



Bowers v. Hardwick / Lawrence v. Texas

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Two of the most significant Supreme Court decisions regarding constitutional liberty for gay men and lesbians are Bowers v. Hardwick (1986) and Lawrence v. Texas (2003).

Bowers was a response to a particularly intrusive police action that lesbian and gay rights advocates had hoped would invalidate sodomy laws in the United States when it reached the Supreme Court in 1986. However, the majority opinion of the Supreme Court in Bowers found that nothing in the Constitution "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."

In Lawrence v. Texas, however, the Supreme Court reversed Bowers v. Hardwick, recognizing that privacy rights and due process protections extended to all citizens, including homosexuals.

Bowers v. Hardwick

In 1982 an unknowing house guest let a police officer into Michael Hardwick's Atlanta home. The police officer went to a bedroom where Hardwick was engaged in oral sex with another man. The two men were arrested on a charge of sodomy. The Georgia statute, which prohibited all oral-genital and anal-genital sexual relations, carried a penalty of up to twenty years imprisonment.

After a preliminary hearing, the local district attorney decided not to present the matter to a grand jury, and the charges were dropped. However, Hardwick and his attorneys pursued the case to the United States Supreme Court with the purpose of challenging the constitutionality of the Georgia statute criminalizing adult consensual sodomy.

The District Court dismissed Hardwick's case, but the United States Court of Appeals reversed that ruling, holding that Hardwick's right to privacy and intimate association were violated.

Georgia Attorney General Mike Bowers defended the statute before the Supreme Court, while Harvard law professor Lawrence Tribe argued the case for Hardwick. A bitterly divided Court upheld the statute on a 5 to 4 vote, ruling that Georgia's law banning consensual sodomy did not violate fundamental rights under the Constitution.

Writing for the majority, Justice Byron White dismissed the claim that homosexuals had a right to sexual privacy as "facetious." A concurring opinion by Chief Justice Warren Burger blatantly based his opinion on religious ideology.

Impassioned dissents by Justices Harry Blackmun and John Paul Stevens attacked the reasoning of the majority. Justice Blackmun pointedly remarked that, "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."

The fact that Hardwick was not prosecuted or imprisoned apparently affected the swing vote, cast by

Justice Lewis F. Powell, Jr. Although Powell agreed with four other members of the Court that the sodomy law violated no privacy right, he wrote that "a prison sentence for such conduct--certainly a sentence of long duration--would create a serious Eighth Amendment issue." That constitutional amendment outlaws cruel and unusual punishment.

Aftermath of Bowers

After retiring from the Supreme Court, Powell said in a 1990 interview that he had probably erred in voting to uphold sodomy laws, but he dismissed the Hardwick case as "frivolous," one brought "just to see what the court would do."

For many gay men and lesbians and for the embattled gay and lesbian rights movement, preoccupied with the AIDS epidemic and with a conservative backlash against its hard-won gains, the 1986 ruling was a bitter disappointment. It was a stinging rejection of the aspirations of gay men and lesbians to equality before the law.

Anger and frustration over the Bowers ruling, however, spurred many activists into a renewed dedication to the movement. The battle over sodomy laws moved from the federal courts to state legislatures and courts.

Effects of Sodomy Laws

The danger of sodomy laws, which were largely remnants of colonial law, when "crimes against nature" were sometimes punishable by death, lay less in their likelihood of enforcement than in the stigma they created.

The laws were regularly invoked to deny equal rights to gay men and lesbians. From custody cases and parental rights to the roles of gay men and lesbians in the military, such laws were often cited to argue that homosexuality is illegal and that homosexuals are unworthy of legal protections or equality under the law.

Moreover, since they were so infrequently enforced (and, indeed, were largely unenforceable) they functioned largely to disparage gay men and lesbians, even when they applied more broadly.

Progress in Invalidating Sodomy Laws

A measure of the progress of the gay and lesbian rights movement is that whereas in 1960 all the states had sodomy laws, some of them carrying penalties of life imprisonment, in 1986, when the Court decided *Bowers v. Hardwick*, only half the states retained sodomy laws.

In the years between 1960 and 1986, many of the sodomy laws had been struck down by state courts and some had been repealed by state legislatures. (The Georgia sodomy law that the United States Supreme Court upheld in *Bowers v. Hardwick* was itself overturned by the Georgia State Supreme Court in 1998.)

By 2003, the number of states with sodomy laws had shrunk to 13--mainly in the South and the Midwest. Nine of these states prohibited both heterosexual and homosexual sodomy, while four prohibited only homosexual sodomy.

Lawrence v. Texas

This was the situation when the United States Supreme Court revisited *Bowers* in June 2003. In *Lawrence v. Texas*, the Court soundly repudiated the reasoning in *Bowers v. Hardwick*, overruling a Texas sodomy law in the broadest possible terms. As a result of the court's broad declaration in *Lawrence v. Texas*, laws in the 13 states that made sodomy a crime were invalidated.

The facts that led to Lawrence v. Texas were similar to Bowers, in that two men--John G. Lawrence and Tyron Garner--were arrested in the Houston home of one of them and charged with sodomy, a class C misdemeanor in Texas that could have resulted in jail time and a \$5,000 fine. The men were held in jail overnight and were each fined \$200.

The case reached the Supreme Court after the Texas Court of Appeals, relying on Bowers v. Hardwick, had upheld the Texas law. At the Supreme Court, Lawrence and Garner were represented by Paul C. Smith of the Lambda Legal Defense Fund and Texas was represented by the Harris County District Attorney, Charles Rosenthal.

In a ringing endorsement of due process and the right to privacy, Justice Anthony M. Kennedy, joined by Justices Breyer, Ginsberg, Souter, and Stevens, wrote that gay men and lesbians 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."

Perhaps most significant, the Court recognized that what was at issue was not simply the prohibition of a particular sexual act, but liberty itself. Justice Kennedy wrote, "The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."

Moreover, the Court recognized the stigmatizing effect of sodomy laws and of Bowers v. Hardwick. Of the latter, Justice Kennedy wrote, "Its continuance as a precedent demeans the lives of homosexual persons."

The vote to overturn Bowers v. Hardwick was 5 to 4. "Bowers was not correct when it was decided, and it is not correct today," Justice Kennedy concluded. "Bowers v. Hardwick should be and now is overruled."

O'Connor's Concurring Opinion

Although Justice O'Connor (who in 1986 had been in the majority in Bowers v. Hardwick) did not vote to overrule Bowers, she did join the majority in Lawrence v. Texas in invalidating the Texas sodomy law. She did so on equal protection grounds, finding that, "The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct--and only that conduct--subject to criminal sanction."

Had Justice O'Connor's reasoning been endorsed by a majority on the Court, the four sodomy laws that applied only to homosexual sodomy would have been struck down, but the nine laws that applied to both homosexual and heterosexual sodomy would not have been affected.

The Dissents

Justices Scalia, Rehnquist, and Thomas voted to uphold the Texas law (and the right of all states to criminalize consensual sodomy). In an intemperate dissent, more political than judicial in tone, Scalia, joined by Rehnquist, bitterly denounced the majority opinion as "the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda."

In a separate dissent, Thomas called the Texas law "uncommonly silly" and stated that he would vote for its repeal were he a Texas legislator, but he could not declare it unconstitutional because he did not find a right to privacy in the Constitution.

Aftermath of Lawrence v. Texas

The Court's ruling in Lawrence v. Texas is the most significant legal victory in the history of the gay rights movement. It has been likened to such seminal Supreme Court decisions as Brown v. Board of Education of

Topeka, Kansas (which overturned Plessy v. Ferguson and banned school segregation) and Roe v. Wade (which legalized abortion).

Certainly, most gay men and lesbians--especially those in the 13 states that stubbornly retained sodomy laws--felt that with the ruling in Lawrence v. Texas a great psychological burden had been lifted.

Gay and lesbian rights activists predicted that the overturning of Bowers will embolden the movement for equality. By acknowledging the legitimacy of gay and lesbian relationships, the United States Supreme Court has given the glbtq movement a new credibility in debates about such issues as marriage, partner benefits, adoption, and parental rights.

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