IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1985, MICHAEL J. BOWERS, PETITIONER, v. MICHAEL HARDWICK, *ET AL.*, RESPONDENTS. BRIEF *AMICUS CURIAE* FOR THE LESBIAN RIGHTS PROJECT, WOMEN'S LEGAL DEFENSE FUND, EQUAL RIGHTS ADVOCATES, INC., AND THE NATIONAL WOMEN'S LAW CENTER.

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INTRODUCTION**

To public interest litigators, modeling radical arguments in controversial cases is a matter of much interest and, often, consternation. Does one fashion an argument in terms that soothe those jurists most likely to be offended by the proponent's basic position? Does one try to "win the middle" of a court and hope that the left and right will be drawn to it in a spirit of compromise? No single answer to such complex questions about the ethics and pragmatics of public interest litigation seems adequate to cover all cases and situations, nor is there necessarily a correct response for each situation.

Within the politically-loaded process of framing provocative and creative arguments in "hot" cases, some relatively consistent patterns of response to these situations have emerged in recent years, at least at the U.S. Supreme Court level. These patterns include the following:

1. Counsel for the party whose position is most controversial tend to argue less radically than do some of the *amici* for that party.
2. In well-organized litigation, a wide and not infrequently surprising array of allied interest groups submit *amicus curiae* briefs to demonstrate the breadth and diversity of support for the proponents' basic positions.
3. When writing a brief in direct support of a client's position, counsel tend to smooth rough linguistic, symbolic, and political edges by using relatively neutral language, factual descriptions, and presentations of the posture of a

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case. For example, counsel avoid using popular, off-color, or explicit sexual terminology except where absolutely necessary to present material facts accurately, and adopt a respectful, as opposed to an accusatory, tone for criticism of lower court decision-making processes.

The *amicus curiae* brief that follows this introduction was written on behalf of the Lesbian Rights Project and other organizations working for women's rights, and was filed with the Supreme Court in *Bowers v. Hardwick*.[1] The brief followed the above mentioned patterns in significant part, while at the same time disturbing some of the expectations upon which they are based. Assuredly, the brief took a more radical position, and a more plainly pro-gay/lesbian position, than did the brief in support of respondent Hardwick. The principal brief for the respondents and the oral argument of Professor Laurence Tribe emphasized the fourth amendment physical privacy of the bedroom, while the Lesbian Rights Project *amicus* focused upon the personal privacy of gay, lesbian, and bisexual persons, and on the constitutional implications of that human-centered privacy concept. The respondents' brief assured the Supreme Court that a ruling for Hardwick would not be a ruling in favor of the legitimation of gay/lesbian persons and relationships.[2] In contrast, the Lesbian Rights Project *et al.* forthrightly argued that because gay men and lesbians constitute an oppressed minority worthy of constitutional protection, the Court was required by law to render a decision which would legitimate gay/lesbian persons and relationships.

Perhaps the most unorthodox aspect of the *amicus* published here is that it directly and unapologetically confronts the members of the Supreme Court with prior rulings that the Court has had to disavow, particularly its upholding of the internment of Japanese-Americans during World War II as constitutional[3] and its endorsement of racially segregated public accommodations at the turn of the Twentieth Century.[4] This aspect of the brief might be viewed as highly confrontational and even indecorous. Yet, the tone of the brief was carefully developed to assure that the Justices understood that the author did not intend to condemn either the Court as an institution or its members, past or present, for these errors. Rather, these errors were offered as warning signs against the repetition of these past mistakes.

In the end, advocates must strike a delicate balance in their work, characterized by truthful and respectful differing. If they are less than truthful about their differing, the danger exists that their position will be misconstrued and ultimately lost. Similarly, advocates who are less than respectful in their way of differing run the risk of turning the process of briefing and argument into a contest of personal tempers. Regardless of the belief system underpinning an advocate's approach to the Supreme Court, a posture of open, vigorous differ-

1. 106 S. Ct. 2841 (1986).
2. Respondent's Brief at 24, Bowers v. Hardwick, 106 S. Ct. 2841 (1986).
3. Korematsu v. U.S., 323 U.S. 214 (1944).
4. Plessy v. Ferguson, 163 U.S. 537 (1896).

ence with the *status quo* can be effective if the presentation embodies two qualities. First, such arguments should be tempered with diplomacy and sensitivity to particular Justices' attitudes. Second, they should be phrased with candor, and rooted in a determination not to cater to those attitudes in ways that undercut the Constitution and justice itself.

Having approached the *Bowers* case with care, hope, and guarded optimism, it is difficult now to read the opinions of Justices White and Powell and Chief Justice Burger without concluding that these opinions represent unqualified disaster for lesbian and gay freedom and equality under law. It is also difficult not to feel that the tremendous work and deliberate effort at balance involved in the writing of *amicus* briefs of the type published here are wasted and misdirected, when Supreme Court Justices dare to term the argument, made on behalf of the oppressed party, "facetious,"[5] and when they cite reflexively a history of oppression to justify its perpetuation under law.[6]

However, the dissenting opinions of Justices Blackmun and Stevens in *Bowers* give tangible encouragement to those of us who believe that *amicus* briefs such as this one do not fall on deaf ears. Justice Blackmun vigorously defended the proposition that "the right of an individual to conduct intimate relationships in the intimacy of his or her home seems . . . to be the heart of the Constitution's protection of privacy."[7] The statement embodies, to some extent, the tone and content of the Lesbian Rights Project's *amicus* position, among others'. The four dissenting Justices in *Bowers* reached out forcefully and creatively in developing opinions that we will struggle to make into majority law, and that in the interim surely will provide fuel for the fires of academic discussion and state-level challenges to "anti-sodomy" laws.

When a defeat as monstrous in its implications as *Bowers* is inflicted by a governmental authority as powerful as a majority, however bare, of the Supreme Court, some who feel the defeat most stingingly will call for retreat from the federal legal system. But retreat from development of the United States Constitution (in whatever direction) is not feasible. If those of us who resist the message and consequences of *Bowers* fail to do so in federal court, our voices will be missing in that arena and process of development. If we absent ourselves from the litigative part of this federal process out of disgust, dismay, or the sincere belief that we would be making "bad law" by remaining, others will make the "bad law" for us, without our participation, struggle, and resistance. The right to privacy is far too basic and essential to be abandoned or neglected in the federal legal system. The right to privacy for gay and lesbian persons cannot be fully and powerfully developed if we relegate our efforts solely to the patchwork of state legal systems.

In a large if not immeasurable number of legal disputes, the horribly homophobic opinions of Justices White, Powell, and Chief Justice Burger will

5. 106 S. Ct. at 2846 (White, J., writing for the majority).
6. *Id.* at 2847 (Burger, C.J., concurring); *Id.* at 2848 n.2 (Powell, J., concurring).
7. *Id.* at 2853 (Blackmun, J., dissenting).

be invoked to diminish the rights and freedoms of gays, lesbians, and others seeking individual freedom and privacy. We will not avoid these aggressive uses of *Bowers* by staying out of federal courts, by avoiding the Supreme Court, or by settling for the victories that we will and must continue to seek in state courts. The dissenting opinions by Justices Blackmun and Stevens reflect the most generous and tolerant definitions of the constitutional freedoms of sexual minorities *ever* formulated by any members of the U.S. Supreme Court (or by virtually any federal judge at any level, for that matter). Those vibrantly dissenting voices, and the others who will learn to follow them, must continue to be informed, supported, and strengthened, federally as elsewhere, by the litigative and public educational efforts of such groups as the *amici* herein, the Lesbian Rights Project, Equal Rights Advocates, the National Women's Law Project, and the National Women's Law Center. Radical, humanistic, and freedom-loving perspectives can and do become majoritarian, as dissenting opinions do, by consistent and tireless articulation, argumentation and struggle, and by refusal to retreat.