

FOUR

Sodomy Reform from Stonewall to *Bowers*

On June 26, 2003, the U.S. Supreme Court handed down a decision that Lambda's executive director, Kevin Cathcart (2003), described as "the most significant ruling ever for our civil rights." *Lawrence v. Texas* struck down Texas's "Homosexual Conduct" law, which criminalized oral and anal sex when performed by same-sex couples. The government, according to the Court, had no business policing the intimate personal relationships of consenting adults.

Adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. (2478)

Lawrence was an unqualified legal victory for Lambda. Prohibitions against sodomy had long been invoked to justify the legality of discrimination against lgb people in multiple domains, including employment, military service, housing, public accommodations, immigration, speech and association, custody, adoption, marriage, and the provision of government benefits (see Achtenberg 1996; Rivera 1979, 1985, 1986).¹ In short, sodomy laws have been "the chief systematic way that society as a whole tells gays they are scum" (Mohr 1986, 53).

Not only did *Lawrence* invalidate Texas's sodomy law and, by extension, all other state sodomy laws, it did so in language that made it clear that lgb people deserved legal respect. As Justice Kennedy's majority opinion put it: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime" (*Lawrence*, 2485).

This victory, however, took a long time coming. Lambda had viewed the eradication of sodomy laws as a core priority since its creation in 1973. In the thirty years leading up to its final victory in *Lawrence*, Lambda attacked the constitutionality of sodomy laws twenty-four times, acting as counsel in eleven cases and filing amicus briefs in the other thirteen. As we shall see, a number of Lambda's cases were in fact successful, leading several states to judicially void their laws. But until *Lawrence*, Lambda's biggest sodomy case was a paradigmatic example of a test case gone badly awry.

Bowers v. Hardwick came before the U.S. Supreme Court in 1986. Like *Lawrence*, *Bowers* asked the high court to find that a (Georgia) state law criminalizing anal and oral sex violated the right of privacy under the federal Constitution.² The *Bowers* Court's reaction to this request was dramatically different from the *Lawrence* Court's. In a scathingly worded decision, the Supreme Court decreed that the notion of a "fundamental right to engage in homosexual sodomy" was, "at best, facetious" (*Bowers*, 193). It upheld Georgia's power to criminalize sodomy and, by extension, the power of all other states to do so as well. Lower courts subsequently relied on *Bowers* to justify discrimination against lgb people in a wide variety of legal contexts.

In this chapter and the next I examine the long campaign by Lambda and other gay rights litigators to eradicate sodomy laws. This chapter traces the progress of sodomy law reform from its beginnings in the early 1970s through the Supreme Court's decision in *Bowers v. Hardwick*. Chapter 5 tells the tale of litigating in *Bowers*'s shadow and continues through to the Supreme Court's decision in *Lawrence v. Texas*. The primary focus of my inquiry is on the shifting ability of Lambda and other gay rights litigators to mobilize the law successfully in the context of sodomy reform. Why did gay rights advocates lose *Bowers* but win *Lawrence*? More broadly, under what circumstances have rights claims about same-sex sexuality been more or less likely to prevail in court?

In the following pages, I show that sodomy reform has been a start-and-stop process proceeding in four distinct stages. I then examine Lambda's actions and the prevailing structure of legal opportunities in each of those stages. Ultimately, I argue that the progress of Lambda's thirty-year campaign against sodomy laws is best understood as a product of shifts in the LOS and the strategic responses of Lambda and other organized litigators to those shifts.

The Stages of Sodomy Reform

The legal status of sodomy laws has changed enormously in the years since Stonewall. In 1969, every state in the nation except Illinois had a sodomy law on the books.³ By 2003, when the Supreme Court issued its decision in *Lawrence*, the number of states with sodomy laws had dropped to thirteen.

Figure 1 charts the progress of sodomy reform between 1960 and 2003. (The starting point for the graph is arbitrary. Had it started earlier, nothing would have changed; the graph would show sodomy laws in all fifty states.) It reveals that sodomy reform has proceeded in four relatively distinct stages. Stage 1 can be considered to be the status quo ante. It runs from 1960 to 1970. In 1971, Connecticut became the second state in the nation to erase its sodomy statute, inaugurating a period of reform that lasted for thirteen years, coming to a close in 1983 (stage 2). During stage 2, the number of states with operational sodomy laws dropped from forty-nine to twenty-four (line A). During this same period of time, a number of states embarked on an alternate path, exempting heterosexual sodomy from prosecution but retaining prohibitions on same-sex sodomy (line C).

Stage 3 runs from 1984 through 1991 and marks a period of backsliding with respect to sodomy reform. The trend toward repeal (line A) leveled off while the specification trend (line C) continued to gather momentum, rising to ten states by the close of the period. The *Bowers* decision came down during this stage. Although the 1986 decision in the case is commonly considered to mark a transition from a period of reform to a period of backlash, figure 1 suggests that *Bowers* symbolized the period of backsliding rather than generating it.

Stage 4 marks the final era. It runs from 1992, the year Kentucky became the first post-*Bowers* state to invalidate its sodomy law (*Kentucky v. Wasson*), to June 2003, when the Supreme Court invalidated all remaining state sodomy laws. Much like stage 2, stage 4 represents a period of reform. The number of states with sodomy laws dropped from twenty-four to fourteen in the years between *Bowers* and *Lawrence*—a number that includes one state, Michigan, where the enforceability of the law became questionable.⁴ The District of Columbia likewise repealed its sodomy law during stage 4. Most notable among the states invalidating their laws was Georgia, the state whose sodomy law birthed *Bowers v. Hardwick* (*Powell v. State*, 1998).

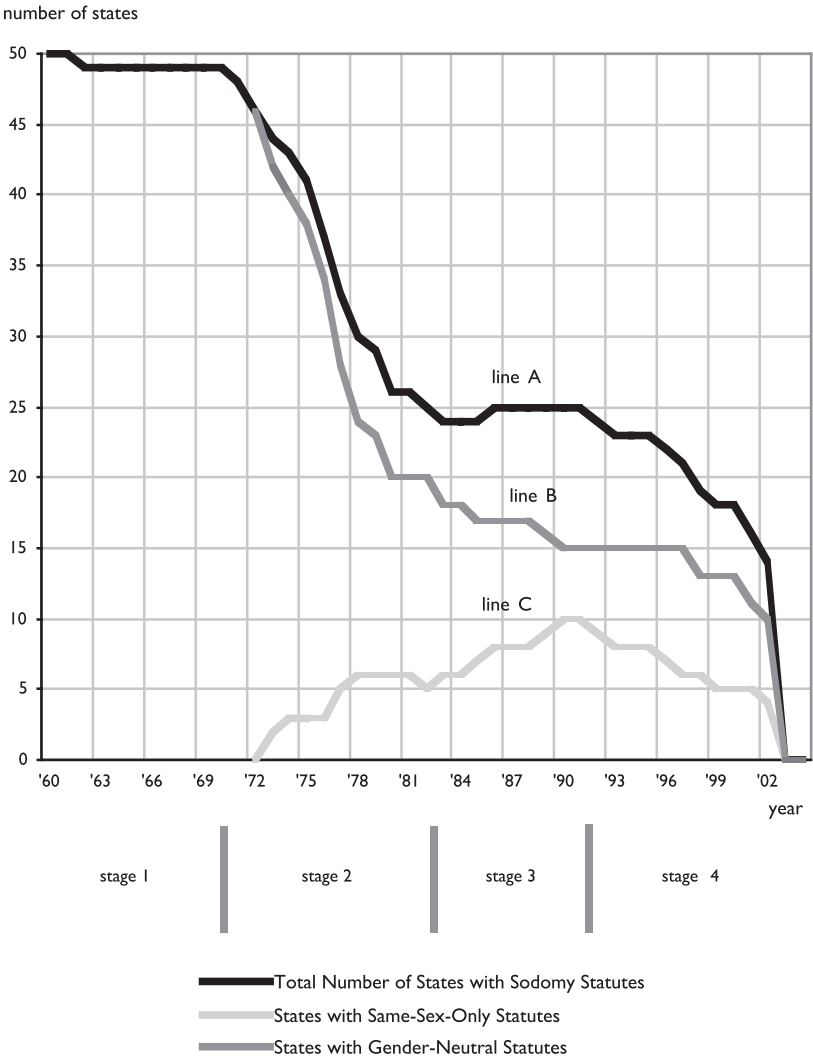


Fig. 1. The stages of sodomy reform, 1960–2003

Why these sudden shifts in the course of sodomy reform? Why does it begin suddenly in the early 1970s and then ground to a (temporary) halt in the mid-1980s? And what happened to jump-start reform again in the 1990s? In the following pages, I examine the first three phases of sodomy reform in depth. I leave consideration of the fourth phase until chapter 5.

Stage I (1960–70): The Status Quo Ante

Laws regulating sexual activities have been a staple of American jurisprudence since colonial times. For example, when Plymouth became the first settlement to codify a set of laws, four of the eight offenses punishable by death concerned sex: sodomy, buggery, rape, and adultery.⁵ The criminalization of sexual acts such as sodomy and buggery was widespread as the nation coalesced; eleven of the thirteen original states had statutory prohibitions against such acts.⁶ The penalties for these acts ranged from death to life imprisonment to whipping to public humiliation to disqualification from property ownership (Katz 1983).

In marked contrast to the widespread prohibitions of sodomy and buggery, there was little legal elaboration of what these crimes actually entailed. Anal intercourse seems to have clearly fallen within their purview, but the criminality of other acts was uncertain. For example, courts differed over whether sodomy required penetration, ejaculation, or both; mutual masturbation and tribadism thus fell into murky legal waters. Likewise, courts differed over whether sodomy encompassed oral-genital contact. The first court to answer the question ruled that “however vile and detestable” fellatio was, it did not fall within the crime of sodomy (*Prindle v. State*, 1893). Others disagreed, finding fellatio to be as heinous as—or even more heinous than—anal intercourse.⁷

By 1940, the definition of sodomy had more or less stabilized. Almost all states criminalized oral-genital as well as anal-genital contact, via either statutory language or judicial interpretation. At this point in time, prohibitions against sodomy either made no reference to the gender of the actors or expressly included heterosexual conduct; many statutes even reached nonprocreative sexual activity between married couples. The penalties for engaging in sodomy ranged from three years to life imprisonment. Laws in a number of states permitted sexual “psychopaths” to be held until “cured.”

Although stage 1 marks a period of outward calm with respect to sodomy reform, tensions over the criminalization of private, consensual sexual activity were bubbling beneath the surface. As discussed in chapter 3, the LOS altered in several respects in the 1950s and 1960s. *Griswold v. Connecticut* and its progeny suggested the existence of a right to sexual privacy. The ACLU added sexual privacy cases to its pantheon of interests. Perhaps most important is that the ALI’s Model Penal Code exempted certain private consensual activities, including sodomy, from prosecution. The impact of the Model Penal Code on sodomy reform first

became apparent in Illinois. In 1961, it adopted the massive Model Penal Code in toto and in the process became the first state in the nation to decriminalize sodomy.

Stage 2 (1971–83): Rapid Reform

Illinois remained alone in its stance until 1971, when Connecticut became the second state in the nation to erase sodomy statutes from its books. Within three years, five additional states followed the path of Illinois and Connecticut.⁸ By 1979, Stonewall's tenth anniversary, fully twenty-one states had invalidated their sodomy laws. By 1983, the close of stage 2, the number of states with operational sodomy laws had dropped from forty-nine to twenty-four.

Why such a dramatic shift in the 1970s? Because the trend of rapid reform followed so soon on the heels of Stonewall, it is tempting to ascribe it mainly to the influence of the gay rights movement. In fact, although gay rights advocates pushed for sodomy law reform in several states, the major instigator of reform was the Model Penal Code. Of the twenty-five states shedding sodomy statutes in the years between 1971 and 1983, only three resulted from judicial rather than legislative action; in all other states, sodomy reform piggybacked on a larger project of penal reform.

Thirty-four states incorporated some or all of the Model Penal Code between 1971 and 1983. Of these thirty-four states, twenty-two basically adopted the text of the Model Penal Code wholesale (Hunter, Michaelson, and Stoddard 1992, 120). There is doubt as to whether legislators in some states were even aware that adoption of the Model Penal Code would result in the decriminalization of sodomy (Shilts 1993, 170), although legislators in at least one state (California) decriminalized sodomy after considering it separately and specifically.

Of the twelve states that did not adopt the Model Penal Code wholesale, five chose to keep their sodomy provisions untouched. The other seven states rewrote their sodomy statutes to prohibit oral and/or anal sex only between same-sex partners.⁹ Missouri's rewritten statute was the most comprehensive, outlawing "any sex act involving the genitals of one person and the mouth, tongue, hand or anus of another person of the same sex." That some states chose not to reform their sodomy statutes or engaged in a process of specification highlights the fact that, in at least some states, sodomy laws were not simply relics from earlier eras but rather active tools of public policy.

Although very little of the sodomy reform occurring in stage 2 can be traced directly to the emergence of the gay rights movement, this does not mean that lgb legal activists did not try to influence the course of sodomy reform. Indeed, stage 2 saw two notable court decisions striking down state sodomy laws: New York's *People v. Onofre* (1980) and Texas's *Baker v. Wade* (1982). These cases significantly affected subsequent sodomy litigation and will be examined in detail later in this chapter. For the moment, though, I wish to emphasize that would-be reformers such as Lambda were hampered in their quest to use the courts by sizeable roadblocks. One roadblock was the general dearth of resources available to gay rights activists in the 1970s. Another, more specific, roadblock emanated from the mechanics of the legal process. Lambda and other gay rights advocates seeking to reform sodomy statutes consistently encountered difficulties in getting access to the courts for a simple but frustrating reason: the indirect nature of the harms caused by sodomy laws.

Sodomy and Standing

Sodomy laws have rarely been enforced in the context of private, consensual conduct.¹⁰ The general nonenforcement of these laws posed an enormous legal hurdle for gay rights activists. As a rule, in order to obtain standing to challenge the legality of a statute, would-be plaintiffs must show that they have suffered actual or threatened injury large enough to give them a real and personal stake in the outcome. People who have not *actually* been injured by a statute and who seek to challenge a statute because of the *threat* it poses to them generally need to satisfy two requirements: they must show that they are likely to engage in the proscribed conduct and that the government is likely to prosecute them for it.¹¹ Since prosecutions for consensual sodomy were extremely rare, finding plaintiffs who could show actual harm (i.e., arrest and/or conviction) from the statute was correspondingly difficult. This pattern of nonenforcement also made it hard to show a credible threat of future prosecution.

The facts surrounding *Bowers v. Hardwick* provide a striking illustration of just how rarely private, consensual conduct served as the basis for arrest. In 1982, Michael Hardwick was arrested in his own bedroom when a police officer looked through the room's partially open door and saw him engaging in mutual oral sex with another man. The officer was in the house to serve a warrant on Hardwick for failure to appear in court. (Hardwick, in fact, had already resolved the legal matter, which

involved a charge of public drinking.) A houseguest had let the officer into the house and gestured in the direction of Hardwick's bedroom. Upon reaching the bedroom and witnessing the sexual activity, the officer arrested the men for violating Georgia's sodomy statute, which proscribed "perform[ing] or submit[ting] to any sexual act involving the sex organs of one person and the mouth or anus of another" under penalty of up to twenty years' imprisonment.¹²

Members of the Georgia affiliate of the ACLU had been searching for a good test case to challenge the state's sodomy statute and approached Hardwick within a week of his arrest. We shall turn to *Bowers's* litigation presently, but for the moment the important point is that the Georgia litigators had been looking for a good case for five years prior to Hardwick's arrest and during that time were unable to come up with a *single instance* of a conviction for sodomy that was not the result of a plea bargain agreement in which a more serious charge (such as rape) was dismissed in return for a guilty plea on the sodomy charge.¹³ As it turns out, Michael Hardwick was the first person to be arrested in the state of Georgia for adult, private, consensual same-sex conduct *in nearly fifty years*.

Lambda's first attempt at using the courts to reform New York's sex laws is likewise illustrative with respect to the problem of standing. In *Dudal v. Codd* (1975), Lambda represented a man who had been charged with "loitering for the purposes of deviant sex" in violation of New York's Penal Code. These kinds of charges were commonly pressed against gay men caught frequenting areas where "known homosexuals" congregated. They rarely went to trial, however. Either the suspect pleaded guilty in return for a fine rather than jail time, or the police dropped the charges after locking the suspect up overnight. When Dudal, represented by Lambda, chose to fight the charge, the district attorney's office declined to prosecute. Lambda then initiated suit, seeking to have the statute declared unconstitutional, but ran into the standing hurdle. Since the charges against Dudal had been dismissed, the court ruled, he no longer had standing to challenge the statute.

Legal Frames and Legal Access: The Problem of *Doe v. Commonwealth's Attorney*

The problems faced by activists seeking to use the courts to effect sodomy reform in stage 2 were exacerbated by a case called *Doe v. Commonwealth's Attorney*. In 1975, two gay male plaintiffs filed suit in federal

court challenging the constitutionality of Virginia's "crime against nature" statute.

The case was filed shortly after several gay activists spoke with Justice William Douglas at an open forum held on Staten Island. Douglas had opined during the forum that a sodomy challenge might succeed if the litigants could show that they were in genuine jeopardy of persecution under the law and that they lived otherwise impeccable lives (Shilts 1993, 283). One of the activists present at the forum subsequently initiated *Doe* to test Douglas's hypothesis. The two plaintiffs in the case asserted that they regularly engaged in private, consensual conduct falling within the provisions of Virginia's statute and feared arrest. (One of the two, in fact, had previously been prosecuted under the statute.) They sought to declare the statute unconstitutional on a host of constitutional grounds, including their rights to privacy and free expression, as well as their right to be free from cruel and unusual punishment.

The three-judge panel of the federal district court assigned to hear the case rejected all of these claims, citing Justice Goldberg's concurrence in *Griswold* distinguishing homosexuality from sexual intimacy within marriage (see chap. 2). Homosexual conduct, said the *Doe* court, was "obviously no portion of marriage, home or family life" and therefore did not fall within the parameters of the right to privacy (*Doe*, 1202).

In a classic example of making a bad decision worse, the gay male plaintiffs chose to take their case to the Supreme Court via a mechanism of appeal that has since been largely discontinued. Requests for Supreme Court review are typically made via a writ of certiorari. The Court may choose whether or not to hear the case; if it chooses not to hear it (which is what happens the great majority of the time), no precedential value is attached to its decision not to decide.¹⁴ The *Doe* case, however, came before the Court via a process whereby federal constitutional challenges to state statutes were heard by a three-judge panel of district judges and then appealed directly to the Supreme Court (bypassing the U.S. Court of Appeals). Under this procedure, the Court had to take the case and summarily affirm it or summarily reverse the decision of the district court. Precedential value was attached to the Court's decision no matter what.

The Supreme Court's response to the *Doe* appeal was to summarily affirm the decision of the federal district court. Although Justices William Brennan, Thurgood Marshall, and John Paul Stevens¹⁵—the three justices with the most liberal voting records on civil rights issues—voted to hear the case, they were overruled by their more conservative brethren.

With the Supreme Court's summary affirmance in *Doe*, efforts to use

the courts to effect sodomy reform took a step backward. The access hurdle became that much higher to jump, because *Doe* shifted the legal frames encompassing sodomy laws. Unsurprising, and without exception, district attorneys and other sodomy law defenders claimed that *Doe* was an authoritative ruling on the constitutionality of sodomy laws.

Despite the arguments made by district attorneys and other sodomy law defenders, the Supreme Court's ruling in *Doe* did not knock all future sodomy reform litigation out of the judicial ballpark. Summary affirmations are, by definition, not accompanied by an explanation of the Court's reasoning in the case. Thus, the nature of the precedent emanating from them is necessarily inchoate.¹⁶ The Supreme Court might agree with both the lower court's disposition of the case and its reasoning. Alternately, it might agree with the disposition but reject the reasoning. Without an opinion, it is impossible to know.

The ambiguity of the ruling in *Doe* thus left some "wiggle room" for later challenges. Lambda's litigation is illustrative here. In every sodomy reform case it litigated post-*Doe* (and pre-*Bowers*), the organization had to contend with the opposing counsel's assertion that *Doe* had already determined the constitutionality of sodomy laws. Lambda took a number of different paths to circumvent *Doe*: it asserted the essential indeterminacy of summary affirmances; it argued that *Doe* was limited to the specific facts of the Virginia challenge (a declaratory action against possible future police enforcement) and that other factual situations (such as an actual arrest) were beyond *Doe*'s reach; and it also forwarded state constitutional arguments to get around the damaging federal precedent.

Fortunately, a Supreme Court case decided one year after *Doe* gave Lambda and other sodomy law reformers a legal wedge with which to prop open the doorway to the courts. In *Carey v. Population Services* (1977), the Court struck down a handful of New York laws regulating the advertisement and distribution of contraceptives. Justice Brennan's opinion for the Court reiterated the privacy interest at the heart of *Roe v. Wade* and also explicitly linked abortion and sodomy jurisprudence. After noting that the outer limits of the right to privacy had not yet been defined, Brennan stated: "[T]he Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits State statutes regulating private consensual sexual behavior among adults . . . and we do not purport to answer that question now" (*Carey*, 688 n. 5).

The value of *Carey* to Lambda and other gay rights advocates was that it indicated that the Court itself did not find *Doe* to be dispositive

vis-à-vis sodomy laws and that the issue of their constitutionality was still an open question. Of course, whatever else it was, *Doe* could not be construed as an indictment of sodomy laws. This inconvenient fact continued to cause litigators problems as they sought to convince the courts to invalidate state statutes.

Ultimately, courts hearing sodomy challenges during stage 2 split over *Carey*'s effect on *Doe*. Courts in Michigan and Maryland drew on *Doe* to uphold sodomy statutes facing privacy challenges, notwithstanding *Carey*.¹⁷ Some courts even used *Doe* to deny gay rights claims in contexts not explicitly involving sexual activity.¹⁸ Courts in New York, Pennsylvania, and Texas, however, relied on *Carey* to strike down the sodomy statutes in those states.¹⁹

The Wisdom of Litigating Bowers

Like Monday morning quarterbacks, many people have questioned the wisdom of litigating *Bowers v. Hardwick*, arguing that gay rights litigators failed to develop a body of precedent over several years before bringing a case to the Supreme Court and that their hasty actions only magnified the impact of *Doe*. But at the time, Lambda and gay rights advocates had real reason to believe that the stage was set for a successful federal challenge to the constitutionality of sodomy laws if a case with the "right" facts could be found. This belief was based largely on the outcomes of two cases: New York's *People v. Onofre* and Texas's *Baker v. Wade*. An examination of these two cases offers insight into why some gay rights litigators believed that a broad attack on the constitutionality of sodomy statutes might be received favorably by the courts.

People v. Onofre

Ronald Onofre was that most unusual of plaintiffs in sodomy challenges: a gay man who had actually been convicted of engaging in consensual sodomy in his own home. He was arrested in 1977, after a seventeen-year-old male accused him of forcible sodomy. During the trial, though, the young man recanted his accusation, admitting that he had lied to the police and that the relationship had been entirely consensual. On this admission, the district attorney's office dismissed all charges related to the use of force but refused to dismiss the sodomy charge (under New York law, consent was not a defense to sodomy). Onofre's private attorney unsuccessfully sought to have that charge dismissed as well, arguing that the statute violated Onofre's right to privacy and

denied him the equal protection of the laws. Relying in part on *Doe v. Commonwealth's Attorney*, the trial court upheld the constitutionality of New York's sodomy statutes, convicted Onofre, and sentenced him to a year's probation.²⁰

While the fact that Onofre's own partner had initially accused him of forcible sodomy might not have made Onofre the most sympathetic figure, the issue of sexual privacy stood in sharp relief: Onofre had been convicted of engaging in consensual sodomy in his own home. Lambda entered the case as cocounsel on the appeal, which alleged that New York's statute violated Onofre's rights to privacy and equal protection under both the federal Constitution and New York's constitution. His privacy argument drew on *Griswold* and its progeny. His equal protection argument drew on the fact that New York only criminalized sodomy when engaged in by "persons not married to each other."

The state of New York, in response, alleged that the statute advanced three governmental interests: the general promotion of morality, the preservation of marriage and the family, and the prevention of injury. Its brief was extremely graphic in depicting the physical injuries sodomy supposedly caused.

One of the activities for which the respondent was convicted was his penetration into the anus of the victim with his penis. . . . This deviate sexual practice can result in anal ulcer or fissure as well as "extensive changes in the anus and rectum both by friction and as a result of infection" since the anal canal was not evolved for such activity. Another of the activities committed by the respondent . . . was fellatio (the placing of his penis into the victim's mouth). Injury from this activity has also been reported. (*Onofre*, Appellant's Brief, 10, citations omitted)

Moreover, the state argued, striking down the statute would endanger society by creating a slippery slope that would lead to the legitimization of other immoral but consensual acts, including bigamy, prostitution, self-mutilation, consensual murder, and the distribution of drugs (*Onofre*, Appellant's Brief, 16–17).

The New York Court of Appeals unequivocally rejected each of the state's arguments. It found no evidence for the proposition that private, consensual sodomy was harmful either to the participants or to society in general. It also found no rational reason to distinguish between married and unmarried people. New York's sodomy statute, the court ruled, vio-

lated Onofre's right to privacy and equal protection under the federal Constitution.

In its ruling, the Court of Appeals specifically distinguished between public morality, which it saw as the legitimate province of state regulation, and private morality, which was beyond the reach of the state, finding that consensual sodomy statutes reached into the forbidden sphere of private morality without advancing public morality in any way. Personal distaste, it ruled, was not a sufficient rationale for intruding into an area of "important personal decision" (*Onofre*, 942).

The 1980 New York Court of Appeals decision in *Onofre* was not the first judicial decision to invalidate state prohibitions on private consensual activity.²¹ It was, however, the first to do so when same-sex acts were directly at issue. That the court had considered and rejected a wide variety of reasons for upholding consensual sodomy statutes suggested to Lambda (and other gay rights advocates) that, if they could just overcome the standing hurdle, they might be successful in other courts as well.

Lambda's perception was reinforced by the subsequent actions of the U.S. Supreme Court. Unwilling to concede defeat, the district attorney prosecuting *Onofre* petitioned the Supreme Court for a writ of certiorari. The Court turned down the opportunity to clarify its decision in *Doe v. Commonwealth's Attorney*. Although denials of certiorari have no precedential value, Lambda interpreted the Court's decision as further support that *Doe* should not be read to preclude privacy-based sodomy challenges (*Lambda Update* 1981, 1). At least one federal court interpreted the Court's actions similarly (*Rich v. Secretary of the Army*, 1984).

Baker v. Wade

In 1982, two years after *Onofre*, gay rights activists succeeded in overturning Texas's sodomy statute. The case, *Baker v. Wade*, was in many ways the antithesis of *Onofre*. *Onofre* was brought in state court; *Baker* was a federal suit. *Onofre* involved a man actually convicted for consensual sodomy; *Baker* involved a man who had never been arrested for violating Texas's sodomy statute but argued that the law's existence posed a real and immediate threat to him. Ronald Onofre may have been less than sympathetic as a plaintiff; Don Baker had clearly lived the kind of "impeccable" life that Justice Douglas had suggested would be a vital component in a successful challenge. He had served in the Navy for four years during the Vietnam War and had an excellent service record. He was a former Dallas schoolteacher with a master's degree in education;

his school district regarded him as an “excellent teacher.” He had not been open about his sexuality while teaching, nor did he “advocate homosexuality to the students.” He was an “active and devout Christian.” In addition, he was a “good citizen, having served as precinct chairman and as a delegate to two state Democratic Party conventions.” But for his sexual orientation, he was a model citizen.²²

As did Onofre, Baker argued that the sodomy statute at issue violated his right to privacy and equal protection under the federal Constitution. The legal basis for Baker’s equal protection claim differed somewhat from Onofre’s: New York’s law distinguished between married and unmarried partners while Texas’s statute distinguished between same-sex and opposite-sex partners, forbidding sodomy in the first instance but permitting it in the second.

Over the course of the twenty-two-day trial in the case, both sides presented reams of testimony about the nature of homosexuality, the sexual practices of gay men, and the impact of consensual sodomy on the participants and public at large.²³ The *Baker* litigation marked the entrance of dueling experts into sodomy law litigation. Several expert witnesses testified on behalf of Baker, including a psychiatrist, a sociologist, and a theologian. These experts presented “social facts” about homosexuality, including the number of lesbians and gay men in Texas, the intractable nature of sexual orientation, the American Psychiatric Association’s removal of homosexuality from its list of mental disorders, and the lack of any evidence that homosexuals had any greater criminal propensity than heterosexuals (other than through violation of the sodomy law under dispute).

The state of Texas responded to these experts by presenting one of its own: a legal psychiatrist. He claimed that sodomy laws benefited both children and homosexuals, the former by reinforcing the “culture of society’s norm pattern or expected pattern of behavior” and the latter by encouraging homosexuals to seek help to resolve “their problems.”²⁴ Homosexuals were less stable than heterosexuals, he said, and had more pathological illnesses. The state also introduced explicit depictions of what it termed “common homosexual practices,” including anal sex, fisting, and “golden showers” (urination). Relying heavily on its expert, the state advanced four interests justifying the sodomy law: morality and decency, public health, welfare and safety, and procreation.

In August 1982, the U.S. District Court ruled that Texas’s sodomy law unconstitutionally denied Baker his rights to privacy and equal protection. Said the court: “The right of two individuals to choose what type of

sexual conduct they will enjoy in private is just as personal, just as important, just as sensitive—*indeed, even more so*—than the decision by the same couple to engage in sex using a contraceptive to prevent unwanted pregnancy” (*Baker*, 1140; emphasis added). Moreover, the district court concluded, the state of Texas had failed to show that its law met the minimal requirement of being rationally related to a legitimate state purpose, much less show that the statute advanced a compelling governmental interest (which was the legal standard in the case).

The *Baker* court was the first federal court to consider a sodomy challenge since the Supreme Court’s ambiguous affirmance in *Doe*. That it found the statute to be unconstitutional was a clear gay rights victory, especially because it had come down after an extended trial. That the federal district court had heard reams of testimony about the meaning of sex, sexuality, and privacy and *then* decided in favor of *Baker* seemed to signal a new judicial openness to gay rights claims. The decision by the Texas attorney general not to appeal *Baker* to the Fifth Circuit lent further support to this perception, suggesting that the state’s antigay stance was shallow.

Baker and *Onofre*, then, gave Lambda and other gay rights advocates real reason to believe that a carefully crafted attack on the constitutionality of sodomy laws might succeed. The courts in both cases had considered and rejected a wide variety of rationales for maintaining such laws, even after being presented by opposing counsel with graphic depictions of some of the conduct that would be protected if the laws were struck down. Both courts in turn issued broadly worded opinions striking down sodomy statutes as impermissibly infringing on the rights of privacy and equal protection guaranteed by the U.S. Constitution.

Stage 3 (1984–91): Backsliding

In 1982, when Michael Hardwick filed a challenge to Georgia’s sodomy statute in federal district court, the timing seemed ripe. With the benefit of hindsight, we can see that the first period of rapid sodomy reform was drawing to a close even as *Bowers* was starting its litigation journey. Figure 2 compares the legislative response to the Model Penal Code’s recommendation regarding sodomy statutes in stages 2 and 3. It shows that, of the twelve states considering the Model Penal Code in the years from 1984 through 1991, not a single one repealed its sodomy statute. This stands in stark contrast to the trend in stage 2, when nearly two-thirds of the states considering the Model Penal Code repealed their sodomy

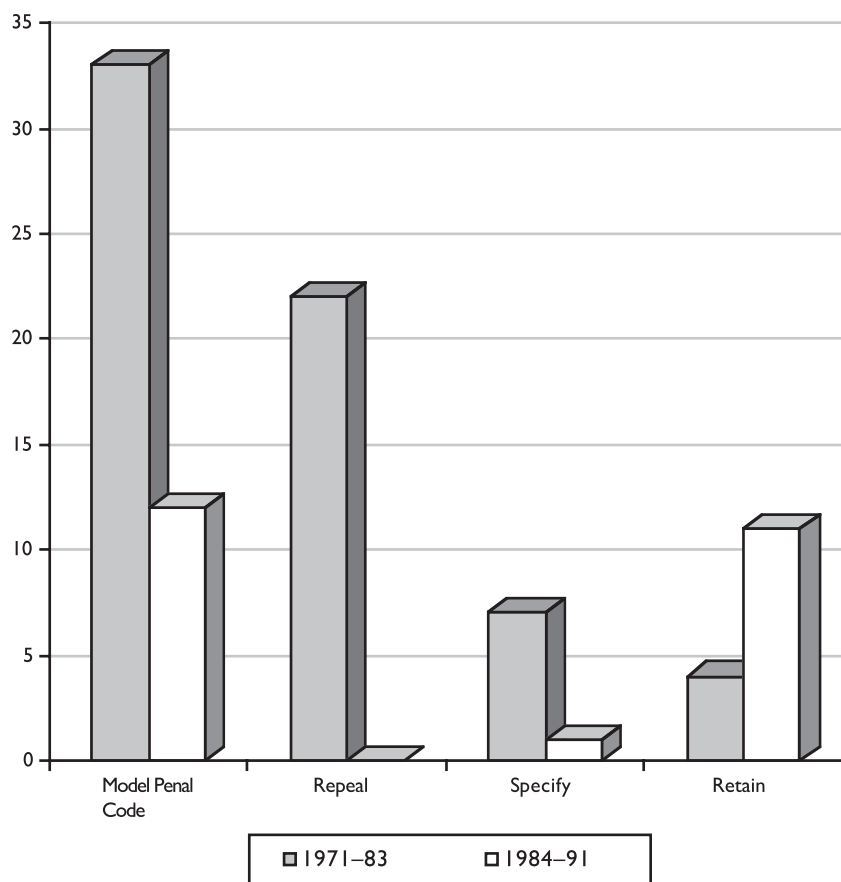


Fig. 2. Comparison of states considering Model Penal Code in stages 2 and 3

statutes. Legislative repeal, in fact, tapered off after 1980. The only state to repeal its sodomy statute in the 1980s was Wisconsin, which did so in 1983.

The course of sodomy reform in the courts likewise stalled in the period between 1984 and 1991. Challenges to sodomy laws were heard by several state trial courts, two state supreme courts, one federal district court, two federal courts of appeal, and the U.S. Supreme Court in stage 3. In the end, not a single state's sodomy law was overturned insofar as it applied to same-sex acts.

Bowers v. Hardwick is, of course, the most obvious example of the

judiciary's unwillingness to strike down sodomy laws in stage 3. In a bitterly contested 5–4 vote, the Supreme Court upheld the constitutionality of Georgia's statute. Writing for the Court, Justice Byron White distinguished *Bowers* from the line of privacy cases preceding it. Earlier cases, he said, concerned issues related to procreation, child rearing, marriage, and family relationships: “[W]e think it evident that none of the rights announced in these cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. 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). “Proscriptions against that conduct have ancient roots,” he continued (192). Against such a backdrop, the notion that Hardwick possessed a fundamental right to have same-sex sex was, “at best, facetious” (*Bowers*, 193–94).

Given the Supreme Court's role as the authoritative interpreter of the U.S. Constitution and its unambiguous ruling in *Bowers*, it should come as no surprise that federal challenges to laws prohibiting same-sex sodomy either failed or were withdrawn in the immediate aftermath of the decision.²⁵ I argue, however, that stage 3 began in 1984, some two years *before* the decision in *Bowers*, while the case was still working its way up through the federal courts and while litigators still had real reason to believe that a carefully crafted federal challenge to state sodomy laws would be successful. My reason for placing the start of stage 3 in 1984 reflects the fact that at this point in time the trend toward legislative sodomy reform ceased, supplanted by a spate of bills seeking to recriminalize same-sex sodomy. It also reflects the fact that *Baker v. Wade* unraveled in 1985, when the Fifth Circuit reinstated Texas's sodomy law.

It may be that others will disagree with this decision and will place the line of demarcation between stages 2 and 3 closer to 1986. The ambiguity of this temporal boundary highlights the fact that shifts in the structure of legal opportunities do not always occur at discrete points in time. Some changes, such as *Bowers*'s alteration of the legal frames available to sodomy reformers, are immediately apparent. On June 29, 1986, the federal constitutional right to privacy arguably encompassed consensual intimacy between partners of the same sex. On July 1, 1986, the federal constitutional right to privacy definitely did not encompass consensual intimacy between partners of the same sex. Other events, such as the emergence of the AIDS epidemic, clearly altered the LOS but took place over longer periods of time and cannot be pinned down to a single moment.

In any event, during stage 3 sodomy reform stagnated and even reversed course. Why? I argue in the following pages that this backsliding was powered by several conceptually distinct but analytically intertwined factors, including fallout from the 1980 elections, shifts in the membership of the federal courts, the mounting backlash against abortion and the notion of a right to sexual privacy, the emergence of the AIDS epidemic, and doctrinal and access-related constraints. These factors combined variously to staunch the reform of sodomy laws in both the legislative and judicial branches, despite (and occasionally because of) the best efforts of Lambda and other gay rights advocates to eradicate them.

The 1980 Election and Judicial Turnover

The 1980 presidential election was a critical event for gay rights advocates, albeit one whose direct effects on gay rights litigation took a few years to manifest themselves. Ronald Reagan was an ardent pro-lifer who disagreed strongly with the notion of a right to privacy that encompassed abortion. His platform included a promise to rein in what he saw as an “activist” judiciary, that is, a judiciary whose rulings emerged from the political values (read: liberal beliefs) of judges rather than from the dictates of law per se. He vowed, if elected president, to nominate jurists to the federal bench who shared his ideological values on a range of issues, most notably abortion (Schwartz 1988). While he never explicitly discussed sodomy, the common doctrinal grounding of abortion and sodomy jurisprudence meant that, to the extent that Reagan’s antipathy to the notion of a constitutional right to abortion was reflected in his appointments to the bench, a major doctrinal argument for voiding sodomy laws would be undermined.²⁶

In the end, the “promise” of Reagan’s election was fulfilled. Reagan’s appointees were far more likely to rule in favor of pro-life claims than were Carter’s appointees (Alumbaugh and Rowland 1990). The impact of Reagan’s ideological litmus test was augmented by the sheer number of lower court judges he appointed. During the course of his presidency, he successfully brokered the nominations of 378 judges to the federal bench. The most significant of these were his Supreme Court appointments. Over the course of his two-term presidency, Reagan placed three new justices on the Court: Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy. In addition, he selected sitting justice William Rehnquist to serve as Chief Justice of the Supreme Court.

In all but one instance, Reagan’s Supreme Court nominees were as or

more conservative than their predecessors (table 6).²⁷ Rehnquist's elevation to Chief Justice is emblematic of Reagan's ideological designs. Of the justices then sitting on the Supreme Court, Rehnquist's voting record with respect to civil liberties cases was by far the most conservative. By one measure, Rehnquist supported the liberal position in civil liberties cases only 19 percent of the time. As such, he stood in sharp contrast to justices such as Brennan and Marshall, who consistently supported the liberal position in such cases.

It should be noted here that most of Reagan's opportunities to shape the contours of the Supreme Court occurred in the last few years of his presidency. Reagan appointed only one justice in the years before *Bowers*: Sandra Day O'Connor.²⁸ As table 6 shows, O'Connor's position on civil liberties issues fell considerably to the right of Potter Stewart's, the justice whose seat she filled. While Stewart had supported the liberal position in civil liberties cases some 44 percent of the time in the years from 1958 (when he arrived on the Court) to 1981, O'Connor supported such positions only 28 percent of the time in the years between 1981 and 1985. The ideological difference between the two justices was exemplified by their positions on abortion-related cases. Stewart had been a member of the majority in *Roe v. Wade* and had voted pro-choice in a number of subsequent cases. Although O'Connor would vote to "save" *Roe* in *Planned Parenthood v. Casey* (1992), in the 1980s she consistently argued for rolling back the right to abortion.²⁹

In 1986, O'Connor provided one of the five votes to uphold Georgia's sodomy law in *Bowers*. Ultimately, there is no way to ascertain the direct effect of judicial turnover in the case; there is no way to know whether Stewart would have taken a different position in *Bowers*, providing the

TABLE 6. Comparison of Outgoing and Incoming Justices during Reagan's Presidency

Departing Justices	Civil Liberties (%) ^a	Replacement Justices	Civil Liberties (%) ^b
Burger, Chief Justice (1969–86)	28	Rehnquist, Chief Justice (1986–)	19
Stewart (1958–81)	44	O'Connor (1981–)	28
Rehnquist (1972–86)	19	Scalia (1986–)	30
Powell (1971–87)	35	Kennedy (1988–)	35

^aPercentages represent justices' support for the liberal position in civil liberties cases from arrival on the Supreme Court through 1985. Source for data is Segal and Spaeth 1989.

^bPercentages represent justices' support for the liberal position in civil liberties cases from their arrival on the Supreme Court through 1995. Source for data is Epstein and Knight 1998.

fifth vote to strike down Georgia’s sodomy law rather than the fifth vote to uphold it. However, comparing the justices’ votes in *Bowers* with their voting record on civil liberties cases more generally is suggestive.

Table 7 lays out the justices on the *Bowers* Court according to their Baum scores. Baum scores rank the relative ideological stances of the twenty-six justices who sat on the Supreme Court in the years between 1946 and 1985. The lower the Baum score, the more liberal the voting record in cases that split along a left-right schema. As table 7 shows, the four most liberal members of the *Bowers* Court all believed that Georgia’s sodomy law violated Michael Hardwick’s right to privacy, while the five most conservative members all voted to sustain the law. O’Connor’s Baum score was twenty out of twenty-six, making her the third most conservative member of the *Bowers* Court, ranking just beneath Rehnquist and Burger. Stewart’s Baum score, on the other hand, was eleven out of twenty-six. Had he remained on the Court for *Bowers*, he would have been the fourth most liberal justice hearing the case. To the extent that Stewart’s Baum score can be used as a predictor of his vote in *Bowers* (and this is a big caveat), Georgia’s sodomy statute would have fallen had he, not O’Connor, heard the case.

In sum, the 1980 elections shifted the structure of legal opportunities

TABLE 7. Supreme Court Votes in *Bowers*

Justice	Vote in <i>Bowers</i>	Baum Score ^a	Court Ranking ^b
Rehnquist	Uphold law	25/26	9
Burger	Uphold law	21/26	8
O’Connor	Uphold law	20/26	7
Powell	Uphold law	16/26	6
White	Uphold law	14/26	5
Blackmun	Strike law	13/26	4
[Stewart] ^c	—	11/26	
Stevens	Strike law	10/26	3
Brennan	Strike law	5/26	2
Marshall	Strike law	3/26	1

^aBaum scores rank the relative ideological stance of the twenty-six justices who have sat on the Supreme Court in the years between 1946 and 1985. Marshall’s score of 3 indicates that he has the third most liberal voting record with respect to civil liberties issues, while Rehnquist’s score of 25 indicates that he has the second most conservative voting record on the Court during the period studied. Source for data is Baum 1989.

^bCourt ranking adjusts the Baum scores to reflect the relative ideological stances of the nine justices sitting on the Supreme Court in 1986, when *Bowers* was decided.

^cJustice Stewart’s name is in brackets because he was not actually on the Supreme Court in 1986, when *Bowers* was decided.

with respect to sodomy reform, because they put into office a president whose judicial philosophy was antithetical to the privacy doctrine that grounded most sodomy challenges. This president in turn used the power of his office to nominate jurists who shared his philosophy, resulting in a federal bench that grew increasingly hostile to the notion of sexual privacy rights. One of these jurists, Justice Sandra Day O'Connor, replaced a member of the pro-choice majority on the Supreme Court and subsequently voted to limit the right to abortion in a number of cases. In 1986, she provided the fifth vote to deny Michael Hardwick's challenge to the constitutionality of Georgia's sodomy statute.

The Emergence of AIDS

Like the 1980 elections, the AIDS epidemic began several years before stage 3 began. Again like the 1980 elections, it was a critical event whose direct effects on the course of gay rights and sodomy reform took a few years to manifest themselves. Ultimately, however, the emergence of the AIDS epidemic shifted the LOS surrounding sodomy reform by sparking a backlash against homosexuality more generally and gay male sexuality more specifically.

Events in Texas during 1983 illustrate the impact of AIDS on sodomy reform. Remember that in *Baker v. Wade* (1982) a U.S. District Court ruled that Texas's sodomy law violated Don Baker's constitutional rights to privacy and equal protection. Although Texas's attorney general decided not to appeal the decision in *Baker* to the Fifth Circuit, a district attorney from Amarillo by the name of Danny Hill appealed the case (and the attorney general's choice not to pursue *Baker*) in a variety of judicial fora, including the U.S. District Court, the Fifth Circuit, and the Texas Supreme Court.³⁰

Under the legal rules governing Hill's federal appeals, he had to show either the existence of newly discovered evidence or some other reason (such as fraud) important enough to require a different result in the case in order to get the original decision set aside. The thrust of his "newly discovered evidence" argument was the public threat posed by homosexuality. His proof: AIDS.

The incidence of AIDS in persons who engage in homosexual conduct and its deathly public health threat are newly discovered evidence. Although AIDS had been discovered at the time of trial, its direct relationship to homosexual conduct was not fully estab-

lished. AIDS is recognized by the medical community as one of the most deadly and proliferic [*sic*] diseases in recent memory and is directly related to homosexual conduct. The court should consider the public health dangers which AIDS poses and its relationship to the type of conduct which is before the Court in this action. (*Baker*, Brief in Support of Motion to Set Aside Final Judgment and Reopen the Evidence, 4)

Shortly after Hill filed his appeal in *Baker*, Bill Ceverha, a Texas state legislator, approached the subject of sodomy laws from a different direction. He introduced a bill, HB 2138, that was designed to broaden Texas's sodomy statute (depending on the outcome of the court appeal) to prohibit all "homosexual conduct" and to dramatically increase the penalties involved.³¹ The stated purpose of the bill was to prevent homosexuals from destroying the nation's health.

Hill and Ceverha were connected by a newly formed group called Dallas Doctors Against AIDS (DDAA).³² One of the group's founding members served as Danny Hill's lawyer and also helped draft HB 2138. Although DDAA presented itself as an objective research-oriented group, its efforts were clearly directed toward restricting the civil liberties of lgb people in a wide variety of contexts. The amicus brief it filed in the *Baker* appeal detailed the "AIDS-threat" posed by homosexual (by which it meant gay male) activities. DDAA also solicited Dr. Paul Cameron to testify on behalf of HB 2138 and to serve as an expert witness in the *Baker* appeal. Cameron was—and is—a notorious opponent of gay rights.³³ Most telling is the fact that DDAA also involved itself in a concurrent lawsuit over the formation of an lgb student group at Texas A&M University (*Gay Student Services v. Texas A&M University*, 1984). The student group should be prevented from forming, they argued, because it would encourage the commission of sodomy and thereby further the transmission of AIDS.³⁴

Ultimately, both the legislative and judicial attempts to use AIDS in order to derail sodomy reform failed. HB 2138 died in committee when the legislative session ended. The U.S. District Court rejected Hill's (and DDAA's) arguments that sodomy laws were needed to combat AIDS. Although the Fifth Circuit reversed the U.S. District Court's decision in *Baker* and reinstated Texas's sodomy law, it did not base its decision on the perceived threat to public health.

Nevertheless, HB 2138 and Hill's appeal both signaled the potential power of AIDS to reframe sodomy from an issue of privacy to a matter

of public health. AIDS put sodomy law reformers into a difficult position. On the one hand, they needed to respond to the public health arguments raised by their opponents. On the other hand, they wanted to avoid graphic discussions of the mechanics of the sexual activities at issue, concentrating instead on the liberty interests infringed on by state intrusion into one of the “fundamental experiences” through which “people define the meaning of their lives.”³⁵ Opponents of sodomy law reform, conversely, usually embraced explicit discussions of sex acts, as Danny Hill’s appeal illustrates.

The [U.S. District] Court was offered very little evidence concerning what homosexuals do and why homosexual conduct poses such a severe public health threat to the citizens of the State of Texas. *The case was tried on the basis of homosexuality as a state of being or lifestyle rather than on the specific acts of “homosexual conduct.”* Common homosexual practices such as “rimming,” “scat,” “handballing,” “golden showers,” the insertion of various objects into the anus of individuals and oral/anal, oral/penal and penal/anal conduct were not referred to or discussed in depth. The variety of sexual conduct, in conjunction with the frequency of anonymous sexual partners, poses substantial considerations which were not presented to the Court in the trial of this matter. (*Baker*, Brief in Support of Motion to Set Aside Final Judgment and Reopen the Evidence, 4; emphasis added)

By explicitly treating homosexuality as a set of sexual practices, Hill sought simultaneously to inspire revulsion by the reader, to situate gay men (lesbians being virtually absent) as different from “normal” people, and to exclude the conclusion that homosexuality was a fundamental component of identity. AIDS played into this strategy neatly, because it forced consideration of gay male sexual practices and their potential threat to public health. Literally thousands of pages of medical articles about AIDS were introduced into the *Baker* appeal, an occurrence that was repeated in several other sodomy challenges, including *Bowers*.

That legislative repeal of sodomy statutes ceased just as the AIDS epidemic became visible may be coincidental, although the simultaneous appearance of bills designed to recriminalize and/or increase the criminal penalties associated with same-sex sodomy suggests otherwise. The evidence that judicial openness to repealing sodomy statutes was affected by the emergence of AIDS is more direct; some decisions explicitly invoked

the epidemic. The most notable example of this is the Missouri Supreme Court, which in 1986 upheld the constitutionality of the state's sodomy statute, holding in part that the statute was

rationally related to the State's concededly legitimate interest in protecting the public health. The State has argued that forbidding homosexual activity will inhibit the spread of sexually communicable disease like [AIDS]. . . . [T]he General Assembly could have reasonably concluded that the general promiscuity characteristic of the homosexual lifestyle made such acts among homosexuals particularly deserving of regulation. (*State v. Walsh*, 1986)

In sum, the emergence of the AIDS epidemic shifted the structure of legal opportunities surrounding sodomy reform in several ways. It served as a catalyst for mobilization on the part of those who opposed gay rights in general. It altered the persuasiveness of the sociolegal arguments about the (de)merits of sodomy laws by giving those opponents of sodomy reform a documented public health issue to support their long-standing "homosexual danger" claims. It sparked the introduction of legislative bills designed to heighten the criminal penalties associated with same-sex sodomy. It probably contributed to the abrupt end of legislative repeal. It certainly undercut the efforts of gay rights litigators to frame homosexuality as a core aspect of identity rather than as a taste for certain sexual activities, in the process weakening the privacy argument at the heart of most sodomy challenges. And it was invoked as a basis for upholding sodomy laws in a number of legal challenges.

The Wisdom of Litigating Bowers, Revisited

The foregoing discussion of the impact of the 1980 elections and the AIDS epidemic on the course of sodomy reform inevitably calls into question the wisdom of litigating *Bowers* in the first place. By their actions, Lambda, the ACLU, and the other litigators involved in the case worsened the legal position of lgb people—at least temporarily—rather than improving it. Why did they not read the shifting political winds correctly? The answer to this is multifaceted, but a large part of it is that what seems clear in retrospect can be fuzzy while it is ongoing. When *Bowers* was initiated in 1982, the scope of sodomy reform seemed to be expanding, not contracting. Broadly worded decisions in *Onofre* and *Baker* seemed to indicate that a carefully crafted attack on the constitu-

tionality of sodomy laws might well be successful. AIDS was not yet a potent political threat to gay rights.

Moreover, the 1980 elections, while clearly auguring that the federal bench would grow more conservative, did not suggest an obvious course of action to gay rights litigators. On the one hand, the fact that the space available for legal activism around sodomy reform would likely decrease in the future indicated that sodomy reformers should seek alternate routes for achieving their sociopolitical goals. On the other hand, the fact that the courts would likely grow less friendly to sodomy reform suggested that gay rights activists should press cases quickly, before Reagan had the opportunity to appoint new judges to the bench. The appropriate litigation response to the 1980 elections was in fact a source of tension among gay rights groups.

This intergroup tension over tactics can be seen clearly in *National Gay Task Force (NGTF) v. Board of Education of Oklahoma*. The case was brought by the GRA and the Oklahoma affiliate of the ACLU. It involved a challenge to the constitutionality of a law making “public homosexual conduct or activity” grounds for firing (or refusing to hire) schoolteachers. *Conduct* was defined as “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that the conduct will come to the attention of school children or school employees.”³⁶ The constitutionality of sodomy laws themselves was not directly at issue, although “homosexual sodomy” was clearly at the heart of the dispute.

The U.S. District Court upheld the statute’s constitutionality when the matter came before it in 1982, but in dicta³⁷ accompanying the decision the court construed the reach of the provision narrowly. The court said that the Oklahoma law did not permit the school board to dismiss or otherwise discipline a teacher “who merely advocates equality or tolerance of homosexuality, . . . who openly discusses homosexuality, . . . who assigns for class study articles and books written by advocates of gay rights, . . . who expresses an opinion, publicly or privately on the subject of homosexuality; or . . . who advocates the enactment of laws establishing civil rights for homosexuals” (*NGTF*, 32–33). The court continued, “If, under the Act, a school board could declare a teacher unfit for doing any of the foregoing or refuse to hire one for similar reasons, it would likely not meet constitutional muster” (33).

At the time, the GRA was pursuing a policy of seeking high court review of all its cases, hoping to have them decided before Reagan could appoint more conservative judges to the bench. It immediately filed an

appeal of the district court ruling to the Tenth Circuit. Lambda, however, fearing the growing conservatism of the federal bench, believed that the GRA should cut its losses. In a letter dated August 3, 1982, Lambda wrote:

We realize that the notice of appeal has been filed and that substantial publicity about the appeal has been sent out. We believe, however, that the risk of a negative decision from the 10th Circuit is significant enough to warrant reconsideration of your decision. We also believe that a decision not to proceed with the appeal, if based on a thorough review of the legal precedent and an analysis of the risks involved, could be effectively communicated to the gay community. . . .

The question of what we have to lose by proceeding with this appeal has been raised. There is some positive dicta in the court's opinion [referring to the district court's narrow reading mentioned previously] which leaves the door open for a possible challenge at a later date if the statute is applied to a teacher solely on the basis of his or her speech or for a possible challenge if we can clearly demonstrate that teachers are restricting their discussion of gay issues because of this legislation. A negative decision from the 10th Circuit might preclude such a challenge, eliminating even the positive dicta in the decision. A negative decision might also affect future cases in other Circuits.³⁸

Lambda was not alone in its concerns. The national ACLU also opposed the appeal. The day after Lambda sent its missive, the national ACLU sent a virtually identical letter to its Oklahoma affiliate, urging it to reverse course. The recipients of these letters were not persuaded and continued their litigation.³⁹

Hindsight reveals that Lambda and the national ACLU need not have worried about *NGTF*. In 1984, the Tenth Circuit came down with a mixed but reasonably favorable ruling holding that the Oklahoma law violated the First Amendment speech rights of schoolteachers. In 1985, the Supreme Court summarily affirmed the Tenth Circuit's decision, albeit by the narrowest of margins: a 4–4 tie.⁴⁰

Ironically, given the ultimate outcome in *Bowers*, the Tenth Circuit and Supreme Court decisions in *NGTF* soothed Lambda's concerns about the tactical wisdom of seeking high court review of gay rights cases. And *Bowers* seemed to offer an unparalleled opportunity to attack state sodomy statutes.

Hardwick's arrest clearly gave him standing to challenge Georgia's sodomy law. The location of the arrest (Hardwick's own bedroom) made the privacy interest at stake very clear, with respect to both its decisional and its spatial aspects. Hardwick's willingness to expose himself to the potential trauma of extended litigation about his private sexual activities constituted yet a third reason for bringing the case.⁴¹ As Goldstein (1993, 1792) phrased it, "Hardwick seemed to be the perfect plaintiff to challenge the law—he was arrested in the bedroom of his own home with another consenting adult; he worked in a gay bar, so his job would not be endangered by a public fight and he was already out to his mother." Given the infrequency of the law's enforcement in the context of private, consensual sexual activity, the likelihood of finding another case with as good a fact pattern was remote. In short, even though Lambda recognized that Reagan's election augured a change in judicial winds, *Bowers* seemed to be as good a means to challenge sodomy laws as gay rights advocates were likely to find.

That said, the decision to press *Bowers* was quite controversial within the universe of sodomy-reform litigators. Discord surfaced immediately. Kathy Wilde, an Atlanta attorney in private practice, had agreed to serve as Hardwick's counsel on behalf of the Georgia ACLU, which had initiated the case.⁴² As she told me in a telephone interview, she began to receive calls from gay rights activists around the country within days of filing the case.⁴³ Many were upset with her for initiating *Bowers*, arguing that Georgia was a "bad" state in which to pursue sodomy reform through the courts. Unlike the sodomy statutes of New York and Texas, Georgia's statute did not offer a clear equal protection claim. Although Wilde suspected that Georgia's sodomy statute was being disproportionately enforced against gay men, no hard evidence was at hand. Many of Wilde's callers believed that a combined equal protection/privacy challenge was more likely to succeed and that sodomy reformers should bring cases only in those states whose statutes offered that option.

Intracommunity tensions over *Bowers*'s viability heightened early in 1983, when the U.S. District Court dismissed the case, ruling that Hardwick's privacy claim had been foreclosed by the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*. Wilde immediately appealed the ruling to the Eleventh Circuit. The Georgia ACLU, however, declined to sponsor the appeal. As Wilde recalled it, the affiliate was more divided over the politics of having a heterosexual woman press the case than the lack of an equal protection argument. (Much as the NAACP felt it was important for black lawyers to press major civil rights

cases, some members of the affiliate apparently felt that a lesbian or gay lawyer should litigate *Bowers*.)

No matter what the reason for the affiliate's withdrawal from the case, Wilde needed to find another group to underwrite the costs of the appeal. She approached the national ACLU, but it declined the case based on its affiliate's decision. Lambda then offered to fund the appeal (although a review of its financial status in 1983 indicates that the organization would have been hard-pressed to cover the not inconsiderable costs of continuing the litigation).

Ultimately, Lambda did not need to find the money to finance the case. Lambda was physically located at the ACLU's New York offices in 1983, and Lambda's managing attorney, Abby Rubenfeld, had been using her geographical proximity to ACLU decision makers to pressure the organization to lend its stature to gay rights litigation by creating its own project rather than continue to take cases on an ad hoc basis. She was joined in her informal campaign by several of the ACLU's own litigators. Based in part on pressure from Lambda and its own litigators, the national ACLU ultimately reversed its decision and agreed to underwrite *Bowers* (although it would not establish the Lesbian and Gay Rights Project until 1986).

Although Lambda had lobbied for the ACLU to lend its institutional credibility to the case, the then-small organization was eager to establish its own importance as a gay rights litigator and did not want its role in *Bowers* to be entirely usurped by the larger, more established litigator. Lambda thus took on the task of defusing tensions and increasing communication among the fragmented network of gay rights litigators.

Late in 1983, Rubenfeld brought key sodomy reform advocates together for an unprecedented meeting, hosted jointly by Lambda and the ACLU. Representatives from the five other gay legal groups then in existence attended the meeting,⁴⁴ as did key private litigators such as Wilde and Jim Kellogg, the attorney in *Baker*. From this meeting emerged a coalition—infelicitously named the Ad-Hoc Task Force to Challenge Sodomy Laws—that would serve as a crucial mechanism for communication and coordination among gay legal activists.

The task force met periodically to hash out legal theories, consider rhetorical approaches, and forge agreements among the various litigators. One of the major subjects of discussion was, obviously, *Bowers*. The other was the increasingly complicated litigation in *Baker v. Wade*. There was ongoing debate among task force members over how best to handle the two cases. Some argued that *Bowers* should be dropped in

favor of *Baker*, despite the latter case's procedural complications, because its combined equal protection/privacy challenge offered more bases under which the sodomy law could be struck down. Some task force members also felt that Don Baker would be a more sympathetic figure to the justices on the Supreme Court than would Michael Hardwick. Baker, after all, had lived an "impeccable life" and was a "model citizen" but for his sexual orientation. Hardwick worked in a gay bar, had been cited for public drinking, and had been arrested for engaging in mutual oral sex with a one-night stand. Since both cases were federal challenges, they reasoned, a negative decision in *Bowers* might damage *Baker's* chances.

Other members of the task force felt that the facts in *Bowers* made such a compelling privacy case that the lack of an equal protection argument would not matter. In addition, they argued, bifurcating privacy arguments from equal protection arguments would lessen the negative impact of *Bowers* in the event the case ended badly. While privacy arguments based on the federal Constitution would be foreclosed, equal protection arguments would remain available to gay rights litigators. Still other members of the task force hoped to consolidate the two cases at the Supreme Court level, if both made it that far. Consolidating the cases, they felt, would present the Supreme Court with the most compelling illustration of the harms engendered by sodomy statutes.

The task force members ultimately chose not to sacrifice one case for the other, opting instead to devote their energies to developing the two parallel challenges.⁴⁵ They also decided not to seek consolidation of the two cases at the Supreme Court level, opting instead to keep the cases separate. In retrospect, these were bad decisions. *Bowers* made it to the Supreme Court first. *Baker* was still awaiting word on certiorari when the decision in *Bowers* came down; the Supreme Court subsequently declined to hear the case.

It is impossible to know, though, whether the Supreme Court would have ruled differently had it been faced with the issues in *Baker* rather than—or together with—those in *Bowers*. It is possible that the only "good" legal decision would have been the decision not to litigate either case. It is also possible that the *Baker* adherents were correct and that *Bowers* was simply the weaker case. The important point for the purpose at hand is that the members of the task force diligently attempted to read the courts and made reasonable decisions given the limited information before them.

Losing Bowers

Despite the considered efforts of Wilde, the ACLU, Lambda, and the other litigators involved in the Ad-Hoc Task Force, *Bowers* failed. The impact of the 1980 elections and the AIDS epidemic on the course of sodomy reform more generally has already been noted. In this section, I argue that the mechanics of the legal process also played an important role in *Bowers*'s failure. Despite Michael Hardwick's arrest, the general nonenforcement of sodomy laws bedeviled the litigation in the case.

The Georgia ACLU's original plan was to secure Michael Hardwick's criminal conviction for violating Georgia's sodomy law and then to use that conviction as the basis for a legal challenge to the law as applied. These plans were scratched, however, when the district attorney declined to prosecute the case, despite the eyewitness account of a police officer and despite Hardwick's own statements that he had broken the law and intended to do so again in the future. Instead, Hardwick filed a civil challenge in federal district court, alleging that the statute violated his constitutional right to privacy and bore no rational relationship to any legitimate state interest. Hardwick's lack of a criminal conviction would come back to haunt him in the Supreme Court, because it served as the basis for Justice Lewis Powell's vote.

Powell, Sodomy, and Standing

As table 7 shows, Powell was one of the five-justice majority in *Bowers*. The task force had identified him early on as possessing the crucial swing vote in the case, based on his general ideological leanings and his voting record in other sexual privacy and gay rights cases. While the Supreme Court had provided no authoritative guidance on the constitutionality of sodomy laws in the years between *Doe* and *Bowers*, the reaction of the justices in other cases suggested to the task force that *Bowers* would be close and would probably be decided by a 5-4 margin, win or lose (table 8).

As the task force saw it, Rehnquist, Burger, and White would almost certainly vote to sustain Georgia's sodomy statute, while Marshall, Brennan, Stevens, and Blackmun would almost certainly vote to strike it down. Although some members of the task force felt that O'Connor might be persuaded to strike down Georgia's law, most felt that her vote would go against Hardwick. Powell was the puzzle. His voting record offered scant information on his beliefs about the constitutionality of

sodomy laws. On the one hand, he favored the notion of a right of sexual privacy, at least insofar as it applied to abortion. On the other hand, he was concerned about how far that right extended.

The case of *Carey v. Population Services* illustrates the ambiguity of Powell's position. The case involved a New York statute prohibiting the distribution of contraceptives by anyone other than a licensed pharmacist. The Court struck down the statute by a vote of 7–2, which Powell

TABLE 8. Ad-Hoc Task Force's Predictions in *Bowers*

Predicted Vote	Justice	Prior Decisions ^a	Ranking ^b
Pro-Hardwick	Marshall	Roe, Carey, Akron, <i>Uplinger</i> , ^c NGTF ^d	1
	Brennan	Roe, Carey, Akron, <i>Uplinger</i> , NGTF	2
	Stevens	<i>Carey</i> , Akron, <i>Uplinger</i> , NGTF	3
	Blackmun	Roe, Carey, Akron, <i>Uplinger</i> , NGTF	4
Uncertain	Powell	Roe, <i>Carey</i> , Akron, <i>Uplinger</i>	6
Pro-Bowers	O'Connor	Akron, <i>Uplinger</i> , NGTF	7
	White	Roe, Carey, Akron, <i>Uplinger</i> , NGTF	5
	Burger	Roe, Carey, Akron, <i>Uplinger</i> , NGTF	8
	Rehnquist	Roe, Carey, Akron, <i>Uplinger</i> , NGTF	9

^aCase names without underlining are votes that are considered pro-gay. Case names with underlining are votes that are considered to be antigay. Case names in italics are votes that are ambiguous.

^bRankings reflect the relative ideological stances of the nine justices sitting on the Supreme Court in 1985, when certiorari was granted in *Bowers*.

^c*New York v. Uplinger* (1984) concerned the constitutionality of a New York statute prohibiting solicitation for “deviate sexual intercourse.” The case was important vis-à-vis sodomy reform because it presented an opportunity for the high court to rule on the constitutionality of sodomy laws. In an extremely unusual turn of events, the Court granted certiorari, heard oral arguments in the case, and then dismissed certiorari as improvidently granted rather than deciding the case on its merits. Justices Burger, Rehnquist, White, and O'Connor issued a two-sentence dissent from the dismissal of certiorari, arguing that since New York's sodomy statute was invalidated on federal constitutional grounds (in *Onofre*), “the merits of that decision are properly before us and should be addressed” (*Uplinger*, 252). Powell joined the four more liberal members of the Court in voting to dismiss the case. Votes on petitions for certiorari are very imperfect measures of votes on the merits; justices may vote to deny certiorari for reasons having little to do with their beliefs about the merits of the issue raised by the case (see Perry 1991). Thus, Powell's vote gave no real indication of his position on the constitutionality of sodomy statutes.

^d*National Gay Task Force v. Board of Education of Oklahoma* (1985) was the second gay-related case handled by the Supreme Court in the years between *Doe* and *Bowers*. It involved the constitutionality of an Oklahoma law making “public homosexual conduct or activity” grounds to fire (or refuse to hire) schoolteachers. *Conduct* was defined as “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that the conduct will come to the attention of school children or school employees” (Okla. Stat. Tit. 70, § 6-103.15 (A) (2)). By the time NGTF made it to the Supreme Court, the only live issue was whether the statute impermissibly restricted constitutionally protected speech on the part of the school teacher. The constitutionality of sodomy laws themselves was not directly at issue, although “homosexual sodomy” was clearly at the heart of the dispute. The Court summarily affirmed the lower court's holding that Oklahoma's statute violated the First Amendment rights of schoolteachers. It is intriguing that the affirmation was the product of a 4–4 tie. Justice Powell did not participate in NGTF because he was recovering from surgery.

joined (Rehnquist and Burger dissented). In articulating the reasons for their decision, Blackmun, Brennan, and Marshall specifically argued that the outer limits of the right to sexual privacy had not yet been marked. Rehnquist's dissenting opinion instead argued that sodomy laws were constitutional. Powell took a middle road, arguing that Blackmun, Brennan, and Marshall had gone too far in protecting sexual privacy rights but giving little indication of where the constitutional lines should be drawn.

Hardwick's legal team⁴⁶ thus tailored their arguments to appeal to Powell. Since his jurisprudence had consistently emphasized the constitutional significance accorded to the home, they played up the spatial aspects of the case.

All that Respondent [Hardwick] argues is that a Georgia citizen is entitled by the Constitution to demand not only a warrant of the Georgia police officer who would enter his bedroom, but also a substantial justification of the Georgia legislature when it declares criminal the consensual intimacies he chooses to engage in there. No less justification is acceptable in a society whose constitutional values have always placed the highest value upon the sanctity of the home against governmental intrusion or control. (*Bowers*, Respondent's Brief, 4)

Despite their attempt to "capture" Powell, he ultimately sided with the conservative wing of the Court. His concurrence laid out his reasoning, which centered on the *lack of injury* incurred by Hardwick: although arrested, Hardwick had not been prosecuted, much less convicted and sentenced. Had he been, wrote Powell, it "would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first degree arson, and robbery" (*Bowers*, 197–98, citations omitted).

Powell's reasoning here bears further perusal, both because he provided the crucial fifth vote to uphold Georgia's sodomy statute and because he had originally voted to strike the law down. The papers of Justice Marshall contain a memo written by Powell and circulated to all eight of his colleagues in which he explained his shift.

At Conference last week, I expressed the view that in some cases it would violate the Eighth Amendment to imprison a person for a private act of homosexual sodomy. I continue to think that in such

cases imprisonment would constitute cruel and unusual punishment. I relied primarily on *Robinson v. California*.

At Conference, given my views as to the Eighth Amendment, my vote was to affirm but on this ground rather than the view of four other Justices that there was a violation of a fundamental substantive constitutional rights—as [the Eleventh Circuit] held. I did not agree that there is a substantive due process right to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity. I may say generally, that I also hesitate to create another substantive due process right.

I write this memorandum today because upon further study as to what is before us, I conclude that my “bottom line” should be to reverse rather than affirm. The only question presented by the parties is the substantive due process issues, and—as several of you noted at Conference—my Eighth Amendment view was not addressed by the court below or by the parties.

In sum, my more carefully considered view is that I will vote to reverse but will write separately to explain my views of this case generally. I will not know, until I see the writing, whether I can join an opinion finding no substantive due process right or simply join the judgment.⁴⁷

Three years after *Bowers*, Powell (who had since retired from the Court) expanded on his reasoning in the case. In an address to a group of law students, he said that he “probably made a mistake in [*Bowers*].” The case, he opined, was a “close call.” But, he maintained, “[t]hat case was not a major case, and one of the reasons I voted the way I did was the case was a frivolous case” brought “just to see what the Court would do” (Marcus 1990, A3).

Powell’s use of the word *frivolous* to describe *Bowers* drives home the core problem of gay rights litigators seeking to use the courts to effect sodomy reform: the general nonenforcement of sodomy laws made it easy for jurists to conclude that those laws did not harm people. Ironically, by not enforcing their sodomy provisions, states could successfully insulate them from constitutional challenge.

Sodomy and Standing, Revisited

The general nonenforcement of sodomy laws bedeviled *Bowers* in more ways than one. Virtually all commentary on *Bowers* has noted what Hal-

ley (1993, 1742) calls the “transparent fictionality” of the Supreme Court’s framing of the case. Georgia’s sodomy statute made no distinction based on gender, proscribing instead “any sexual act involving the sex organs of one person and the mouth or anus of another” under penalty of up to twenty years’ imprisonment. Michael Hardwick challenged this statute on its face, yet the Supreme Court construed the question in the case to be “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy” (*Bowers*, 1990). The Court was able to frame the question in this fashion largely because of the inability of gay rights litigators to completely jump the standing hurdle in the case.

Kathy Wilde, Hardwick’s lead counsel in the lower court phases of the case, was well aware of the doctrinal constraints imposed by Georgia’s statute. She sought to turn the disadvantage caused by her inability to raise an equal protection claim into an advantage by soliciting a married couple to join the case. John and Mary Doe (pseudonyms) were acquaintances of Hardwick. They claimed that Hardwick’s arrest had “chilled and deterred” their sexual intimacy and interfered with their marital relationship. By bringing in the Does, Wilde sought to foreclose the interpretation that *Bowers* was just about homosexual sodomy. The plain language of Georgia’s statute applied to all people, heterosexual or homosexual, married or single. The presence of the Does pointed to the fact that the activity for which Michael Hardwick was arrested (oral sex) was an activity engaged in by married heterosexual couples as well and dramatized the scope of the sexual privacy issues at stake: the language of Georgia’s statute reached into the privacy of the marital bedroom.

Michael Bowers, Georgia’s attorney general, argued in response that the Does did not have standing to challenge Georgia’s statute, because they had not been arrested and were unlikely to face arrest in the foreseeable future. Their lack of immediate danger from the statute, he argued, meant that they did not meet the legal requirements to challenge it. The U.S. District Court agreed. The Does, it ruled, lacked standing to challenge the law. Wilde appealed the district court’s ruling to the Eleventh Circuit. She argued that the danger was real, even if the Does had never been arrested; were she allowed to proceed with the discovery process, she said, she would present evidence of a number of prosecutions of married couples under Georgia’s statute.⁴⁸ In response, the state of Georgia reiterated its position that the Does lacked standing, *conceding that their sexual activities were encompassed by the right of privacy*.

The decision handed down by the Eleventh Circuit in May 1985 was

in many ways a major victory for gay rights. Analogizing Hardwick's activity to the intimate association of marriage and noting its location (Hardwick's own bed), the court ruled that "[t]he activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation" (*Bowers* 1985, 1212). This decision marked the first time a federal appellate court had found sodomy laws to violate a fundamental right.

The victory had a major drawback, however. The court ruled that the Does lacked standing. Explained the court:

Each of them [Hardwick and the Does] claims that their normal course of activity will lead them to violate the statute, completely apart from their desire to have it invalidated. *Hardwick's status as a homosexual adds special credence to his claim.* While a plaintiff hoping only to challenge a statute might overestimate his or her willingness to risk actual prosecution, a plaintiff who genuinely desires to engage in conduct regardless of its legal status presents a court with a more plausible threat of future prosecution. (*Bowers* 1985, 1205; emphasis added)

The court concluded that "the authenticity of Hardwick's desire to engage in the proscribed activity" (1206) together with his actual arrest gave him—but not the Does—standing.

By removing the plaintiffs who linked the case most closely to the right of privacy articulated in *Griswold v. Connecticut* and its progeny, the court of appeals weakened the explicit connection to the larger theory of sexual privacy advanced in the case, even as it issued a ruling in Hardwick's favor. Moreover, it set up a factual context that allowed the Supreme Court to limit its review to "homosexual sodomy" despite the facially neutral language of the statute itself. Had the Does been accorded standing by the Eleventh Circuit, it would have been well-nigh impossible for the Supreme Court to morph the question at issue to exclude the consideration of "heterosexual sodomy."

The Impact of Bowers

Had Hardwick won his case, the sodomy laws of twenty-six states would have fallen. His loss, conversely, gave additional ammunition to opponents of sodomy reform. *Bowers's* legal impact was immediate. One

week after the Court handed down its decision in *Bowers*, it denied certiorari in *Baker v. Wade*, leaving standing the Fifth Circuit ruling upholding the constitutionality of the Texas sodomy law. One week after that, the Missouri Supreme Court upheld the constitutionality of its state's sodomy law, relying primarily on *Bowers* (*State v. Walsh*). Lambda and its fellow gay rights litigators quickly withdrew all the other sodomy challenges in progress.

Bowers's impact was not limited to sodomy challenges or privacy-based claims. *Padula v. Webster* (1987) was the first gay rights case to reach a federal court of appeals after *Bowers* came down. *Padula* concerned the FBI's refusal to hire an otherwise qualified lesbian applicant. She sued, arguing that the FBI's actions violated her right to equal protection of the laws. In 1987, the case reached the D.C. Court of Appeals, which dismissed the case, ruling that *Bowers* constituted an insurmountable barrier to her claim. Said the court: "If the [Supreme] Court was unwilling to object to laws that criminalize the behavior that defines the class, it is hardly open to a lower court 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" (*Padula*, 103).

Shortly thereafter, a different circuit relied on *Bowers* and *Padula* to rule against a man discharged by the Navy because of his homosexuality (*Woodward v. United States*, 1989). Woodward alleged that the Navy's policy violated the due process clause as well as his right to freedom of association. The federal circuit's response was this: "After [*Bowers v.*] *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm" (*Woodward*, 1076).

One year later, yet another circuit court relied on *Bowers* to uphold a federal agency's blanket policy of denying security clearances to lgb people (*High Tech Gays v. Defense Industry Security Clearance Office*, 1990). Reasoning that under *Bowers* "there is no fundamental right to engage in homosexual sodomy" the Ninth Circuit found it "incongruous" to claim a right of equal protection based on "homosexual conduct" (571).

Bowers's impact also reverberated in cases much closer to home for most lgb people. Shortly after *Bowers* was announced, the Arizona Court of Appeals relied on it as evidence that a bisexual man was presumptively unacceptable to adopt children (*Appeal in Pima County Juvenile Action B-10489*, 1986). One year later, the New Hampshire Supreme Court sim-

ilarly relied on *Bowers* in opining that a state statute prohibiting lgb people from fostering or adopting children would pass constitutional muster (*Opinion of the Justices*, 1987).

Reliance on *Bowers* to justify legal discrimination against lgb people in a wide range of contexts would continue until the case was overruled by *Lawrence v. Texas* in 2003. It is important to recognize, though, that the aftermath of *Bowers* was not entirely disheartening for gay rights advocates. There were a few bright spots. One was that newspaper editorials and cartoons across the nation criticized the Court's ruling, often in scathing terms, as grossly undermining the basic privacy rights due all Americans. The *New York Times* (1986), for instance, called *Bowers* a "gratuitous and petty ruling, and an offense to American society's maturing standards of individual dignity." The *Los Angeles Times* (1986) likewise took the Court to task for the "rigid and hostile attitude woven through White's opinion." In addition, a *Newsweek* poll conducted by Gallup the week after *Bowers* was announced found that more people disapproved of the ruling than approved.⁴⁹ Of those surveyed, 57 percent also believed that states should not have the power to regulate private consensual sexual practices between homosexuals. While these poll results were not tremendously favorable, they did indicate a reservoir of political tolerance toward lgb people.

By far the most positive result of *Bowers* was that it had what Lambda attorney Evan Wolfson referred to as a "galvanizing effect" on lgb people, spurring them to newfound activism in the gay rights movement.⁵⁰ As noted in chapter 3, the decision inspired a number of protests by lgb people, most notably the 1987 March on Washington for Lesbian and Gay Rights. Lambda moved quickly to capitalize on the anger *Bowers* provoked, even as it was halting all its ongoing sodomy challenges. An excerpt from a solicitation letter dated one week after the decision illustrates this effort:

What does the Supreme Court decision mean in terms of your rights?

For those of who live in states that still have sodomy laws on the books, indeed for all of us, the decision amounts to a reaffirmation of centuries of prejudice. Sodomy laws are often used to legitimate discrimination or harassment against us. For example, in a custody case, the fact that the mother is a lesbian, coupled with a presumption that she therefore is in violation of a state's sodomy law, may be used to deny her parental rights. Or in a debate in a state legislature, sodomy

laws may be used to justify a vote against a bill to ban sexual orientation discrimination.

There is no doubt that the Supreme Court's decision last week will add new vigor to hate campaigns against us, including calls to enforce energetically the sodomy laws already on the books and efforts to reintroduce sodomy laws in the 25 states that are free from them at present.

The letter then went on to analogize the Court's opinion to *Plessy v. Ferguson*, the infamous 1896 case in which the Supreme Court refused to find the practice of racial segregation unconstitutional. The black community mobilized in *Plessy's* aftermath, then-executive director Tom Stoddard wrote, and the decision was ultimately overturned; gay men and lesbians should do the same.⁵¹

Table 3 (chap. 3) charts Lambda's income over the years. It shows that individual contributions more than tripled between 1985 and 1986, jumping from \$181,239 to \$553,402. This dramatic increase suggests that Lambda was reasonably successful in using a litigation defeat to mobilize support for its work. Ironically then, *Bowers* helped to increase mobilization on behalf of gay rights claims, even as it directly harmed the legal interests of lgb people.

Conclusion

Shifts in the structure of legal opportunity can variously open up and close down spaces within which social movements can act to effect their sociolegal goals. In this chapter, I have argued that the pace of sodomy reform in the years between Stonewall and *Bowers* varied quite significantly in response to shifts in the structure of legal opportunities as well as to the decisions made by Lambda and other social movement litigators.

I want to emphasize here that the stop-and-start course of sodomy reform cannot be explained by reference to a single agent. Myriad factors interacted to drive (or stall) the pace of sodomy reform. For example, the period of stagnation and backsliding vis-à-vis sodomy reform that marked stage 3 appears to be a product of the emergence of AIDS, tensions over the right to abortion and the right to privacy, and the growing conservatism of the federal bench, not to mention the Supreme Court's

decision in *Bowers*. These factors can be discussed separately, but they operated interactively. Moreover, the composition of the factors driving the pace of sodomy reform altered over time. For example, the Model Penal Code was a major instigator of sodomy repeal during stage 2. Likewise the emergence of AIDS helped to power the period of stagnation and backsliding that characterized stage 3.

While some of the factors driving sodomy reform were unrelated to the actions of gay rights advocates (e.g., the passage of the Model Penal Code or the emergence of the AIDS epidemic), others were a product of decisions made by movement actors (e.g., the pursuit of *Doe v. Commonwealth's Attorney*, *Onofre*, *Baker*, and *Bowers*). 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. Just as shifts in the structure of legal opportunities can open or close space for legal action, that action can shape the structure of legal opportunities.

This is clearly evidenced in *Bowers*. Virtually every aspect of the case was a product of considered choice. The Georgia affiliate of the ACLU had been actively searching for a test case and approached Michael Hardwick with an offer to represent him. When the Georgia affiliate chose to withdraw its sponsorship of *Bowers* after the initial loss in district court, Kathy Wilde actively sought a new funding source. Lambda and the ACLU chose to become involved in the case, chose to create the Ad-Hoc Task Force to Challenge Sodomy Laws, and chose to continue with *Bowers* despite concerns raised by several of the task force members that *Baker v. Wade* was the better legal vehicle with which to challenge the constitutionality of sodomy laws. Their actions directly facilitated the Supreme Court's ruling in the case and the major shift in LOS that occurred as a result of the decision.

With the virtue of 20/20 hindsight, it is clear that Lambda, the ACLU, Kathy Wilde, and the other litigators who pushed the *Bowers* case miscalculated. At the same time, it is unclear whether *Baker v. Wade* would have been a better case to bring before the Supreme Court. Decoding the structure of legal opportunities is not a simple task; there is no Rosetta stone. Actors can do no more than make educated guesses based on the available information. In a world of imperfect information, it should come as no surprise that actors sometimes guess poorly.

The task of decoding the LOS is complicated further by the length of time most cases take to work their way through the courts. For example,

the LOS surrounding sodomy reform seemed reasonably advantageous when *Bowers* began. But by the time the case made it to the Supreme Court, the LOS had become less favorable, in part due to the emergence of the AIDS epidemic. Moreover, the “heterosexual panic” that erupted at the revelation that Rock Hudson had AIDS occurred at the worst possible time for the *Bowers* team—just after the Eleventh Circuit struck down Georgia’s sodomy law and before the Supreme Court considered whether to accept certiorari in the case.⁵² At that point in time, gay rights litigators had no control over the case. The decision to appeal to the U.S. Supreme Court was entirely up to Georgia, and while Hardwick’s legal team urged the Supreme Court to turn down the case, it had no power to prevent the Supreme Court from choosing to hear it. While there is no direct evidence that post-Rock Hudson AIDS phobia was a major factor in the Supreme Court’s decision to hear the case, it seems plausible to suggest that the social panic about homosexuality and AIDS heightened the salience of Georgia’s AIDS-fear arguments.

One of the most interesting things about *Bowers* is that Lambda succeeded in overturning it seventeen years later, despite the Supreme Court’s great reluctance to disturb recent precedents. Chapter 5 seeks to understand how and why this occurred.