# YALE LAW SCHOOL AND THE OVERRULING OF *BOWERS V. HARDWICK*

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One of the landmark decisions of the Supreme Court's 2002 Term was *Lawrence v. Texas*. The Court held that the Due Process Clause precluded the states from criminalizing sodomy between consenting adults in private places. Because some states enforced consensual sodomy laws only against gay defendants and relied on those laws to justify rules discriminating against lesbian and gay people, *Lawrence* is an important gay rights decision. It may even assume an importance for gay people that *Brown v. Board of Education* has had for people of color.

To invalidate consensual sodomy laws, the *Lawrence* Court overruled a 1986 precedent, *Bowers v. Hardwick*, which had held that states could make "homosexual sodomy" a felony without violating the Due Process Clause. *Bowers* was a controversial decision. No decision of the Supreme Court *upholding* a statute against constitutional attack has been subject to the immediate and overwhelming criticism that *Bowers* was. Among the most influential critiques were pieces written for *The Yale Law Journal* or by Yale law professors.[1]

Even a superficial examination of the *Lawrence* appeal reveals that the overruling of *Bowers v. Hardwick* was a Yale Law School seminar. The lower court litigation was conducted by the Lambda Legal Defense & Education Fund, Inc., under the leadership of its legal director, Ruth Harlow '86, and Susan Sommer '86. Representing appellants Lawrence and Garner at oral argument was eminent Supreme Court advocate Paul Smith '79. Smith and William Hohengarten '94 teamed up with Harlow and Sommer to write the brief for the appellants.

Under the supervision of a committee chaired by Mark Agrast '85, the American Bar Association filed an *amicus* brief urging the overruling of *Bowers*. Other important *amicus* briefs were filed by Professor Harold Koh and the Yale Law School's Allard K. Lowenstein International Human Rights Law Clinic for several international human rights groups; Paul R.Q. Wolfson '87 for various medical and psychological associations; Pamela Karlan '84 for eighteen professors of constitutional law, including Yale Law School Professors Bruce Ackerman '67, Jack Balkin, and Kenji Yoshino '96; and myself for the Cato Institute.

(Opposite, from left) Photographs by Rick Bowmer/AP Photos; Rick Friedman/Corbis.

# v. Hardwic

The various Yale Law School materials were clearly helpful to the Court. Justice Anthony Kennedy's opinion for the Court cited and relied on Koh's International Brief and my Cato Brief. Justice Antonin Scalia's dissenting opinion cited and relied on my book, *Gaylaw: Challenging the Apartheid of the Closet*, while Justice Kennedy's opinion cited and relied on a law review article I wrote that became chapter four of *Gaylaw*.

Like the best law school seminar, the one the Yale Law School hosted for the Court was not as much interested in a particular result as in thinking more broadly about constitutional theory, methodology, and principle. In this regard, the Yale influence was more subtle and potentially more important in the long run.

As the various Yale briefs emphasized, constitutional precedents ought not be lightly overruled. Even controversial precedents must be understood in light of history, practice, and constitutional principle. Many academics believe that *Lawrence v. Texas* was one of the Supreme Court's more satisfying opinions, because the overruling of precedent was soberly and persuasively justified, without the overstatement or law office history often found in Supreme Court opinions. We believe its virtues were deeply informed by the Yale Law School briefs filed in that case.

## *Bowers v. Hardwick* and Historiography

*Bowers* ruled that there was no fundamental privacy interest in people's engaging in "homosexual sodomy," because this conduct was an established crime when the Fourteenth Amendment was adopted in 1868. My Cato Brief demonstrated that this was factually and normatively questionable. Most states in 1868 made it an offense to commit the "crime against nature," but none targeted "homosexual sodomy." The word "homosexual" was not in the English language until the 1890s, and the statutes regulated conduct without regard to the sex (or even species) of the partners. Thus, the crime against nature could be committed by a man against a woman or animal as well as by a man against a man—but not by a woman with a woman.

If crime-against-nature laws were not aimed at "homosexual sodomy," what was their object? By examining the state codes as well as criminal law treatises of the period, the Cato Brief established that the primary object of such laws was nonconsensual sexual assault not covered by rape and seduction laws of the period. Almost all the reported nineteenth-century sodomy prosecutions involved sexual assault by powerful adult men against women, other men, girls, boys, and animals. None involved consensual relations within the home. A secondary purpose of crime-against-nature laws


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*(From left) Protests outside the Supreme Court during the hearing of* Lawrence v. Texas; *celebration rally held by the The National Gay and Lesbian Task Force, in Copley Square in Boston.*

was sexual behavior in public. Indeed, as the Cato Brief showed, when the crime against nature involved a consenting adult with no third party present, the rules of evidence required acquittal.

These historical materials helped persuade the Court that "the historical grounds relied upon in *Bowers* are more complex than the majority opinion...indicate[d]" and "at the very least, are overstated." But that alone did not require the overruling of *Bowers*, which had assumed that the Due Process Clause only protects liberties affirmatively established in 1868. The Cato Brief and Mark Agrast's ABA Brief further argued that the traditional liberties protected by substantive due process must be understood in light of the purposes of the Fourteenth Amendment—a neutral operation of law transparent to all persons subject to it, the freedom to conduct one's personal affairs and to enjoy one's home without state interference, and avoidance of laws tending to create social castes.

Following these *amici*, Justice Kennedy's opinion in *Lawrence* viewed American traditions of liberty as an evolving understanding of what "respect the Constitution demands for the autonomy of the person in making [intimate, personal] choices." Moreover, Justice Kennedy emphasized the Fourteenth Amendment norms—especially the libertarian and anti-caste norms—in coming to rest on a proper understanding of what the Framers' words mean in the context of modern society.

### The Relevance of International Precedents

As *amici* also urged, the Court did not deliberate about liberty in the abstract. Justice Kennedy examined normative materials developed by the American Law Institute and the United Kingdom's Wolfenden Committee. Further, the Court considered the experience at the state level. In traditionalist states like Arkansas, Georgia, Kentucky, Montana, and Tennessee, defendants represented by Ruth Harlow and Lambda had persuaded judges of all perspectives that consensual sodomy laws were antithetical to a neutral understanding of personal liberty or equality.

Harold Koh's International Brief urged the Court to consider sodomy precedents from other countries. Just as the Declaration of Independence announced that the decision to revolt against England was reached in a process that accorded "a decent respect to the opinions of mankind," so the modern Court should consider transnational materials when reaching momentous decisions. The experience of other countries provides both factual and normative feedback that can be valuable. The International Brief demonstrated that all the nations of Europe had abandoned their consensual sodomy laws, after mature reflection about the same libertarian and equality principles that are embodied in the Fourteenth Amendment. And the abandonment of sodomy laws was universally hailed in those countries as not only necessary in light of their many problems, but salutary in light of the productive contributions made to those societies by their lesbian, gay, bisexual, and transgendered citizens.

Justice Kennedy agreed that foreign precedents can help American judges evaluate the consistency of American laws with fundamental constitutional principles. The renunciation of sodomy laws abroad deepened concerns the majority had about the harmfulness as well as the incorrectness of *Bowers*. *Lawrence* is the first time the Supreme Court has relied on foreign case law as a basis for overruling an American constitutional precedent.[2] It will surely not be the last.

Such a prospect troubled the *Lawrence* dissenters. Quoting Justice Clarence Thomas '74, Justice Scalia warned against imposing "'foreign moods, fads, or fashions on Americans.'" This point is well-taken. The Justices should not follow international precedents that are badly reasoned or misplaced in an American context. Anticipating this point, the International Brief quoted another Scalia dissent (in *Thompson v. Oklahoma*): "The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well."

### The Interconnection of Liberty and Equal Citizenship

Both the Cato Brief and the International Brief emphasized that constitutional protection of liberty and equality are interconnected. In the Appellants' Brief, Hohengarten, Harlow, Sommer, and Smith developed this idea as a further reason to believe that *Bowers* was an unfortunate precedent. Justice Kennedy agreed: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."

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By going out of its way to disrespect "homosexual sodomy," *Bowers* was not only ignoring American libertarian traditions, but was also reinforcing more recent tendencies of some states to discriminate against gay people. In *Romer v. Evans*, the Court had ruled that antigay laws reflecting animus violate the equality guarantee of the Fourteenth Amendment. The *Lawrence* Court invoked *Romer*, perhaps as a suggestion that Texas's "Homosexual Conduct Law" reflected antigay animus rather than a neutral message about morality—a notion emphasized in Justice O'Connor's opinion concurring in the *Lawrence* judgment.[3] As *amici* had argued, the stare decisis value of *Bowers* was undermined by the difficulty in reconciling that precedent with *Romer*.[4]

Yale-trained brief-writers also demonstrated how even a misdemeanor sodomy law, ostensibly regulating conduct, contributed to state treatment of gay people as an outlaw class.[5] In Texas and other states, sodomy laws have routinely been invoked as a basis for denying lesbian and gay parents custody of their biological children, refusing to consider gay people for state employment, and exclusion of gays from state licenses needed for professional work. In some states, gays convicted of consensual sodomy would have to register as sex offenders. Justice Kennedy agreed that these were reasons to reconsider *Bowers v. Hardwick*. "Its continuance as precedent demeans the lives of homosexual persons."

Several larger points are suggested by a Yale Law School reading of the Kennedy and O'Connor opinions in *Lawrence*. One is that the Fourteenth Amendment's commitment to equal citizenship entails not only a close examination of our nation's most historically divisive classifications, such as race and sex, but also a careful look at more recent classifications, such as sexual orientation ones. Such a careful look is most appropriate when state classifications involve criminal liability or other important disadvantages to the objects of the discrimination.[6]

A more ambitious Yale spin on *Lawrence* would focus on the ways in which nonconforming *conduct* remains a basis for disadvantage for minority *classes*. I think lower court judges will read *Lawrence* to disallow state discrimination against gay people because of their presumed conduct, sodomy. But many will not read *Lawrence* to protect gay men against discrimination because they are campy, or to protect lesbians against discrimination because they marry other women, or to protect transgendered people against discrimination because they cross-dress, or to protect people of color against discrimination because they behave or dress in ways not acceptable to mainstream culture. How should judges treat nonconforming conduct characteristic of a minority class? Focusing on conduct inside the bedroom, *Lawrence* does not solve these riddles. Harlon Dalton '73 and Kenji Yoshino, my Yale faculty colleagues, have initiated an important academic conversation about these issues.[7] In some future case, ideas incubated at the Yale Law School will surely help the Supreme Court grapple with these issues. Y

[1] *See, e.g., William N. Eskridge, Jr.,* Hardwick *and Historiography, 1999* Ill. L. Rev. *631; Anne Goldstein, History, Homosexuality, and Political Values: The Hidden Determinants of* Bowers v. Hardwick, *97* Yale L.J. *1073 (1988); Frank Michelman, Law's Republic, 97* Yale L.J. *1493 (1987); Jed Rubenfeld, The Right of Privacy, 102* Harv. L. Rev. *707 (1989); Andrew Koppelman, Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98* Yale L.J. *145 (1988).*

[2] *In previous Eighth Amendment cases, the Court had relied on foreign statutes and administrative practices as reason to reevaluate the application of the death penalty to certain classes of defendants. See* Atkins v. Virginia, *122 S. Ct. 2242 (2002) (mentally disabled defendants);* Thompson v. Oklahoma, *487 U.S. 815 (1988) (juveniles).*

[3] *Although not voting to overrule* Bowers v. Hardwick, *Justice O'Connor concurred in the Court's judgment on the ground that Texas's law violated the Equal Protection Clause.*

[4] *See Eskridge,* Gaylaw *149–52, which demonstrates the formal irreconcilability of* Bowers *and* Romer. *Neither Harris County, Texas (the respondent) nor any* amicus *brief supporting respondent asked the Court to overrule or narrow* Romer v. Evans.

[5] *This was a major theme of the Appellants' Brief, the Cato Brief, and the Law Professors' Brief in particular.*

[6] *This was the argument of Pam Karlan's Law Professors Brief, which elaborates on an approach to equal protection pioneered by Justice Thurgood Marshall in* San Antonio Indep. Sch. Dist. v. Rodriguez, *411 U.S. 1, 56-59 (1973). See William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100* Mich. L. Rev. *2062, 2250-87 (2002), which argues that the Court's double standard of hard-to-pass strict scrutiny and hard-to-fail rational basis review has effectively been replaced by a cautious version of Justice Marshall's sliding scale approach.*

[7] *See Harlon Dalton, AIDS in Blackface, 118* Daedelus *205 (1989); Kenji Yoshino, Covering, 111*