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I. INTRODUCTION

The cognitive dissonance theory[1] suggests that people strive for consistency between and among their thoughts.[2] Dissonance or discord occurs when new ideas are inconsistent with a person's individually held beliefs.[3] The theory states that people prefer not to have cognitive dissonance and eliminate it at the first opportunity.[4] This premise is a cornerstone of the American legal system, which strives for equity and impartiality. If a party in a lawsuit presents a law as unfair or unjust, the possibility of cognitive dissonance is heightened and judges are more likely to seek resolution of the problem.

This article compares briefs submitted to the United States Supreme Court by the opposing sides in *Loving v. Virginia*[5] and *Bowers v. Hardwick*[6] and examines the impact of cognitive dissonance on the outcome of those cases. Had the respondents in *Bowers* used cognitive dissonance the way that the appellants did in *Loving*, Hardwick would have won. *Lawrence v. Texas*[7] reinforces this theory.

II. THE *LOVING* BRIEFS

In June 1958, Mildred Jeter, an African-American female, married Richard Perry Loving, a white male, in the District of Columbia.[8] The Lovings, Virginia residents, returned home to face arrest warrants because their interracial marriage violated Virginia's anti-miscegenation laws.[9] The Lovings pleaded guilty and the Virginia Supreme Court sentenced them to a one-year suspended sentence provided that they left the state for at least

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1 Leon Festinger, a social scientist, developed the cognitive dissonance theory. *See* EM GRIFFIN, A FIRST LOOK AT COMMUNICATION THEORY (3d ed. 1997) (explaining the theory in Chapter 16), http://www.afirstlook.com/archive/cogdiss.cfm (last visited Mar. 25, 2004).

2 MAGILL'S ENCYCLOPEDIA OF SOCIAL SCIENCE 358 (Nancy A. Piotrowski & Tracy Irons-George eds., 1st ed. 2003).

3 *See* GRIFFIN, *supra* note 1.

4 *See id.*

5 Loving v. Virginia, 388 U.S. 1 (1967).

6 Bowers v. Hardwick, 478 U.S. 186 (1986).

7 Lawrence v. Texas, 123 S. Ct. 2472 (2003).

8 *Loving*, 388 U.S. at 2.

9 *Id.* at 2–3.

twenty-five years.[10] They appealed, arguing that Virginia's laws violated the Constitution.[11]

The State of Virginia began its brief with a history of the Fourteenth Amendment and argued that the framers lacked the intent of prohibiting anti-miscegenation laws.[12] The State cited subsequent state and federal judicial decisions upholding the constitutionality of these laws.[13] The State further argued that because the Fourteenth Amendment did not apply, it would be inappropriate for the Court to delve into the wisdom of this law.[14]

In their brief, the Lovings argued that miscegenation laws were relics of slavery and expressions of racism.[15] They substantiated this argument by detailing the early history of white racial superiority and the enactment of the Racial Integrity Act of 1924.[16] They further argued that such laws caused social harm[17] and violated the Fourteenth Amendment.[18]

III. THE *BOWERS* BRIEFS

In August 1982, Georgia police broke into the home of Michael Hardwick and observed him engaging in the act of sodomy with another man.[19] The police then arrested Hardwick for violating a Georgia statute that criminalized sodomy.[20] Although the State of Georgia later chose not to indict him, the statute of limitations left Hardwick open to possible prosecution for the next four years.[21] With potential prosecution looming, Hardwick filed suit, arguing that sodomy laws were unconstitutional.[22]

In its brief, the State of Georgia first argued that the lower court erroneously interpreted prior precedent.[23] In *Doe v. City of Richmond*,[24] the district court held Virginia's sodomy statute constitutional and the United States Supreme Court had affirmed without issuing an opinion.[25] The court of appeals in *Bowers*, however, disregarded the *Doe* holding, finding the

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10 *Id.* at 3.
11 *Id.* at 3–4.
12 Brief and Appendix on Behalf of Appellee at 31, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).
13 *Id.* at 32.
14 *Id.* at 38.
15 Brief for Appellants at 15, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).
16 *See id.* at 16–24.
17 *See id.* at 24–28.
18 *See id.* at 28–39.
19 *See* Brief for Respondent at 1, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).
20 *Id.*
21 *Id.* at 2.
22 *Id.*
23 Brief for Petitioner at 4, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).
24 Doe v. City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975).
25 Brief for Petitioner at 6, *Bowers* (No. 85-140).

Virginia statute unconstitutional.[26] The court believed that the Supreme Court in *Doe* might have affirmed the ruling because the plaintiffs lacked standing and not necessarily because it agreed with the substantive ruling in *Doe*.[27] Therefore, the court drew its own conclusion about the constitutionality of the sodomy laws.[28] In its brief, the State argued that this interpretation was in error.[29] The State also argued that the Constitution did not grant a fundamental right for homosexuals to engage in sodomy.[30] The State argued that the right of privacy did not encompass acts of sodomy because permitting those acts was inconsistent with history and tradition.[31]

In the respondent's brief, Hardwick argued that because the conduct was intimate in nature and took place in the home, the State had to show special justification for regulating the conduct.[32] He then argued that heightened scrutiny of this law would not necessitate heightened scrutiny of other laws against prostitution and public indecency.[33] Finally, Hardwick argued that the State's goal of preserving morality was not substantial enough to withstand close scrutiny.[34]

IV. COMPARING THE BRIEFS OF *LOVING* AND *BOWERS*

Both cases were battles over deeply rooted emotional issues. In each case, the side with the most compelling emotional and psychological pleas to the Justices won. In *Loving*, the State of Virginia's most compelling tactic was to rely on science and racial prejudice; in contrast, the Lovings' most compelling tactic was to appeal to the Justices' fears of being perceived as racists. The Lovings prevailed because the cognitive dissonance that would have resulted from the affirmation of racist laws outweighed the scientific arguments and racist views exploited by the State.

In *Bowers*, the State of Georgia strategically relied on homophobia, history, and tradition. Hardwick's most compelling tactic would have been to scare the Justices into equating support of the law with discrimination, thereby creating cognitive dissonance. However, Hardwick failed to make such a plea. Instead, he restricted his argument to a strictly legal analysis of privacy in the home. In order to combat something as deeply rooted in the culture as homosexual animus, Hardwick needed to fight back with

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26 *Id.* at 4.
27 *Id.*
28 *Id.* at 5.
29 *Id.*
30 *Id.*
31 *Id.*
32 Brief for Respondent at 6–7, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).
33 *Id.* at 21–22.
34 *Id.* at 25–27.

something emotionally and psychologically charged. His downfall was his failure to come up with an emotional plea that demonstrated cognitive dissonance for judicial consideration.

A. The Use of Race and Morality: The Winning Arguments

The Lovings framed the Virginia statute and their case as a race issue. They deliberately used words and phrases that promoted immediate emotional responses in the Justices. The second sentence of the brief boldly stated that the case "gives [the] Court an appropriate opportunity to strike down the last remnants of legalized slavery in our country—the anti-miscegenation laws."[35] The Lovings asserted that the State passed the laws to foster and implement the institution of slavery[36] and to preserve the integrity of the "White Race" for reasons analogous to Hitler's goal of a "Super Race."[37] Recognizing the general aversion to being perceived as racist during the Civil Rights era, the Lovings focused the issue on discrimination rather than constitutionality.

The oral arguments evidence the effectiveness of this argument. During the State's oral argument, the Court asked the attorney,

> May I ask you this question? Aside from all questions of genetics, physiology, psychiatry, sociology, and everything else—aside from all that, forgetting it for the moment—is there any doubt in your mind that the object of these statutes, the basic premise on which they rest, is that the white people are superior to the colored people, and should not be permitted to marry them?[38]

The Court therefore understood that the case rested on whether the State predicated the law on notions of inequality.

In *Bowers*, the State defined the issue as one involving sodomy and morality. The State described the conduct in question as conduct "which for hundreds of years, if not thousands, has been uniformly condemned as immoral."[39] The State said that traditional Judeo-Christian values proscribed the conduct[40] and referenced several passages from the Bible.[41] In its brief, the State described sodomy as "sexual deviancy" and "an unnatural means of satisfying an unnatural lust, which [was] declared by Georgia to be morally

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35 Brief for Appellants at 1, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).
36 *Id.* at 9.
37 *Id.*
38 Tr. of Oral Arg. at 32, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).
39 Brief of Petitioner at 19, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).
40 *Id.* at 20.
41 *Id.* at 21.

wrong."[42] The State analogized sodomy to polygamy, consensual incest, and liaisons with prostitutes.[43] In one of its most blatant attempts to appeal to the homophobic fears of the Court, the State asserted that "homosexual sodomy leads to other deviate practices such as sadomasochism, group orgies, or transvestism."[44] The State referred to research characterizing homosexual sodomy by "multiplicity and anonymity of sexual partners, disproportionate involvement with adolescents and, indeed, possible relationship[s] to crimes of violence."[45] Finally, the State linked homosexual sodomy to Acquired Immune Deficiency Syndrome (AIDS) and diseases such as anorectal gonorrhea and Hepatitis.[46]

Like the State of Virginia in *Loving*, the State of Georgia intentionally made these statements. The State was familiar with its audience and the way that its statements would affect the Justices. The State intended to trigger homophobia in these very old, very conservative, religiously indoctrinated judges with repeated references to sodomy as immoral and unnatural. Similarly, the State mentioned AIDS and promoted stereotypes about homosexuals to trigger the Justices' deeply rooted fears. In doing so, the State clearly demonstrated its belief that it was writing for a sympathetic audience. In contrast, the language of the *Loving* briefs evidences the State's uncertainty as to whether the Justices would be sympathetic to arguments that implied racial inequality. The fact that the State in *Bowers* was not afraid of offending the Justices with homophobic sentiments indicates its awareness that the Justices were indoctrinated by a society that did not find this speech repellent.

In *Loving*, the State of Virginia tried not to respond to the Lovings' arguments about racial inequality. Instead, the State insisted that any inquiry into the wisdom of the law would be improper and should be left to the legislature.[47] The State therefore submitted evidence suggesting that upholding the law was not unequivocal racism. This evidence included a quote from Dr. Albert I. Gordon: "The argument that persons who oppose intermarriage—religious or racial—are per se 'prejudiced,' may be true of some persons . . . yet be completely untrue about still others."[48] Inclusion of

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[42] *Id.* at 27.

[43] *Id.* at 32–33.

[44] *Id.* at 36 (citing KARLA JAY & ALLEN YOUNG, THE GAY REPORT: LESBIANS AND GAY MEN SPEAK OUT ABOUT SEXUAL EXPERIENCES AND LIFESTYLES 563–64 (1st ed. 1979)).

[45] *Id.* at 37 (citing PAUL CAMERON, INSTITUTE FOR THE SCIENTIFIC INVESTIGATION OF SEXUALITY, REPORT ON HOMOSEXUALITY AND MURDER (1984); ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 309 (1978)).

[46] *Id.*

[47] Brief and Appendix on Behalf of Appellee at 7, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

[48] *Id.* at 48.

this quote acknowledged that the State believed that the Justices were concerned about being perceived as prejudiced.

Like the State of Virginia in *Loving*, Hardwick's brief avoided the controversial topic, in this case homosexuality. Hardwick instead argued for privacy in the home and in the bedroom: "At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral."[49] The brief made frequent references to the sanctity of the home and of the bedroom.[50]

To some degree, Hardwick tried to confront the anti-homosexual sentiments of the Court. He argued that homosexual sodomy could not be "deemed transparently evil."[51] He justified this proposition by arguing that over half of the states had decriminalized sodomy[52] and that permitting homosexual sodomy did not equate to opening the door to other acts.[53] He insisted that homosexual sodomy was a private issue, whereas public indecency, prostitution, and pimping remained public issues still subject to state regulation.[54] Hardwick called the State's characterizations of homosexuals "imaginative recasting[s]" based on "irrational fear and prejudice."[55]

Although the law in *Bowers* was as discriminatory toward homosexuals as the law in *Loving* was toward people of color, Hardwick dealt with the discrimination in a relatively subdued way. He did not make grandiose statements about the hardships endured by homosexuals. Instead, he avoided the topic of homosexual sodomy as much as possible, referencing it only to denounce the State's homophobic characterizations. He took this approach because he understood the unlikelihood of swaying the Justices by arguing in favor of the morality of sodomy. This was so because there was no pre-existing sentiment against homophobia.

Hardwick should not have expected to win on an emotionally charged topic such as homosexuality without convincing the Justices that homophobia was "bad." Recasting the issue as one of privacy was not effective because the Court could not forget that the case was about homosexuality. Whereas the *Loving* Court was unwilling to go on the record supporting racism, the *Bowers* Court was willing to go on the record

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49 Brief for Respondent at 1, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).
50 *See, e.g., id.* at 4, 7–9.
51 *Id.* at 13.
52 *Id.*
53 *Id.* at 19.
54 *Id.* at 21.
55 *Id.* at 22 n.38.

denouncing homosexual acts. In the minds of the Justices, homophobic laws were not "bad" because Hardwick's brief had failed to cast them as such.

B. The Use of Science and Sanctity of the Home: The Losing Arguments

In *Loving*, the State carefully avoided racist language but included scientific testimony portraying interracial marriage as bad.[56] Instead of making explicit statements denouncing interracial marriage, the State presented the negative scientific views of others. The State argued, "This work *has been characterized as* 'the definitive book on intermarriage,'"[57] instead of "this book *is* the definitive book on intermarriage." The State thus covertly presented information to avoid offending the Justices.

In *Bowers*, Hardwick touted the sanctity of the home instead of attempting to make the case a rights issue. He argued that the State had no right to invade the privacy of a person's home.[58] He broadly defined the privacy right in question, realizing that the Justices would be wary of declaring a constitutional right to engage in homosexual sodomy. Hardwick's privacy argument was intelligent, focusing the Justices' minds on a traditional constitutional right. The Justices, however, did not forget that the case was about homosexuality. Hardwick thus should have argued beyond the law with a strong emotional plea to counter the morality argument.

In *Loving*, the State did not use the scientific arguments it had used before the Virginia Supreme Court. The Lovings responded to the arguments anyway, using their brief as a forum to acknowledge and dispel myths about race: "[T]he maintenance of racial purity or integrity is a meretricious basis for these laws for there is no evidence to support the existence of the so-called 'pure' races." [59] Even if one could attain racial purity, they argued, the law would not effectuate that purpose.[60] The Lovings also argued that the only race protected by the laws was the Caucasian race[61] and presented evidence that race mixing did not "cause biologically deleterious results."[62] Despite these strong science-based arguments, the Lovings won the case due to their characterization of the law as racist.

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[56] Brief and Appendix on Behalf of Appellee at 18–21, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

[57] *Id.* (emphasis added).

[58] Brief for Respondent at 4, 7–9, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

[59] Brief for Appellants at 35, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 37.

The State's response to Hardwick's argument about the sanctity of the home was to use legal arguments that preyed on the Justices' fears. First, the State argued that in order for something to fall into the privacy realm, it must be a fundamental right established by history.[63] It impressed upon the Court that states had historically regulated sodomy.[64] The State further argued that including homosexual sodomy within the realm of privacy would open the door for "polygamy, homosexual marriage, fornication, adultery and some cases of incest."[65] Equating overturning the sodomy law with things that the Justices found repugnant was a deliberate and effective technique.

This effectiveness was evident in the oral arguments. The Supreme Court's first question was about the limits of privacy and whether it would open the door to other acts: "[I]s there a limiting principle to your argument? . . . [H]ow do you draw the line between bigamy involving private homes or incest or prostitution . . . ?"[66] The Court persisted in this line of inquiry:

> You emphasize the home [as a limiting principle] and so would I if I were arguing this case, but what about—Take an easier one, a motel room or the back of an automobile, or toilet or wherever. . . . What about incest in the private home? . . . Suppose it is parent and adult child. Those are two consenting adults then perhaps. . . . [Y]our line of reasoning would make the Edmonds Act unconstitutional, would it not? . . . [T]he Edmonds Act forbade cohabitation by one who is already married. . . . [W]ould you distinguish the home between the back of an automobile? . . . And, a public toilet of course? . . . What about a hotel room overnight?[67]

It is clear from the myriad of questions that the State's scare tactic was very effective in rattling the Justices.

V. HOW HARDWICK COULD HAVE PREVAILED

Hardwick should have modeled his arguments on the Lovings' brief in *Loving*. First, his preliminary statement should have read that this case "'gives [the] court an appropriate opportunity to strike down'[68] homophobia

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[63] Reply Brief of Petitioner at 6–7, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

[64] *Id.* at 6–8.

[65] *Id.* at 13.

[66] Tr. of Oral Arg. at 16, 1986 U.S. TRANS LEXIS 74, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140).

[67] *Id.* at 16–22.

[68] Brief for Appellants at 1, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

in our country—the sodomy laws of Georgia and the twenty-four states that criminalize consensual sodomy." Second, he should have focused on the discriminatory intent behind laws motivated by sexual intolerance and antagonism toward homosexuals.[69] Hardwick could have drawn parallels to similar laws in Nazi Germany used to persecute homosexuals.[70] Third, he should have included a section on the immeasurable social harm caused by anti-homosexual laws[71] and cited instances of hate crimes against gays. Finally, Hardwick could have included data demonstrating that the social stigma of homosexuality causes severe anxiety, sometimes leading to suicide.[72] This would have given the Justices an opportunity to stop government-endorsed social harms.

In *Loving*, the Lovings adamantly argued that a ruling in favor of the State would promote racism. While homosexual equality did not have the social support of the civil rights movement in 1986, Hardwick could similarly have discussed rights, discrimination, violence, hatred, and fear. The Hardwick brief could have benefited from plenary evidence of discrimination and violence such that the Justices would have been compelled to view the case as a rights issue. The Justices might then have sided with Hardwick in a conscious effort to promote civil and human rights, as they did in *Loving*.

Justice Powell, the fifth vote in the majority opinion, contemplated siding with the dissent in *Bowers*, which would have changed the outcome of the case.[73] In a lecture before New York University law students, Justice Powell said that Hardwick "had not been prosecuted, 'much less convicted, and sentenced.'"[74] This remark suggests that Justice Powell did not believe that the State had unduly burdened Hardwick. However, an argument detailing the harms that anti-sodomy statutes inflicted on homosexuals might have compelled Justice Powell to view the law differently. Other sources suggest that Justice Powell decided in favor of the Georgia statute because he did not know any homosexuals and found it hard to believe that homosexuals could be active members of society.[75] Justice Powell's remark further suggests that the Court is influenced by emotions and personal experiences

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[69] *Id.* at 9.

[70] *See generally* BEN S. AUSTIN, HOMOSEXUALS AND THE HOLOCAUST, *at* http://www.mtsu.edu/~baustin/homobg.html (last visited Apr. 1, 2004).

[71] Brief for Appellants at 24, *Loving* (No. 395).

[72] *See generally* C. Barillas, *Gay Youth Higher Suicide Risk*, THE DATA LOUNGE, Aug. 28, 1997, *at* http://www.datalounge.com/datalounge/news/record.html?record=2303 (last visited Apr. 1, 2004).

[73] Al Kamen, *Powell Changed Vote in Sodomy Case*, WASHINGTON POST, July 13, 1986, at A1.

[74] Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASHINGTON POST, Oct. 26, 1990, at A3.

[75] *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 53–54 (1st ed. 1997).

as much as it is influenced by legal arguments. An argument addressing social ignorance and homophobia with facts and illustrations might therefore have changed Justice Powell's vote.

VI. *LAWRENCE V. TEXAS*: GAY RIGHTS PREVAIL

In 2003, the Supreme Court eliminated cognitive dissonance with *Lawrence v. Texas*.[76] In *Lawrence*, the Court faced a sodomy law similar to *Bowers*; this time, however, phrasing the argument as a gay rights issue changed the outcome. The petitioners' brief emphasized the importance of eliminating homophobia and made the Justices feel uncomfortable allowing another *Bowers* holding.

On September 17, 1998, Texas police entered the home of John Lawrence on a false report of "weapons disturbance."[77] Once inside, the police witnessed Mr. Lawrence and Mr. Tyron Garner engaging in sex in Mr. Lawrence's bedroom.[78] Police arrested the two men under a statute known as the "Homosexual Conduct Law," which criminalized deviate sexual intercourse with persons of the same sex.[79] The two men pleaded nolo contendere and received a $200 fine.[80] On appeal, the Texas Court of Appeals initially reversed the lower court but later reinstated the convictions en banc.[81] Both men appealed to the United States Supreme Court.[82]

In the petitioners' brief, Lawrence and Garner based their arguments on substantive due process and equal protection. The substantive due process argument stated that fundamental liberty interests exist for private sexual relations.[83] The equal protection argument stated that the statute discriminated against homosexuals without a rational basis[84] and that the law fueled discrimination against homosexuals.[85]

The State of Texas contended that Lawrence's claim failed under substantive due process and maintained that the statute did not violate equal protection. Responding to the substantive due process argument, the State argued that the petitioners were not members of the class seeking the liberty interest.[86] It next argued that Lawrence should lose under the Supreme

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76 Lawrence v. Texas, 123 S. Ct. 2472, 2475 (2003).

77 *Id.* at 2477.

78 *Id.*

79 *Id.* at 2476.

80 *Id.*

81 *Id.*

82 *Id.*

83 Brief of Petitioner at 11, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).

84 *Id.* at 32.

85 *Id.* at 45.

86 Respondent Brief at 11, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102) (contending that there was no confirmation that petitioners were in fact homosexuals).

Court's historical approach of determining the existence of a liberty interest because tradition did not protect sodomy.[87] The State also argued that stare decisis required the Court to remain consistent with *Bowers*.[88] The State next argued that the Court should use a rational basis standard of review for the Texas statute[89] and that the statute bore a rational relationship to the legitimate interest of promoting morality.[90] Finally, the State argued that the statute was facially neutral and that even if Lawrence showed that the law had a disparate impact on homosexuals, the record did not show that the petitioners were in fact homosexuals.[91]

The *Lawrence* petitioners "normalized" gay relationships by providing examples of gay families. They argued,

> Most lesbians and gay men want intimate relationships and are successful in creating them. . . . Same sex relationships often last a lifetime, and provide deep sustenance to each member of the couple. . . . These families live in 99.3% of American counties. . . . Virtually every state permits gay men and lesbians to adopt children individually, jointly and/or through second-parent adoptions.[92]

These statements removed homosexual stigmas and stereotypes, making it difficult for Justices to view homosexuals as an 'other' group.

The petitioners also characterized the laws as discriminatory, contending that "[t]he Homosexual Conduct Law and its badge of criminality functions to make gay people unequal in myriad spheres of everyday life and continue an ignominious history of discrimination based on sexual orientation."[93] Furthermore,

> [t]he Homosexual Conduct Law does not just discriminate against gay and lesbian Texans in their private intimate relations, but brands gay persons as second-class citizens and legitimizes discrimination against them in all aspects of life. . . . [T]he discrimination worked by this law reflects and reinforces a century-long history of discrimination against gay Americans.[94]

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87 *Id.* at 13.
88 *Id.* at 24.
89 *Id.* at 28.
90 *Id.* at 42.
91 *Id.* at 33.
92 Brief of Petitioner at 17–18, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).
93 *Id.* at 34.
94 *Id.* at 40–41.

The petitioners further sought the sympathy of the Justices by arguing that "[s]odomy laws are often invoked to deny or restrict gay parents' custody of or visitation with their own children, to deny public employment to gay people, and to block protection of gay citizens under hate crime legislation."[95] And by "deeming them 'sex[ual] deviants,' states involuntarily commit gay men and lesbians to mental institutions under extremely inhumane conditions . . . . 'Treatments' to 'cure' homosexuality were often sadistically cruel . . . ."[96] Additionally, "[v]iolence motivated by irrational hatred of gay people can result in crimes of unimaginable brutality, as occurred with the murder of college student Matthew Shepard."[97] Unlike the respondents in *Bowers*, the *Lawrence* petitioners humanized their cause, thereby strengthening their plea for gay rights.

The oral arguments demonstrate that some Justices had reservations about striking down the Texas statute. The attorney for Lawrence and Garner stated that Texas discriminated against one group and favored another, mirroring the Lovings' arguments that the Court risked cognitive dissonance by not deciding in favor of individual rights.[98] Justice Scalia countered,

> I mean you can put it that way, but society always—in a lot of its lives—makes these moral judgments. You can make it sound very puritanical, the—you know, the laws—the laws against bigamy, I mean, who are you to tell me that I can't have more than one wife? You blue-nose bigot. Sure. You can make it sound that way, but these are laws dealing with morality.[99]

In response, the petitioners further emphasized the gay family model by demonstrating that homosexuals were everyday people fighting for constitutional rights:

> [We] submit it has to be apparent to the Court that there are gay families, that family relationships are established, that there are hundreds of thousands of people registered in the Census in the 2000 census who have formed gay families, gay partnerships, many of them raising children and that for those people, the opportunity to engage in sexual expression as they will in the privacy of their own homes performs much the same function that it does in the marital context, that you can't protect one without the

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[95] *Id.* at 42.

[96] *Id.* at 46.

[97] *Id.* at 47.

[98] Tr. of Oral Arg. at 16, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102), *available at* http://www.oyez.org/oyez/resource/case/1542/argument/transcript (last visited Apr. 1, 2004).

[99] *Id.* at 17.

> other, that it doesn't make sense to draw a line there that you should protect it for everyone. That this is a fundamental matter of American values.[100]

The effectiveness of these arguments was evident in the Justices' later interaction with the State's counsel. One Justice said, "Bowers has prove[n] to be harmful to thousands and thousands and thousands of people, if not because they're going to be prosecuted [but] because they fear it—they might be, which makes it a possible instrument of repression in the hands of the prosecutors."[101] Thus, the Court finally realized that gay rights were the rights of individuals to live their own lives.

The State's substantive due process arguments initially focused on the history of sodomy laws and the lack of change in the seventeen years following *Bowers*.[102] The State then tried to turn the focus away from the statute's homophobic origins by contending that the statute prohibited "extramarital sexual conduct"[103] and was not about sexual orientation.[104] The State also countered the petitioners' equal protection arguments by claiming that the statute "rationally furthers other legitimate state interests, namely, the continued expression of the State's long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity, particularly with regard to the contemplated conduct of heterosexuals and bisexuals."[105] This statement, which contradicted the State's earlier focus on "extramarital sexual conduct," probably caused the State to lose the case because it demonstrated the State's own cognitive disconnect.

The Supreme Court held that the Texas statute violated the Fourteenth Amendment's Due Process Clause, stating that "the liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives."[106] The Court further acknowledged, "When 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 public and in the private spheres."[107] Thus, the *Bowers* decision "demean[ed] the lives of homosexual persons."[108]

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100 *Id.* at 23.
101 *Id.* at 33.
102 Respondent Brief at 13–14, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).
103 *Id.* at 19–21.
104 *Id.* at 35.
105 *Id.* at 41.
106 Lawrence v. Texas, 123 S. Ct. 2472, 2473 (2003).
107 *Id.* at 2482.
108 *Id.*

Dissenting, Justice Scalia wrote that the decision was more about gay rights than it was about the Fourteenth Amendment.[109] Although he stated that "the Court has taken sides in the culture war,"[110] it was the petitioners who had characterized the case as one involving sides; the State simply failed to give the Court a neutral place to stand. Justice Scalia added that "[t]he Court views it as 'discrimination' which it is the function of judgments to deter. . . . [W]hat the Court calls 'discrimination' against those who engage in homosexual acts is perfectly legal."[111] Perhaps Justice Scalia was right that it is "legal" to discriminate against homosexuals (or at least that it was legal before *Lawrence*); however, it was highly unlikely that a Supreme Court Justice would align with an opinion that discriminated, regardless of how "legal" that discrimination was. A cognitive disconnect would result if the highest court in the land supported bias and homophobia.

In his dissent, Justice Scalia became the best example of the power of cognitive disconnect. While he blasted the majority for falling prey to the whims of "the law profession's anti-anti-homosexual culture,"[112] Justice Scalia did the very same thing by writing, "Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means."[113] Thus, he too did not want to experience the cognitive disconnect of being the discriminator.

VII. CONCLUSION

In social sciences, the cognitive dissonance theory requires the elimination of confusion. In law, a party arguing against deeply entrenched beliefs must not only make a persuasive legal argument but must also make strong public policy arguments. In *Loving v. Virginia*, the Lovings won by persuading the Supreme Court to look beyond the stigma of interracial marriage and to focus instead on civil rights. In *Bowers v. Hardwick*, the respondents erred by making only legal arguments and not also addressing the social repercussions of the law. That approach allowed the Court to continue in its own ignorance about the repercussions of homophobia on gay Americans. In *Lawrence v. Texas*, the petitioners won by equating anti-sodomy laws with discrimination and demonstrating the social harms caused by the *Bowers* decision. In both *Loving* and *Lawrence*, the Court eliminated cognitive dissonance by focusing on eliminating social problems; in doing so, the Court furthered both civil rights and human rights.

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109 *See id.* at 2488.
110 *Id.* at 2497.
111 *Id.*
112 *Id.*
113 *Id.*