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Cass R. Sunstein

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## TWO PHONE CALLS

*Cass R. Sunstein*<sup>1</sup>

June 16, 2036

Dearest Helen:

Here you are, about to graduate from law school, and your old grandfather is awfully proud of you. I remember the day you were born—yes, yes, as if it were yesterday, it's true. And I remember the first day—were you six?—that you held a tennis racquet in that strong right hand. From the determined expression on your face, I had a hunch that you might be a lawyer. I can't tell you how thrilled I am, and how proud I am, that you're graduating.

I haven't gotten you a proper present. But I do have something for you—a story, an old one, and one that I haven't told anyone before. In just two weeks, after all, it's going to be the 50th anniversary of *Bowers v. Hardwick*, and there's going to be a big celebration, and I don't think my old boss Lewis Powell (younger than than I am now!) would mind.

Janet and I, and the others, have kept it secret for all these years, and I must tell you that I'm pleased about that. But it's time, I think.

It was a warm spring morning when Justice Powell called me into his office. "This is a hard case for me," he said, "because I've never met a homosexual." Of course I was stunned—how could he possibly think that?—but at first I kept my silence, even though several of Justice Powell's own law clerks had been gay. I really wasn't sure what to do. But that afternoon I talked to my co-clerk Janet, and after a lot of soul-searching and a good, long, hard talk, we decided that the Justice (that's what we

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called him) could not be asked to decide this case without knowing a little more.

So we took a big risk. We called two of his gay clerks and asked if we could tell the Justice that he had indeed met a homosexual, or two, or more.

Please don't be shocked that we did this, Helen. Maybe it wasn't exactly ethical, but we didn't tell our predecessors anything about the *Hardwick* case, or anything about our discussions with Justice Powell about the legal issues involved. We disclosed no inside information. We were just asking whether the closet might be opened a little bit. (You might not know what that means. The "closet" is the term that was used to mean where gay people stayed, when they kept secret the fact that they were gay. This must seem mysterious to you, I know.) We wanted the Justice to know a bit more than he did. We actually thought that it was *relevant*.

Anyway we got their permission, and the next morning, at 10 am, we went into the Justice's office and said, in brief, "We think you ought to know that you have met a homosexual, or two, or more. In fact some of your own clerks have been homosexuals." And then we named two of them. Well, the Justice was stunned. For a while he was silent. Then he said, very slowly, "Why didn't I know?" And then, a little angrily: "Why didn't they tell me?" And then, with some grief, and quietly: "Oh my." And then, very firmly: "I need to be alone now."

I never knew what happened next. But I know that Justice Powell stayed in his office, alone, for nearly three hours. We were all told that he was "not to be disturbed." I believe that he did a lot of thinking. I also suspect—though I'm not sure—that he called the two clerks we mentioned.

As you know, Justice Powell was a crucial vote in *Bowers v. Hardwick*, striking down that Georgia sodomy statute. What you don't know is the firmness with which he stood by his vote, in the face of frequent, and sometimes severe, entreaties from his conservative colleagues. But everyone respected Lewis Powell. And I think that those famous passages about discrimination and secrecy in Justice Blackmun's majority opinion had a lot to do with Justice Powell's thinking about the case. And my private hunch is that Justice O'Connor would have voted with Justice White if not for Justice Powell's private eloquence, and intense feelings, about the rights involved.

Well, what happened next is on the public record; but it must seem like ancient history to you! Many people celebrated the outcome as a great day for civil rights, and Michael Hardwick was on the cover of all the leading magazines, and he soon became a hero and a celebrity. President Reagan denounced the Court's decision and denounced the Court as a whole, and he strongly supported the Defense of Marriage Amendment, which became a focal point of public debate for the next decade. President Hatch—what a firebrand!—had two pretty successful terms, defeating a mealy-mouthed Southern Democrat (what was his name?), who simply would not take a clear stand for, or against, the *Hardwick* decision.

You know, Helen, I actually thought the Defense of Marriage Amendment would finally pass under President Quayle (boy was he a canny politician). But the key states—New York, California, New Jersey, Illinois, and Michigan—somehow stood firm. Bless those framers; it's awfully hard to change the Constitution.

You're too young to know this, at least not in any detail, but 1990-2010 was a grim time for this wonderful country. There was a lot of anti-gay violence, and some governors seemed to think that that was just fine. Though the public would not repudiate *Hardwick*, the whole cause of civil rights was on thin ice. When President Quayle abolished affirmative action in 2003, the country seemed to me in big trouble. And the deficit went completely out of control; that was the most serious problem, I think. People were awfully worried about the economy, and the recession of the mid-1990s—some called it a depression—was bound to make it a bad period for civil rights.

It certainly took a while, but as this country always does, we got back on track. Old Man Bradley finally made it to the White House—the first Democrat since Jimmy Carter; imagine that!—and he certainly did a wonderful job. And now the Civil Rights Act bars discrimination on the basis of sexual orientation. Justice Powell certainly could not have imagined that—or that *Bowers v. Hardwick*, his pride and joy, would be invoked in the President's signing statement! And to think that now *everyone* thinks that *Hardwick* was right, that it stands with *Brown* itself as a symbol of constitutional justice—Helen, I have to tell you, that's the hardest thing for your old grampa to believe.

I don't know if you study this in law school, but Lewis Powell did us proud. Before he died, he said in an interview that his

vote in *Bowers v. Hardwick* was “the best vote I ever cast, and if I had it to do over again, I would do exactly the same thing.” I don’t know if he was a great man, Helen. But I do know that he was a *good* man.

Sometimes I wonder a bit about what would happened if I hadn’t talked to Janet and if we hadn’t made those phone calls. Would Justice Powell have voted the way he did? Maybe the Court would have come out the other way; is that possible? And if it had, would things have been different? You never know.

Well, that’s my story, my little graduation present for you. It’s your story now, not mine. Do with it as you wish.

Helen, you’re a woman now, and I don’t have anything to teach you, not any more. But maybe you’ll forgive one small plea from an old man. In the law, you’ll have a lot of chances to do something that might make a difference, small or large. Even if you’re not sure, maybe you’ll make that phone call.

Much love,

Grampa