

Using Judicial Motives to Persuade Judges

A Dramatistic Analysis of the Petitioners’ Brief in *Lawrence v. Texas*

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I. Introduction

Lawrence v. Texas was one of the most important civil rights cases in history. The team petitioning on behalf of John Lawrence and Tyron Garner faced entrenched discrimination against the LGBTQ community and contrary Supreme Court precedent in the form of *Bowers v. Hardwick*. Despite these challenges, Petitioners’ team prevailed, overturning a Texas law forbidding sexual intercourse between two people of the same sex.

This article examines the Petitioners’ winning Brief through the lens of Kenneth Burke’s Dramatism. Dramatism is a technique for rhetorical criticism that attempts to uncover the motives, or underlying rationalizations and worldview, contained in a speaker’s message regarding an action.¹ We are more easily persuaded by people who have similar “properties” to us: those with similar tone, attitudes, and ideas.² Studies have suggested that persuasion is more effective when the speaker’s attitude is presented as congruent to the recipient’s attitude.³ Once the motives of a speaker are uncovered, a listener is able to better evaluate a speaker’s

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¹ Michael A. Overington, *Kenneth Burke and the Method of Dramatism*, THEORY AND SOC’Y, Spring 1977, at 131, 133–34.

² See Dennis G. Day, *Persuasion and the Concept of Identification*, 46 Q. J. SPEECH 270, 271 (1960).

³ Gregory R. Maio & Geoffrey Haddick, *Attitude Change*, in SOCIAL PSYCHOLOGY, HANDBOOK OF BASIC PRINCIPLES 565, 577 (Arie W. Kruglanski & E. Tory Higgins eds., 2d ed. 2007).

message.⁴ Dramatism suggests that if a speaker is able to convey that the motives contained in their⁵ message are similar to the listener's motives, then the listener will "identify" with the speaker and be persuaded.⁶ Although the idea of similar underlying motives being more persuasive was not unique to Burke, he was the first one to suggest that persuasion is solely a product of motive identification.⁷

Section II of this article discusses the history of the Texas statute at issue in *Lawrence v. Texas*, as well as the facts and history surrounding the case of *Lawrence v. Texas*. Section III then analyzes the Petitioners' Brief in detail. Section IV discusses the theory of Dramatism as developed by Kenneth Burke and explains how it can be used both as a method of rhetorical analysis and as a persuasive technique.⁸ Section V analyzes the Petitioners' Brief through the lens of Dramatism as outlined by Kenneth Burke and expanded on by Professor Clarke Rountree. That section concludes that the Petitioners' Brief was able to create identification with the justices by conveying motives that Rountree suggests all judges share. The section further argues that this identification may have persuaded the justices to adopt Petitioners' argument. This article concludes by suggesting advocates may benefit by keeping these principles in mind while crafting persuasive briefs.

II. The Case of *Lawrence v. Texas*

A. The History of the Texas Sodomy Statute

Texas enacted Penal Code Section 21.06, the Homosexual Conduct Law, in 1973. Prior to 1973, all acts of extramarital sexual intercourse, as well as oral and anal sex, were criminalized. These restrictions applied to all couples, regardless of their sex.⁹ In 1973, all laws criminalizing private sexual conduct were decriminalized.¹⁰ Subsequently, however, 21.06 was passed, which recriminalized only sexual acts between two individuals

⁴ See Ryan Erik McGeough & Andrew King, *Dramatism and Kenneth Burke's Pentadic Criticism*, in *RHETORICAL CRITICISM: PERSPECTIVES IN ACTION* 147, 149 (Jim A. Kuypers ed., 2d ed. 2016) (discussing how dramatism was developed to help listeners "cut through" a speaker's rhetoric).

⁵ I use "their" or "they" in this paper as a gender-neutral singular pronoun.

⁶ Day, *supra* note 2, at 273.

⁷ *Id.*

⁸ In recent years, rhetorical criticism of effective, high-profile briefs to develop advocacy skills has become more common. See LINDA BERGER & KATHRYN STANCHI, *LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE* (2018); ROSS GUBERMAN, *POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES* (2d ed. 2014); NOAH A. MESSING, *THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS* (2013).

⁹ Brief of Petitioners at 5, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

¹⁰ *Id.*

of the same sex.¹¹ The law made it a crime to engage in “deviant sexual intercourse” with another individual of the same sex.¹² Deviant sexual intercourse was defined in Section 21.01 as including any contact with the genitals of one person and the mouth or anus of another person.¹³ Prior to *Lawrence*, there were no public court records involving the enforcement of this law against consenting adults in a private space.¹⁴

A similar sodomy law enacted in Georgia had previously been challenged in the case of *Bowers v. Hardwick* in 1986. In that case, the Supreme Court upheld the sodomy law, ruling it was constitutional under the Fourteenth Amendment. In doing so, the Court characterized the right asserted by the petitioner extremely narrowly, holding there was no “right to homosexuals to engage in acts of consensual sodomy.”¹⁵ The *Bowers* court, despite having the opportunity, declined to find a fundamental right involved in private sexual intimacy between two men.¹⁶ This was the case Petitioners would have to overcome in *Lawrence*.

B. The Facts, Issues, and Procedural History of *Lawrence*

On the night of September 17, 1998, officers responding to a false report of a domestic disturbance entered John Lawrence’s home. Robert Eubanks, a former paramour of Tyron Garner, had called the police, claiming there was an armed assailant in the building.¹⁷ Eubanks later admitted he had fabricated the story of the assailant and the gun.¹⁸ In the home, the police disturbed Lawrence, who was allegedly engaged in sexual intercourse with Garner. In fact, whether or not Lawrence and Garner actually had sex (or even were touching at the time) is disputed.¹⁹ Nevertheless, Lawrence and Garner were arrested for violating the Homosexual Conduct Law.²⁰

With the aid of lawyers from Lambda Legal (“Lambda”), a civil rights organization that focused on LGBTQ rights,²¹ and the firm of Jenner &

11 *Id.*

12 *Id.*

13 *Id.* at 2.

14 DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS; HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS 13 (2012).

15 *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

16 *Id.* at 192–95.

17 CARPENTER, *supra* note 14, at 61–66.

18 *Id.* at 77.

19 In his book, Carpenter suggests that the police’s account is ludicrous at best, and it is likely the officers arrested Lawrence and Garner for false reasons, perhaps because of the erotica in the apartment. *Id.* at 71–74, 76.

20 Brief of Petitioners, *supra* note 9, at 2.

21 CARPENTER, *supra* note 14, at 124.

Block,²² Lawrence and Garner challenged the constitutionality of the Homosexual Conduct Law. Initially, Lawrence and Garner suggested in Texas courts that the sodomy law was an impermissible form of sexual orientation discrimination, sex discrimination, and a violation of the constitutional right to privacy.²³ In 2002, the Texas Court of Criminal Appeals declined to declare the Homosexual Conduct Law invalid.²⁴ As a result, Lawrence and Garner appealed the decision to the United States Supreme Court.²⁵ Once the appeal was accepted,²⁶ a team of lawyers, most prominently Ruth Harlow of Lambda and Paul Smith and Bill Hohengarten of Jenner & Block, crafted the Petitioners' Brief, refining the earlier arguments into their final form.²⁷

III. Deconstructing the Petitioners' Brief

The Petitioners' Brief has been heavily referenced as a superlative example of legal writing and has been analyzed in other materials prior to this piece.²⁸ The Brief itself was authored by a team of lawyers with a long history in civil rights work, litigation before the Supreme Court, or both. Harlow, a Yale graduate, had spent virtually her whole career fighting for LGBTQ rights for both Lambda and the ACLU.²⁹ She was extremely familiar with the bigotry the LGBTQ community could face in the legal system, having once encountered a prosecutor who argued putting a gay man in prison was like putting a child in a candy store.³⁰ Hohengarten, a former clerk to Justice David Souter, was an experienced Supreme Court litigator.³¹ Additionally, he had briefly worked with Harlow in 1992 on the ACLU gay rights project.³² Finally, Smith, who argued the case for Petitioners, had some of the most extensive litigation experience in the Supreme Court in history, arguing eight cases and filing over 100 cert

²² *Id.* at 182.

²³ *Id.* at 155–58.

²⁴ *Id.* at 178.

²⁵ Petition for a Writ of Certiorari, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

²⁶ *Lawrence v. State*, 41 S.W.3d 349 (Tex. Ct. App. 2001), *cert. granted*, *Lawrence v. Texas*, 537 U.S. 1044 (2002).

²⁷ CARPENTER, *supra* note 14, at 185.

²⁸ For example, Linda Edwards included a discussion of the Brief in a work discussing exceptional examples of legal writing. See generally LINDA HOLDEMAN EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD PART 2 (6th ed. 2012).

²⁹ CARPENTER, *supra* note 14, at 127–29.

³⁰ *Id.* at 128.

³¹ *Id.* at 182.

³² *Id.*

petitions or oppositions.³³ While not as seasoned as Harlow in litigating LGBTQ rights, Smith had some experience, writing an amicus brief for the American Psychology Association in the Supreme Court case of *Romer v. Evans* and briefs in cases challenging state sodomy laws.³⁴

Aware of the challenges facing them, Petitioners carefully framed the Brief with an eye on both public opinion and the *Bowers* decision. While sexual orientation discrimination was still a contentious issue at the time, privacy rights and general principles of equality were much less controversial.³⁵ Because of this, Petitioners chose to base the legal arguments on the two principles of privacy rights under the Due Process Clause and Equal Protection Clause, both guaranteed by the Fourteenth Amendment of the Constitution.³⁶ Working off of these twin arguments, the team writing the Brief argued that *Bowers* should be overruled and the Texas sodomy law declared unconstitutional.

Roughly the first half of the Brief's argument was based on the right to privacy under the Due Process Clause of the Fourteenth Amendment. Petitioners argued, based on prior cases such as *Griswold v. Connecticut*³⁷ and *Planned Parenthood v. Casey*,³⁸ that the government was invading the privacy interests of LGBTQ individuals in their most intimate setting.³⁹ These privacy rights involved intimacy, family, relationships, and personal dignity.⁴⁰ Notably, the Brief minimized any reference to homosexual conduct or the specific acts outlawed in the statute. Dale Carpenter, a legal commenter and author, suggested the Brief's writers wanted the Court to see *Lawrence* as a case about families and relationships, not about sex.⁴¹ Petitioners emphasized that any infringement of these privacy rights suggested a violation of the Due Process Clause.⁴² Additionally, Petitioners discussed the increasing acceptance of LGBTQ people as being normal, healthy, and able to live fulfilling lives, rebutting the long-held belief that homosexuality involves mental health issues or moral degeneracy.⁴³ Finally, the Brief emphasized that the State had no countervailing interest in justifying a privacy invasion besides morality.⁴⁴ Petitioners argued that, while powerful countervailing interests by the state can justify some burden on liberty interests,⁴⁵ Texas's justification essentially amounted to a statement of disapproval of the conduct Lawrence and Garner committed.⁴⁶

33 *Id.* at 211–12.

34 *Id.* at 212.

35 *Id.* at 185–87.

36 *Id.* at 184–85.

37 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

39 See Brief of Petitioners, *supra* note 9, at 10–11.

40 CARPENTER, *supra* note 14, at 187.

41 *Id.*

42 See Brief of Petitioners, *supra* note 9, at 9.

43 *Id.* at 16.

44 *Id.* at 26.

45 See *id.* at 25.

46 See *id.* at 28.

In cases involving similar protected liberty interests such as *Casey* or *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*,⁴⁷ the state was only able to justify the infringement on privacy rights by showing the state's compelling interest in preserving human life. Petitioners argued that unlike the State in those cases, Texas showed no compelling state interest even remotely able to justify the intrusion in this case.⁴⁸

The second half of the Brief was based on an Equal Protection Clause argument. This section argued that the statute discriminatorily treated gay people differently than heterosexuals, in violation of the Fourteenth Amendment.⁴⁹ Petitioners alleged that criminalization of sodomy between two adults of the same sex while permitting it between couples of different sexes constituted disparate treatment.⁵⁰ Disparate treatment by the government could be justified if Texas was able to show a rational basis for the treatment.⁵¹ However, Petitioners argued Texas was unable to meet even this deferential standard. Rather, the state of Texas had no rational basis for treating homosexual conduct differently from heterosexual conduct. The only justification offered by the state was morality, which Petitioners claimed was an invalid justification for disparate treatment.⁵² If the legislature's view of what was considered moral was sufficient to justify disparate treatment, any discriminatory law, no matter how vile, could be justified.⁵³

The Petitioners further argued that, even if morality was accepted as a rational basis for imposing the law, the disparate treatment of gay people in the Texas statute was in truth motivated by "archaic and unfounded negative attitudes towards a group," not morality.⁵⁴ Petitioners emphasized that negative attitudes towards one group could not provide legal justification for disparate treatment, even if those attitudes were rooted in moral justifications.⁵⁵

The Equal Protection Clause section of the Brief also contextualized the law by suggesting it was part of a long history of discrimination against the LGBTQ community. Petitioners recounted how LGBTQ individuals were historically characterized as suffering from mental illness or sexual deviance.⁵⁶ They described the Texas homosexual conduct law as "a remnant of a historical pattern of repressive law enforcement measures" that had supported widespread discrimination against LGBTQ Americans.⁵⁷ Finally, Petitioners gave examples of state-sponsored

⁴⁷ *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990).

⁴⁸ Brief of Petitioners, *supra* note 9, at 26.

⁴⁹ *Id.* at 32.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 36–38.

⁵³ *Id.*

⁵⁴ *Id.* at 38.

⁵⁵ *Id.*

⁵⁶ *Id.* at 46.

⁵⁷ *Id.*

discriminatory conduct, including involuntary commitment of gay Americans, conversion therapy, authorizations of arrests for “‘appearing’ to be gay or lesbian” and prevention of gay Americans from having the same rights as heterosexuals.⁵⁸ Although acknowledging that great strides had been made in the field of equality, Petitioners argued that discrimination still continued, and the Constitution “neither knows nor tolerates classes among citizens.”⁵⁹ Petitioners argued that because of this, the state could not claim that “freedom from state intrusion into the private sexual intimacy of two consenting adults is an important aspect of liberty for most of its citizens, but then deny that liberty to a minority.”⁶⁰

Even when viewed from a purely legal perspective, the Brief is a superlative example of persuasive writing. However, when viewed through the lens of Dramatism, it is evident that motives underlying the brief were ideal for persuading the Court.

IV. Dramatism as a Method for Rhetorical Criticism and Persuasion

Kenneth Burke was one of the most influential rhetorical critics of the twentieth century when it came to understanding the rhetoric of others.⁶¹ Burke was born in 1897, and spent most of his life writing, working, and teaching in New York and Vermont.⁶² Although never holding a formal position in scholarship such as a professorship, Burke was well known for the books he wrote discussing motives: the attitudes, values, and beliefs which underlie human action.⁶³ These books, *A Grammar of Motives* and *A Rhetoric of Motives*, discussed both Burke’s overarching theory of dramatism and a toolset to identify motives he called the “pentad.”⁶⁴ Having lived through two World Wars, Burke was concerned that people had difficulty cutting through rhetorical techniques to discover the true worldviews of speakers.⁶⁵ In order to analyze how speakers and writers characterize human action, and to analyze the flood of persuasive messages that we deal with every day, Burke developed dramatism, which included the pentad, a rhetorical framework

⁵⁸ *Id.*

⁵⁹ *Id.* at 48 (quoting *Romer v. Evans*, 517 U.S. 620, 623 (1996)).

⁶⁰ *Id.* at 50.

⁶¹ McGeough & King, *supra* note 4, at 147.

⁶² John McGowan, *Burke, Kenneth*, in *THE ENCYCLOPEDIA OF LITERARY AND CULTURAL THEORY* (Michael Ryan ed., 2011).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ McGeough & King, *supra* note 4, at 151.

to analyze discourse and better understand how speakers view the world.⁶⁶

Burke's method of rhetorical criticism can be used not only to reveal the writer's underlying worldview, but as a means of persuading listeners. Listeners tend to be more amenable to new ideas if they are framed as coming from similar motives as those of the listeners.⁶⁷ If writers are able to frame their motives in a way that increases the likelihood of audience identification, persuasion is substantially more likely to occur.⁶⁸

A. The Pentad as a Tool for Revealing Writer's Motives

The goal of Burkean analysis is to reveal how the strategic choices of speakers in describing an action can reveal the speaker's underlying worldview regarding the action.⁶⁹ Of special interest to Burke was the process of understanding what occurs when a speaker describes "what people are doing and why they are doing it."⁷⁰ In understanding why people's actions are characterized in a certain way, one can understand the motives of the speaker.⁷¹ Burke believed these "motives" could be discovered through textual analysis of thought or language.⁷² For example, in a speech discussing a decision to forbid illegal immigration into the United States, Burkean analysis could reveal that the speaker's motive for their decision was a belief that immigrants are fundamentally dangerous or less important than citizens. Once this motive is understood, a listener could better understand the implications of the offered message.⁷³

In 1945, Burke published many of his ideas regarding motives and the pentad in a book he called *A Grammar of Motives*.⁷⁴ Burke's theory of Dramatism is designed to identify the grammar through which humans express their experience of the world.⁷⁵ Pentadic analysis allows us to take this grammar and uncover the worldview of a speaker in the characterization of an action.⁷⁶ The choice to frame, emphasize, or deemphasize the

⁶⁶ *Id.* at 149.

⁶⁷ Day, *supra* note 2, at 273.

⁶⁸ *Id.*

⁶⁹ McGeough & King, *supra* note 4, at 161–62.

⁷⁰ KENNETH BURKE, *A GRAMMAR OF MOTIVES*, xv (Univ. of Cal. Press ed. 1969).

⁷¹ See McGeough & King, *supra* note 4, at 151.

⁷² *Id.* at 150.

⁷³ *Id.* at 149.

⁷⁴ *Id.*

⁷⁵ Jeffrey W. Murray, *Kenneth Burke: A Dialogue of Motives*, 35 *PHIL. & RHETORIC* 22, 33 (2002).

⁷⁶ See McGeough & King, *supra* note 4, at 161–62 ("Making the perspectives [of the speaker] visible through application of the pentad to the text allows us to . . . evaluate a text.")

pentadic elements of an event in certain ways can reveal the underlying motive of the speaker.⁷⁷ It is through pentadic analysis that motives can be identified.⁷⁸

In any statement that describes a situation surrounding human action, there must be a characterization of five elements.⁷⁹ What happened, or the act. Where, when, or under what circumstances the act was done, or the scene. Who did the act, and with what characteristics, or the agent. How and in what way the act was done, or the agency. And why the act was done, or the purpose.⁸⁰ In defining the pentad, Burke explained that the elements he chose revealed the strategic spots in a message where ambiguities arose and could be manipulated.⁸¹ Burke did not create the pentad, but repurposed it from earlier descriptions of narrative form identified by Greek philosophers.⁸² He believed that these elements of form existed logically prior to his identification, as an intrinsic part of the human experience and any description of action slots naturally into these preconceived elements.⁸³ This is because we, as humans, experience and interpret life as narrative form.⁸⁴

In making a choice to emphasize or deemphasize these elements, a speaker creates different characterizations of what is occurring.⁸⁵ In doing so, the speaker can reveal the motives underlying their actions. For example, emphasizing the purpose of an action over the act could suggest a motive of “the end justifies the means.” Comparatively, emphasizing the scene over the agent suggests a motive of a “product of their environment.”⁸⁶ Further, in discussing motives, the ratios of the pentad, or which elements are emphasized, are just as important as the elements themselves. Which element the speaker emphasizes can convey different underlying meanings in their messages. The act especially is important, as it is often the dominant element in persuasive pieces.⁸⁷

77 See *id.* at 161.

78 See *id.* at 151.

79 J. Clarke Rountree, *Coming to Terms with Kenneth Burke's Pentad*, AM. COMM. J., May 1988, at 1; BURKE, A GRAMMAR OF MOTIVES, *supra* note 70, at xv.

80 BURKE, A GRAMMAR OF MOTIVES, *supra* note 70, at xv.

81 *Id.* at xviii.

82 McGeough & King, *supra* note 4, at 150.

83 *Id.* at 150–51.

84 *Id.*

85 BURKE, A GRAMMAR OF MOTIVES, *supra* note 70, at xx.

86 See McGeough & King, *supra* note 4, at 157.

87 *Id.* at 148.

In choosing to describe and emphasize certain elements, speakers are conveying motives that suggest a definition of reality.⁸⁸ In doing so, they are also deflecting competing realities; framing a scenario in one way can implicitly exclude other frames.⁸⁹ Characterizing a baseball player as successful by emphasizing his or her physical traits suggests the speaker views the player's success as a product of the agent—the player's own innate characteristics. This in turn implies external factors are not responsible for the player's success. Conversely, describing a player as successful because of the training he undergoes implies the agency or scene predominated over the agent.

Characterizations can be used to not only deflect competing realities, but also to imply a reality that casts an opposing side in a negative light or to constrict the other side's ability to reframe the situation. This is called a terministic screen.⁹⁰ For example, opponents of abortion favor themselves as pro-life, suggesting that their opposition is against life.⁹¹ Reality is not only defined by the speaker, it is screened away from other realities through the terminologies used.⁹²

B. Dramatism as a Tool for Persuasion

Continuing with the concepts he discussed with his work in *A Grammar of Motives*, Burke published his next book, *A Rhetoric of Motives*, in 1950. While *Grammar* described motives as a tool for identifying a speaker's underlying worldview, *Rhetoric* suggested motives and Dramatism could be used as a tool for persuasion. Building on his description of motives identified in *Grammar*, Burke described in *Rhetoric* the mechanisms by which these motives become shared and persuasion occurs.⁹³ *Rhetoric* suggests that a speaker persuades an audience by identification, or by characterizing the speaker's motive as "consubstantial" with that of the audience.⁹⁴ By consubstantiality, Burke did not mean merely agreeing with a speaker, but rather the audience and speaker's motives and worldview are substantially the same regarding a given situation.⁹⁵

⁸⁸ BURKE, *A GRAMMAR OF MOTIVES*, *supra* note 70, at 59 (suggesting that humans seek vocabularies that select certain realities).

⁸⁹ *Id.*

⁹⁰ See Richard Bello, *A Burkeian Analysis of the "Political Correctness" Confrontation in Higher Education*, S. COMM. J., Spring 1976, at 243, 244.

⁹¹ See McGeough & King, *supra* note 4, at 148.

⁹² Bello, *supra* note 90, at 244.

⁹³ Murray, *supra* note 75, at 33.

⁹⁴ KENNETH BURKE, *A RHETORIC OF MOTIVES*, 46 (1950).

⁹⁵ *Id.* at 21.

Burke theorized that if a person was able to convey that their motives are substantially the same as the audience, identification and subsequently persuasion would occur.⁹⁶ As Burke explained, “you persuade a man only insofar as you . . . identify[] your ways with him.”⁹⁷

C. Using Dramatism to Reveal Judicial Motives

Clarke Rountree has built on Burke’s theory of identification in the context of legal writing by incorporating a theory of judicial motives into Dramatism. Professor Rountree has suggested that in writing an opinion, a judge must persuade readers that their rationale “embod[ies] proper judicial motives.”⁹⁸ There are three of these judicial motives that a court should ideally convey in its decisions.⁹⁹ First, a judge must show that “prior cases, long-accepted legal principles, legislative statutes, administrative regulations, state and federal constitutions, and their authors (whose intentions are invoked) require the decision.”¹⁰⁰ Second, a judge must show that “the decision yields the greatest justice in the instant case.”¹⁰¹ And third, a judge must show “that the decision creates the fairest and most efficacious results in the long run, providing clear direction and a just outcome for all foreseeable cases like it.”¹⁰² A legitimate judicial opinion should ideally reflect these proper judicial motives, rather than a judge’s personal motive.¹⁰³ Failing to demonstrate these judicial ideals runs the risk of the opinion being viewed as illegitimate.¹⁰⁴ This theory recognizes that judges do not always issue opinions that perfectly convey all three motives. For example, Rountree suggests that the case of *Bush v. Gore* failed to successfully convey *any* of these motives, especially future equity, as the justices limited the holding to the present case.¹⁰⁵ Instead, according to Rountree, judges seek to convey they are conforming with as many of the motives as possible.

Typically, identification is seen as occurring when a speaker’s motives become consubstantial with the audience’s motives.¹⁰⁶ Burke’s view of identification, as applied to the context of legal persuasion, suggests that to persuade a judge to rule a certain way, an advocate would have to create

96 See Day, *supra* note 2, at 273.

97 BURKE, A RHETORIC OF MOTIVES, *supra* note 94, at 55.

98 CLARKE ROUNTREE, JUDGING THE SUPREME COURT: CONSTRUCTIONS OF MOTIVES IN BUSH V. GORE 5 (2007) (ebook).

99 *Id.* at 16.

100 *Id.*

101 *Id.*

102 *Id.*

103 See *id.* at 1–2, 5.

104 See *id.* at xiv.

105 See *id.* at 49, 392 (suggesting this failure was a factor in making the justification for the outcome in *Bush v. Gore* highly unpersuasive).

106 See BURKE, A RHETORIC OF MOTIVES, *supra* note 94, at 46.

consubstantiality with a judge's personal motives.¹⁰⁷ Subsequently, the judge would then turn the advocate's position into a valid legal opinion.

However, this type of identification may not convince a judge to rule in an advocate's favor. Judges are expected to, at least in appearance, base their rulings on legal principles, not their personal feelings about the case.¹⁰⁸ Their personal motives should not be reflected in an opinion, and judges cannot simply casually disregard the legal principles they are expected to base their ruling on.¹⁰⁹ At a minimum, an opinion must at least convey that the motives contained in a decision are based on accepted judicial principles.¹¹⁰ Given Rountree's suggestion that judges are constrained to demonstrate the three judicial motives as a consequence of their position,¹¹¹ any judicial opinion can be viewed as inherently seeking to convey these motives. Of course, opinions sometimes fail to convey all three of the motives. In failing to convey even one, the opinion is risked as being viewed as illegitimate or unpersuasive; therefore, judges seek to convey all three motives whenever possible.¹¹²

Therefore, if a speaker is able to convey that their position is consubstantial with and supported by these judicial motives, a judge should identify with the speaker's argument. This judicial motive identification may be even more appealing to a judge than personal identification, as the judge can subsequently use the representation of these motives to support their opinion without having to reframe them.

V. Alignment of Petitioners' Motives with Judicial Motives

The ultimate goal of the writers of the Petitioners' Brief in *Lawrence v. Texas* was to persuade the justices of the Supreme Court to agree with their argument. In order to do that, the writers needed the justices to identify with them, for as Burke explained, identification is the key to persuasion. Therefore, the approach of a successful appellate advocate can be seen as attempting to convey motives that are substantially equivalent to these judicial ideals (which can be seen by analysis with the pentad). Once identification is achieved from this, persuasion can occur.

107 See *id.* at 55.

108 ROUNTREE, *supra* note 98, at 1–2, 5.

109 J. Clarke Rountree, *Instantiating "The Law" and its Dissents in Korematsu v. United States: A Dramatistic Analysis of Judicial Discourse*, Q. J. SPEECH, Feb. 2001, at 1, 3.

110 See ROUNTREE, *supra* note 98, at 1–2, 5.

111 See *id.* at 4–5.

112 See *id.* at 16.

A. Analyzing the Pentad in the Petitioners' Brief

In order to discuss how the motives of the Brief were conveyed to the Court, the pentad and pentadic ratios can be used to identify and analyze the underlying motives in the Brief. The framing of the factual circumstances surrounding this case, and the effectiveness thereof, can be clearly shown by identifying the pentadic ratios present in the Brief.¹¹³

1. Act

The act in this case was Texas's enactment of the Homosexual Conduct Law, and more broadly, the imposition of regulations on the intimate relations of gay couples. Petitioners did not merely focus on the law itself, but also on the law's effect on the people it regulates. For example, Petitioners wrote that the law "singl[es] out a certain class of citizens for disfavored legal status,"¹¹⁴ and described it as imposing "one particular view of how to conduct one's most private relationships."¹¹⁵ Focusing on the wider effect of the law, rather than just the law itself, allowed the writers to emphasize the magnitude of the act. Framing the act as a movement affecting an entire class of citizens' status suggests a far more insidious act than preventing individuals from engaging in sodomy.

Additionally, the history of the law was prominently remarked on in the Brief. At the start of the Brief, Petitioners drew attention to the enactment of the law: how private sexual behavior was decriminalized, then recriminalized only for gay couples.¹¹⁶ The history of the bill further contextualized this law as a smaller part of a greater whole. Rather than just a singular, insular bill, the law was framed as just a further example of a pattern of continuous discriminatory acts against gay couples in Texas.¹¹⁷

2. Agent

Petitioners characterized the agent in *Lawrence* as the "overly controlling and intrusive government."¹¹⁸ Petitioners emphasized the government's characteristics as intrusive¹¹⁹ and advocating an antiquated

¹¹³ I spoke to Paul Smith, one of the Brief's writers. He explained that while the writers did generally have the considerations Rountree identified as judicial motives in mind, the close conformation between the Brief and the judicial motives appears to have been a happy accident. Telephone Interview with Paul Smith, Attorney for John Geddes Lawrence Jr. and Tyron Garner (Feb. 14, 2020).

¹¹⁴ Brief of Petitioners, *supra* note 9, at 31 (quoting *Romer v. Evans*, 517 U.S. 620, 623 (1996)).

¹¹⁵ *Id.* at 28.

¹¹⁶ *Id.* at 5.

¹¹⁷ *Id.* at 46–47.

¹¹⁸ *Id.* at 15.

¹¹⁹ *Id.*

view about sexual morality.¹²⁰ For example, the government was framed as harboring animus against LGBTQ individuals based on the same type of puritan moral interests that led women to be burned at the stake,¹²¹ and thus possessing a desire to intrude in those intimate interactions that was “unwarranted”¹²² and based only on “dislike of a smaller group who are different.”¹²³

The choice to focus on the government as the agent, rather than Lawrence and Garner, allowed Petitioners to emphasize that the rights the Homosexual Conduct Law violated were not exclusive to LGBTQ Americans. Rather, the Court risked giving the government the right to violate the rights of all Americans.¹²⁴ Petitioners framed the government as an actor in need of restraint, describing democracy as requiring limits to be placed on the degree the government can intrude into life.¹²⁵ This characterization helped foreshadow and support the due process argument that would occur later in the Brief; because the government was the actor infringing on rights, its conduct could be constitutionally proscribed.¹²⁶

3. Scene

The scene was characterized as the environment of discrimination the LGBTQ community has faced in America. The Brief spent a large part of its second half describing the landscape in which the law has been passed, recounting how gay people have been viewed as “sick,” suffered from endemic “anti-gay prejudice,” and subjected to “a historical pattern of repressive law enforcement measures that have reinforced an outcast status for gay citizens.”¹²⁷ Furthermore, the description of the enactment of the bill reinforced the underlying scene as a hostile environment that discriminated against gay couples.¹²⁸

Contextualizing the scene as part of a greater pattern of discrimination against gay people added credibility and served to support the argument that the law’s purpose was discriminatory. This use of scene to support the characterization of the purpose is an example of gram-

120 *Id.* at 28.

121 *Id.* at 37.

122 *Id.* at 12.

123 *Id.* at 38.

124 See CARPENTER, *supra* note 14, at 195–96 (recounting how Petitioners chose to base their arguments on the government’s intrusion into a private home rather than sexual-orientation discrimination to appeal to the justices).

125 Brief of Petitioners, *supra* note 9, at 16.

126 *Id.* at 13 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992)).

127 *Id.* at 46–47.

128 *Id.* at 5.

matical anchoring. If an audience already accepts a pentadic relationship, or the characterization of an element of the pentad is not in dispute, the speaker can build on that representation to characterize other elements in the pentad.¹²⁹ The Court had found in the past that the purpose of certain laws was to limit the rights of gay people.¹³⁰ By suggesting through the scene that the Homosexual Conduct Act was an outgrowth of these past discriminatory acts,¹³¹ Petitioners were able to add legitimacy to the argument that the law was passed for discriminatory purposes.

4. Purpose

Petitioners characterized the purpose of the law as discrimination and repression against gay people in the guise of morality. The Brief suggested this in two ways. First, the Brief argued that the true purpose of the law was to label a certain group as being less worthy of protection than others because of unfounded animosity towards gay people, merely “[u]sing a moral lens to describe negative attitudes about a group.”¹³² This characterization is supported by the fact that the law only applied to gay people, despite heterosexual people being able to perform the same act. Rather than any valid reason for the law, the state of Texas was described as having a “bald preference for those with the most common sexual orientation and dislike of a smaller group who are different.”¹³³

Second, the Brief adds further legitimacy to this characterization by portraying the law as yet another in a long line of laws meant only to discriminate against gay Americans.¹³⁴ As previously stated in the analysis of the act and scene, this bill was just another in the long line of measures meant by the state to restrict the rights of gay Americans. In the face of this history, it was further reinforced that the true purpose of the law was, as Petitioners stated, rooted in “dislike of a smaller group.”¹³⁵ Petitioners emphasized that, in a vacuum, perhaps claims of other purposes may have been more credible, but when faced with the history, the true purpose of the law was characterized as evident.¹³⁶

129 Rountree, *Coming to Terms*, *supra* note 79, at 1.

130 *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996).

131 Brief of Petitioners, *supra* note 9, at 45–48.

132 *Id.* at 37.

133 *Id.* at 38.

134 *Id.* While this framing may seem like it overlaps with the scene element, Burke remarked that the elements of the pentad are not indivisible, and in fact frequently overlap in some manner. *See BURKE, A GRAMMAR OF MOTIVES*, *supra* note 70, at xviii–xx.

135 Brief of Petitioners, *supra* note 9, at 38.

136 *Id.*

Finally, Petitioners suggested that even if the state’s characterization of the purpose of the law—public morality—was accepted, that purpose had little ability to justify anything, as it was an invalid basis for a law.¹³⁷ This characterization additionally served as a terministic screen to deflect the audience away from the competing pentadic form: that this act and the necessary evil of the invasion of privacy was *justified* by the state’s ability to proscribe morality and protect its citizens.¹³⁸

5. Agency

Finally, the agency was characterized as the extreme lengths to which the government went in order to control the intimate relationships of its citizens, by reaching into the bedroom and private lives of gay Americans. The intrusive character of the law was emphasized throughout the Brief, as the enforcement of the law was described as “intrud[ing] into the privacy of innumerable homes by regulating the actual physical details of how consenting adults must conduct their most intimate relationships.”¹³⁹

Furthermore, this mechanism was framed as constitutionally suspect. Pointing to various cases involving bodily autonomy, Petitioners suggested that any time a government actor reached into the private sphere of the home through the “license” of the law, it is a privacy intrusion of the most stark sense.¹⁴⁰ The gravity of this intrusion is portrayed as one of the most serious things the government can do, thereby giving legitimacy to Petitioners’ claims.¹⁴¹

B. The Pentadic Ratios and Screens of the Brief

Strategic representation of motives typically involves two main processes. First, there is characterization of pentadic elements and their hierarchal ratios: what Rountree calls their terministic relationships.¹⁴² Certain elements are portrayed as dominant, and have more focus directed toward them. Second, terministic screens are used to deflect competing pentadic characterizations, as one speaker attempts to restrict alternate characterizations of the pentadic elements.¹⁴³ The dominant elements in the Brief were agency and act in the first half, while purpose was emphasized in the second half.

¹³⁷ *Id.* at 36–37.

¹³⁸ See *Romer v. Evans*, 517 U.S. 620, 637–38 (1996) (Scalia, J., dissenting).

¹³⁹ Brief of Petitioners, *supra* note 9, at 28.

¹⁴⁰ *Id.* at 14–15.

¹⁴¹ *Id.* at 14.

¹⁴² Rountree, *Coming to Terms*, *supra* note 79, at 1.

¹⁴³ Bello, *supra* note 90, at 244.

1. Pentadic Ratios in the Due Process Clause Argument

The first half of the Brief, which based its argument on due process, characterized agency and act as dominant over purpose. The result of this framing was to characterize the act and the agency as unjustified by whatever purpose Texas claimed the law had. In the Due Process Clause half of the Brief, Petitioners argued that past precedent and the Constitution created a protected area of private intimacy that the government cannot intrude in, barring a compelling purpose.¹⁴⁴ However, Texas did not have such a purpose.¹⁴⁵ In other words, the agency and act were emphasized as being dominant over purpose here.

The very first line in the argument section of the Brief quotes the case of *Planned Parenthood v. Casey*, declaring, “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”¹⁴⁶ From the beginning of the Brief, Petitioners established that there are methods of legal enforcement that the government cannot perform, no matter what. The Brief, through this declaration, set an ironclad rule from the start that, even if the act itself was legitimate, or undertaken for legitimate reasons, past precedent established that there are means through which a government cannot under any circumstances act. This framing of the agency-purpose ratio suggested that, just as was the case in *Casey*,¹⁴⁷ the means of the law could not be justified by its ends.

As the Brief continued, Petitioners further expounded upon the act of the law itself to show the incredibly detrimental effect it had on gay people. Petitioners emphasized the repugnancy of the law’s effects, declaring that “[b]eing forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation.”¹⁴⁸ This legitimacy of this characterization of the act was enhanced by references to the Court’s past decision in *Griswold*, which forbade enforcement of a prohibition that, through “regulation of the private details of sexual relations between two adults sharing an intimate relationship . . . intruded directly into a married couple’s private sexual intimacy.”¹⁴⁹ More than being just intrusive, this act in *Griswold* was characterized by the Court as “the grossest form[] of intrusion in the homes of individuals and couples.”¹⁵⁰

144 Other academics analyzing this Brief have emphasized that Petitioners chose to frame the issue as the right to intimacy, not to sexual intercourse. EDWARDS, *supra* note 28, at 408. This can be viewed as further subordination of the act.

145 Brief of Petitioners, *supra* note 9, at 26.

146 *Id.* at 10 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

147 See *Casey*, 505 U.S. at 878–79.

148 Brief of Petitioners, *supra* note 9, at 11.

149 *Id.* at 12.

150 *Id.* at 15.

This characterization additionally served to deflect a competing characterization, that the burden of the act may be relatively low compared to the important purpose. Both the act (prevention of sexual intimacy of adults and altering the status of an entire group of people) and the agency (legally enforced regulation of sexual acts) were presented as reprehensible on their own. Together, the law and its enforcement were described as “utterly destroy[ing] that freedom [of sexual intimacy].”¹⁵¹

Petitioners characterized the purported purpose of the law as unable to justify the high burdens that the law puts on its citizens. The framing of purpose in this manner was supported by past precedent requiring a compelling state interest for similarly burdensome laws.¹⁵² Petitioners rejected any idea that the purpose could justify the act or agency, stating that there “is no countervailing State interest remotely comparable to those weighed by this Court in other recent cases involving fundamental liberties.”¹⁵³ In fact, according to Petitioners, the state “ha[d] conceded that Section 21.06 furthers no compelling state interest.”¹⁵⁴ The only justification the state offered was the encouragement of public morality, which Petitioners labeled “illegitimate.”¹⁵⁵ Additionally, the Brief warned that accepting the purpose as justifying the agency and the acts could lead to inequitable holdings in the future. If the purpose of public morality was held sufficient to justify these acts, “the power of government to reject liberty interests would be unlimited.”¹⁵⁶

Petitioners also used terministic screens in their characterization of the law in this section of the Brief. Framing morality as the only presented justification, while at the same time claiming the state had conceded there is no compelling state interest, deflected the audience’s attention away from any idea that the state can use morality as a compelling state interest. Whatever minor purpose the law may have had, Petitioners used this screen to suggest it could not justify the repugnancy of the act and agency.¹⁵⁷

The due process argument was first in the Brief for a reason: it was seen by Petitioners as a superior way to tell the story and frame their arguments.¹⁵⁸ Petitioners chose to ground their argument in the funda-

¹⁵¹ *Id.* at 13.

¹⁵² *Id.* at 26 (citing *Casey*, 505 U.S. at 871–79 and *Troxel v. Granville*, 530 U.S. 57, 73 (2000)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 26 (“This Court, however, has never allowed fundamental freedoms to be circumscribed simply to enforce majority preferences or moral views concerning deeply personal matters.”)

¹⁵⁶ *Id.* at 28.

¹⁵⁷ See EDWARDS, *supra* note 28, at 408 (discussing how Petitioners deemphasized the purpose of the law).

¹⁵⁸ CARPENTER, *supra* note 14, at 194–95.

mental rights of private intimacy, arguing to the Court that an act which violated this due process right required a high countervailing purpose to justify. According to Petitioners, because the purpose was shown to be subordinated to the act and agency here, the law could not be justified and was unconstitutional.¹⁵⁹

2. Pentadic Ratios in the Equal Protection Clause Argument

The second half of the Brief, which based its argument on the Equal Protection Clause, focused mainly on purpose. That section sought to delegitimize any use of the purpose to justify the law, framing the purpose as entirely based on discrimination. In doing so, Petitioners attempted to frame the purpose as unable to justify any act or law, which served to both subordinate the purpose to the other parts of the pentad and deflect competing characterizations. Rather than focusing on the domination of act and agency over purpose, this section solely focused on the purpose of the law. Here, Petitioners attempted to subordinate purpose to the extent that this element became completely delegitimized in its ability to positively characterize the law. If accepted, this characterization would impose serious grammatical constraints on the government, as it would screen away any use of purpose to justify the law.

Petitioners portrayed the purpose of the law as solely discriminatory, arguing it should be overturned based on both past precedent and the fairness of the law as applied in the instant case. The Brief quoted *Romer v. Evans*¹⁶⁰ at the start to suggest that gay people are often singled out for disfavored status and discriminated against.¹⁶¹ And, according to Petitioners, “the State offers only a tautological, illegitimate, and irrational purported justification for such discrimination.”¹⁶² Consequently, Petitioners argued that the law was only meant to “continue an ignominious history of discrimination based on sexual orientation.”¹⁶³

Any arguments that the law was enacted for a valid purpose were quickly brushed aside by the Brief. Petitioners emphasized that, despite the claim of morality, the law did not incorporate considerations based on age, intent, maturity, location, commercial nature, or any other factor that could have a relation to morality.¹⁶⁴ Instead, the law only considered whether or not the people conducting the prohibited act were of the same sex. Viewed in this context, the purpose of the law could only be to

¹⁵⁹ Brief of Petitioners, *supra* note 9, at 25–26.

¹⁶⁰ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

¹⁶¹ Brief of Petitioners, *supra* note 9, at 32.

¹⁶² *Id.* at 33.

¹⁶³ *Id.* at 34.

¹⁶⁴ *Id.* at 39.

prevent gay people from engaging in the same activity that heterosexuals could freely perform. Petitioners’ framing of the law invited the characterization that the law was specifically designed to treat citizens differently on the sole basis of their sexual orientation and suggested the true purpose underlying the Homosexual Conduct Law was naked discrimination.¹⁶⁵

Additionally, the scene and act lent significant weight to Petitioners’ delegitimization of the purpose element in this section of the Brief. Petitioners characterized the law as an extension of the history of discrimination against gay people, which added legitimacy to the claimed purpose.¹⁶⁶ Because private sexual conduct had been decriminalized and then recriminalized only for gay couples,¹⁶⁷ it was evident that there was some unique discrimination solely directed at those people who were attracted to the same sex. Furthermore, like in the due process argument, Petitioners argued that accepting the purpose of this law as legitimate ran the risk of creating precedent that would lead to unjust results. According to Petitioners, if morality was sufficient purpose to overturn an equal protection challenge, the state could treat different groups differently whenever it pleased.¹⁶⁸

C. Creating Consubstantiality between the Petitioners and the Judicial Motives

To achieve identification and ultimately persuasion, Petitioners had to appeal to the judicial ideals of 1) compliance with law, statutes, constitutions, and legal principles; 2) justice in the present case; and 3) clearest standard and most equitable outcome in future cases.¹⁶⁹ Through their Brief, Petitioners were able to form consubstantiality with these three judicial motives.

1. Creating Consubstantiality in the Due Process Clause Argument

The due process section of the Brief, which was ultimately the constitutional principle the Court based its ruling on, managed to create consubstantiality with all three judicial motives in demanding that the law be declared unconstitutional and overturned. Petitioners did this through emphasizing the elements of agency and act.

First, the argument in this section suggested that well-established past case law and the Constitution drastically limited the ability of the



¹⁶⁵ *Id.* at 38.

¹⁶⁶ *See id.* at 46–47.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *See id.* at 36-37.

¹⁶⁹ ROUNTREE, *supra* note 98, at 16.

government to commit certain acts (invading sexual intimacy) in certain ways (legal regulations).¹⁷⁰ Characterizing the act and agency of the law as overly intrusive and unfair suggested that the law was forbidden by past constitutional precedent establishing a right to privacy. Petitioners supported this characterization by arguing, “There should be no doubt, then, that the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults.”¹⁷¹

Petitioners’ characterization of past cases further supported the notion that both the act and the agency of the Texas law had been established in the past to be unconstitutionally intrusive. For example, Petitioners argued that the law was proscribed because it was well established that the Court had both recognized the liberty interests inherent to sexual intimacy¹⁷² and declared personal privacy as a realm into which the government could not enter.¹⁷³ Because of the intrusive nature of the act and agency of the government here, Petitioners suggested the law was forbidden by prior cases. If this characterization was accepted by the Court, they would have to rule in favor of Lawrence and Garner to conform to past precedent. Conversely, failing to rule in favor of Lawrence and Garner could potentially undermine well-established cases and principles.

Additionally, in this section, Petitioners screened the Court away from a competing characterization: that past precedent suggested that the act and the agency could be justified. Petitioners spent significant time refuting any notion that past cases such as *Bowers* could support the Homosexual Conduct Law, stating that “there are no considerations like those identified in *Casey* or other *stare decisis* cases that might favor continued adherence to *Bowers*.”¹⁷⁴ *Bowers*, a past case that could interfere with Petitioners’ characterization of their motives, was screened away, presented as an aberration that demanded to be overruled.¹⁷⁵ If the judges were to issue a decision that squarely complied with the rationales of past cases, as well as conveyed the other two judicial motives, Petitioners suggested that overruling *Bowers* was the only option.

170 Brief of Petitioners, *supra* note 9, at 11.

171 *Id.*

172 *Id.* at 11–12.

173 *Id.* at 10.

174 *Id.* at 30.

175 *See id.* at 31 (“*Bowers* stands today as ‘a doctrinal anachronism discounted by society.’”) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992)).

Second, Petitioners also implied that the principles of justice and equity in the present case demanded that the law be overruled. The act and agency of the law were framed as not only proscribed by past precedent, but also fundamentally unjust. Petitioners emphasized that a law depriving gay people of sexual intimacy “would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals.”¹⁷⁶ The government’s ability to regulate sexual intimacy was described as extremely limited, as “sexual intimacy marks an intensely personal and vital part of [the liberty of free people].”¹⁷⁷ Because of the fundamental unfairness of restricting persons such as Lawrence and Garner in a significant part of their personhood through intrusive means, the only just result would be to overturn the law.¹⁷⁸

Finally, Petitioners suggested through their emphasis on the predominance of act and agency that the unconstitutionality of the law was supported by future considerations. If the Court denied that this law was a violation of liberty, it “would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples.”¹⁷⁹ Future laws would be able to justify incredible intrusion into the private lives of American citizens based on nothing more than “a mere declaration that the State disapproves of . . . the conduct at issue.”¹⁸⁰ If the law was not overturned, similar claimed governmental purposes could justify extremely unfair laws, and people would be prevented from engaging in other intimate actions simply because the government disapproved of such actions.¹⁸¹ Because such a principle would be incompatible with the judicial motive of future equity, a valid decision would have to overturn the law. Through these methods, the arguments by Petitioners in favor of overturning the law created consubstantiality with a judicial motive, and consequently the justices.

2. Creating Consubstantiality in the Equal Protection Clause Argument

The Equal Protection Clause section of the Brief is more difficult to analyze, as the Court did not reach a decision on the merits of the equal protection argument.¹⁸² Accordingly, it is difficult to see the extent to which the Court accepted the arguments in this section. However, analysis of this section serves two purposes. First, this analysis can help further develop how Petitioners created consubstantiality with the Court. Second, if this section was able to less effectively convey the judicial motives, then

176 *Id.* at 11.

177 *Id.*

178 *See id.* at 13.

179 *Id.* at 15.

180 *Id.* at 28.

181 *See id.*

182 *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003).

that may be at least part of the reason it was not adopted by the Court. If that is the case, then the argument that identification with judicial ideals is a feasible way to persuade a judge gains weight.

Like in the due process section, Petitioners suggested the law was incompatible with past precedent and the Constitution. Petitioners attempted to achieve this through characterizing the state's purpose as discriminatory, arguing, that "[t]his Court has many times repeated the core principle of rejecting bias, however characterized, in law,"¹⁸³ as well as, "[t]he Constitution and this Court's precedent forbid" a preference for one group motivated by bias.¹⁸⁴ These references to precedent implied that the purpose of the law was completely inconsistent with established legal principles. Through characterizing the law's purpose as discrimination and thus invalid, Petitioners suggested that past precedent demanded the law be overturned.¹⁸⁵

Additionally, Petitioners attempted to convey that the law was unjust in the present case. Because of the law's discriminatory purpose, Petitioners argued it was unfair and should be overturned.¹⁸⁶ The law was designed to essentially "send a message in the criminal law that one group is condemned by the majority."¹⁸⁷ Instead of any health, safety, or welfare concerns, the writers of the Brief framed the law as motivated by a "history of irrational anti-gay discrimination," that had nothing to do with any actual wrongdoing by gay people.¹⁸⁸ Petitioners argued that a criminal law based on this purpose was fundamentally unfair, and should be declared unconstitutional and overturned.

Finally, Petitioners also attempted to frame acceptance of their argument as necessary to ensure workable future standards. By framing the purpose as purely discriminatory, the Brief suggested that the law should be overturned due to the risk of polluting future precedent. If the law was allowed to stand, discriminatory laws would be given "*carte blanche* to presumed majority sentiment," and future laws that discriminated against a group could be allowed to stand simply because the legislature claimed they were moralistic.¹⁸⁹ The threat of these future laws motivated by discriminatory purpose further deflected the justices from accepting any elevation of the purpose over the agency and act. By claiming only their position would provide a fair and just result for similar cases in the future to be reflected in the opinion, Petitioners suggested

183 Brief of Petitioners, *supra* note 9, at 37.

184 *Id.* at 38.

185 *See id.* at 37–38.

186 *See id.* at 40.

187 *Id.*

188 *Id.* at 45.

189 *See id.* at 36.

the motive underlying their argument was consubstantial with a judicial motive.

However, the equal protection portion of the Brief contained grammatical strains that may have limited its persuasive effect.¹⁹⁰ A grammatical strain occurs when parts of the presented pentad are incompatible with each other, or when facts cannot fit into a frame despite the author's attempts.¹⁹¹ The due process part of the Brief spent significant time discussing the importance of privacy rights for gay Americans. The equal protection section acknowledged this, arguing that the importance of the privacy rights reinforces their equal protection argument.¹⁹² Yet the equal protection argument was not completely in line with this principle. Petitioners' equal protection claim was based on the law only forbidding gay people from committing sodomy, not heterosexuals. Implicit in this argument, however, is the idea that in future cases, a permissible law could forbid sodomy in both gay and heterosexual couples. Although this hypothetical law would be permissible under the second argument, it would be extremely inequitable, and conflict with the principles established in the due process argument. This conflict created a serious grammatical strain, that may have made it difficult for the equal protection section of the Brief to become consubstantial with the motives of the Court.

D. The Net Result: The Opinion of the Court in *Lawrence v. Texas*

The opinion shows the Court incorporated into its ultimate decision the Petitioners' arguments that were consubstantial with the judicial motives. For example, Justice Kennedy, in the majority opinion, described how past precedent such as *Casey* and the constitutional right to privacy supported overturning the law.¹⁹³ Kennedy also spent significant space in the opinion remarking on the unfairness of the law as applied to *Lawrence* and *Garner*: "The present case does not involve minors. . . . It does not involve public conduct or prostitution. . . . 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."¹⁹⁴ Perhaps most notably, however, Kennedy explained in the opinion why the ruling is based on the Due Process Clause rather than the equal protection argument:

190 See ROUNTREE, *supra* note 98, at 5–6 (discussing how grammatical strains weaken arguments).

191 *See id.*

192 Brief of Petitioners, *supra* note 9, at 48.

193 *See Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003).

194 *Id.* at 578.

[Lawrence argues that] *Romer* provides the basis for declaring the Texas statute invalid under the Due Process Clause. That is a tenable argument, but . . . [w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.¹⁹⁵

This statement by Kennedy suggests that the due process and equal protection arguments differed in their ability to appeal to the third judicial motive. It also suggests that a main reason the due process argument was accepted was because it would provide the most equitable result in the future and conformed more closely to the judicial ideals. In other words, the implication was that the equal protection argument was less appealing because it was less able to effectively identify with the judicial ideals.

In *Lawrence*, when faced with two arguments, the Supreme Court adopted the argument that more closely identified with the judicial motives. Furthermore, the Court implied that the equal protection argument's grammatical strain with the third judicial motive was a reason why the equal protection argument was not adopted. The arguments that were adopted by the Court seemed to be the ones that were able to most closely convey identity with the judicial motives. This outcome suggests that advocates would be wise to keep the judicial motives in mind when attempting to persuade judges.

VI. Conclusion

Dramatism is a method of rhetorical criticism most commonly used for analyzing messages received by an audience. However, as the Petitioners' Brief demonstrates, it is possible to use dramatism to effectively persuade an audience through identification. In this case, we can see that through strategic representation of the pentad, Petitioners' motives aligned with the three judicial motives identified by Clarke Rountree. The success of Petitioners' argument suggests that creating consubstantiality with Rountree's judicial motives may be an effective way to identify with and persuade judges. Therefore, a Dramatistic approach to persuading judges in persuasive writing can be seen. If one can frame an argument to suggest the motives underlying it are identical with the judicial motives, a judge should be convinced by the argument. By cloaking arguments in the same cloth with which a judge must make an opinion, one can thus create an argument a judge is more easily able to accept.

195 *Id.* at 574–75.