

THE SHOT HEARD AROUND THE LGBT WORLD: *BOWERS V. HARDWICK* AS A
 MOBILIZING FORCE FOR THE NATIONAL GAY AND LESBIAN TASK FORCE

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Introduction

The United States Supreme Court decision in *Bowers v. Hardwick*,¹ which held that laws criminalizing sodomy did not violate the constitutional right to privacy,² shocked gays and lesbians. It was a sign that the Court and, by extension, society, did not accept homosexuals. Although it was a clear setback for the gay rights movement, the *Bowers* decision galvanized gay activists and lesbian, gay, bisexual and transgender (“LGBT”) organizations. In particular, in response to *Bowers*, the National Gay and Lesbian Task Force established the Privacy Project to repeal sodomy laws on a state-by-state basis. From 1986-1991, the Privacy Project did not successfully persuade any state legislatures to repeal existing sodomy laws. However, it was able to establish and expand the reach of statewide LGBT organizations, bring together gay and lesbian individuals, educate the public about gay rights issues, and put a “human face” on the gay rights movement. These achievements, when combined with the work of litigators, historians, and other LGBT organizations, and with the passage of time, ultimately set the stage not only for the subsequent repeal of a majority of state sodomy laws, but also for the total invalidation of *Bowers* by the Supreme Court’s decision in *Lawrence v. Texas*.³

The Supreme Court’s Decision in *Bowers v. Hardwick*

Prior to analyzing the galvanizing effect that the United States Supreme Court’s decision in *Bowers v. Hardwick* had on the gay rights movement in general and on the National Gay and Lesbian Task Force in particular, the *Bowers* decision must be examined.

On August 3, 1982, Officer Torick, an Atlanta police officer, arrested Michael Hardwick, a bartender at a gay bar, because Hardwick “had committed the crime of sodomy with a consenting male adult in the bedroom of his own home.”⁴ Three weeks earlier, Torick had issued Hardwick a ticket for drinking in

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¹ *Hardwick v. Bowers (Bowers I)*, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev’d*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

² *Bowers v. Hardwick (Bowers II)*, 478 U.S. 186, 189 (1986).

³ 539 U.S. 558 (2003).

⁴ *Bowers I*, 760 F.2d at 1204.

public, which required Hardwick to come to court to pay his fine. Hardwick missed his court appearance due to a discrepancy in the dates listed on the ticket. Immediately after Hardwick failed to appear in court, Torick obtained a warrant for Hardwick's arrest, although he was not able to serve it upon Hardwick because Hardwick was not home.⁵ After learning about the warrant, Hardwick paid the ticket and, for three weeks, forgot about the matter. On August 3, Torick again went to Hardwick's home to serve the warrant (which was invalid because Hardwick had already paid his ticket), and was admitted by a guest staying at the home. After walking into the home and observing Hardwick engaging in consensual oral sex with another man in his bedroom, Torick arrested him. Hardwick "then spent twelve hours in jail [while being] harassed by other prisoners[,] who were told the nature of his arrest."⁶

When the local District Attorney's office "decided not to present [Hardwick's] case to the grand jury unless further evidence developed,"⁷ Hardwick, "a practicing homosexual who regularly engage[d] in private homosexual acts,"⁸ filed a lawsuit asking the United States District Court for the Northern District of Georgia to invalidate—on constitutional grounds—the Georgia sodomy statute pursuant to which he was arrested.⁹ In part, the statute stated that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."¹⁰ The penalty for a conviction for sodomy under the statute was "imprisonment for not less than one nor more than 20 years."¹¹

⁵ See Paula A. Brantner, Note, *Removing Bricks From a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L. Q. 495, 503 (1992). In an interview, Hardwick suggested that Torick "had it out [for Hardwick]" because he had seen Hardwick exit the gay bar in which Hardwick worked; Torick also personally processed Hardwick's warrant—it was the first time he had personally processed a warrant in ten years. See Peter Irons, *What Are You Doing in My Bedroom?*, in *THE COURAGE OF THEIR CONVICTIONS* 392 (1988), in WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW* 217, 219 (2d ed. 1997).

⁶ Brantner, *supra* note 5, at 504. According to Hardwick, Torick made sure that everyone "in the holding cells and guard[s] and [the] people processing us knew I was there for 'cocksucking' and that I should be able to get what I was looking for." Irons, *supra* note 5, at 220. While he was being held at the jail, Hardwick indicated that although he was initially placed in a holding cell for four hours, he was later transferred to a cell on a different floor, which housed convicted criminals. See *id.*

⁷ *Bowers I*, 760 F.2d at 1204.

⁸ *Id.* John and Mary Doe, a married couple who knew Hardwick and who "desired to engage in sexual activity proscribed by the statute but had been 'chilled and deterred' by the existence of the statute and the recent arrest of Hardwick" joined Hardwick in the suit. *Id.*

⁹ Hardwick had pursued the case in part because lawyers working for the ACLU of Georgia had contacted him several days after his arrest; they had notified him that "they were looking for an appropriate test case." Brantner, *supra* note 5, at 504. Because Hardwick needed an adverse judgment at the state court level before he could pursue litigation at the federal court level, "Hardwick's attorneys insisted upon obtaining a letter indicating that the district attorney had no intentions of further prosecution . . . to serve as the necessary state court judgment." *Id.*

¹⁰ *Id.*

¹¹ *Id.*

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After considering Hardwick's case, the district court granted the defendant's motion to dismiss for failure to state a claim.¹² However, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed the district court's decision. Relying on the Supreme Court's opinions in *Griswold v. Connecticut*,¹³ *Eisenstadt v. Baird*,¹⁴ *Stanley v. Georgia*,¹⁵ and *Roe v. Wade*,¹⁶ the Eleventh Circuit held that "the Georgia statute violated [Hardwick's] fundamental rights because his homosexual activity [was] a private and intimate association that [was] beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."¹⁷ After the Eleventh Circuit issued its opinion, Georgia's Attorney General, Michael Bowers, filed a petition for writ of certiorari in the Supreme Court, which the Court granted.¹⁸

From the beginning of the litigation and until, and including, the petition for certiorari, Hardwick's attorneys — a team of lawyers affiliated with the American Civil Liberties Union ("ACLU") of Georgia that was headed by Kathleen L. Wilde — "consistently framed his case as raising a question of homosexual rights, emphasizing his sexual-orientation identity and deemphasizing the acts for which he was arrested."¹⁹ Thus, Hardwick's lawyers'

¹² See *Bowers v. Hardwick (Bowers II)*, 478 U.S. 186, 188 (1986). The court also held that the heterosexual couple, who had joined Hardwick in the suit, had no standing because they had not sustained any direct injury as a result of the enforcement of the statute. *Id.*

¹³ In *Griswold v. Connecticut*, the Supreme Court held that a Connecticut law prohibiting the use of contraceptives was unconstitutional because it violated the right to marital privacy. Although the right to privacy was not explicitly mentioned in the Constitution, Justice William O. Douglas, writing for the majority, concluded "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." 381 U.S. 479, 484 (1965) (citations omitted).

¹⁴ The Supreme Court's decision in *Eisenstadt v. Baird* extended the right to marital privacy announced in *Griswold* to any procreative sexual intercourse, holding that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453 (1972).

¹⁵ In *Stanley v. Georgia*, the Supreme Court held that although "the States retain broad power to regulate obscenity[,] that power simply does not extend to mere possession by the individual in the privacy of his own home." 394 U.S. 557, 568 (1969).

¹⁶ Citing cases such as *Griswold* and *Stanley*, the Supreme Court, in *Roe v. Wade*, indicated that a "right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution" and concluded that this "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 152-53 (1973).

¹⁷ *Bowers I*, 760 F.2d at 1212. The Eleventh Circuit remanded the case for trial. To prevail, Georgia "would have to prove that the statute [was] supported by a compelling interest and [was] the most narrowly drawn means of achieving that end." *Id.* at 1213.

¹⁸ See Petition for Writ of Certiorari, *Bowers v. Hardwick*, 474 U.S. 943 (1985) (No. 85-140). Laurence Tribe argued before the Supreme Court on behalf of Michael Hardwick, with Kathleen Sullivan and Kathleen L. Wilde joining Tribe on the brief. *Bowers II*, 478 U.S. at 187. Michael Hobbs, the Senior Assistant Attorney General of Georgia, represented the State of Georgia. See *id.*

¹⁹ Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1744 (1993).

first strategy was “to call on the court to protect a group of persons from intimate invasion by making their acts a merely adventitious (in Aristotelian terms, an accidental) characteristic that renders them vulnerable to arrest.”²⁰ After the Supreme Court granted certiorari, a new group of attorneys convened by Professors Laurence Tribe and Kathleen Sullivan pursued a different litigation strategy, recasting Hardwick’s claim as a “bid for protection along the register not of identities but of acts—‘the associational intimacies of private life in the sanctuary of the home.’”²¹ Hardwick’s Supreme Court brief referred to “homosexual sodomy” only once, “and then it argued that Georgia’s decision to prosecute selectively, targeting only homosexual sodomy, required ‘particularized explanation’ above and beyond the mere recitation of moral condemnation of homosexuality.”²² Only if Hardwick’s gay identity was downplayed or even eradicated from Hardwick’s Supreme Court brief and from the oral arguments did his lawyers feel that it would be possible for the Court to comfortably consider a facial challenge to the Georgia sodomy statute on privacy grounds and to potentially rule in Hardwick’s favor.²³

Despite how carefully Hardwick’s lawyers had couched the case in terms of the constitutional right to privacy both in the Supreme Court brief and in the oral argument, Justice Powell—the “swing voter” on the bench—was not persuaded and the Supreme Court rejected Hardwick’s claim with a 5-4 vote. Writing for the majority,²⁴ Justice Byron White framed the issue before the Court

²⁰ *Id.*

²¹ *Id.* (citing Brief of Respondent-Appellee at 7, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)). Tribe understood that the Court’s increasing conservatism would mean that constitutional right to privacy arguments would prevail more readily than arguments revolving around homosexual identity and the need for protection of homosexuals. Tribe also understood that “the case was very sharply uphill but not a sure loser.” JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 286 (2001). In order to convince the Court to rule in Hardwick’s favor, Tribe felt that he would have to win over Justice Lewis Powell. “If I could convince Powell, I would have five votes and possibly six [if Justice Sandra Day O’Connor went along with Powell]; if I could not, I would lose 5-4.” *Id.* at 285-86. It seemed apparent to Tribe that Chief Justice Burger and Justices White and Rehnquist would vote against Hardwick’s claim, no matter how it was framed; Justice O’Connor was also likely to do so. Justices Brennan and Marshall were certain to vote in favor of Hardwick, while Justices Blackmun and Stevens could be convinced to follow Brennan and Marshall. *See id.*

²² Halley, *supra* note 19, at 1744-45 (citations omitted).

²³ Although they were not confident that they would prevail, Hardwick’s lawyers were cautiously optimistic. After finishing his oral argument before the Court, Tribe “felt very good mostly because [he] expected the [C]ourt to be even more hostile and didn’t expect Justice Powell to seem so close to being open-minded[,] even if not persuaded.” MURDOCH & PRICE, *supra* note 21, at 302. Michael Hardwick similarly observed that after Tribe finished arguing *Bowers* before the Court, “everyone was pretty much pre-victory. They were *sure* I would win. About forty of us went to lunch around the corner and everything seemed very positive and optimistic” Irons, *supra* note 5, at 223. When the decision in *Bowers* was announced, Hardwick called Tribe, who was even “more devastated than [Hardwick]. Nobody expected [the decision to come out the way it did.]” *Id.*

²⁴ Also joining the majority opinion were Chief Justice Burger and Justices O’Connor, Powell, and Rehnquist. *See Oyez: Bowers v. Hardwick*, http://www.oyez.org/cases/1980-1989/1985/1985_85_140/ (last visited March 27, 2008).

as being “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”²⁵ White first dismissed Hardwick’s reliance on the Court’s previous privacy jurisprudence, distinguishing cases such as *Griswold* and *Eisenstadt* because they, unlike Hardwick’s case, concerned “family, marriage, . . . [and] procreation.”²⁶ Furthermore, White pointed out that only “those fundamental liberties that are ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if [they] were sacrificed’”²⁷ or those that are “deeply rooted in this Nation’s history and tradition”²⁸ merited heightened judicial protection. In light of the fact that “[s]odomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States,”²⁹ White declared that a fundamental right to engage in homosexual sodomy was “at best, facetious.”³⁰ He also declined to “discover” new fundamental rights arising out of the Due Process Clause of the Fourteenth Amendment, because to do so would be to render the Court vulnerable and open to claims of illegitimacy; the farther it strayed from the language and purpose of the Constitution, the more credibility the Court would presumably lose.

White also dismissed Hardwick’s First Amendment claim, which was premised on the idea that certain private conduct—such as sexual activity—deserved protection even though it would not be protected when performed in public. White distinguished the Court’s decision in *Stanley*, which held that “the First and Fourteenth Amendments prohibit[ed] making mere private possession of obscene material a crime,”³¹ by alluding to the fact that victimless crimes such as drug possession did not become any less criminal because they were committed in the home.³² Additionally, White pointed out that recognizing the right to private homosexual conduct would force the Court to consider the propriety of other private but criminalized conduct such as adultery, incest, and other sexual crimes—something the Court was categorically unwilling to do.³³

Finally, White addressed Hardwick’s argument that, even if Hardwick’s conduct was not a fundamental right, the Georgia anti-sodomy law should be subject to rational basis review. Hardwick contended that the Georgia law had no rational basis and that, instead, it was premised on the Georgia legislature’s belief that homosexuality was immoral and unacceptable. Making short work of this argument, White pronounced that the law is necessarily “based on notions of

²⁵ *Bowers II*, 486 U.S. at 190.

²⁶ *Id.* at 191.

²⁷ *Id.* at 191-92 (citations omitted).

²⁸ *Id.* at 192 (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

²⁹ *Id.*

³⁰ *Id.* at 194.

³¹ *Stanley*, 394 U.S. at 568.

³² See *Bowers II*, 478 U.S. at 195.

³³ See *id.* at 195-96.

morality[] and [that] if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”³⁴

For the most part, the concurring Justices echoed White’s sentiments. Chief Justice Warren Burger wrote separately to emphasize that, “in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.”³⁵ Burger took a two-part approach in his brief concurrence. First, he first argued that a fundamental right to homosexual sodomy could not exist in light of the condemnation of sodomy, which was “ancient” and “firmly rooted in Judeo-Christian moral and ethical standards.”³⁶ Second, Burger defended the rationality of Georgia’s law by contending that the law did not embody the moral preferences of the Georgia legislature; instead, it was validly enacted pursuant to the “legislative authority of the state.”³⁷

As Laurence Tribe had predicted, Justice Lewis Powell provided the decisive vote in *Bowers*. Instead of giving Hardwick his victory, however, Powell’s concurrence cemented Hardwick’s defeat. Agreeing with the majority and presumably with Burger’s concurrence, Powell wrote separately only to suggest that, if Hardwick were tried, convicted and sentenced under the Georgia law, he might have had an argument pursuant to the Eighth Amendment -- Georgia law imposed a penalty of up to twenty years in prison for a “single private, consensual act of sodomy.”³⁸

The two Justices who dissented in *Bowers* understandably attacked the very underpinnings of the majority opinion.³⁹ Justice Blackmun’s dissent, which was joined by Justices Brennan, Marshall and Stevens, began by reformulating the issue at the heart of the case. According to Blackmun, the question was not whether there was a fundamental right to engage in homosexual sodomy, but rather whether individuals had the “‘right most valued by civilized men,’ namely ‘the right to be let alone.’”⁴⁰ First, Blackmun criticized the majority’s “almost obsessive focus on homosexual activity”⁴¹ in light of the Georgia statute’s neutral language. Second, Blackmun disagreed with the majority’s refusal to consider whether the Georgia law violated the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. Third, Blackmun suggested that

³⁴ *Id.* at 196.

³⁵ *Id.* (Burger, C.J., concurring).

³⁶ *Id.* (Burger, C.J., concurring).

³⁷ *Id.* at 197 (Burger, C.J., concurring).

³⁸ *Id.* (Powell, J., concurring).

³⁹ As Professor Anne Goldstein explained, the “dissenters challenged the majority on two levels: [Justice Harry] Blackmun accepted the factual premise that homosexuality was abhorred when the Constitution was adopted, but rejected the notion that this is constitutionally significant, and [Justice John Paul] Stevens challenged this factual premise itself.” Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L. J.* 1073, 1102 (1988).

⁴⁰ *Bowers II*, 478 U.S. at 199 (Blackmun, J., concurring) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

⁴¹ *Id.* at 200 (Blackmun, J., concurring).

the Court's decision "refused to recognize the fundamental interest all individuals have in controlling the nature of their intimate associations with others."⁴² For Blackmun, the right to privacy was "neither the right to simply be left alone nor an instrument for social control [I]t was the essence of modern, liberal personhood."⁴³ Finally, Blackmun criticized the Court's conclusion that Georgia had a rational basis for enacting the legislation in question, stating that "[t]he legitimacy of secular legislation depends [not on traditional Judeo-Christian values, but]. . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine."⁴⁴ Blackmun ended by urging the Court to reconsider its decision and to conclude that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do."⁴⁵

Joined by Justices Brennan and Marshall, Justice Stevens wrote a separate dissent in which he contended that the Georgia statute could not be enforced as written because the conduct it sought to prohibit "is a protected form of liberty for the vast majority of Georgia's citizens."⁴⁶ Furthermore, Stevens argued that Georgia could not meet its burden of justifying a selective application of the law because homosexual individuals have the same liberty interest as heterosexual individuals and because "[a] policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group."⁴⁷

Scholarly Criticisms of the *Bowers* Decision

The Supreme Court's decision in *Bowers* was attacked on a number of grounds as soon as it was announced. Indeed, some scholars have suggested that it was the proliferation of articles and books examining and, more often than not,

⁴² *Id.* at 206 (Blackmun, J., concurring). Blackmun pointed out that the text of the Fourth Amendment guaranteed the right of the people to be secure in their houses, contravening the majority's claim that Hardwick's right to privacy had no basis in the Constitution. *See id.* at 208 (Blackmun, J., concurring).

⁴³ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* 24 (2005).

⁴⁴ *Bowers II*, 478 U.S. at 211 (Blackmun, J., concurring). Blackmun also reminded the majority that "[n]o matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'" *Id.* at 212 (Blackmun, J., concurring) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

⁴⁵ *Id.* at 214 (Blackmun, J., concurring).

⁴⁶ *Id.* at 218 (Stevens, J., concurring).

⁴⁷ *Id.* at 219 (Stevens, J., concurring). Stevens indicated that "neither the State nor the Court has identified any such [neutral and legitimate] interest in this case." *Id.* (Stevens, J., concurring). Moreover, Stevens alluded to the fact that the statute had not been enforced "for decades" to support his point that Georgia did not have a legitimate reason to single out and specifically regulate homosexual conduct. *See id.* at 220 (Stevens, J., concurring).

rejecting the Court's reasoning and conclusion in *Bowers* that helped to draw favorable attention to the gay rights movement, and that ultimately permitted the Court to overturn *Bowers* in *Lawrence v. Texas*.⁴⁸

In addition to analyzing how the Justices' (or Justice Powell's) personal opinions or biases may have affected the outcome in *Bowers*,⁴⁹ commentators

⁴⁸See John D'Emilio, *Some Lessons from Lawrence*, in *THE FUTURE OF GAY RIGHTS IN AMERICA* 3, 7 (H.N. Hirsch ed., 2005) ("The overwhelming majority of the works of history cited [in the majority's opinion in *Lawrence*] were published from the mid-1980s onward. Whatever [Justice] Kennedy's views of the Fourteenth Amendment and the Due Process Clause might be, he needed back up to discard so recent a contrary decision. This is what the historians offered."); see also Telephone Interview with John D'Emilio, Professor, Univ. of Ill. at Chi., in Phila., Pa. (Apr. 14, 2008) (transcript on file with author) [hereinafter D'Emilio Interview] (suggesting that a "combination of legal writing and legal activism (such as additional state court challenges) provided the foundation for the *Lawrence* decision," as opposed to "grassroots activism").

⁴⁹John C. Jeffries, Jr.—the Dean and current professor at the University of Virginia Law School and a former law clerk to Justice Powell—had suggested that Powell's "continuing unease at choosing between sodomy as a crime and sodomy as a fundamental right," as well as his purported unfamiliarity with homosexuals, cost Michael Hardwick his Supreme Court victory. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 530 (1994). Jeffries, in his biography of Powell entitled JUSTICE LEWIS F. POWELL, JR., contended that Powell had originally intended to vote against the Georgia law based on his belief that the Eighth Amendment barred Hardwick's criminal punishment and that Powell expressed his views in the Justices' *Bowers* Conference. See *id.* at 522. Powell's Eighth Amendment argument in *Bowers* rested on the fact that the Georgia law provided that individuals violating the law could serve up to twenty years in prison; serving such a term for a single sexual act would arguably constitute "cruel and unusual punishment[]." U.S. CONST. amend. VIII. Following the Conference, Chief Justice Burger wrote Powell a letter reminding Powell that his Eighth Amendment "theory had not been raised by the litigants," framing the law in question as merely regulating an individual's right to sexual gratification, and noting that just because a certain activity, such as "incest, drug use, gambling, exhibitionism, prostitution, [and] rape," provided gratification did not make it constitutionally protected. JEFFRIES, *supra* note 49, at 523. Powell's conservative law clerk, Michael Mosman, also urged Powell to change his vote, arguing that Powell's Eighth Amendment theory did not apply in *Bowers*, as the only "question squarely before the Court was whether homosexual sodomy was a fundamental right." *Id.* at 524. Following these communications, Powell notified the other Justices that he intended to change his vote and to uphold the Georgia law. See *id.* Powell ultimately joined Justice White's majority opinion, despite initially telling White that he would write separately. See *id.*

Perhaps the explanation behind Powell's wishy-washy stance regarding *Bowers* is rooted in Powell's claim that "he had never known a homosexual." *Id.* at 528. A number of accounts have concluded that "in each of six consecutive terms in the 1980's one of Justice Powell's four clerks was gay." John Brigham, *Some Thoughts on Institutional Life and "The Rest of the Closet,"* in *THE FUTURE OF GAY RIGHTS IN AMERICA* 95, 98 (H.N. Hirsch ed., 2005). Indeed, the clerk whom Powell informed that he had never met a homosexual was himself gay. The clerk responded by telling Powell "Certainly you have, but you just don't know that they are." JEFFRIES, *supra* note 49, at 521. Jeffries suggested that Powell was not lying, *per se*. He "had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it." *Id.* at 529. Whether or not Powell truly believed that he'd never encountered a homosexual, it is apparent that Powell never quite came to terms with his role in *Bowers*. As soon as four years after *Bowers* was handed down, Powell responded to a student question regarding how he "could reconcile his vote in *Bowers v. Hardwick* with his support for *Roe v. Wade*" by acknowledging that "he probably made

attacked the very foundation of the majority opinion. Several scholars argued, in the words of William N. Eskridge, Jr., that Justice White's claim that there was no fundamental right to engage in homosexual sodomy was "manipulative, ignorant, inefficient, violent, historically inaccurate, misogynistic, authoritarian, and contrary to precedent."⁵⁰ The Supreme Court would later use much of this scholarship in *Lawrence v. Texas* to support its decision to overturn *Bowers*.⁵¹

In his book *Gaylaw: Challenging the Apartheid of the Closet*, Eskridge indicated that the *Bowers* majority inaccurately found that homosexual sodomy had been prohibited even before the adoption of the Fourteenth Amendment and that "only activities unregulated in 1868 could be considered liberties protected by the due process clause."⁵² According to Eskridge, these findings were not based on historical reality. He argued that "homosexual sodomy," as it was described in the *Bowers* opinion:

bore little resemblance to the actual regime in place in 1868, when the [F]ourteenth [A]mendment was adopted. Although most states had sodomy laws, as White said, . . . [they] were rarely enforced against anyone before the 1880s, and it is not clear they were much applied to consensual male intercourse Not a single sodomy opinion or police report before the twentieth century mentioned the words "homosexual" or "homosexuality," terms that did not enter the English language until 1892.⁵³ Thus, as Eskridge pointed out, "homosexual sodomy," which was "demonized" by the majority in *Bowers*, "was a creation of the twentieth century, and not exactly the crime condemned by 'millennia of moral teaching []'."⁵⁴

Furthermore, Eskridge argued that White misunderstood not only the historical use of sodomy laws, but also the normative reasons behind such laws. Sodomy laws have generally been enacted to ensure that sexual acts are procreative, consensual, and gendered or heterosexual.⁵⁵ In writing the majority opinion, White focused only on the gendered or heterosexual normative reasoning

a mistake in that one" and later clarifying that "[w]hen [he] had the opportunity to reread the opinions a few months later, [he] thought the dissent had the better of the arguments." *Id.* at 530.

⁵⁰WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 150 (1999) [hereinafter ESKRIDGE, *GAYLAW*]; see also Earl Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 645 n.95 (1990) (collecting thirty-three law review articles and comments criticizing *Bowers*).

⁵¹ See *infra* note 157 and accompanying text.

⁵² ESKRIDGE, *GAYLAW*, *supra* note 50, at 156.

⁵³ *Id.* at 160; see also RICHARD POSNER, *SEX AND REASON* 343 (1992) (stressing the fact that "at common law[,] sodomy did not include fellatio, the specific act for which Hardwick had been arrested").

⁵⁴ ESKRIDGE, *GAYLAW*, *supra* note 50, at 160 (citing *Bowers II*, 478 U.S. at 197 (Burger, J., concurring)).

⁵⁵ See *id.* at 161.

behind sodomy laws because, following the Court's decisions in *Griswold*, *Roe*, and *Eisenstadt*, White could not argue that the framers understood the Fourteenth Amendment to require that sexual activity occur within the marital institution and for the purpose of procreation.⁵⁶ As a result, Eskridge suggested that White's decision to focus on the gendered normative regime behind sodomy laws "had nothing to do with the expectations of the nineteenth-century legislatures that adopted such laws or of the framers of the [F]ourteenth [A]mendment His [decision] was rooted in twentieth-century law's creation of the 'homosexual' as the object of criminalization, persecution, and erasure" and therefore the "proscriptions that had neither 'ancient roots' nor sanctifications by 'millennia of moral teaching.'" ⁵⁷

Richard Posner and Michael Sandel also attacked the members of the *Bowers* Court for their inability to see gay and lesbian people as individuals who were worthy of respect. These scholars' notions concerning the need for tolerance of and respect for gay and lesbian individuals were certainly present in the Court's later discussions in *Lawrence*.⁵⁸ Posner, in his book *Sex and Reason*, pointed out that White's majority opinion in *Bowers* lacked awareness of or empathy for the precarious situation of male homosexuals in America in the age of AIDS.⁵⁹

Similarly, Michael Sandel, in his article *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, criticized the dissent's voluntarist approach – that is, the view that homosexual practices should be tolerated because individuals should be "free to choose their intimate associations for themselves, regardless of the virtue or popularity of the practices they choose so long as they do not harm others."⁶⁰ Sandel argued that the dissenters' voluntarist argument for the toleration of homosexuality suffered, despite its "powerful appeal,"⁶¹ from two problems. First, it was "by no means clear that social cooperation [could] be secured on the strength of autonomy rights alone, absent some measure of

⁵⁶ See *id.* As was previously mentioned, "*Griswold* recognized as fundamental people's right not to procreate when they have penile-vaginal intercourse. *Roe* and *Eisenstadt* expanded *Griswold* to nonmarital contexts. These precedents rejected the teachings of either natural law or the Bible as the basis for privacy doctrine and emphasized an evolving idea of liberty suitable for an industrial society." *Id.* at 161-62.

⁵⁷ *Id.* at 163 (citing *Bowers II*, 478 U.S. at 196-97 (Burger, J., dissenting)); see also POSNER, *supra* note 53, at 345-46 (indicating that the inclusive (non-gendered) nature of Georgia's anti-sodomy law "call[ed] into question Justice White's assumption that Georgia's . . . law was based on 'majority sentiments about the morality of homosexuality'" and suggesting that the law had less "to do with the morality of homosexuality than with the morality of using certain bodily orifices for purposes not ordained or condoned by the Creator: a sectarian morality").

⁵⁸ See *infra* notes 163-164 and accompanying text.

⁵⁹ POSNER, *supra* note 53, at 346.

⁶⁰ Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 534 (1989). This perspective on homosexual intimacies is derived from the "autonomy the practices reflect," while the so-called "substantive" view point concerning homosexual intimacies focuses on "the human goods the practices realize." *Id.*

⁶¹ *Id.* at 536.

agreement on the moral permissibility of the practices at issue.”⁶² Second, the quality of respect for homosexuality that would be secured through the use of the voluntarist argument was suspect. According to Sandel, this framework equated homosexuality with obscenity—“a base thing that should nonetheless be tolerated so long as it takes place in private.”⁶³ Sandel therefore contended that, rather than arguing for toleration of homosexual practices that “tie[d] toleration to autonomy rights alone,”⁶⁴ the dissenters should have argued that homosexual intimacy shares certain virtuous qualities with heterosexual intimacies and has “distinctive virtues of its own.”⁶⁵ Thus, Sandel suggested that, as long as even sympathetic judges followed the lead of the *Bowers* dissenters’, “even a court ruling in their favor [was] unlikely to win for homosexuals more than a thin and fragile toleration. A fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live.”⁶⁶

Bowers as a Galvanizing Force for the National Gay and Lesbian Task Force

Although it is probable that the sheer volume and variety of scholarly work generated in the wake of *Bowers* drew attention to the gay rights movement and subsequently gave the *Lawrence* Court a body of scholarship in which it could ground its arguments for overturning *Bowers*, it is unlikely that this work was solely (or even primarily) responsible for the strides made by the gay rights movement after *Bowers*. Broad societal change, not just additional scholarly research and legal commentary, was vital to bringing about the *Lawrence* decision. It was organizations like the National Gay and Lesbian Task Force (“NGLTF” or “Task Force”) that helped to produce this change, while using *Bowers* as a galvanizing force.⁶⁷

⁶² *Id.* at 536-37.

⁶³ *Id.* at 537.

⁶⁴ *Id.* at 533.

⁶⁵ *Id.* at 534.

⁶⁶ *Id.*

⁶⁷ See Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 948 (2006) (“Although the gay rights movement was almost twenty years old when the Court decided *Bowers*, the movement had not captured the public’s imagination to the degree it has today [W]hen the Supreme Court decided *Lawrence*, the movement had changed public attitudes sufficiently to call into question the use of the criminal law to punish homosexuals for the sexual orientation.”). Balkin and Siegel argue that social movements can change or alter the meaning of constitutional principles and practices because “movements disrupt and help reformulate the social order on which the law and the courts ultimately depend.” *Id.* at 949. Social movements “can undermine or support the legitimacy of existing practices, dislodge long agreed-upon principles, and nourish new constitutional norms. They can make principles apply to practices to which the principles never before seemed applicable. They can assert the legitimacy of practices previously thought illegitimate.” *Id.*; see also Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 32-35 (2005) (suggesting that social movements change the positive law of the U.S. Constitution by influencing the major political parties, thereby leading to the appointment of judges who favor the movements’ particular causes, and by using means of social persuasion and protest to get “both popular and elite opinion to view the world differently and to acknowledge changes as salient and important [For example,] [r]ecognition that homosexuality is

The NGLTF — a relatively small organization that had very little involvement in the realm of gay and lesbian rights litigation prior to *Bowers*⁶⁸ — established the Privacy Project. Immediately after *Bowers*, The Privacy Project focused on state-by-state repeal of sodomy laws. Although the Project did not ultimately succeed in directly repealing any state sodomy laws, it set the stage for the subsequent repeal of the majority of state sodomy laws, and laid the groundwork for the Supreme Court’s decision in *Lawrence v. Texas*, which overturned *Bowers v. Hardwick*.

The Origins of the National Gay and Lesbian Task Force

In October 1973, Bruce Voeller, Nath Rockhill, Ron Gold, and Howard Brown founded the National Gay Task Force Foundation (now the National Gay and Lesbian Task Force).⁶⁹ These activists had been associated with the Gay Activists Alliance (“GAA”), one of the early gay rights organizations that came into existence after the Stonewall Riots,⁷⁰ but they were “tired of the GAA’s chaotic style of operation in which every proposal could be debated endlessly and mass membership meetings seemed to stand in the way of the coordinated pursuit of long-term goals.”⁷¹ The NGLTF, unlike the GAA, was designed to operate within the existing political system and to “pursue typical interest group strategies, such as lobbying, litigation, electoral campaigns, and meetings with

increasingly accepted socially might lead judges to revise their opinion of the groups protected by the Equal Protection Clause or the liberties protected by the Due Process Clause”); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 503 (2001) (“Political equilibrium theory suggests [that] . . . [s]o long as the minority is highly unpopular, judges will do little for that minority beyond ensuring that minimal rule of law guarantees are applied to its members. Once the minority organizes, however, judges . . . will be more careful and usually more protective in dealing with its members. But the judiciary will not stick out its collective neck unless the minority persuades the polity that its variation is at least tolerable.”).

⁶⁸ The Task Force did sue the Oklahoma City Board of Education to test the constitutionality of an Oklahoma law that allowed public schools to fire or refuse to hire anyone who anyone who engaged in “public homosexual activity” or “public homosexual conduct.” MURDOCH & PRICE, *supra* note 21, at 252-53. The Task Force lost in the federal district court, but it won in the United States Court of Appeals for the Tenth Circuit, which held that although firing a teacher for breaking the law was not unconstitutional, the law did unconstitutionally restrict free speech. *See id.* at 254. The Tenth Circuit’s ruling was affirmed by an equally divided Supreme Court. *See Bd. of Educ. of City of Okla. v. Nat’l Gay Task Force*, 470 U.S. 903, 903 (1985). Justice Powell had missed the oral argument due to illness and he later abstained from voting; “a Supreme Court tie vote meant the Tenth Circuit’s ruling stood.” MURDOCH & PRICE, *supra* note 21, at 259.

⁶⁹ *See* JOHN D’EMILIO, *Organizational Tales: Interpreting the NGLTF Story*, in THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE 99, 104 (2002) [hereinafter D’EMILIO, *Organizational Tales*].

⁷⁰ *See* DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 1 (2004) (“The Stonewall Riots were a series of violent protests and street demonstrations that began in the early morning hours of June 28, 1969 These riots are widely credited with being the motivating force in the transformation of the gay political movement.”).

⁷¹ D’EMILIO, *Organizational Tales*, *supra* note 69.

administration officials[,] as well as public education.”⁷² The NGLTF would have a paid and professional staff to “provide a measure of continuity and professionalism to the work of gay advocacy.”⁷³ Despite its small size at this early stage, the NGLTF was able to achieve positive changes in several areas. For example, Task Force activists persuaded the national board of the American Psychiatric Association to remove homosexuality from its list of mental disorders and fought to have the Civil Service Commission reverse its ban on the employment of gays and lesbians in federal jobs.⁷⁴

After Jean O’Leary joined the NGLTF and became co-executive director in 1975,⁷⁵ she worked to ensure that the NGLTF gained a foothold in the Carter administration. This political focus meant that a number of other potential organizational initiatives, including sodomy law repeal, had to stay in the background.⁷⁶ In the late 1970s, however, the Task Force began facing opposition from the New Right, whose “rhetoric of family and morality [challenged] both feminism and gay liberation.”⁷⁷ The NGLTF’s activists struggled, and frequently lost, the battle to keep local anti-discrimination ordinances from being overturned.⁷⁸ Additionally, the Task Force experienced some organizational restructuring around this time, with O’Leary and Bruce Voeller, the Task Force’s co-executive directors, leaving the NGLTF in 1979. The subsequent co-executive directors were gone within three years.⁷⁹

⁷²Mary Bernstein, *Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement*, 26 SOC. SCI. HIST. 531, 549 (2002) [hereinafter Bernstein, *Identities and Politics*].

⁷³ D’EMILIO, *Organizational Tales*, *supra* note 69.

⁷⁴ *See id.* at 104-05.

⁷⁵ Prior to joining NGLTF, O’Leary founded the Lesbian Feminist Liberation in New York City. *Id.* at 105.

⁷⁶*See* Mary Bernstein, *Nothing Ventured, Nothing Gained? Conceptualizing Social Movement “Success” in the Lesbian and Gay Movement*, 46 SOC. PERSP. 353, 361 (2003) (hereinafter Bernstein, *Nothing Ventured*) (“Jean O’Leary, then co[-]executive director of the NGTF, recommended that the best strategy for success was to work quietly behind the scenes to assist states in revising their penal codes . . . O’Leary’s recommendation may . . . have been influenced by the movement’s effort to gain Democratic Party support for a gay rights plank in 1972 that included sodomy law repeal, which was summarily defeated.”). During this time, the NGLTF did pursue several relatively non-political initiatives. For example, it won its lawsuit against the IRS, which challenged the denial of tax exemptions to lesbian and gay charitable organizations, and its case against the Federal Bureau of Prisons, which prohibited inmates from receiving gay publications. *See* Bernstein, *Identities and Politics*, *supra* note 72, at 550-51. Additionally, the NGLTF persuaded the U.S. Public Health Service to conclude that homosexuality was not an inherent index of “poor moral character.” *Id.* at 551 (citations omitted).

⁷⁷D’EMILIO, *Organizational Tales*, *supra* note 69, at 106; *see also* Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY AND CIVIL RIGHTS 149, 154-155 (John D’Emilio, William B. Turner & Urvashi Vaid eds., 2000) (describing singer Anita Bryant’s successful campaign to repeal a recently enacted gay rights ordinance in Dade County, Florida).

⁷⁸*See* D’EMILIO, *Organizational Tales*, *supra* note 69, at 106.

⁷⁹*See id.* at 107 (“[Charles] Brydon quit as co-[executive] director in 1981. The following year, [Lucia] Valeska was fired by the board of directors after a disastrous performance in Dallas at the first national forum on AIDS.”).

The Task Force's Board hired Virginia Apuzzo to revive the NGLTF, which was near collapse in the early 1980s.⁸⁰ In responding to the New Right, which had swept Ronald Reagan into power and simultaneously decreased the amount of political access and clout possessed by the NGLTF, Apuzzo developed several initiatives that focused on mobilizing gay rights activists on the state and local level.⁸¹ Addressing the rise of anti-gay and lesbian violence that was prompted by the highly conservative political climate of the time, Apuzzo established the national Anti-Violence Project, whose goal was "to mobilize community and political indignation about hate crimes and, by so doing, finally end the long-ignored epidemic of anti-LGBT violence."⁸² Most importantly, Apuzzo compelled the NGLTF to focus on the AIDS crisis during a time when there was no "satisfactory government response to the epidemic,"⁸³ although her launch of numerous AIDS lobbying organizations "almost bankrupted the [Task Force], weakening the organization's infrastructure."⁸⁴

After Apuzzo left the NGLTF in 1985, Jeff Levi, a Washington, D.C. activist who had been hired by Apuzzo to be an AIDS lobbyist, took over as the Task Force's executive director.⁸⁵ Levi was no stranger to the movement to repeal sodomy laws. Prior to joining the NGLTF, Levi had been the president of the Gay and Lesbian Activists Alliance ("GLAA"), which was the "lead organization in achieving the . . . repeal of the [Washington D.C.] sodomy law in 1981, [although the repeal] was overturned by Congress after the intervention of Jerry Falwell."⁸⁶ Thus, Levi was arguably the ideal leader of the NGLTF at the time that *Bowers v. Hardwick* was decided because his expertise permitted him to understand not only the significance of *Bowers*, but also what had to be done to address the effects of this decision and to potentially overturn it.⁸⁷

⁸⁰ See *id.* ("Apuzzo possessed a number of strengths . . . [including her ability to] combine[] a commitment to using conventional modes of politics with a visionary rhetoric of radical social change.").

⁸¹ See Bernstein, *Identities and Politics*, *supra* note 72, at 555-56.

⁸² Hate Crimes Protections Historical Overview, National Gay and Lesbian Task Force, http://www.thetaskforce.org/issues/hate_crimes_main_page/overview (last visited Apr. 4, 2008). The Anti-Violence Project did succeed in getting the Hate Crime Statistics Act passed. The Act "required the Department of Justice to collect and publish statistics about crimes motivated by hatred based on race, religion, ethnic origin and sexual orientation. . . . [; it was] the first federal statute in [United States] history that named and recognized lesbian, gay[,] and bisexual people." *Id.*

⁸³ Bernstein, *Identities and Politics*, *supra* note 72, at 558.

⁸⁴ D'EMILIO, *Organizational Tales*, *supra* note 69, at 108.

⁸⁵ E-mail from Jeff Levi, Executive Director, Trust for America's Health, to author (Apr. 4, 2008, 10:25:12 EST) [hereinafter Levi E-mail].

⁸⁶ *Id.*; see also Hans Johnson & William Eskridge, *The Legacy of Falwell's Bully Pulpit*, WASH. POST, May 19, 2007, at A17 (describing how Falwell "took issue with a bid in Washington to repeal the District's anti-sodomy law[;] . . . [f]acing such a drive in the seat of the nation's government, where Congress wielded veto power," Falwell, along with a group of black ministers he had mobilized, was able to push the House to debate and reject "the bill to overturn the D.C. statute").

⁸⁷ Urvashi Vaid, who had been a Task Force Board member and the NGLTF's media director from 1986, became executive director in July 1989, replacing Jeff Levi. Vaid was the Task Force's

The NGLTF's Response to *Bowers*

When *Bowers* was decided on June 30, 1986, it was the “shot heard around the LGBT world.”⁸⁸ In major cities all over the United States, there were huge demonstrations protesting the decision.⁸⁹ According to Sue Hyde, an up-and-coming gay rights advocate at the time, “[o]n the editorial pages of most major newspapers and magazines, the Supreme Court was derided and mocked.”⁹⁰ As Jeff Levi explains, the decision was shocking to many gay and lesbian individuals not only because of its outcome, but also because of the homophobic language that the Court used.⁹¹ Hyde notes that there seemed to be no more obvious violation of the right to privacy than the arrest of individuals who were engaged in consensual sex in the bedroom of their home.⁹² Yet, according to the *Bowers* majority, it seemingly did not matter that an individual’s right to privacy was violated as long as he or she was a homosexual.⁹³

executive director until 1992, when she left the organization, although she came back in 1997 to head the NGLTF Policy Institute think tank. See E-mail from Urvasi Vaid, Executive Director, Arcus Foundation, to author (Apr. 10, 2008, 23:04:13 EST) [hereinafter Vaid E-mail].

⁸⁸ Telephone Interview with Sue Hyde, Director of the Creating Change Conference, in Phila., Pa. (Apr. 4, 2008) [hereinafter Hyde Interview]. Levi hired Sue Hyde to be the first director of the Privacy Project in October 1986 and she assumed her duties on December 9, 1986. See *infra* note 95-97 and accompanying text (describing the Privacy Project); see also *New NGLTF Board Meets; Task Force Debt Dramatically Reduced*, NGLTF (Nat’l Gay & Lesbian Task Force, Wash., D.C.), Nov. 7-9, 1986.

⁸⁹ See William G. Blair, *City’s Homosexuals Protest High Court Sodomy Ruling*, N.Y. TIMES, July 3, 1986, at B5 (“The Supreme Court ruling this week that upheld sodomy laws has generated anger and demonstrations in New York City’s homosexual community.”); Alan Finder, *Police Halt Rights Marchers at Wall St.*, N.Y. TIMES, July 5, 1986, at A32 (“Hundreds of homosexual-rights activists, marching to protest a Supreme Court ruling on sodomy, confronted a police barricade yesterday in crowded lower Manhattan. After 15 tense minutes, in which some demonstrators urged a charge against the police lines, the march broke up without incident or arrests.”).

⁹⁰ Hyde Interview, *supra* note 88; see also Stephen Chapman, Op-Ed, *Court’s Judicial ‘Restraint’ Puts Locks on Gays*, CHI. TRIBUNE, July 4, 1986, at C16 (“But if the government is forbidden to regulate what heterosexuals do between the sheets, it becomes hard to see why it should be permitted to monitor homosexual conduct. The fact that the majority of the people find the latter morally or aesthetically offensive isn’t enough to justify different treatment.”); Judy Man, *The Sex Police State*, WASH. POST, July 2, 1986, at B3 (“[W]hat the Supreme Court has done is pave the way for states to abridge th[e] right[] to privacy and to make what a great many people do, in an intimate expression of love, a felony. Lights out, everyone. The Sex Police are here.”).

⁹¹ See Levi E-mail, *supra* note 85; see also Mary C. Dunlop, *Gay Men and Lesbians Down by Law in the 1990’s USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 12 (1992) (“To those in the community of gay and lesbian persons and out allies, [*Bowers*] was a stunning blow that drew a variety of responses.”).

⁹² See Hyde Interview, *supra* note 88.

⁹³ See *id.* Despite the fact that *Bowers* involved male defendants and concerned a crime that is typically associated with gay men, most of the major lesbian-focused organizations that were established at the time took up the cause of overturning sodomy laws. Indeed, the Lesbian Rights Project, the Women’s Legal Defense Fund, Equal Rights Advocates, Inc., the Women’s Law Project and the National Women’s Law Center filed an amicus brief in *Bowers*, arguing that sodomy laws needlessly and improperly affected the lives of gay men and lesbian women and that

The NGLTF seized the opportunity to respond to *Bowers*, while also expanding the scope and reach of the organization. The HIV/AIDS crisis had facilitated the increased visibility of the gay and lesbian community and had provided the gay rights movement with an opportunity to “engage the federal government.”⁹⁴ According to Levi, “[t]he Reagan Administration had no interest in discussing sodomy legislation; it had no choice but to deal with the gay community on issues related to the AIDS epidemic” Focusing on sodomy law repeal allowed the NGLTF to take advantage of the raw anger and outrage felt by the gay and lesbian community and its sympathizers following the *Bowers* decision, while building upon the publicity already surrounding the gay rights movement and the political access the movement had slowly amassed (or regained) while engaging in AIDS-related advocacy.

Indeed, soon after the decision in *Bowers* was announced, Levi came up with the idea of the Privacy Project, which would be led by Sue Hyde.⁹⁵ The Privacy Project had three main goals: First, it was devoted to research, preparing materials, and working with already existing groups on the repeal of sodomy laws. Second, it had an organizing mission—to create new organizations in the

they should therefore be overturned. See Brief for Lesbian Rights Project et al. as Amici Curiae Supporting Respondents at 23, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) (“If this Court were to uphold Georgia’s power to make criminals of *Hardwick et al.*, this Court would be lending its unparalleled leadership to the position that it is acceptable to hate those who are gay and lesbian, and even to prosecute and punish those unfortunate enough (as respondent *Hardwick* was) to have their entirely unobtrusive and non-public sexual activities come to the attention of criminal law authorities.”). The amici also pointed out that “discrimination against gay men and lesbians in employment, domestic relations, public accommodations, and other vital realms of human existence are the subjects of myriad legal challenges, with varying results. In this milieu, a determination by this Court that states are free to criminalize gay/lesbian sexual activities *per se* would reinforce the homopho[b]ic elements of both anti-gay violence and the anti-gay legal decisions that are proliferating at the present time.” *Id.* at 22-23.

⁹⁴ Levi Email, *supra* note 85.

⁹⁵ In essence, the Privacy Project consisted of one individual. In 1987, the NGLTF as a whole had a staff of eight people, with one individual leading each of its three specific projects: the Anti-Violence Project, the Federal Legislative Lobby Project, and the Privacy Project. See Hyde Interview, *supra* note 88. The Anti-Violence Project involved organizing to eliminate violence against gay and lesbian individuals. The Federal Legislative Lobby Project primarily concerned lobbying for more AIDS funding. See *id.* The total budget of the organization was around \$600,000 to \$700,000 dollars. Sue Hyde, as the director of the Privacy Project, was single-handedly responsible for preparing educational materials about sodomy laws, including a flyer entitled “Eight Good Reasons to Decriminalize Sodomy,” which stated that “[a]nti-sodomy laws define love and sexual intimacy as criminal, unnatural, perverse, and repulsive. That’s the real crime.” Bernstein, *Nothing Ventured*, *supra* note 76, at 366; see also Hyde Interview, *supra* note 88. Additionally, Hyde developed organizing materials to support the work of activist leaders throughout the country who were interested in repealing sodomy laws on the state level and reached out to organizers in several states that retained anti-sodomy laws and were home to LGBT organizations who were launching or had already launched sodomy law repeal efforts. See Hyde Interview, *supra* note 88.

unreformed states Third, the project was “to promote and encourage discussion of sexuality among and between lesbians and gay men.”⁹⁶

Overall, by repealing sodomy laws on a state-by-state basis, the Privacy Project would attempt to ensure that future *Bowers*-type cases did not come before the federal courts. Previously, “it was assumed that the courts (and thus the legal organizations) would be the battleground for sodomy repeal—a more comfortable place than discussing sex in the state legislatures. But [*Bowers*] left [gay rights activists and the NGLTF] no alternative but to think about state-by-state organizing for legislative repeal.”⁹⁷

1. Organizing in States with Existing LGBT Organizations

The primary initiative of the Privacy Project consisted of Hyde’s organizing trips to states that had strong LGBT organizations, such as Texas, New Hampshire, and Michigan.⁹⁸ These trips were designed to educate and focus already existing state LGBT organizations and, in many cases, to work alongside these organizations to lobby for sodomy law repeal at the state level. Hyde

tailored her educational and organizational approaches to the particular LGBT issues that each state was facing. For instance, in Texas, Hyde attended the annual meeting of the Lesbian and Gay Rights Lobby—a statewide LGBT group—to encourage activists to counter arguments regarding homosexuality and sodomy put forth by Texas doctors who supported the Texas sodomy law.⁹⁹ In

⁹⁶ Bernstein, *Nothing Ventured*, *supra* note 76, at 366; *see also* Hyde Interview, *supra* note 88; *see generally* *New NGLTF Board Meets; Task Force Debt Dramatically Reduced*, NGLTF (Nat’l Gay & Lesbian Task Force, Wash., D.C.), Nov. 7-9, 1986 (“The Privacy Project was created by the Task Force to organize for the repeal of sodomy laws at the state and local level. The Project will develop organizational materials, work with state and local gay organizations to develop model strategies to achieve sodomy repeal, and will build coalitions among a variety of gay and non-gay organizations which have an interest in the issues raised by such laws.”). Jeff Levi provides a slightly altered conception of the goals of the Privacy Project, suggesting that it would “provide a positive channel for the anger that was felt [as a result of *Bowers*] [,] create[] a new agenda for the community that was more inclusive than HIV [, and offer] the opportunity to introduce more focused assistance to local organizing efforts—something critical to the long-term strength of the [gay and lesbian] community.” Levi Email, *supra* note 85.

⁹⁷ Levi Email, *supra* note 85.

⁹⁸ *See* Bernstein, *Nothing Ventured*, *supra* note 76, at 367 (noting that in these states, as well as in “Arizona, Georgia, Minnesota, Oklahoma, and Rhode Island, activists pursued traditional lobbying approaches, preferring to work with state elites”).

⁹⁹ In a case decided prior to *Bowers*, *Baker v. Wade*, a gay man named Donald Baker sought a declaration that the Texas sodomy statute, which proscribed engaging “in deviate sexual intercourse with another individual of the same sex,” was unconstitutional. 769 F.2d 289, 291 (5th Cir. 1985) (citations omitted). The United States District Court for the Northern District of Texas held that the Texas statute violated the constitutional protections of privacy and equal protection. *See Baker v. Wade*, 553 F. Supp. 1121, 1148 (N.D. Tex. 1982). The United States Court of Appeals for the Fifth Circuit overturned the district court’s decision because it determined that it was bound to do so by the Supreme Court’s decision in *Doe v. Commonwealth’s Attorney*, 425 U.S. 901 (1976), in which the Court summarily affirmed “the judgment of a three-judge district court upholding the constitutionality of a Virginia sodomy statute similar to the Texas statute which [was] attacked in [*Baker*].” 769 F.2d at 292. “The *Doe* case arose . . . under a now-

New Hampshire, Hyde developed educational and organizing materials in working to prevent the re-criminalization of sodomy. The New Hampshire sodomy statute had been struck down before *Bowers* but, following this decision, a state representative decided to campaign for its reinstatement.¹⁰⁰ In New Hampshire:

[A]ctivists got public health advocates, the state’s psychological association, and mainline Protestant religious leaders to testify alongside them at the committee hearing. The bill was rejected by the committee before it could be introduced into the legislature. Hyde conjectures that this example stopped other state legislatures from considering [and approving] similar measures.¹⁰¹

In some instances, Hyde wanted to study the organizational models of successful state LGBT organizations with the goal of replicating these models in organizations in other states. For example, in visiting Michigan, Hyde hoped to understand and reproduce in other states the infrastructure of a well-established LGBT organization called Michigan for Human Rights (“MOHR”). MOHR was a “statewide political/lobbying group founded in 1977 to secure the civil rights of gay men and lesbians in the state of Michigan.”¹⁰² It had “a paid staff of three people in a Detroit office and hundreds of volunteers around the state, MOHR” and was characterized as being “the most successful grassroots gay and lesbian political organization in the country”¹⁰³ MOHR was able to defeat several anti-gay AIDS bills in 1986 and to work to amend Michigan’s human rights law to protect lesbians and gay men in 1987 because it developed a “simple but elegant program the goal of which [was] to interact with every Representative in the state.”¹⁰⁴ The program recruited volunteers, known as legislative district coordinators or LDCs, assigned them to particular state House of Representatives districts, and then provided them with information regarding how they could best lobby their respective Representatives.¹⁰⁵ In seeking to introduce the MOHR

outdated procedure by which challenges to the constitutionality of state statutes were heard by a three-judge district court and then *appealed* directly to the Supreme Court. In such instances, the Court had to either take the case, summarily affirm the result below, or summarily reverse the result below [In *Doe*,] it is not known on what basis the Supreme Court agreed with the lower court’s result.” WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW* 187 (2d ed. 1997). A group of physicians (Dallas Doctors Against AIDS) filed an amicus brief in support of Texas’s sodomy law in *Baker*, and it is these doctors’ arguments that Hyde sought to counter. See Hyde Interview, *supra* note 88.

¹⁰⁰ See Hyde Interview, *supra* note 88.

¹⁰¹ Laura Secor, *Rainbow Warriors: The Gay Rights Movement Has Seized the Nation’s Attention and Agenda. Can it Hold Them?*, B. GLOBE, Aug. 3, 2003, at E1.

¹⁰² *Statewide Constituent Organizing for Legislative Change: The Michigan Organization for Human Rights Model*, NGLTF PRIVACY PROJECT (Nat’l Gay & Lesbian Task Force, Wash., D.C.), June 1987 (on file with the University of California, Los Angeles Library).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

lobbying structure to LGBT organizations in other states, Hyde suggested that new or existing organizations: (1) hold a statewide planning meeting; (2) create a means of communication and decision-making in the group; (3) set priorities in the group's first two years; (4) make and maintain contact with friendly legislators; and (5) develop working relationships with non-gay, mainstream political organizations.¹⁰⁶

Hyde not only prepared, educated, and studied existing LGBT organizations, but also worked with these organizations as they lobbied for the state-by-state elimination of sodomy laws. In 1987, Hyde worked with Minnesota activists “on the ground” and attended and testified at the repeal hearings for Minnesota’s sodomy law.¹⁰⁷ Alan Spear, an openly gay Minnesota state senator and chair of the Senate Judiciary Committee, helped to organize the repeal effort, and “was able to shepherd the [repeal] bill out of the Senate Judiciary Committee.”¹⁰⁸

The bill ultimately died in Minnesota’s House Judiciary Committee. For Hyde, the defeat in Minnesota was particularly disheartening because the activists failed to openly and unabashedly defend themselves and their sexuality in light of the arguments put forth by the opponents of the sodomy law’s repeal. Opponents “described in graphic detail every possible permutation of gay male sex [while ignoring] . . . sex between women or kinky straight sex, also criminalized by the Minnesota law[, and calling gay sex] . . . criminal, immoral, unnatural, repulsive, and sinful”¹⁰⁹ Instead of directly contradicting the opposition’s salacious arguments during the repeal hearings, the activists “carefully and thoughtfully articulat[ed] the least sexy and most acceptable reasons for repeal—privacy rights, separation of church and state, reducing interference in AIDS prevention education, decriminalizing the sexuality of disabled persons and so on.”¹¹⁰

Additionally, the Minnesota repeal bill arguably divided the gay rights activists, instead of bringing them together. Although the Minnesota repeal bill eliminated “not only the sodomy statute, but also the fornication and adultery statutes,” the backers of the bill included in it a proposal for a new law prohibiting public sexual conduct, which they felt would give conservative legislators “something to vote for.”¹¹¹ The new law would require police officers to actually observe “penetration, oral or anal or vaginal; no other sexual behavior would be an arrestable offense. But with each conviction for public sex, the charges [would] escalate[]”¹¹² Some members of the gay community opposed the public sex provision because the “Minneapolis gay male community ha[d], at

¹⁰⁶ *See id.*

¹⁰⁷ *See* Hyde Interview, *supra* note 88.

¹⁰⁸ Bernstein, *Nothing Ventured*, *supra* note 76, at 368.

¹⁰⁹ Sue Hyde, *Sex and Politics: Challenging the Sodomy Laws*, 22 *RADICAL AM.* 56, 61 (1989).

¹¹⁰ *Id.*

¹¹¹ SUE HYDE, NAT’L GAY & LESBIAN TASK FORCE, MINNESOTA SODOMY REFORM—1987 LEGISLATIVE SESSION 1 (1987) (on file with the University of California, Los Angeles Library).

¹¹² *Id.*

best, an uneasy relationship with the local vice squad”¹¹³ and these individuals felt that the public sex law would be a more effective tool for the police in arresting gay and lesbian individuals than the Minnesota sodomy law ever was.

Sue Hyde downplayed the role that this opposing faction played in the defeat of the bill, arguing that “[i]t is doubtful that opposition within the gay community significantly affected the outcome of this year’s reform effort”¹¹⁴ She did acknowledge, however, that due to the inclusion of the public sex provision, “it is likely that an already-existing rift within the community was no closer to repair.”¹¹⁵

The effort to repeal Maryland’s sodomy law, which lasted from 1987 to 1989, would suffer the same fate as the attempt to repeal Minnesota’s sodomy statute.¹¹⁶ What distinguished the repeal effort in Maryland, however, was that the activists took a stand and did not permit the addition of a preamble to the bill providing for the repeal of the Maryland sodomy law. The proposed preamble would have proclaimed that “the state acknowledges its citizens’ right to privacy, but[,] at the same time, supports the institution of the heterosexual nuclear

¹¹³ *Id.* at 2.

¹¹⁴ *Id.*

¹¹⁵ *Id.* Thus, in addition to battling the courts and their various detractors, Sue Hyde and her fellow activists in a sense battled each other with respect to the proper approaches to state-by-state sodomy repeal. As William B. Rubenstein points out, this is not an unusual occurrence within any movement. “Groups are messy. They are, by definition, comprised of many individuals and thus encompass a range of desires and agendas. Any group must generate ways to reach decisions among these competing possibilities.” William B. Rubenstein, *Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1623 (1997). Furthermore, the disputes between group members in this case were particularly understandable because “there is not a fixed lesbian and gay ‘community.’ Indeed, if anything, the fact that lesbians and gay men, and bisexuals are generally not visually identifiable makes the boundaries of this ‘community’ especially amorphous.” *Id.* at 1631-32 (internal quotations omitted). Even many of those individuals who identify themselves as lesbian, gay, or bisexual do not consider themselves members of a “community,” and it would be impossible to claim a coherent collective identity or set of approaches to resolving issues for such a “community.” See Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105, 105-42 (Michael Warner ed., 1993).

¹¹⁶ NAT’L GAY & LESBIAN TASK FORCE, MARYLAND SODOMY REFORM—1987 LEGISLATIVE SESSION (1987) (on file with the University of California, Los Angeles Library). The 1987 Maryland bill, like the Minnesota bill, made it through the Senate Judiciary Committee only to be defeated in the House Judiciary Committee. See *id.* Hyde returned to Maryland in 1988 “with more constituent organizing and support” and presented a witness at the hearing on the 1988 sodomy law repeal bill who made the point that “hundreds of thousands of Marylanders regularly violate the sodomy law.” *Id.* at 62. The activists suffered a defeat once again, however, when, at the committee’s voting session, a hostile legislator displayed literature from the North American Man/Boy Love Association and persuasively argued that “sodomy law repeal would be an endorsement of intergenerational sexual relationships.” *Id.*

family.”¹¹⁷ Unlike the public sex provision included in the Minnesota repeal bill,¹¹⁸ this preamble “seemed to [the activists] too high a price to pay”¹¹⁹

A year after the culmination of the Maryland sodomy law repeal effort, Hyde and activists in Georgia demonstrated that there truly had been a shift “toward discourse on sodomy law reform that celebrated and defended lesbian and gay sexuality rather than concealed and apologized for it.”¹²⁰ On the first day of the legislative season, an Atlanta LGBT organization organized a rally to publicize the Georgia sodomy law, which had been upheld in *Bowers*, as well as the gay rights activists’ efforts to repeal this law. Among other acts, the activists “marched a large brass bed down Atlanta streets, with ‘male and female inflatable dolls simulating the heterosexual and homosexual acts forbidden by the Georgia law’ while gay and lesbian couples lay in the road embracing.”¹²¹ According to Hyde, this demonstration was a “[r]ambunctious expression of anger at the existence of the Georgia sodomy law.”¹²² Although many legislators and conservative activists later blamed the demonstration for causing the defeat of the Georgia sodomy repeal bill,¹²³ according to Hyde, it was highly unlikely that the bill would have made it through the legislature in the first place.¹²⁴ Additionally, while the demonstration did not bring about, or prevented, the repeal of the Georgia sodomy law, it ushered in the use of a “more open approach to discussing sexuality.”¹²⁵

2. Developing New LGBT Organizations

¹¹⁷ See Hyde Interview, *supra* note 88. The kind of preamble that was under consideration for inclusion in the Maryland sodomy law repeal bill was called the “Wisconsin-style preamble” because “[i]n the year before [*Bowers*] was decided, Wisconsin’s openly gay state senator, David Clarenbach, successfully guided a sodomy law repeal bill through the legislature. To obtain the necessary votes, the bill explicitly declared that although the state does not regulate the private sexual activity of consenting adults, ‘it does not condone or encourage any form of sexual conduct outside the institution of marriage.’” Bernstein, *Nothing Ventured*, *supra* note 76, at 368 (citations omitted).

¹¹⁸ The 1987 Maryland bill had no public sex provision. See Hyde, *supra* note 109.

¹¹⁹ NAT’L GAY & LESBIAN TASK FORCE, MARYLAND SODOMY REFORM—1987 LEGISLATIVE SESSION (1987) (on file with the University of California, Los Angeles Library).

¹²⁰ Bernstein, *Nothing Ventured*, *supra* note 76, at 368.

¹²¹ *Id.*; see also Hyde Interview, *supra* note 88.

¹²² Hyde Interview, *supra* note 88.

¹²³ See Bernstein, *Nothing Ventured*, *supra* note 76, at 369 (“Before the Atlanta demonstration, it appeared that the repeal bill had enough votes to pass. But after the demonstration, the bill was quickly defeated.”); see also *supra* note 115 and accompanying text (describing how members of the gay rights movement often fought with each other, in addition to battling negative outside forces, regarding the approaches that the movement should take in working to repeal state sodomy laws and noting that this is a common occurrence in identity-based movements, which are often made up of individuals with varying sets of values and beliefs).

¹²⁴ See *supra* note 115 and accompanying text (describing how activists within the gay rights movement often disagreed about the tactics that should be used to repeal sodomy laws state-by-state due to the nature of the movement and the varying values and agendas of the individuals making up the movement).

¹²⁵ Bernstein, *Nothing Ventured*, *supra* note 76, at 369.

While state-based organizing for sodomy law repeal was most effective (at least in getting sodomy law repeal bills before the legislature) when a strong statewide LGBT organization was already in place, Hyde also worked to develop new LGBT organizations and a gay rights movement presence in wholly “unorganized” states. In doing so, she was identifying the organizational “gaps” in the Privacy Project’s movement to repeal sodomy laws and acting to fill these “gaps.”¹²⁶ For example, states, including Tennessee, Arkansas, North Carolina, Missouri, Virginia, and Kentucky, “witnessed their first public LGBT political events, such as lobby days and rallies.”¹²⁷ In Virginia, in particular, Hyde “convened statewide meetings to discuss sodomy law repeal. As a result of these state meetings, two new LGBT organizations formed, one devoted to AIDS issues and the other¹²⁸ to pursuing a broad array of policies relevant to lesbians and gays, including sodomy law repeal.”¹²⁹

3. Publicizing and Educating Individuals about Sodomy Laws and the *Bowers* Decision

In addition to educating and motivating already established LGBT organizations to push for sodomy law repeal at the state level and to working with local activists to establish strong LGBT organizations, Hyde also organized a series of large-scale marches and rallies to publicize the *Bowers* decision and to draw attention to the existence and the negative effects of state sodomy laws. For example, the *Bowers* decision prompted one of the largest mass protests (and mass arrests) at the Supreme Court. The demonstration, which took place on October 13, 1987, “was the final act in a weeklong series of events in which homosexuals and their supporters from around the country held rallies and political forums, lobbied Congress[,] and staged a dramatic march Sunday [the 1987 March on Washington] that drew what the police said were 200,000 participants and what organizers said were half a million.”¹³⁰ Between two thousand to four thousand people attended the demonstration and nearly six

¹²⁶ Hyde Interview, *supra* note 88.

¹²⁷ Bernstein, *Nothing Ventured*, *supra* note 76, at 367.

¹²⁸ This organization was Virginians for Justice, now Equality Virginia. See About Equality Virginia, Equality Virginia, <http://www.equalityvirginia.org/site/pp.asp?c=dfIIITMIG&b=132619> (last visited Apr. 7, 2008).

¹²⁹ Bernstein, *Nothing Ventured*, *supra* note 76, at 367; see also Hyde Interview, *supra* note 88.

¹³⁰ Lena Williams, *600 in Gay Demonstration Arrested at Supreme Court*, N.Y. TIMES, Oct. 14, 1987, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0DE4D61738F937A25753C1A961948260>. Many of the individuals attending this demonstration wore T-shirts sold by the NGLTF that read “‘So-Do-My Friends, So-Do-My Neighbors’ to raise public awareness that the acts prohibited by the sodomy statutes were engaged in by most people, gay or straight, married or single.” Bernstein, *Nothing Ventured*, *supra* note 76, at 367; see also *Hundreds Protest Supreme Court Sodomy Ruling*, N.Y. TIMES, Aug. 12, 1986, at A20 (“As members of the American Bar Association held a dinner inside, hundreds of protesters gathered last night on the plaza of Lincoln Center to protest the recent Supreme Court ruling that Constitutional guarantees to privacy do not protect homosexual sex.”).

hundred were arrested, including Michael Hardwick.¹³¹ According to Urvashi Vaid, the 1987 March on Washington sparked a dramatic growth in the Task Force's grassroots support base and prompted the establishment of Creating Change ("the premier national grassroots organizing and skills building LGBT conference"),¹³² to address the March participants' requests for advice and assistance organizing at the local and state level.¹³³

Furthermore, Hyde launched "a series of annual events ranging from lobbying to rallies and protest[s] to commemorate a 'National Day of Mourning for the Right to Privacy [NDOM]'"¹³⁴ in the states where she spearheaded sodomy law repeal efforts. "In many cities and states, these events marked the first public emergence of lesbians and gay men into politics."¹³⁵ The purpose of the NDOM was two-fold. First NDOM was to take part in the "national upsurge in organizing for [gay and lesbian] freedom" that followed the *Bowers* decision, thereby "nurtur[ing] and promot[ing] even more growth and development in local and state gay and lesbian political groups." Second, NDOM was to demonstrate that although "a terrible blow was sustained by the [gay and lesbian] community on June 30, 1986."¹³⁶ *Bowers* would not stifle gay and lesbian activists' fight for rights and recognition.

The organizing materials for the NDOM urged activists to put their communities, allies and opponents on notice that they had not forgotten *Bowers v. Hardwick*, to tell them that they would not be satisfied until their lives were fully recognized and appreciated, and to "shout out loud and proud that [they would not] permit [their] sexuality to be denigrated, scorned or criminalized."¹³⁷

¹³¹ See Williams, *supra* note 130. The 1987 demonstration was preceded by a smaller protest in October 1986, which Sue Hyde attended immediately after interviewing for the position of Director of the Privacy Project. The 1986 protest was designed to remind the Supreme Court of its "tawdry and homophobic decision in *Bowers*." Hyde Interview, *supra* note 88. Michael Hardwick also attended this protest. See also *id.*

¹³² Creating Change Conference, National Gay and Lesbian Task Force, http://www.thetaskforce.org/events/creating_change (last visited Apr. 27, 2008).

¹³³ See Vaid E-mail, *supra* note 87. Vaid notes that following the 1987 March on Washington, the gay rights movement "was growing at the local level and NGLTF was *the* organization that cared about building the movement at the state level and that was providing meaningful help [in this regard]." *Id.*

¹³⁴ Bernstein, *Nothing Ventured*, *supra* note 76, at 367; see also Sharon L. Lynch, *Film Marks Gay Rights Celebration*, THE DAILY COLLEGIAN ONLINE, June 26, 1989, <http://www.collegian.psu.edu/archive/1989/06/06-26-89tdc/06-26-89dnews-03.asp> ("This Friday, LGSA and other supporters of the gay rights movement will participate in the National Day of Mourning for the Right to Privacy. The event will protest a 1986 U.S. Supreme Court case in which the justices upheld a Georgia sodomy law, ruling against the right to privacy for gay men and lesbians.").

¹³⁵ Bernstein, *Nothing Ventured*, *supra* note 76, at 367.

¹³⁶ NAT'L GAY & LESBIAN TASK FORCE POLICY INST., SODOMY LAW REPEAL PACKET 2 (1989).

¹³⁷ *Id.* The organizational packet distributed to activists in conjunction with the NDOM provided a list of suggested activities for "unfree" states (states with sodomy laws), which included petition drives, letter-writing campaigns, legislative lobbying, press conferences, and rallies. See *id.* at 5. The list of activities for "free" states (states without sodomy laws) included holding a "kiss-in for

Protests and demonstrations coinciding with the NDOM made gay and lesbian activists more visible, thereby disseminating their message to the masses and putting a human face on the gay rights movement. It also brought gay and lesbian activists together, uniting them in their fight for goals such as the repeal of state sodomy laws.

Organizational Successes and Failures

During its existence from 1986 until 1991, the NGLTF's Privacy Project did not achieve the repeal of any state sodomy laws. Despite this fact, the Privacy Project can still be considered a success in many respects. According to its director, Sue Hyde, the Project's state-level organizing work "awakened activists to the potential for seeking substantive change in law and public policy in their states. Many groups [established or educated by the Privacy Project] have gone on to take on a range of issues, such as hate crime laws [and] non-discrimination laws."¹³⁸ Indeed, Hyde points out that without the strengthening of state-level organizing on the part of gay rights activists, she and her partner would not have been able to get married in Massachusetts.¹³⁹

The Privacy Project also brought to the attention of people the way that sodomy laws had collateral impact on their lives. [Sodomy laws] were rarely enforced as they were written or [were] selectively enforced. In reality, they were used to squash [the] organizing of LGBT student groups [and as a rationale for] . . . deny[ing] custody of children to gay parents in divorce cases, . . . [not] fund[ing] safe sex education[al] materials [and AIDS prevention education[al] materials at the height of the epidemic] in several states [such as Georgia and Texas], [and denying] . . . licenses to professionals who were identified as openly gay or lesbian people[, particularly in the South].¹⁴⁰

Not only did the Privacy Project make individuals aware of the many evils of sodomy laws, but it also used the existence of sodomy laws to prompt a "discussion within the LGBT community about sex, sexuality, and the politics of

liberty" or for "sexual freedom" at an appropriate state building to celebrate the repeal of the state's sodomy law, holding fundraisers for local LGBT groups or for the Privacy Project, participating in NDOM activities in "unfree" states, and coming to Washington, D.C. to join lesbian and gay activists at a Supreme Court demonstration commemorating the anniversary of the *Bowers* decision. *See id.* at 6. Finally, a list of activities for both "free" and "unfree" states included holding a candlelight vigil for the right to privacy, sponsoring an educational forum on privacy rights and sexual freedom, wearing black armbands, and holding a "mock funeral" for the right to privacy. *See id.* The organizing packet also included suggestions regarding how activists could obtain media coverage for the NDOM events, which would "only help the cause of sodomy law repeal," *id.* at 7, and provided activists with information about existing sodomy laws and about the *Bowers* opinion.

¹³⁸ Hyde Interview, *supra* note 88.

¹³⁹ *See id.*

¹⁴⁰ *Id.*

these topics.”¹⁴¹ During the existence of the Privacy Project, there was a “very scary conversation going on in [the United States] about homosexuality and AIDS. Gay men were seen as dangerous to public health and public good. So, . . . it was important to invite individuals to come together [to talk about how their sexuality was impacted by the law].”¹⁴²

Although the Privacy Project was “less successful [in] launching or spearheading [the] direct repeal of sodomy laws from 1986-1991,”¹⁴³ it also arguably laid the groundwork for sodomy law repeals occurring after 1991 and for the case that would ultimately overturn *Bowers v. Hardwick* — *Lawrence v. Texas*. Although no sodomy laws were repealed from 1986 to 1991, eleven states and the District of Columbia repealed their sodomy laws soon after 1991.¹⁴⁴ A majority of these states had experienced sodomy law repeal campaigns organized by the NGLTF’s Privacy Project. Hyde explains this phenomenon by noting that many states had no grassroots LGBT organizations in the time period immediately following the *Bowers* decision; after these organizations were established through the efforts of the Privacy Project, it took years for many of them to achieve their goals, such as sodomy law repeal. Even many state LGBT organizations that were well-established in the mid-to-late 1980s had difficulty overcoming the negative presumptions associated with homosexuality. It was already unlikely that legislators would go out on a limb to permit all kinds of sexual conduct in private and this likelihood was diminished to almost nothing in the context of the AIDS epidemic.¹⁴⁵ The groups had to look for “teachable legislative moment[s]” in seeking to repeal sodomy laws.¹⁴⁶ For example, Nevada overturned its sodomy statute partially because activists saw an opportunity for repeal when the state was recodifying its statutes relating to public sex.¹⁴⁷

¹⁴¹ *Id.*; see also Levi E-mail, *supra* note 85 (“To the degree that the project (a) helped define the privacy issue to a larger constituency and (b) created local political capacity that could be tapped for other issues, it was a success. And it did do those things.”).

¹⁴² Hyde Interview, *supra* note 88.

¹⁴³ *Id.* The Project came to an end because Hyde wanted to leave Washington, D.C. to be with her girlfriend in Boston. Because Hyde left the NGLTF she had to leave the Project, since the organization could not adapt to having activists working outside D.C.—the organization’s home base. The NGLTF was also experiencing a “restructuring moment;” the end of the Privacy Project didn’t reflect the NGLTF’s lack of interest in the Project, but its desire to “restructure its work.” *Id.*

¹⁴⁴ See Brief for Nat’l Gay & Lesbian Task Force et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (Jan. 16, 2003) (No. 02-102), 2003 WL 152347 [hereinafter NGLTF Amicus Brief]. The NGLTF amicus brief listed Nevada, Arkansas, Kentucky, Montana, and Tennessee as repealing or invalidating their same-sex-only sodomy laws and Arizona, District of Columbia, Rhode Island, Georgia, Maryland, Michigan, and Minnesota as repealing or invalidating their general sodomy laws. See *id.* at 21 n.63. The earliest sodomy law repeal in which the matter was contested occurred in 1993. See *id.*; see generally PIERCESON, *supra* note 43, at 76-98 (describing in detail the sodomy law repeal efforts after *Bowers* and before *Lawrence*).

¹⁴⁵ See Hyde Interview, *supra* note 88.

¹⁴⁶ *Id.*

¹⁴⁷ See *id.*

The work done by the Privacy Project from 1986 to 1991 also set the stage for the Supreme Court's decision in *Lawrence v. Texas*, which overruled *Bowers v. Hardwick*.¹⁴⁸ In addition to establishing a network of state LGBT organizations that worked toward the repeal of existing state sodomy laws and were relatively successful in eventually reaching this goal, the Privacy Project fulfilled some of its broader aims by bringing together gay and lesbian individuals, fostering the creation of multi-goal LGBT organizations, educating the public (including gay and lesbian individuals) about gay rights issues, and putting a "human face" on the gay rights movement. In the long run, these achievements helped to change the public's negative conceptions of gay and lesbian individuals, thereby bringing about not only the repeal of select state sodomy laws, but also the repeal of all "archaic sex laws."¹⁴⁹

In the amicus brief that it filed in *Lawrence v. Texas*, the NGLTF was therefore able to show that "shifts in law and attitude"¹⁵⁰ toward homosexuals supported overturning *Bowers*. The relevant shifts in the law included the fact that a majority of states had repealed their sodomy laws and had instituted hate crime laws that covered sexual orientation after *Bowers* was decided.¹⁵¹ Additionally, the NGLTF explained in its amicus brief that growing societal acceptance of homosexuals was evidenced by poll results, more liberal treatment of homosexuality by a number of religions, and the positive view of homosexuals in the media.¹⁵² The NGLTF argued that this growing societal acceptance was inconsistent with the existence of sodomy laws.¹⁵³

Due in part to the work done by the Privacy Project, the Supreme Court overturned *Bowers* just seventeen years after it was decided. The circumstances in *Lawrence* were eerily similar to those in *Bowers*, although the Texas statute in *Lawrence* prohibited only homosexual sodomy, not both heterosexual and homosexual sodomy like the Georgia statute at issue in *Bowers*.¹⁵⁴ The *Lawrence*

¹⁴⁸ In an interview, historian John D'Emilio argued that, although the Task Force and the Privacy Project had been doing important work, it would be hard for him to content that "the Task Force had anything but the most indirect impact on *Lawrence*." D'Emilio Interview, *supra* note 48. D'Emilio suggested that "it was the work of lawyers over the years in one by one getting states to eliminate their sodomy laws that really brought about the decision in *Lawrence*." *Id.* It is likely that D'Emilio does not give the Task Force a great deal of credit because he did not observe the organization accomplish many of its state-level organizing goals when he was working for the NGLTF Board in North Carolina in the late 1980s. *See id.* Additionally, it is understandable that D'Emilio, an historian who wrote an amicus brief in *Lawrence* and who had lost touch with the NGLTF, would most appreciate the impact of legal changes on the gay rights movement after *Bowers*, as opposed to the impact of grassroots activism.

¹⁴⁹ NGLTF Amicus Brief, *supra* note 144, at 25.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 20-22.

¹⁵² *See id.* at 23-25.

¹⁵³ *Id.*

¹⁵⁴ In *Lawrence*, Houston police officers "were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John

majority opinion, which was written by Justice Anthony Kennedy, framed the issue before the Court as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution,”¹⁵⁵ while criticizing the *Bowers* Court for failing “to appreciate the extent of the liberty at stake [in that case].”¹⁵⁶

The *Lawrence* Court did point out that the “historical grounds relied upon in *Bowers* . . . [were] overstated,”¹⁵⁷ citing the post-*Bowers* work of scholars like John D’Emilio and Richard Posner regarding the origins and application of sodomy laws in the United States. Additionally, the Court suggested that the *Bowers* decision had been weakened by the Court’s subsequent decisions.¹⁵⁸ Most importantly, however, the Court noted that the propriety of the decision in *Bowers* should be questioned because of its many deficiencies, which “became even more apparent in the years following its announcement.”¹⁵⁹ The Court acknowledged that:

[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.¹⁶⁰

In referring to these statistics, the Court was acknowledging the NGLTF’s argument that shifts in the law—which the NGLTF likely had a hand in bringing

Geddes Lawrence, resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.” 539 U.S. at 562-63. The Texas statute pursuant to which Lawrence and Garner were charged and convicted provided that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* at 563 (citations omitted). The statute defined “[d]eviate sexual intercourse” as . . . (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” *Id.*

¹⁵⁵ *Id.* at 564.

¹⁵⁶ *Id.* at 567.

¹⁵⁷ *Id.* at 571.

¹⁵⁸ *Id.* at 576. Decisions such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and *Romer v. Evans*, 517 U.S. 620 (1996) shed doubt on the holding in *Bowers*. In *Casey*, the Court reaffirmed the notion that constitutional protection should be afforded to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. 505 U.S. at 851. In *Romer*, the Court struck down class-based legislation directed at homosexuals because it violated the Equal Protection Clause. 517 U.S. at 624.

¹⁵⁹ See *Lawrence*, 539 U.S. at 573.

¹⁶⁰ *Id.*

about due to the Privacy Project's work to repeal sodomy laws on a state-by-state basis—supported the invalidation of *Bowers*.¹⁶¹

The influence of the Privacy Project's work was also evident in the *Lawrence* majority's ultimate conclusion.¹⁶² Apparently relying on the suggestion made by the NGLTF in its amicus brief that society had become much more accepting of homosexuals, the Court acknowledged that gay and lesbian individuals were people who were worthy of respect, noting that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.”¹⁶³ The Court echoed this idea at the end of the *Lawrence* opinion, holding that:

[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. *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. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.¹⁶⁴

¹⁶¹ See *supra* notes 150-153 and accompanying text (describing the arguments made by the NGLTF in its amicus brief in *Lawrence*).

¹⁶² Justice O'Connor concurred in the decision, arguing that although *Bowers* should not be overruled, Texas's sodomy statute, which banned only same-sex sodomy, violated the Equal Protection Clause. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring). Chief Justice Rehnquist and Justices Scalia and Thomas dissented, contending that “the ground on which the Court squarely rests its holding[—]the contention that there is no rational basis for the law here under attack— . . . is so out of accord with our jurisprudence—indeed, with the jurisprudence of any society we know—that it requires little discussion.” *Id.* at 599 (Scalia, J., dissenting).

¹⁶³ See *id.* at 575; see also *supra* note 153 (describing the NGLTF's arguments regarding the public's growing acceptance of homosexuals); see generally *supra* note 58-66 (describing scholars' arguments concerning the fact that the *Bowers* decision was deficient because it lacked any empathy toward homosexual individuals).

¹⁶⁴ *Id.* at 578 (emphasis added).

In light of this conclusion, it is difficult to believe that Sue Hyde and the activists with whom she had worked on behalf of the NGLTF's Privacy Project did not influence the outcome of *Lawrence*. After all, the Privacy Project's key message, which it disseminated to gay and lesbian individuals and to the public at large by means of its many initiatives, was that "it's none of the state's business what kind of sex consenting adult Americans are having with each other in the privacy of their homes."¹⁶⁵

Conclusion

Although the Supreme Court's decision in *Bowers v. Hardwick* was a setback for the gay rights movement, it also galvanized gay activists and LGBT organizations, particularly the National Gay and Lesbian Task Force. The NGLTF's Privacy Project, which was established in response to *Bowers*, did not successfully convince any state legislatures to repeal their sodomy laws. However, it was able to establish and expand the reach of statewide LGBT organizations, bring together gay and lesbian individuals, educate the public about gay rights issues, and put a "human face" on the gay rights movement. These achievements were likely instrumental in bringing about not only the subsequent repeal of a majority of state sodomy laws, but also the total invalidation of *Bowers* by the Supreme Court's decision in *Lawrence v. Texas*.

¹⁶⁵ Sue Hyde, Letter to the Editor, *Conservative Double Standards and Sex*, WASH. TIMES, Feb.13, 1990, at F2; see also *supra* note 92 and accompanying text.