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# Futile Arguments: Lawrence v. Texas and the Supreme Court Bar

**Keywords**

Lawrence v. Texas, Supreme Court Bar

# FUTILE ARGUMENTS: LAWRENCE V. TEXAS AND THE SUPREME COURT BAR

By: Heron Greensmith<sup>1</sup>

## I. Introduction

I am a third year law student, gearing up to face a bleak legal job market, a bleaker economy, and almost two hundred thousand dollars in student debt.<sup>2</sup> I entered law school from the Peace Corps with a clear goal: to be an advocate for gender and sexual minorities through public policy, legislative drafting, or appellate litigation.<sup>3</sup> Now to make that dream come true. Passion? Check. Knowledge? Check. Partnership in a D.C. law firm specializing in appellate and Supreme Court litigation? Not yet.

Last semester, my penultimate, I took a seminar on the Supreme Court taught by long time Supreme Court journalist Stephen Wermiel. The course broadly covered several controversial aspects of the Supreme Court, one of which was the rise of the professional, specialized Supreme Court bar. Our class discussions led me to wonder how appellate attorney Paul Smith, an appellate attorney at Jenner and Block, got the privilege of arguing *Lawrence v. Texas*<sup>4</sup> in the Supreme Court instead of the lawyers at Lambda Legal. Mr. Smith seemed to be a very kind, passionate individual when he visited our class, but Mitchell Katine, along with Lambda Legal lawyers Ruth Harlow and Suzanne Goldberg, had carried the case from trial. I was sure that there was a story behind Mr. Smith getting to argue in the Supreme Court rather than Mr. Katine, Ms. Harlow, or Ms. Goldberg, and I wanted to hear it. Would the theme of the story be the rise of the Supreme Court bar: D.C.'s repeat players who have over ten arguments under each of their belts and whose names Supreme Court buffs whisper in reverence?

The elite Supreme Court bar rises as another hurdle, another inequity standing between me (and by proxy all passionate advocates) and the chance to argue a case before the Supreme Court. As a future public

interest lawyer, it is hard to describe my feelings: a mixture of jealousy, respect, frustration, resignation. As an advocate for a particular community, I know that I do not want to work in general appellate litigation, waiting around for the case of my dreams to come to me. I am also aware that dozens of years often pass before appellate litigators and successful advocates are offered the chance to argue in the Supreme Court. I hope to spend those years of my life as Ruth Harlow and Suzanne Goldberg from Lambda Legal spent theirs, working on a cause about which they were passionate, creating legal strategies, building reputations, writing, researching, arguing, being cool. But if after all that, Paul Smith was given the opportunity to argue *Lawrence v. Texas* in the Supreme Court instead of Ruth Harlow, what chance have I? This paper explores the impact that the elite Supreme Court bar may have on the chance that non-specialized lawyers will be given the opportunity to advocate for their clients and causes in the Supreme Court.

## II. The Supreme Court Bar

The current consensus in the literature and among Supreme Court litigators themselves is that hiring specialized appellate counsel is generally a good thing. Michelle Lore wrote an excellent article for *The Minnesota Lawyer* in 2007, detailing all the reasons a trial lawyer should hand off an appeal to an appellate specialist.<sup>5</sup> Among other advantages, she points out the specialized skill set, familiarity with appellate judges, and the objectivity that new appellate counsel can bring to a case.<sup>6</sup> She also notes the prestige that attaches to specialized counsel, recognizing that clients view appellate work as “a distinct service.”<sup>7</sup>

These clients may be correct in their view. According to Kevin McGuire and Joseph Swanson, specialized

appellate counsel achieve much higher rates of being granted certiorari (also known as “cert,” or review on appeal) in the Supreme Court and possibly reach higher rates of winning cases. In his article, *Repeat Players*, Mr. McGuire examined the lawyers in all Supreme Court cases between 1977 to 1982 to determine that “lawyers who litigate in the high court more frequently than their opponents will prevail substantially more often.”<sup>8</sup> Kevin McGuire proposes that the more an attorney appears before the Court, the higher the likelihood of his<sup>9</sup> success.<sup>10</sup> Joseph Swanson takes a micro look at the certiorari process by examining three particular members of the Supreme Court bar in three particular cases, but arrives at a conclusion similar to Mr. McGuire’s: “One can only conclude that hiring experienced Supreme Court counsel to petition the Justices for review may improve one’s chances considerably.”<sup>11</sup>

One consequence of the rise of the elite Supreme Court bar is that judges may expect something different, if not better, of the parties appearing before them than they have in the past. According to Jennifer S. Carroll, appellate judges expect a different level of legal argumentation than trial judges.<sup>12</sup> The “emotional pleas” considered the norm at the trial level, she says, would be “inappropriate at the appellate level.”<sup>13</sup> In fact, she argues that “[a]ppellate practice has evolved into a specialized area of the law, and justifiably so. The fundamentals of appellate advocacy—writing a simple persuasive brief, making an effective oral argument, and having a command of the appellate procedure—necessarily reflect effort, skill, and at the highest level, art.”<sup>14</sup>

Even the Supreme Court agrees. The *American Bar Association Journal* interviewed<sup>15</sup> Justice Antonin Scalia and Bryan A. Garner about their co-authored book *Making Your Case: The Art of Persuading Judges*.<sup>16</sup> The book instructs

appellate lawyers of at all levels on how best to write briefs, argue cases, and, ultimately, convince judges. When the *Journal* asked Justice Scalia his thoughts on the rise of the Supreme Court bar, the Justice said:

I think that there are a significantly larger number of lawyers who appear at least once a term and sometimes several times a term than when I first came on the court . . . . I think I can say that those who do it with great frequency and are paid a lot of money to do it because they are good at it are obviously going to be better—other things being equal—than a novice.<sup>17</sup>

A litigator approaching her first argument in the Supreme Court may rightfully worry that this presumed level of competence creates an ethical duty to hire specialized appellate counsel. Christine Macey compares the benefits of increased chances of being granted certiorari, more effective oral arguments, and the affordability of appellate specialists to the “novice lawyer’s” obligations to educate her client and provide competent representation.<sup>18</sup> Ms. Macey concludes that “although statistics show that experience matters at the High Court,” inexperienced attorneys may fulfill their ethical duties by comprehensively educating their clients and preparing adequately for trial.<sup>19</sup> Moot courts, Supreme Court clinics, brief writing assistance, and online and print resources (including those co-authored by Justices themselves) are all resources attorneys may use to help them prepare.<sup>20</sup>

Ms. Macey also discusses reasons that attorneys may prefer to not pass on their cases to appellate attorneys.

“A lawyer may want to keep [a] case for legitimate reasons, such as client trust or superior knowledge of the facts. Alternatively, a lawyer may wish to keep [a] case for self-interested reasons. A Supreme Court argument is a once-in-a-lifetime opportunity

for most attorneys. It could lead to television or newspaper coverage, as well as future business. Supreme Court advocacy is associated with prestige. . . . Legal fees may also motivate to keep the case to herself.”<sup>21</sup>

Some of these reasons may also be related to a lawyer’s connection with and passion for the particular cause implicated in the case. The lawyers involved in *Lawrence v. Texas* exemplify the way in which the rise of the Supreme Court bar can affect who argues which cases. To explore the rise of the Supreme Court bar, and specifically the role of *Lawrence v. Texas* and impact litigation, in the lesbian, gay, bisexual, and transgender (LGBT) movement, I interviewed Paul Smith and Mitchell Katine and corresponded briefly with Suzanne Goldberg over email.

### III. Interview with Mitchell Katine

Mitchell Katine is a founding partner at Katine and Nechman, LLP, a general practice firm in Houston, Texas that advertises its connection to the LGBT community. The main goal of my interview was to pinpoint Mr. Katine’s role in *Lawrence* and his feelings about his role and the oral arguments.<sup>22</sup>

Mr. Katine provided some context by describing the time preceding the case and how he and Lambda Legal got involved. He graduated from law school in 1985, a year before the Supreme Court’s decision in *Bowers v. Hardwick*,<sup>23</sup> upholding the constitutionality of the Georgia law that criminalized homosexual sodomy. When Mr. Katine started practicing law in Houston, he was one of few openly gay lawyers in a state hostile to the gay community. When LGBT people called him with problems related to their sexual orientation, there was not much he could legally do since Texas had a statute criminalizing sodomy. Mr. Katine instead focused his practice on fighting HIV/AIDS, particularly since the Americans with Disabilities Act was being refined to prevent discrimination on the basis of HIV status. Mr. Katine

developed his reputation as an activist through his work with HIV/AIDS, and it is through this work that he met Suzanne Goldberg of Lambda Legal.

Soon after John Lawrence and Tyrone Garner were arrested, their case was “leaked” to gay and lesbian activists who knew Mr. Katine through his work with the HIV/AIDS community. Mr. Katine agreed to help with the initial criminal hearings. At the time, he specialized in employment law, real estate, and HIV discrimination but had never handled a criminal or constitutional law case. Still, he realized that this was a crucial case and that he did not have the knowledge or experience to handle it. He contacted Suzanne Goldberg at Lambda Legal for assistance and asked about the possibility of Lambda’s involvement. Fortunately enough, Lambda was meeting that day to talk about new cases, so Ms. Goldberg asked him to fax her the papers.

Ms. Goldberg agreed to help. She first explained how the relationship between Lambda and Mr. Katine would function: because none of Lambda’s constitutional lawyers were licensed in Texas, Mr. Katine would play the crucial role of local counsel. At a fundamental level, Mr. Katine was lead counsel and Lambda constituted co-counsel. Mr. Katine handled the local lawyers, the media, and the defendants, Lawrence and Garner. When the case landed on front pages around the country, many lawyers wanted to be involved. Lambda, Mr. Katine, and these other lawyers worked together. Lambda would call Mr. Katine with local procedural questions, he would call one of these lawyers who knew criminal law or local procedure to ask them the question, and then Mr. Katine would forward the answer to Lambda so that it could properly draft the response or brief and proceed with the case.

Mr. Katine often found himself in awe of the brilliant lawyers at Lambda, and, even though he always considered *Lawrence* his case, Mr. Katine says he has never thought that he could or should have handled that case by himself. He was not qualified to, but he appreciated Lambda’s inclusion of him throughout

the case. Mr. Katine understood that his role was local while Lambda's role was more national, and he believes that he never behaved in a way that showed he felt threatened or wanted to challenge Lambda's leadership, even though Lambda pretty much took over the case immediately.<sup>24</sup>

I asked Mr. Katine about Paul Smith. Mr. Katine's first thought was that Mr. Smith was a gracious, kind person, and he knows that Mr. Smith appreciated him.<sup>25</sup> Lambda made the decision to have Mr. Smith argue the case because of his experience—he knew the Court, and the Court knew that he was an openly gay lawyer—but Mr. Katine hopes that people who are in more influential positions can emulate Mr. Smith's appreciation of the people on the ground. Mr. Smith could have said "this is my case to get to the Supreme Court" and could have mishandled it, but he did not do that. Mr. Katine hopes that lawyers will keep their feet on the ground and recognize that their reputation depends upon their relationships with other lawyers who do not have the opportunity to argue the cases on which they work. Mitchell Katine, Paul Smith, and Lambda Legal continue to help each other when they can, and those ties benefit everyone.

#### IV. Interview with Paul Smith

I asked for Paul Smith's opinion, as a repeat player, on being asked to argue *Lawrence* after so many lawyers had worked so hard to bring the case to the Supreme Court.<sup>26</sup> Mr. Smith emphasized that Jenner and Block did not take over this case. First, Lambda made the decision to take on specialized counsel when *Lawrence* reached the Supreme Court. Mr. Smith acknowledged that Lambda's decision was probably partly based on the elite Supreme Court bar's 25-year effort to emphasize the need for specialized counsel and partly based on the significance of this case. Lambda was worried about it even being safe to bring *Lawrence* to the Court in the first place since the Court did (and does) not have a record of being pro-LGBT

rights. Lambda chose Jenner because of its connections and because of the large number of LGBT lawyers working at the firm. Mr. Smith was not the sole reason that Jenner was retained as counsel.

A second example Mr. Smith used to demonstrate that Jenner and Block did not take over the case was that Ruth Harlow wrote half of the brief and helped enormously in getting *amici* to sign on. Going into oral arguments, it was actually still assumed that Ms. Harlow would speak to the Court. When the Supreme Court granted cert, the question of who would argue finally arose, and Ms. Harlow decided not to make her rookie Supreme Court argument in this case. She had to talk Lambda into agreeing with her. The compromise was that she and Lambda would get as much billing in the case as Jenner and Block—Ms. Harlow would stand with Mr. Smith in all conferences and give as many quotes as he would. She does not have any regrets about this decision, and Mr. Smith has tried to repay Lambda for allowing him to do the arguments by securing recognition for Lambda's efforts and serving as co-chair on its board of directors.

I asked Mr. Smith about the accuracy of Mr. Katine's assumption that Lambda hired Mr. Smith because he is gay and because the Court knew at the time that he is gay. Mr. Smith said that the Court was not then aware of his sexual orientation. It was more important that the LGBT community knew he was gay and wanted someone from the community to do the arguments. In contrast, during the arguments in *Bowers v. Hardwick*, Laurence Tribe made a slightly distasteful comment about the "embarrassing details" of homosexuality.<sup>27</sup> The statement may have been a deliberate acknowledgement of the Justices' discomfort with homosexuality, but it did not sit well with those in the LGBT community for whom he was advocating. Lambda was aware that the LGBT community would not want a repeat of that situation. As a gay man, Mr. Smith felt the direct import of the case, but he also says that he would feel the same even if he were not

gay.

Mr. Smith believes that the rise of the elite Supreme Court bar has largely helped more than hindered advocacy groups. The quality of oral arguments has improved substantially since he was a clerk at the Court in 1980, partly because of the rise of this specialized bar, but also because of mooted sessions, better preparation, and the Supreme Court Clinic at Georgetown University, for example. Mr. Smith thinks that specialists are necessary, and are especially valuable because they are able to put a case in the context of the Court's jurisprudence.

Still, Mr. Smith thinks that Ms. Harlow could have won the argument as well. Mr. Smith and Lambda felt they won the case as soon as the Court granted cert, and he could not think of any particular element of his argument that won it for him. It was less about convincing the Court and more about a presence. There was a "sense of history in the room."

Mr. Smith also notes that there was a deliberate effort to keep Mr. Katine involved, and Mr. Katine did receive a lot of credit in Houston for the case. There are always lawyers who litigate cases before appellate lawyers argue them. Attorneys at all stages of the litigation have to get used to it. There is a certain awkwardness that comes from adding lawyers to cases at the last minute, but new and old attorneys must be integrated.

#### V. Suzanne Goldberg and Ruth Harlow

I asked for Ms. Goldberg's view of Mr. Katine's role in the litigation, as well as her own feelings about the Supreme Court arguments.<sup>28</sup> Ms. Goldberg agreed with Mr. Katine that his role relative to Lambda's was very delineated. Mr. Katine was local liaison, and Lambda contributed the constitutional and LGBT law expertise. Ms. Goldberg found it "terrific to have Mitchell as a colleague on the case as he provided important insight into the local environment as well as many colleagues through his law firm who had criminal

law and related expertise that was very useful for the litigation.” Ms. Goldberg does not regret leaving Lambda in the midst of *Lawrence*. Indeed, she is “very, very happy with the ultimate outcome.” Regarding her feelings about the decision to let Paul Smith give the oral arguments, as opposed to Ruth Harlow or herself, she recognizes that “[t]he decision was made by Lambda’s lawyers . . . on the view that Paul Smith would be the ideal advocate for the issues raised by the case, and he did a terrific job!”

## VI. Analysis

The interviews reveal a contradiction. Mr. Smith, Mr. Katine, and Ms. Goldberg all agree that Lambda’s decision to hire Jenner and Block, and Paul Smith in particular, was strategic. At the same time, Mr. Smith concedes that the case appeared to be won when the Court granted cert and that Ms. Harlow could probably have argued the case without fear of losing. Ms. Harlow may have had many reasons for choosing not to argue *Lawrence*, but what are the longer-term impacts of having Mr. Smith argue the case? Several implications come to mind.

First, a favorable Supreme Court ruling in such a high-profile case as *Lawrence* solidifies Paul Smith’s excellent reputation as a member of the Supreme Court bar and lifts Jenner and Block’s reputation as a whole. Second, *Lawrence* only serves to further convince novice lawyers, advocacy groups, and clients that it might be risky to enter the Supreme Court without specialized counsel. As Mr. Smith said, “There had been a 25-year conscious effort made on the part of the ‘Supreme Court bar’ to convince people that they needed special counsel. Lambda’s decision was particularly natural because of the importance of this case.”

Finally, *Lawrence*, and other cases like it, may scare novice lawyers<sup>29</sup> from ever arguing in the Supreme Court at all, especially if they do not work at firms that specialize in Supreme Court practice. “Refusing to allow first-time advocates to argue before the Court,” warns Ms.

Macey, “would be counterproductive in the long run; even the most experienced Supreme Court advocates had a first Supreme Court case.”<sup>30</sup>

So, is the rise of the Supreme Court bar good or bad for appellate advocates? Does it help win cases or does the hype exceed the value and prevent the truly passionate from arguing cases? Is the Supreme Court itself cultivating the growth of the specialized bar to the detriment of the advocate?

Ruth Harlow is not Kevin McGuire’s “typical Supreme Court lawyer.” Paul Smith, perhaps aside from his sexuality, is. Mr. Smith’s qualifications to argue *Lawrence* arise from his appellate work at Jenner and Block. Ms. Harlow’s qualifications arise from being the legal director of an organization with incredibly extensive appellate work on the exact issue that was argued in the Court. So was Paul Smith’s comparatively narrow skill-set worth the decision to have him argue the case? If so, how do advocates like Ms. Harlow ever reach the Supreme Court? Litigation strategy certainly must take into consideration the abilities and experience of the attorneys involved, but it must also take into consideration the needs and desires of the interest group. The *Lawrence* team made considerable sacrifices to ensure that the LGBT movement was best served by the outcome of the case, and their decisions were informed by the presence and importance of the elite Supreme Court bar.

One may extend the analogy in *Lawrence* by arguing that Supreme Court specialists should control impact litigation from the trial level upward. Although most appellate lawyers are not also trial lawyers, a few exceptions exist. Indeed, two such lawyers recently brought an action in a Federal District Court, challenging California’s ban on same-sex marriage.

## VII. Looking forward to

*Perry v. Schwarzenegger*<sup>31</sup>

The litigation strategy of the LGBT movement recently came under close scrutiny when veteran appellate

lawyers David Boies and Ted Olson decided to initiate a federal suit against California’s ban on same-sex marriage in *Perry v. Schwarzenegger*.

Litigation strategy involves calculation and compromise. Mr. Katine, Ms. Goldberg, Ms. Harlow, and Lambda Legal all made sacrifices by deciding to ask Mr. Smith to argue *Lawrence v. Texas* to the Supreme Court. Mr. Boies and Mr. Olson, by bringing the case at the trial level, are effectively preempting those difficult decisions. Because they are accomplished appellate lawyers who have argued multiple cases in the Supreme Court, they have the luxury of being able to follow the case through every step of the appeals process. But many prominent LGBT groups fear that Mr. Boies and Mr. Olson do not value the needs and desires of the LGBT community as much as the *Lawrence* team took such pains to. When Mr. Boies and Mr. Olson first filed the challenge to “Proposition 8,” these groups protested the move, worrying that a potential loss in the Supreme Court would prove more detrimental to LGBT rights than no ruling at all.

[N]ot everyone is thrilled with the decision of Boies and Olson to pretty much go it alone right now on a federal suit -- and that includes the ACLU, the National Center for Lesbian Rights and Lambda Legal. The Boies-Olson team has been jostling with attorneys of these and other groups that have been pursuing LGBT rights litigation for many years, on a piecemeal basis in the states. They wonder how committed the two are to the victory and note that Boies and Olson have next to nothing to lose - - except some bragging rights - - if they fail. Gays and lesbians, however, have everything to lose if the Supreme Court rules against marriage equality.<sup>32</sup>

After their initial reluctance, the American Civil Liberties Union, the National Center for Lesbian Rights, and Lambda

Legal all filed to intervene in the case. Mr. Boies and Mr. Olson refused to let them intervene, and the judge agreed. Chad Griffin, the president of the American Foundation for Equal Rights (“AFER”),<sup>33</sup> wrote a letter to the groups detailing the decision to prevent them from intervening: “You have unrelentingly and unequivocally acted to undermine this case even before it was filed. In light of this, it is inconceivable that you would zealously and effectively litigate this case if you were successful in intervening. Therefore, we will vigorously oppose any motion to intervene.”<sup>34</sup> This overt decision to shut-out the participation of the major LGBT groups was a strong statement that AFER believes that it can win the case through the strength of its lawyers and legal argument, not through the strength of coalition or movement building.

Perhaps AFER’s decision was based purely on Mr. Olson’s and Mr. Boies’ success as members of the Supreme Court bar. Or perhaps it was an informed, accurate decision, calculated to bring the lawyers’ skills and influence to a case likely to face both liberal and conservative judges. But no matter what the outcome of the case, AFER’s independent work may undermine the litigation strategies that the LGBT groups have spent so much time cultivating. By reinforcing the importance of the Supreme Court bar in impact litigation, *Perry* could unnecessarily deter inexperienced lawyers, such as Ruth Harlow, from risking their inaugural arguments on a case of such importance.

Perhaps it is not a surprise that Mr. Boies and Mr. Olson embody Kevin McGuire’s “typical Supreme Court lawyer.” As this type of lawyer continues to be successful in the Supreme Court in a wide variety of cases, clients will continue to turn towards the specialized bar. What does that say to an ever diversifying pool of upcoming lawyers? What does it say to the lawyers who are not that “typical” lawyer? Is it a signal to give up hope of arguing in front of our nation’s highest court? What does it say to advocacy groups? Is it a sign that the

groups need lawyers like Mr. Boies, Mr. Olson, and Mr. Smith in order to win? Or is it a signal that the system needs to change?

## VIII. Conclusion

Creating a successful strategy for impact litigation requires considerable sacrifice and selfless assessment of all factors. As the relative importance of the Supreme Court bar grows, advocacy groups will continue to rely on outside counsel to argue in front of the Supreme Court. *Lawrence v. Texas* and *Perry v. Schwarzenegger* represent two manifestations of this reliance. In *Lawrence*, Lambda made the difficult decision to ask Paul Smith, someone invested in the LGBT community as well as experienced in the Court, to make the arguments. In *Perry*, the elite lawyers have had control of the case from the beginning. In our conversation, Mr. Katine expressed his hope “that through [the] interview, people who are in the more influential positions can emulate Paul Smith by appreciating the people on the ground.” In *Lawrence*, this appreciation was shown through including Mr. Katine in all levels of the litigation and in the decisions to give Lambda equal booking with Mr. Smith at the Supreme Court level. By bringing a case themselves and by preventing the advocacy groups from signing on, the lawyers at the American Foundation for Equal Rights are precluding collaboration and appreciation.

The outcome *Perry* and its subsequent impact on LGBT advocacy groups remain to be seen. I sincerely hope that *Perry v. Schwarzenegger* does not herald an era in which elite lawyers gain control of advocacy groups’ litigation strategies. As always in impact litigation, a balance must be struck between the individual clients’ needs, the needs of the movement, the needs of the advocacy organizations, and the needs of the lawyers. I hope that the balance is found and maintained.

## Endnotes

<sup>1</sup> Heron Greenesmith, J.D. American University, 2010, would like to thank Professor Stephen Wermiel for his encouragement, guidance, and substantive edits. She would also like to thank Mitchell Katine and Paul Smith for taking time out of their busy days to speak with a lowly law student, and Suzanne Goldberg for answering her emails. Heron hopes to one day make them proud by arguing in the Supreme Court as a rather nontraditional member of the elite Supreme Court bar.

<sup>2</sup> Don’t worry about the debt. I’m relying on Income Based Repayment and the new College Cost Reduction and Access Act to pay my loans off for me. At least, I think that is what happens.

<sup>3</sup> For an excellent overview of early LGBT civil rights litigation strategy and the role of Lambda Legal, see ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (University of Michigan Press 2006).

<sup>4</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>5</sup> Michelle Lore, *Should You Hand off Your Appeal?*, *THE MINNESOTA LAWYER*, Mar. 12, 2007.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1 (quoting Minneapolis attorney David T. Schultz).

<sup>8</sup> Kevin McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 188 (1995).

<sup>9</sup> Please note that I do not use “his” lightly—Mr. McGuire also finds that the “typical Supreme Court lawyer is a forty-five-year-old, Harvard-educated, private practitioner, based in New York, Washington, or Chicago . . . [who] specializes in appellate litigation . . . has at last half a dozen Supreme Court cases to his credit . . . [and] is a liberal white Protestant, with strong attachment to the Democratic party.” KEVIN MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* (University Press of Virginia 1993). “He” is also male.

<sup>10</sup> McGuire, *supra* note 8, at 187.

<sup>11</sup> Joseph W. Swanson, *Experience Matters: the rise of the Supreme Court bar and its effect on certiorari*, 9 J. APP. PRAC. PROCESS 175 (2007).

<sup>12</sup> Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, *FL. BAR J.* 107 (2000).

<sup>13</sup> *Id.* at 107.

<sup>14</sup> *Id.* at 109.

<sup>15</sup> Richard Brust, *A Voice for the Write: Tips on Making Your Case from a Supremely Reliable Source*, 94 A.B.A.J. 36 (2008).

<sup>16</sup> ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (Thomson West 2008).

<sup>17</sup> Burst, *supra* note 15, at 4.

<sup>18</sup> Christine M. Macey, *Referral is Not Required: How Inexperienced Supreme Court Advocates Can Fulfill Their Ethical Obligations* (Note), 22 GEO. J. LEGAL ETHICS 979 (2009).

<sup>19</sup> *Id.* at 994.

<sup>20</sup> *Id.* at 990-91.

<sup>21</sup> *Id.* at 982.

<sup>22</sup> Telephone Interview with Mitchell Katine, Senior Partner, Katine and Nechman (Nov. 19, 2009). Mr. Katine is an experienced attorney who has served as an adjunct professor at the University of Houston Law Center and South Texas College of Law and as a partner at Williams, Birnberg & Andersen, LLP.

<sup>23</sup> 478 U.S. 186 (1986).

<sup>24</sup> There were certain times with tension: for example, the *New York Times* ran an article with a picture of Mr. Katine with Lawrence and Garner and did not mention Lambda. The *L.A. Times* had a similar picture from Houston Gay Pride.

<sup>25</sup> Mr. Katine gave a story about their relationship: at the Supreme Court, Mr. Katine sat behind the counsel table where Paul Smith and Ruth Harlow would sit. Paul Smith arrived at the counsel table and picked up the quilled white pen that the Court provides counsel and handed it to Mr. Katine and said he appreciated him. Mr. Katine remembers that moment vividly. Mr. Katine reemphasized that Mr. Smith was very gracious. To this day, whenever Mr. Katine is at an event with Lambda or Paul Smith and talking about the case and the significance, which is far greater than he ever imagined, Lambda and Paul Smith always acknowledge and appreciate him publicly and make him feel part of the decision; he always does the same. Mr. Katine always acknowledges their brilliance—and the sheer number of hours put in: all the research and historical knowledge that Lambda brought.

<sup>26</sup> Interview with Paul Smith, Partner, Jenner and Block, in Wash., D.C. (Nov. 24, 2009).

<sup>27</sup> Transcript of Oral Argument, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>28</sup> Email from Suzanne Goldberg to author (Nov. 25, 2009, 1:57PM) (on file with author).

<sup>29</sup> Here and throughout, the term “novice”

refers to lawyers who have yet to practice in a particular court—the Supreme Court for example. It does not refer to the skill level or length of time a particular lawyer has been practicing.

<sup>30</sup> Macey, *supra* note 21, at 994.

<sup>31</sup> No C 09-2292 VRW (N.D. Cal. 2010).

<sup>32</sup> Democracy for New Mexico, *David Boies Eloquenty Defends Marriage Equality; Some LGBT Legal Groups Grumble*, [http://www.democracyfornewmexico.com/democracy\\_4\\_new\\_mexico/2009/07/david-boies-elloquenty-defends-marriage-equality-some-lgbt-legal-groups-grumble.html](http://www.democracyfornewmexico.com/democracy_4_new_mexico/2009/07/david-boies-elloquenty-defends-marriage-equality-some-lgbt-legal-groups-grumble.html) (July 20, 2009, 14:48 PST).

<sup>33</sup> American Foundation for Equal Rights, <http://www.equalrightsfoundation.org/>. Formed by Mr. Boies and Mr. Olson.

<sup>34</sup> Letter from Chad H. Griffin, Board President, American Foundation for Equal Rights, to Kate Kendall, Executive Director, National Center for Lesbian Rights, Jenifer Pizer, Senior Counsel for Lambda Legal West Regional Office, and Mark Rosenbaum Legal Director of the American Civil Liberties Union of Southern California (July 8, 2009), available at [http://www.scribd.com/full/17233138?ccess\\_key=key-kxoaf0habwd4otk776u](http://www.scribd.com/full/17233138?ccess_key=key-kxoaf0habwd4otk776u).