few states was through a federal constitutional ruling.

Whether to return to federal constitutional claims was never really a matter of debate. *When* to return was. A Lambda staffer posed the question this way: “How long do you have to wait before you can ask the Court to revisit a terrible decision? Every constitutional lawyer in America would have a different answer.” And in fact, the ACLU’s Lesbian and Gay Rights Project and the Boston-based GLAD both decided to wade back into federal constitutional waters before Lambda did.²⁰

In 1996, Lambda came to an internal consensus that the time was right to begin looking for a sodomy case to bring before the Supreme Court. Its decision reflected its sense that the legal and political context surrounding sodomy and homosexuality had changed to such an extent that the logic governing *Bowers* might no longer be persuasive to the Court. It had a number of reasons for drawing this conclusion.

First, the worst-case scenario had not come to pass. No state legislature had reinstated sodomy laws in response to *Bowers*. In fact, Nevada and the District of Columbia had both legislatively repealed their sodomy

laws. In addition, public attitudes about homosexuality and gay rights were far less negative than they had been in 1986. These events led Lambda to posit that, in the words of one litigator, “the world was ready for this.”

The wide criticism of the majority’s analysis in *Bowers* also helped to persuade Lambda that the precedent might be vulnerable to attack. The great majority of law review articles found the dissenters’ arguments in *Bowers* more persuasive than the majority or concurring opinions (see especially Goldstein 1988; Halley 1993; Thomas 1993). The *Bowers* majority had been roundly taken to task for its cramped reading of the right to privacy, its framing of the issue as concerning “a fundamental right to engage in homosexual sodomy,” and its uncritical reliance on majoritarian morality as a sufficient rationale for legitimating sodomy laws. Justice Powell’s public announcement that he had erred in voting with the majority in *Bowers* likewise seemed to make the precedent more vulnerable. Moreover, in early 1996 Tennessee had become the second state to judicially void its sodomy statute post-*Bowers*. As had the Kentucky Supreme Court in *Wasson*, the Tennessee court had construed the right of privacy much more expansively than had the *Bowers* majority. While both cases were based on state rather than federal constitutional guarantees, they clearly rejected the *Bowers* analysis.

The most important single factor in Lambda’s decision to seek Supreme Court review of another sodomy case, however, was a signal from the Supreme Court itself. The membership of the Supreme Court had changed substantially in the years since *Bowers*. By 1994, only three members of the *Bowers* Court remained—Justices Rehnquist and O’Connor, who had voted to uphold Georgia’s sodomy law, and Justice Stevens, who had voted to strike it down. The key question for Lambda and its allies was whether the Court’s turnover would produce a corresponding shift in its views on the constitutionality of sodomy laws.

The first gay rights case to reach the newly constituted Supreme Court provided few answers. In 1995, the Court decided *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group* (GLIB), otherwise known as the St. Patrick’s Day Parade case. *Hurley* offered scant information about the justices’ attitudes about gay rights, because the question it posed was whether the organizers of the parade could be compelled to include an expressive message they did not wish to include. The Court decided unanimously that the parade was a private event rather than a public one, that it included an expressive message, and that the state could not constitutionally compel the organizers to permit GLIB to march.

Although the opinion did not speak directly to the sociolegal implications of homosexuality, it did differ markedly in tone from the majority and concurring opinions in *Bowers*. Unlike the authors of those opinions, Justice Souter gave no sense that he found homosexuality distasteful or worthy of condemnation. The language he used when discussing GLIB and its purpose was respectful. For example, he referred to GLIB's members as "openly gay, lesbian, and bisexual descendents of the Irish immigrants" (*Hurley*, 570) rather than depicting them as "avowed" or "militant" homosexuals. Gay rights advocates hoped that the rhetorical differences between *Bowers* and *Hurley* presaged a new judicial openness to gay rights claims.

This hope was realized one year later. In *Romer v. Evans* (1996), a six-justice majority struck down Colorado's infamous antigay constitutional amendment. Passed in 1992, Amendment 2 invalidated all existing state and local provisions barring discrimination on the basis of sexual orientation and prohibited the future enactment of such legislation anywhere in the state. The *Romer* majority concluded that Amendment 2 bore no rational relationship to any legitimate government purpose. They found it instead to be "born of animosity" toward lgb people and designed to make them unequal to everyone else. "This government cannot do. A State cannot so deem a class of persons a stranger to its laws" (*Romer*, 635). The Court struck down the amendment as a violation of the federal equal protection rights of lesbian and gay Coloradans.

Romer v. Evans will be discussed at length in chapter 6. For the moment, the important point is that Lambda saw *Romer* as what one litigator called a "huge new tool" for attacking state sodomy laws on the federal level. Six justices had rejected Colorado's argument that, among other things, Amendment 2 was a permissible expression of majoritarian morality, designed to protect children, (heterosexual) families, and (heterosexual) marriage. They had recognized the animus toward lgb people underlying Amendment 2 and had explicitly repudiated it. Those same six justices might recognize the animus at the heart of same-sex sodomy laws as well.

Ironically, *Romer's* potential impact on *Bowers* was articulated by Justice Scalia, a dissenter in the case who argued that, under *Bowers*, Colorado's Amendment 2 must pass constitutional muster.

In *Bowers v. Hardwick*, we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct

a crime. . . . If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit had aptly put it: “If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.”) And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. (*Romer*, 641, citations omitted; emphasis in original)

Scalia’s logic chain was reversible. If, under *Romer*, Colorado’s Amendment 2 could not pass constitutional muster, then surely sodomy laws were unconstitutional as well.

Lambda’s 1996 decision to seek Supreme Court review of another sodomy case was, in summary, based on a combination of litigator preferences, long-term trends, and critical events. The desire to reverse or at least contain *Bowers* was always present. Favorable trends in the cultural framing of homosexuality made this goal seem more attainable, as did waning legislative and judicial support for sodomy laws combined with widespread criticism of the majority’s reasoning in *Bowers*. The Supreme Court’s decision in *Romer* provided the final push by giving Lambda a new tool with which to fight sodomy laws and signaling the Court’s potential openness to gay rights claims.

Developing Test Cases

Having decided to wade back into federal constitutional waters, Lambda set about developing potential test cases. Its decision making here was once again facilitated by extensive discussions with other organized and individual litigators as well as constitutional law professors. Topics of conversation included possible legal theories, fact scenarios, and laws to attack. As the two biggest organized sodomy law litigators, Lambda and the ACLU Lesbian and Gay Rights Project consulted especially closely with one another and ultimately settled on a common strategy. They

decided to focus their litigation efforts on the six states that had laws criminalizing same-sex but not opposite-sex sodomy²¹ and to raise a fourfold argument: such laws violated privacy and equal protection guarantees under both state and federal constitutions.

Their decision to continue raising state constitutional claims reflected the continued value of the state-by-state strategy. While Lambda and the ACLU wanted to bring a case back up to the U.S. Supreme Court, they also wanted to win at the state level. State constitutional claims allowed them to litigate around *Bowers* even as they were actively seeking to dismantle it.

Consensus about bringing both federal equal protection and privacy claims was more difficult to achieve. The general feeling among the litigators at Lambda and the ACLU was that the equal protection argument had a better chance of succeeding at the Supreme Court than did the privacy argument. *Romer* was an equal protection case, and the litigators saw a strong possibility that all six justices in the *Romer* majority would extend its logic to strike down sodomy laws as well.

Finding at least five votes for the privacy claim was more problematic (table 10). As litigators at Lambda and the ACLU “read” the Court, Rehnquist, Scalia, and Thomas would certainly vote to sustain sodomy laws against a privacy challenge as well as an equal protection challenge. Based on his vote in *Bowers*, Stevens seemed likely to strike such laws down on either constitutional ground, and based on their voting records in earlier privacy and equal protection claims, it seemed at least reason-

TABLE 10. Lambda/ACLU Predictions about Supreme Court Voting Patterns in Hypothetical Sodomy Challenge

Justice	Equal Protection	Privacy	Prior Decisions ^a	Ranking ^b
Breyer	Y	Y	Romer, Dale	1
Stevens	Y	Y	Bowers, Romer, Dale	2
Ginsburg	Y	Y	Romer, Dale	3
Souter	Y	Y	Romer, Dale	4
Kennedy	Y	?	Romer, <u>Dale</u>	5
O'Connor	Y	N	Romer, <u>Bowers</u> , <u>Dale</u>	6
Scalia	N	N	<u>Romer</u> , <u>Dale</u>	7
Thomas	N	N	<u>Romer</u> , <u>Dale</u>	8
Rehnquist	N	N	<u>Bowers</u> , <u>Romer</u> , <u>Dale</u>	9

^aCase names without underlining are votes that are considered pro-gay.

^bRankings reflect the justices’s relative support for the liberal position in civil liberties cases from their arrival on the Supreme Court through 1995, where 1 equals the most liberal justice and 9 equals the most conservative justice. Source for data is Epstein and Knight 1998.

ably likely that Breyer, Ginsburg, and Souter would do so as well. O'Connor and Kennedy were the question marks.

O'Connor's vote in *Romer* suggested she might be open to striking down sodomy laws on the basis of equal protection, but her vote in *Bowers* and in other right of privacy cases intimated that she would not be amenable to a privacy argument. Kennedy's vote in *Romer* likewise implied that he would be amenable to an equal protection argument. Whether he would go for a privacy argument was anyone's guess. On the one hand, his majority opinion in *Romer* revealed that he recognized the animus directed at lgb people and would likely be suspicious of any invocation of morality as a justification for the constitutionality of sodomy laws. On the other hand, his prior voting record in privacy cases closely matched O'Connor's.

Some litigators felt that the cause would be best served by raising only an equal protection claim. It seemed a safer bet. Moreover, they felt that a Supreme Court decision striking down sodomy laws on equal protection grounds might actually be more useful to other gay rights litigation than a decision striking down such laws on privacy grounds. Outside of sodomy law reform, very little gay rights litigation centered on privacy-based arguments by the mid-1990s. Equal protection arguments, though, were at the heart of a wide assortment of cases. The core idea behind the notion of equal protection is that the government must treat similarly situated groups in a similar fashion. If the Supreme Court ruled that lgb people were similarly situated to straight people with respect to their sexual relationships, litigators might be able to wield the ruling to dismantle other forms of discrimination of lgb people, including their exclusion from marriage and from openly serving in the military.

Other litigators thought it was important to raise a privacy claim as well as an equal protection claim. (It bears noting here that everyone appears to have agreed on the merits of an equal protection claim.) An equal protection ruling would only strike down sodomy laws in those states that drew distinctions between homosexuality and heterosexuality. The laws in "equal opportunity" states would survive, requiring yet more litigation. Perhaps even more important is the fact that it would leave the essential holding of *Bowers* intact.

In the end, the mechanics of the legal process helped convince Lambda and ACLU litigators to bring a privacy claim as well as an equal protection claim. Making a federal privacy claim in the lower courts would only commit them to arguing it before the Supreme Court *if* they won at the state level *and if* the basis for the state victory was the federal

privacy claim (as opposed to a state claim or a federal equal protection claim) *and if* the state appealed the decision to the Supreme Court *and if* the Supreme Court agreed to hear the case. However, failing to raise the issue in the lower courts would preclude them from arguing it before the Supreme Court when and if they managed to get a case onto the Court's docket. In other words, including a federal privacy claim at the start of a sodomy law challenge would likely not commit Lambda and/or the ACLU to arguing it before the Supreme Court. They would have time to reevaluate their wisdom of this legal argument as the case progressed.

As Lambda and the ACLU were considering legal arguments, they were also contending with the tension between finding litigants who could meet the federal standing requirements and finding litigants whose stories of harm the justices would "get." The core problem, once again, was the general lack of enforcement of sodomy laws. Given the paucity of lgb people who had actually been arrested for private, consensual sodomy, Lambda and the ACLU had two realistic options. The first was to challenge sodomy laws on behalf of gay men who had been convicted of soliciting sodomy. Such litigants would be most likely to jump the standing hurdle. The drawback to this plan was described by one litigator this way: "We didn't want the specter of gay men cruising for sex in public parks" to be raised in the justices' minds. "We didn't want to raise red flags any more than absolutely necessary."

Their other realistic option was to assemble cases with multiple plaintiffs asserting real but indirect harm from the existence of sodomy laws. This approach would allow Lambda and the ACLU to present the Supreme Court with an array of sympathetic litigants who could illustrate the myriad ways petty and profound that sodomy laws were harmful to lgb people. The drawback here was that the lack of criminal prosecution might convince the Supreme Court that the plaintiffs lacked standing.

The desire to avoid what one litigator called the "ick factor" led Lambda and the ACLU to choose the multiple plaintiff option. Lambda set about locating litigants to challenge Arkansas's same-sex-only sodomy law; the ACLU developed a parallel case in Maryland. The cases were launched within a few days of each other in early 1998. A few months later, the ACLU initiated a second case in Puerto Rico; Lambda became cocounsel when Michael Adams, the lawyer in charge of the case, left the ACLU for Lambda.²²

Then, on September 17, 1998, an event occurred that eerily paralleled the facts in *Bowers*. Police in Houston, Texas, burst into John

Lawrence's apartment based on what turned out to be a false report of an armed gunman on the premises. They surprised Lawrence, who was having sex with Tyrone Garner, and arrested both men for violating the state's sodomy law. Lawrence and Garner were held in jail for over twenty-four hours and subsequently released on bond. They pleaded "no contest" to the charges in criminal court and were each fined two hundred dollars.

In a surreal sense, the arrest of Lawrence and Garner was a gift to sodomy law reformers. Their conviction clearly gave them standing to challenge Texas's law. The location of their arrest (Lawrence's bedroom) made the privacy interest at stake clear. And the fact that Texas's law prohibited only same-sex sodomy meant that federal equal protection arguments could be raised as well. Lambda was called in shortly after the arrest and quickly added the new case to its docket.

In sum, the test cases Lambda and the ACLU developed were shaped by a number of forces, including litigator preferences, the mechanics of the legal process, judicial alignments on the Supreme Court, and a confluence of unlikely events.

Litigating in the Lower Courts

Lambda and the ACLU spent the next several years shepherding these four cases through the courts. The cases progressed quite differently. *Williams v. Glendening*, the ACLU's Maryland case, ended shortly after it began, with a favorable ruling at the trial court level; in a subsequent settlement with the ACLU, the state of Maryland agreed that private, consensual sexual conduct fell outside the scope of the criminal law. This was a clear victory for the ACLU, although it obviously meant that *Glendening* was not headed to the U.S. Supreme Court.

In contrast to Maryland, Arkansas fought to preserve its sodomy law all the way up to the state's supreme court—twice. The first time, it argued that the seven plaintiffs in Lambda's *Jegley v. Picado* lacked standing to challenge the law because they had not been directly harmed by it. The Arkansas Supreme Court unanimously rejected the state's claim and remanded the case for trial. The case then worked its way up to the Arkansas Supreme Court again, this time on a consideration of the merits of Lambda's equal protection and privacy arguments. By a 3–2 vote, the high court struck down the law, ruling that it ran afoul of state constitutional guarantees of privacy and equal protection. Lambda was thrilled to win the case, yet its victory meant that *Jegley* would not be

headed to the U.S. Supreme Court either. Because the ruling was based on the state constitution, Arkansas did not have the option of petitioning the U.S. Supreme Court for review.

Puerto Rico's reaction was similar to Arkansas's. It argued in *Sanchez v. Puerto Rico* that the plaintiffs lacked standing to challenge the sodomy law's constitutionality because none of them had been charged with violating it.²³ The trial court rejected this argument and ordered the case to proceed to trial, but the court's ruling was reversed by the court of appeals, which determined that the plaintiffs could not show that they were directly harmed by the law and so lacked standing to challenge it. The ACLU appealed this ruling to the Puerto Rico Supreme Court, which initially declined to accept the case but then reversed itself. The high court ultimately concluded that the plaintiffs were in fact without standing.

With a loss in the Puerto Rico Supreme Court, the ACLU and Lambda (which had become cocounsel in the case) were in a position to ask the U.S. Supreme Court to review the case. There was a clear consensus among the two organizations, however, that *Sanchez* was not a good candidate for Supreme Court review. The merits of the case had never been reached; the legal record focused entirely on questions of justiciability. Lambda and the ACLU knew that the Supreme Court was highly unlikely to consider the merits of a constitutional challenge to Puerto Rico's sodomy law when the courts below had not addressed them; expending additional resources on a case that seemed destined to be denied certiorari seemed unwarranted. Moreover, because the merits of *Sanchez* had not been litigated, Lambda and the ACLU had been unable to build the kind of factual record they thought they would need to bolster their legal arguments.

Lawrence encountered none of the barriers that made *Glendening*, *Jegley*, and *Sanchez* ineligible or inappropriate for Supreme Court review. Because of their conviction, John Lawrence and Tyrone Garner clearly had standing to challenge the constitutionality of Texas's "Homosexual Conduct" law. The merits of both the privacy and the equal protection arguments had been addressed, first by a panel of Texas's Fourteenth District Court of Appeals in Houston, which struck down the law by a vote of 2-1 as violating state constitutional guarantees of equal protection, and then by the Fourteenth District Court of Appeals sitting en banc, which overturned the panel's ruling by a vote of 7-2. The Texas Court of Criminal Appeals' refusal to hear an appeal in *Lawrence* gave Lambda its second opportunity to file a writ of certiorari before the Supreme Court. This time Lambda went forward.

When Lambda and the ACLU were in the process of developing and litigating *Glendening*, *Jegley*, *Sanchez*, and *Lawrence*, they had no idea which one, if any, would make it up to the Supreme Court. As it turned out, *Glendening* and *Jegley* were both derailed, in a manner of speaking, by victory at the state level. The development of *Sanchez* made it technically eligible for Supreme Court review but realistically inappropriate. Only *Lawrence* developed in a fashion that made it not only eligible for review but also a reasonable candidate.

It might have been different. *Jegley*, for example, was decided in Lambda's favor by a 3–2 vote. A one-vote switch would have made it eligible for Supreme Court review as well. Whether Lambda would have asked for a writ of certiorari, whether they would have raised both privacy and equal protection claims, whether the Supreme Court would have taken the case, and, if so, what the Court would have ruled are questions we can only speculate about. The point for the purposes at hand is that litigation strategies are inevitably constrained by events outside the control of the litigators. The most they can do is plan for contingencies. Lambda's executive director Kevin Cathcart referred to this feature of the litigation process when he described Lambda's sodomy reform strategy thus: "Our plan really looks more like an old computer-programming flowchart: if this, then that. We have to have multiple irons in the fire because we just don't know what's going to happen" in any particular case.

Petitioning for a Writ of Certiorari

With *Lawrence* at the certiorari stage, Lambda needed to revisit the issue of whether to ask the Supreme Court to overturn *Bowers v. Hardwick* or to proceed solely with an equal protection claim. The organization solicited input from the Litigators' Roundtable as well as a range of constitutional law scholars. The question was the subject of lengthy and impassioned debate. Unanimity as to the best approach was never achieved. Much of the conversation trod well-worn ground concerning the relative risks and rewards of arguing equal protection versus privacy. The recent Supreme Court decision in *Boy Scouts of America v. Dale* (2000) added fuel to the conversational fire.

Dale, another Lambda case, concerned the question of whether the First Amendment right of expressive association permitted the Boy Scouts to prohibit James Dale from serving as an assistant scoutmaster, despite a New Jersey law prohibiting discrimination on the basis of sex-

ual orientation in public accommodations. *Dale* required the Court to resolve a number of factual disputes, including whether the group's expressive message included a coherent policy of disapproval of homosexuality and, if so, whether the inclusion of an openly gay scoutmaster would significantly burden that message.

The New Jersey Supreme Court had ruled unanimously that the publicly articulated policies of the Boy Scouts did not include any coherent antigay message or purpose and thus that its right of expressive association would not be burdened by Dale's presence. It ordered the organization to reinstate him.

On appeal, the Supreme Court reversed the New Jersey court's ruling, by a vote of 5–4. The majority and dissenting opinions construed the facts at issue in diametrically opposed fashions. Rehnquist's majority opinion accepted the Boy Scouts' assertion that their expressive message included disapproval of homosexuality. It also concluded that, as an openly gay man and "gay rights activist," "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior" (*Dale*, 652).

Stevens's dissenting opinion rejected the Boy Scouts' assertion that their expressive message included disapproval of homosexuality. It also rejected the majority's conclusion that Dale's mere presence as a scoutmaster constituted an expressive message.

Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in any expressive activities. That cannot be, and never has been, the law.

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his

ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. (*Dale*, 695–96)

The worrisome aspect of *Dale* vis-à-vis the certiorari decision in *Lawrence* was that Justices O'Connor and Kennedy had both signed onto Rehnquist's majority opinion rather than Stevens's dissent. *Dale* did not speak directly to either the rights of privacy or equal protection. It did, however, expose a fault line in the Court over the social meaning of homosexuality, captured in the quotes given previously, and also emphasized the crucial swing role played by Kennedy and O'Connor. To some litigators, *Dale* sounded a worrisome note about the more ambitious right of privacy claim.

Ultimately, Lambda had to make a decision, and it chose to include both an equal protection argument and a privacy argument in its writ of certiorari. Its decision was based on a number of factors, including the mechanics of the Supreme Court decision-making process, an anticipated shift in the membership of the Court, and the unusual confluence of events that produced *Lawrence*.

The Supreme Court has virtually unfettered discretion not only in choosing what cases it wants to hear but also in choosing what elements of those cases it wishes to address. Lambda believed (*hoped* may be the better word here) that the Supreme Court would not agree to hear a privacy claim merely to reiterate *Bowers*. The Court was more likely, Lambda thought, to decline to accept the question for review and instead limit the scope of its inquiry to the equal protection claim. Moreover, even if the Supreme Court chose to hear the privacy claim and ultimately upheld *Bowers*, so long as it ruled favorably on the equal protection claim, same-sex-only sodomy statutes would fall.

Lambda was also spurred to include a privacy argument because it anticipated that judicial alignments on the Supreme Court might well become less favorable to gay rights claims in the near future. George W. Bush had won the 2000 presidential election; he had expressed his admiration for the jurisprudence of Justices Scalia and Thomas on a number of occasions. Together with Chief Justice Rehnquist, Scalia and Thomas anchored the conservative wing of the high court; from Lambda's perspective, their track record on gay rights, privacy, and equal protection was dreadful. Were Bush given the opportunity to nominate a Supreme Court justice, Lambda anticipated that he would choose someone cast

from the same mold. Worse, court watchers were widely expecting at least one and possibly as many as three justices to retire in the near future. Among the names floated as a likely candidate for retirement was Justice Stevens, the oldest member on the Court. Stevens, who had voted for *Romer* and against *Bowers* and *Dale*, anchored the liberal wing of the Supreme Court. Replacing him with a conservative justice would dramatically shift the Court to the right, making it difficult if not impossible for gay rights claims to prevail.

Finally, Lambda was very cognizant that the events that precipitated *Lawrence* were unlikely to occur again anytime in the foreseeable future. While neither Lawrence nor Garner had led the sort of impeccable lives that Justice Douglas in that long-ago forum on Staten Island had mentioned would be a useful complement to a sodomy law challenge, the fact that they had been arrested in Lawrence's bedroom threw the privacy issue into stark relief. The odds of Lambda finding a future case that more vividly illustrated the privacy interests at stake seemed vanishingly small.

In sum, Lambda rolled the dice in filing its petition for a writ of certiorari in *Lawrence*, but it had real reasons for thinking that the time was right to challenge *Bowers*. The cultural framings surrounding homosexuality had changed considerably since 1986. The number of states with sodomy laws had dropped from twenty-four to fifteen. The membership of the Supreme Court had likewise changed; *Romer* in particular indicated that a majority of the justices might now look favorably on a challenge to the constitutionality of sodomy laws. The facts in *Lawrence* offered a compelling illustration of the privacy issues at stake, and Texas's same-sex-only sodomy law allowed an equal protection claim to be made as well. Waiting to take on *Bowers* at a future point in time seemed problematic. New judicial appointments would probably push the Court further to the right, and another *Lawrence* was not likely to arise, leaving gay rights litigators with the option of bringing solicitation-based cases (and risk triggering the "ick factor") or bringing multiparty facial challenges (and risk stumbling over the standing hurdle).

In retrospect, its decision was wise. The Supreme Court accepted *Lawrence* and agreed to consider both whether same-sex-only sodomy laws violated the federal guarantee of equal protection and whether *Bowers* was correctly decided. On June 26, 2003, the Supreme Court struck down Texas's sodomy law, finding that it impermissibly infringed on the right of privacy. *Bowers* was overruled, just four days shy of its seventeenth anniversary.

Winning Lawrence

The facts behind *Bowers* and *Lawrence* were remarkably similar. In both cases police had literally looked into the bedroom of a gay man and witnessed him having sex with another man. In both cases, the men had been arrested in their own bedrooms, handcuffed, and brought to holding cells, where they were forced to wait a lengthy period of time before their paperwork was processed.²⁴ In both cases, gay rights litigators argued that sodomy law under which the men had been arrested violated their right of privacy under the federal Constitution.

The similarities between *Bowers* and *Lawrence* extended into the Supreme Court. In both cases, the privacy question was resolved on a 5–4 vote. But here the similarities ended. In *Bowers*, swing vote Justice Powell had decided that the case was, in his words, “frivolous” and “brought just to see what the Court would do” (Marcus 1990). He signed onto Justice White’s majority opinion upholding Georgia’s sodomy law. In *Lawrence*, swing vote Justice Kennedy authored the majority opinion striking down Texas’s law. He construed the privacy interest at stake quite differently.

The Court began its substantive discussion in *Bowers* as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” That statement, we now conclude, discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes 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. (*Lawrence*, 2478, citations omitted)

Why were gay rights litigators able to mobilize the law successfully in *Lawrence* when they had failed in *Bowers*? Justice Scalia's blistering dissent, which was joined by Rehnquist and Thomas, reiterated an accusation he had initially proffered in his *Romer* dissent: that the decision reflected the majority's political preferences rather than the dictates of the law.

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . [T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. (*Lawrence*, 2497)

Rhetoric about the "so-called homosexual agenda" aside, it is clear that Kennedy understood the harms posed by sodomy laws in a way that Powell had not.²⁵ The significant changes in the cultural frames surrounding homosexuality in the seventeen years since *Bowers* undoubtedly played a role in Kennedy's awareness of the liberty interests at stake. In fact, changes in the cultural framing of homosexuality apparently had an impact on the wider court. Even Justice Scalia felt it necessary to announce that he had "nothing against homosexuals, or any other group, promoting their agenda through normal democratic means" in his dissent (*Lawrence*, 2496). Justice Thomas joined Scalia's dissent but also wrote separately to underscore his distaste for Texas's law. Invoking Justice Stewart's famous critique of a Connecticut law banning contraceptive use in *Griswold v. Connecticut* (1965), Thomas wrote: "I write separately to note that the law before the Court today is . . . uncommonly silly.' If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through non-commercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources" (2498).

Thomas's dissent went on to conclude that he was "not empowered to help petitioners and others similarly situated" (2498) because, as he read it, the Constitution did not encompass a generalized right of privacy. His argument suggests that the political values of justices are tempered by their understanding of what the law requires. Justice O'Connor's concurrence in *Lawrence* suggests this as well. O'Connor provided the sixth

vote to strike down Texas's sodomy law, but on a different ground. She rejected the majority's conclusion that the law violated the right of privacy but did find that the law violated the guarantee of equal protection.

It is interesting to note, however, that despite her unwillingness to strike down *Bowers*, O'Connor rejected a central element of *Bowers*'s holding: that Georgia's interest in promoting morality constituted a legitimate basis for its sodomy law. Texas asserted the same interest in *Lawrence*. Indeed, it was the *only* rationale Texas advanced for its sodomy law. O'Connor rejected it flatly, analogizing Texas's sodomy law to Colorado's Amendment 2 and concluding that its intent and effect were actually to single out homosexuals and brand them as legally and socially inferior. "Moral disapproval" of homosexuals, she wrote, "like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause" (2486).

O'Connor's concurrence opens the door to an interesting hypothetical: would she have voted to strike down Georgia's sodomy law in 1986 had the law prohibited only same-sex sodomy? Were the members of the Ad-Hoc Task Force who argued that *Bowers* should be withdrawn and/or consolidated with *Baker v. Wade* correct? The answer is obviously unknowable, but the question is useful because it gets to the heart of the relationship between legal frames and cultural frames. Legal and cultural frames do not exist in isolation from one another. In both *Bowers* and *Lawrence*, cultural symbols and discourses shaped the legal understandings of the presiding justices. Had the ACLU been able to frame the legal issue in *Bowers* as one of equal protection, would O'Connor's vote have changed? Or would the dominant cultural frames surrounding homosexuality at the time have convinced her that people who committed "homosexual sodomy" were sufficiently different from people who committed heterosexual sodomy that states were justified in criminalizing one but not the other?

For what it's worth, my sense is that O'Connor's vote would *not* have changed and that gay rights litigators would have found themselves facing bad precedent on both privacy and equal protection fronts in the alternative universe I've postulated. Both the cultural and the legal context of homosexuality changed significantly in the years between *Bowers* and *Lawrence* in ways that increased the resonance of Lambda's claims and decreased the persuasiveness of "morality" as a basis for distinguishing between homosexuals and heterosexuals. This is not to say that I believe O'Connor switched sides in the "culture war" (to use Scalia's phrase). It is to say that I believe O'Connor had come to more fully

understand the constitutional implications of sodomy laws and to more clearly see that laws directed at lgb people were motivated by animus.

The Impact of Lawrence

On June 25, 2003, thirteen states in addition to Texas had operational sodomy laws.²⁶ On June 26, 2003, all of those laws fell. That *Lawrence* constituted a landmark legal victory for sodomy law reformers is beyond debate. Whether and to what extent *Lawrence* will have an impact on the course of gay rights litigation more generally, however, remains to be seen. In the words of Lambda litigator Pat Logue, *Lawrence* “reshaped the landscape in a way that is clearly profound, and we don’t pretend to know all its implications yet” (Coyle 2003). As this book went to press, Lambda was contemplating a number of areas in which *Lawrence* might prove useful. In October 2003 it took a first step in testing the limits of *Lawrence*: together with the ACLU and the Servicemembers Legal Defense Fund, it filed an amicus brief arguing that *Lawrence* required the military to overturn its ban on consensual sodomy.²⁷ An article posted on Lambda’s web site discussed several additional possible lines of argument.

When gay parents in committed relationships are told that they must choose between living with their partner or their children, we will use the momentum from this great victory on their behalf. We now have a powerful new tool to roll back anti-gay discrimination against public employees, including teachers and law enforcement officials. When public schools refuse to step in and protect lesbian and gay students from violence and harassment, this decision will help us secure their safety. And if any legislature in the country—from the State House in Austin, Texas to a city council in Oregon to the U.S. Congress—passes a law to express disapproval of gay people, we’ll use this ruling to fight back. (Lambda Legal Defense and Education Fund 2004)

Lambda’s rhetoric notwithstanding, early judicial responses to attempts to use *Lawrence* to leverage further gay rights victories have been decidedly mixed. The Massachusetts Supreme Judicial Court cited *Lawrence* repeatedly in a decision striking down the state’s prohibition of same-sex marriage (*Goodridge v. Dept. of Public Health*, 2003) as well as in a related ruling holding that civil unions were a constitutionally

inadequate substitute for marriage (*Opinions of the Justices to the Senate*, 2004).²⁸ The Eleventh Circuit Court of Appeals, in contrast, explicitly rejected the argument that *Lawrence* had any salience to a case challenging Florida's refusal to allow lgb people to adopt children (*Lofton v. Secretary of the Department of Children and Family Services*, 2004). *Lawrence*, said the Eleventh Circuit, concerned itself with criminal penalties for actions involving consenting adults while Florida's adoption law involved a legal privilege involving both adults and children.

The Kansas Court of Appeals likewise minimized *Lawrence's* reach (*State v. Limon*, 2004). Matthew Limon had been sentenced to seventeen years in prison for having sex with a fourteen-year-old boy when Limon himself was eighteen. Had Limon had sex with a girl rather than a boy, he would have served only fifteen months. The day after the Supreme Court decided *Lawrence*, it remanded *Limon* for reconsideration in light of *Lawrence*, a clear indication that the Supreme Court felt that *Lawrence* controlled *Limon*. The Kansas Court of Appeals rejected the high court's implied direction. The cases, it ruled, were both factually and legally distinct from one another. Unlike *Lawrence*, *Limon* involved a minor.²⁹ Moreover, *Limon* raised an equal protection challenge while *Lawrence* was decided on a privacy basis.

The Kansas court's differentiation of *Lawrence* as a privacy case is especially notable because it spoke to a concern expressed by a number of gay rights litigators. As noted earlier in this chapter, the universe of gay rights litigators involved in planning the development of *Lawrence* and other potential test cases had been divided over whether to challenge sodomy laws based on privacy, equal protection, or some combination of the two. A sizable number felt that a decision striking down sodomy laws on the basis of privacy might actually be less useful to future gay rights litigation than a decision grounded in the jurisprudence of equal protection. *Limon* suggests the possibility that this view is correct, and that for all its soaring rhetoric, *Lawrence* may have somewhat limited utility as a tool for advancing gay rights claims through litigation.³⁰

Only time will tell. At a minimum, *Lawrence* has ensured that *Bowers* can no longer be used as a basis for denying gay rights claims. Whether gay rights litigators can wield it effectively as a weapon for advancing gay rights more broadly is unclear. *Lawrence*, like *Bowers* before it, has shifted the LOS, but the value of this shift—both for advocates and opponents of gay rights—is but a wave of probabilities at the moment. Lambda and its allies will wield their considerable expertise to leverage additional gains just as opponents of gay rights will seek to min-

imize those gains and, if possible, use *Lawrence* to further their attacks on gay rights.³¹ *Lawrence* is, at the moment, an opportunity awaiting action.

Conclusion

Why did gay rights litigators lose *Bowers* but win *Lawrence*? I have argued in this chapter that the key difference between the two cases is that the structure of legal opportunities changed significantly in the intervening years. Turnover in the membership of the Supreme Court, the widespread disparagement of the reasoning in *Bowers* in the legal community, the new legal frame provided by *Romer v. Evans*, the “normalization” of AIDS, and shifts in the cultural framing of homosexuality all combined to make the claims raised by Lambda in *Lawrence* more compelling to the Supreme Court than were similar claims raised by the ACLU in *Bowers*.

It is important to recognize that some of these changes (e.g., turnover on the Court) were beyond the control of Lambda and its compatriots but that others were affected by their actions. Lambda and the ACLU, for example, litigated *Romer v. Evans*. Lambda used multiple techniques to work toward the normalization of AIDS, including litigation, congressional testimony, and the convening of a National AIDS Policy Roundtable to attempt to influence the development of public policy related to HIV disease. Lambda and ACLU staffers wrote law review articles detailing what they saw as the legal defects in *Bowers*. And litigation brought by the two organizations—as well as by GLAD, the National Center for Lesbian Rights (NCLR), and other gay rights groups—helped to change the cultural frames surrounding homosexuality; the emergence of a widespread cultural conversation about same-sex marriage in the 1990s is only the most obvious example of the impact of this litigation.

As I noted in chapter 4, studying legal change from a legal opportunity perspective means more than examining the external environment confronting social movement actors. It also means relating a movement’s litigation strategies and outcomes to that external environment. In the context of post-*Bowers* sodomy reform litigation, one particularly important feature of the external environment was the federal structure of the legal system. Gay rights litigators were able to litigate around *Bowers* because of the existence of parallel court systems with independent sources of authority. By turning to state constitutional claims,

Lambda and its colleagues were able to continue chipping away at state sodomy laws. The reduction in the number of states with sodomy laws in turn undermined the “majoritarian morality” claim that served as a basis for the ruling in *Bowers*.

Another important feature of the external environment was the standing requirement. Although Lambda and its fellow litigators encountered fewer standing-related barriers post-*Bowers* than they did pre-*Bowers*, the issue of standing continued to influence their litigation choices. Part of what made *Lawrence* such an obvious vehicle to challenge the constitutionality of Texas’s sodomy law is that the plaintiffs in the case clearly met the standing requirement. In this, the motivation for pursuing *Lawrence* and *Bowers* was exactly the same.

Of course, the dramatically different outcomes of the two cases lead to a perhaps inevitable inference that litigating the former case was a “bad” idea while litigating the latter was a “good” one. Here I would like to reiterate a point I made in chapter 4: there is no Rosetta stone to aid in decoding the structure of legal opportunities. The litigators of both cases made a set of choices based on their reading of the legal and political context surrounding gay rights. In both cases, these choices were disputed by other litigators who were arguably equally as expert in their knowledge of gay rights, constitutional law, and the Supreme Court. The closeness of the vote in both cases—5–4 on the privacy claim—makes it clear that there wasn’t an obviously right answer either time.

This is not to say that there are never any obviously right or wrong choices about what, where, when, and how to litigate. Legal claims must draw on the existing legal and cultural stock in order to be persuasive. Bringing a federal privacy claim in a sodomy case within a few years of *Bowers* would have been foolish by anyone’s estimation, for example. Lower courts, whether federal or state, would have been constrained by *Bowers* to deny the claim, and the Supreme Court would not have granted certiorari in an appeal. Such a case would only have added to the body of precedent construing sodomy as existing outside the realm of protected privacy interests. Organized litigators such as Lambda are all well aware of the “obviously wrong” and “obviously right” litigation choices. The difficulty is in determining the appropriate course of action when the choices are nonobvious.

A final note: The story of sodomy reform efforts reveals that LOS often operates in conjunction with POS. In all four stages of sodomy reform, legal and legislative trends moved in roughly the same direction. This should not be surprising, given that LOS and POS look to many of

the same factors to explain the origins, progress, and outcomes of social movements. The critical event of AIDS, for example, closed down both political and legal spaces for the gay rights movement to push for sodomy reform. Shifts in the cultural framing of homosexuality, in turn, opened both the political and legal spaces for the gay rights movement to push for sodomy reform.

This is not to suggest that the two concepts are interchangeable, merely that they overlap. The problem of standing, for instance, narrowed access to the courts but not to the legislative arena. The Model Penal Code, conversely, facilitated legislative sodomy reform but had virtually no effect on judicial reform. In the next chapter, we shall look more intently at the ways in which legal and political opportunity structures differ.