

The Arc of History: From Bowers to Lawrence to Equality

by Kevin Cathcart, Executive Director

Let us realize the arc of the moral universe is long but it bends toward justice
—Rev. Dr. Martin Luther King, Jr.

In less than two decades, I witnessed the arc of history bending toward justice.

In 1986, in a ruling laced with antigay language, the Court upheld Georgia's sodomy law in *Bowers v. Hardwick*. It was a terrible legal defeat for the lesbian and gay community, coming during a time when we faced tragedy every day as friends and loved ones were lost to AIDS. The court had gotten it very wrong, turning the legal question on its head by asking whether gay people have a constitutionally protected right to sodomy, rather than whether all people have a constitutional right to individual liberty in the conduct of our private lives. In a 5-4 decision, the Supreme Court ratified the power of state governments to treat us as criminals.

The decision moved our community to higher levels of action. We were tired of grief. We had grown stronger and more effective in our struggle for equality. We were ready to fight back.

Seventeen years later, in 2003, the Court reversed itself in its historic ruling in *Lawrence v. Texas*. Through that case, Lambda Legal brought a challenge to Texas' "Homosexual Conduct Law" on behalf of John Lawrence and Tyron Garner, who were arrested for having adult, consensual sex in Lawrence's home. The *Lawrence* litigation followed years of strategic cases brought by Lambda Legal and other LGBT legal groups to challenge sodomy laws in state courts.

In striking down the Texas law and all remaining state sodomy laws, Justice Kennedy wrote:

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct...

[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.

The effect of this ruling on our community was equally electrifying. Advocates and lawyers in the courtroom had tears in our eyes as the decision was read. People at work, in newsrooms around the country, and in their homes heard the news and cheered, hugged and gathered to celebrate. An enormous barrier had finally fallen. The door to constitutionally protected liberty had been unlocked for lesbians and gay men.

How we got from *Bowers* to *Lawrence* in 17 years is an important lesson in strategic legal work, community collaboration and persistence. Understanding what *Lawrence* means five years later and where we go from here in our pursuit of equality is an essential part of planning our future.

The Impact of *Lawrence* on Our Laws and Our Lives

The *Lawrence* decision meant at least three powerful things. First, striking down the remaining sodomy laws in 13 states immediately affected the lives of gay men and lesbians who were freed from the threat of arrest and prosecution for living our lives and expressing our intimacy and sexuality. Second, the ruling finally ended the legal basis for arguing that lesbians and gay men were or might be engaged in criminal activity and for using that argument in countless personal and legal matters that affected our lives.

And third, the Supreme Court upheld the fundamental right to personal liberty for consenting, adult lesbians and gay men (as well as all other adults) in choosing whom we love and with whom we share sexual intimacy.

There was one more powerful message that could not be denied: *Lawrence* was a huge win for the LGBT community at the Supreme Court. We were moving forward and not looking back.

LGBT people living in the 13 states (and Puerto Rico) where sodomy laws remained on the books in 2003 felt the results of the decision most directly. Although arrest and prosecution for consensual adult sex were rare, they did occur, and the fact that such laws and government powers existed shaped people's lives in devastating ways. Millions of people were liberated from the fear of being arrested and sent to jail simply for making love.

But as important as that was, the impact of the ruling was deeply felt in every state and was much broader than the invalidation of remaining sodomy laws. The existence of sodomy laws and their affirmation by the Supreme Court in *Bowers* had branded every lesbian and gay man as a criminal or potential criminal, no matter where they lived. LGBT people were forced to make unfair, limiting choices as a result — whether or not to seek certain jobs, risk legal action in family court or seek public office, for example. And courts used the existence

of sodomy laws as the basis for ruling against LGBT people in a wide variety of matters, with devastating effects.

At Lambda Legal, we heard such stories all the time, and represented a number of people who were hurt by sodomy laws in these ways. For example, Virginia resident and Episcopal priest Linda Kaufman attempted to adopt a second foster child. She thought it would be simple: She had adopted a foster child a few years earlier and had proven herself to be a great parent. She contacted a child placement agency in Virginia about adopting another child in need. But the state of Virginia denied her adoption application, citing its law against sodomy. Lambda Legal and the ACLU had to go to court on Kaufman's behalf to force Virginia to reverse its decision and allow her to adopt.

The day before the *Lawrence* decision, we could be considered criminals; the day after, we could not. We were finally liberated from the message of condemnation that these laws carried and from the broad consequences of legal reasoning that equated being lesbian or gay with being a criminal. Even public discourse was immediately affected — no longer was it possible to argue that talking about LGBT issues was talking about breaking the law. Soon after the *Lawrence* decision, a Massachusetts federal district court relied on it to rule that falsely suggesting that someone is gay could no longer be the basis for a libel or slander suit because, under the law, there is nothing wrong with being gay.

The ruling also acknowledged that people could not be excluded from the protections of the Constitution based on their sexual orientation. This is the most profound meaning of the decision and holds the most promise for the future. Justice Kennedy's words were stunning:

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... gives them the full

right to engage in their conduct without the intervention of the government.

The U.S. Supreme Court recognized that our lives, like the lives of others, were not only about sexual conduct but also about deeply human needs for intimacy, relationships, family, love and the right to make personal decisions without government interference. Five months later, citing *Lawrence*, the Massachusetts Supreme Court struck down the state ban against marriage for same-sex couples in a landmark case brought by our colleagues at GLAD [*Goodridge v. State Department of Public Health*]. Massachusetts Chief Justice Marshall wrote for the majority, saying that while the *Lawrence* decision did not decide whether or not same-sex couples must be allowed to marry, the *Lawrence* decision did affirm that:

the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner [and it] also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity.

Ruling that the Massachusetts Constitution was at least as protective of individual liberty and equality as the U.S. Constitution, the *Goodridge* court held that there was no constitutionally adequate reason to deny civil marriage to same-sex couples, again citing *Lawrence* for the point that judges' "obligation is to define the liberty of all, not to mandate our own moral code."

Strategic, Patient, Fearless

Lawrence brought down the wall that stood in our path, but it did not bring us to the end of the journey. In fact, some people fear that the marriage equality work that preceded *Lawrence* and grew stronger after the decision created a backlash that has brought more harm than good. I strongly disagree — both on the facts and on the analysis of how we move forward toward equality. LGBT people have far more legal rights and protections than we did five years ago, and our movement is stronger and better prepared than it has ever been to fight for equality and to win.

The backlash is real. There are now 41 states that have constitutional or statutory bans against marriage for same-sex couples and/or recognition of these marriages, and some that go even further to prohibit any recognition of same-sex relationships. And few of us could have predicted the breathtaking speed with which the extreme political right-wing has successfully tilted the scales of justice by appointing antigay and anti-civil rights judges to the bench.

But there are other facts that are just as real and just as breathtaking: More than 23 percent of same-sex couples currently live in states where nearly all of the at least tangible state law rights of marriage are available to them. Nearly 35 percent of same-sex couples live in states where some of the state law rights that spouses receive can be obtained by marrying or entering civil unions, reciprocal beneficiary relationships or registered domestic partnerships. Only seven years ago, *none* of these rights existed for any same-sex couples.

In this country, we also have 20 states plus the District of Columbia with express sexual orientation antidiscrimination laws, 14 of which also expressly cover gender identity discrimination. Twenty years ago, there was only one state with such a law (Wisconsin, which adopted its law in 1982). Five years ago there were 13 states and Washington D.C. Then New Mexico adopted its law in 2003; Illinois and Maine in 2005; Washington State in 2006; and

Colorado, Iowa, and Oregon in 2007. This means that approximately 50 percent of gay, lesbian and bisexual adults live in states that expressly prohibit sexual orientation discrimination in employment, housing and public accommodations. Add more than 100 cities and counties that have ordinances prohibiting sexual orientation that are in states without express statutory coverage (including Atlanta, Dallas, Houston, Miami and Philadelphia), and it's clear that a majority of Americans now live in jurisdictions with laws expressly prohibiting sexual orientation discrimination.

The door to the protections provided by the Constitution has been pried open and we are keeping it that way. In 1996, Lambda Legal and co-counsel ACLU and the Colorado Legal Initiatives Project won a U.S. Supreme Court victory in *Romer v. Evans*, which made clear that lesbians, gay men and bisexuals have the same right to seek government protection against discrimination in the United States as any other group of people. The Court rejected the notion that it is legitimate for the government to discriminate against gay people based on moral objections to homosexuality.

Lambda Legal keeps winning strategic battles in court. Just this year, for example, a trial court in Iowa struck down the marriage ban for same-sex couples in a decision that relied heavily on the reasoning of *Lawrence*. In another significant legal victory, a federal appeals court struck down the extreme Adoption Invalidation Law in Oklahoma, relying on the constitutional principle of “full faith and credit” for court judgments. We keep pushing the Constitution to do its job and provide equality under the law.

There may be a backlash, but it has not stopped us from advancing. It is a completely predictable reaction to a successful civil rights movement. History teaches us that change does not come without a fight. But we are up to the fight - we are protecting the rights of LGBT people and making the case for equality in every part of this country.

The lesson of *Lawrence* is that we must be strategic, patient and fearless. Lambda Legal and our sister LGBT legal organizations must continue to choose strategic, high-impact cases at the state and federal level that protect LGBT people in their daily lives, expose prejudice and inequality, and hold our state and federal Constitutions accountable to the promise of fairness and equality. We must all have patience — not in the sense of waiting around for something to happen but in our understanding of how important changes in the law most often come after diligent, persistent litigation and education make those changes necessary and inescapable. Nearly 60 years passed before *Brown v. Board of Education* overturned *Plessy v. Ferguson*. With that perspective, the 17 years between *Bowers* and *Lawrence* seem like the blink of an eye.

Most of all, we must be fearless. We cannot be timid, ask for too little, lower our expectations or compromise the meaning of equality. We cannot be afraid to demand the right to marry, to work and go to school without discrimination, to be parents, to express our gender identity and sexuality, to serve our country openly, to live without fear of violence. There is no such thing as partial equality.

We believe in the promise of the Constitution. Justice Kennedy got it right in *Lawrence* when he described those who drafted the guarantee of liberty in the Constitution:

They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

We have invoked the principles of the Constitution and will continue to do so in our search for greater freedom for LGBT people and people with HIV. We have seen history move toward justice, but we know it does not move on its own — we need to lead it. We still have work to do.