

# SEXUALITY SCHOLARSHIP AS A FOUNDATION FOR CHANGE: Lawrence v. Texas and the Impact of the Historians' Brief

Daniel Hurewitz

On the last Thursday in June 2003, the United States Supreme Court struck down a Texas state law criminalizing homosexual sex, determining that the 30-year-old law violated the U.S. Constitution. The decision, *Lawrence v. Texas*, which affirmed the right of John Lawrence and Tyron Garner to have sex at home, was a watershed moment. The next day, newspapers across the country shouted headlines like "Gay Rights Affirmed in Historic Ruling" and "Decision Represents an Enormous Turn in the Law."<sup>1</sup> Indeed, while it is not uncommon for the nation's highest court to strike down state laws and reverse the decisions of lower courts, in this case the court also overturned its *own* decision from 17 years earlier. In so doing, the court declared all anti-sodomy laws unconstitutional and, according to some observers, articulated one of the most significant human rights decisions in the country in nearly 50 years.<sup>2</sup>

Clearly, the implications of such a decision are widespread and multi-faceted. One set of implications, though, derives from the fact that the arguments presented to the Supreme Court—and reiterated by the justices in their decision—rested heavily on the scholarship of historians of sexuality. The historians' interpretation of the past, and particularly of the changing meaning of sodomy and sodomy laws, proved crucial to convincing the justices to go against their own precedent. Justice Anthony Kennedy's majority opinion

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*Daniel Hurewitz, PhD, is Assistant Professor of History at Tulane University. Please address correspondence to Daniel Hurewitz, History Department, Tulane University, 115F Hebert Bldg, New Orleans, LA 70118, USA or to [danielh@tulane.edu](mailto:danielh@tulane.edu)*

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read like a final paper from a course in the history of sexuality. Within it, he not only offered the accepted academic narrative of the history of sexual identities, but he also cited several sexuality scholars directly.<sup>3</sup> The decision demonstrated the powerful way that scholars can aid advocates working at the frontlines of human rights battles. At the same time, though, the decision also raised questions about the implications of putting history to work in this way. Because jurists draw on history for different purposes than academics, the ramifications of their use of scholarship warrant greater consideration. Toward that end, this commentary attempts, first, to lay out how and why the history of sexuality managed to play such a key role in shaping the Court's decision, and secondly, to highlight the larger, more problematic implications of using scholarship for advocacy.<sup>4</sup>

Importantly, these questions about applied scholarship have equal relevance for the health fields. Like these historians, many U.S. health professionals had long been opposed to sodomy laws. In fact, in *Bowers v. Hardwick*, the 1986 case that the court overturned, both the American Psychological Association and the American Public Health Association had tried to bring their expertise to bear on the decision. They explained to the court the harmful effect of sodomy laws, detailing how criminalizing homosexual activity created a social stigma that was detrimental to mental health and interfered with the research and educational campaigns designed to combat AIDS.<sup>5</sup> This effort to bring scholarly work to bear on policy decisions is familiar terrain to public-health workers. In 1986, however, those health arguments were not enough to sway the Court. Thus for health professionals, the *Lawrence* decision not only transformed how homosexual behavior can now be addressed from a health perspective, it also offered a demonstration of the strengths and weakness of applying academic work in the legal arena. What follows should therefore be read as a case-study investigation into the broader repercussions of applying sexuality scholarship in advocacy situations.

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In part, the excitement of *Lawrence* lay in the fact that it overturned the Supreme Court's own precedent in *Bowers*

*v. Hardwick*, marking both the success of gay-rights activism and the possibility for future victories. That 1986 precedent was established after a Georgia man, Michael Hardwick, challenged the state law that criminalized oral and anal sex. At that time, the Supreme Court declared itself "quite unwilling" to "announce . . . a fundamental right to engage in homosexual sodomy."<sup>6</sup>

In *Bowers*, the justices framed their decision in the language of tradition and history, arguing that history revealed a long-standing condemnation and criminalization of homosexual activity. On behalf of the majority, Justice Byron White cited earlier cases indicating that the Constitution protects only those rights that are "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history and tradition."<sup>7</sup> Using either of these formulas, White wrote, any claim that homosexual sodomy should be protected "is, at best, facetious." Instead, he traced the presence of sodomy laws back to the original U.S. colonies and asserted that "[p]roscriptions against such acts have ancient roots." In a supporting opinion, Chief Justice Warren Burger traced them even further, to Roman law and "Judeo-Christian moral and ethical standards."<sup>8</sup>

Using history as their tool, then, the justices insisted that homosexual sex had, essentially, always been a crime and thus could, justifiably, always be treated as one if a state so wished. The *Bowers* decision, while infuriating to many, was thus a stark reminder of the power that historical arguments could hold in shaping legal arguments in the U.S. In this country, because judicial rulings rely heavily on prior legal interpretations and because of the Court's emphasis on rights that are "deeply rooted in the nation's history and tradition," a battle over historical interpretation can constitute a key argument at the heart of a case.

Much changed in the 17 years between the Supreme Court's considerations of *Bowers* and *Lawrence*, including several of the justices on the Court. The most significant change was the dramatic increase in the visibility of gay men and women in American public life, fueled in part by overdue attention to the AIDS epidemic. In the same period, sexuality studies and gay scholarship increased greatly as well. The amount and quality of research into the questions

the Justices considered in *Bowers*—particularly how much and what kind of opprobrium homosexuality received in the past—had multiplied exponentially. Indeed, by 2003 scholars had produced a fairly extensive array of research contextualizing early sodomy laws and explaining their use in regulating many forms of non-procreative sex. If the justices again wanted to rest an opinion on the “ancient roots” of sexuality laws, there now existed a bounty of sources to clarify those roots.

To be certain, sexuality scholarship was already a dynamic field when *Bowers* was decided in 1986.<sup>9</sup> In fact, in the 1980s historians of Western sexuality were debating a host of questions that were closely linked to Justices Burger and White’s claims about the “ancient roots” of contemporary laws that targeted gay men. One key debate centered on whether people had always viewed sexual activities as the defining basis of a personal identity, or whether the notion of possessing a “sexual identity” was relatively new.<sup>10</sup> Michel Foucault and others insisted that the idea of a homosexual identity only began to emerge in the late 19th century. Prior to that, Foucault claimed, same-sex activity was viewed as a sin, but the people who engaged in same-sex acts were not viewed as essentially different from their peers: sexual behavior was not understood to be the foundation for a personal identity.<sup>11</sup> However, John Boswell argued that people who engaged in homosexual activities were seen as having a separate identity much earlier, at least as far back as the twelfth century.<sup>12</sup> And when Burger and White essentially charged that men convicted of sodomy under the most ancient laws were fundamentally the same as 20th-century gay men, they were, in a sense, offering the most extreme argument: that people who engaged in same-sex activity had always been viewed as different and always treated with scorn. Therefore, though hardly rigorous in their assertions, the justices’ claims could be viewed as fitting into the wider scholarly debates of the 1980s.

That intellectual climate had changed definitively by 2003. Not only was there much more sexuality scholarship in existence, but the majority of historians had come to share Foucault’s position that sexual identities were socially constructed and that a 20th-century homosexual was not

comparable to an 18th-century person convicted of sodomy. When the *Lawrence* case came before the Court, a group of 10 historians filed a brief in support of Lawrence and Garner in order to preclude the Court from again asserting that centuries of tradition upheld laws against homosexuals. They set out to make explicit that the targets of early sodomy laws were not equivalent to contemporary homosexuals.

The historians' brief was drafted initially by University of Chicago historian George Chauncey—in consultation with the plaintiffs' attorneys—and then circulated among the other historians who edited it as they saw fit.<sup>13</sup> The brief ultimately made two basic arguments. First, it maintained that sodomy laws in their earlier form did not target homosexual acts exclusively. "Sodomy," the historians wrote, "was not the equivalent of 'homosexual conduct.'"<sup>14</sup> Rather, sodomy laws covered a variety of homosexual, heterosexual, and bestial sex acts that did not lead to reproduction. Thus the long-standing presence of sodomy laws did not mean that there was a social category called "homosexuals" that had also long been recognized as a particular class or group. The laws were both broader than that, in criminalizing a host of sexual activities, and narrower than that, in recognizing an identity in none of them. The Texas law against homosexuals, therefore, lacked "a significant historical pedigree" because "the history of antigay discrimination is short, not millennial."<sup>15</sup>

Secondly, the historians detailed that short history, contending that U.S. sex laws had only recently been used by states to target homosexual activity. The period from the 1930s to the 1960s, they explained, saw an unprecedented wave of state and non-state discrimination. Police closed bars where homosexuals gathered; Hollywood producers censored homosexuality out of films; and the federal government began driving homosexual men and women out of the civil service. "Discrimination on the basis of homosexual status," the brief insisted, "was a powerful but unprecedented development of the twentieth century."<sup>16</sup> In fact, the Texas law in question in *Lawrence*, written onto the books in 1973, was a product of that development.<sup>17</sup>

The impact of the historians' analysis was plainly evident when the lawyers presented their oral arguments to the

Court in March 2003.<sup>18</sup> Again and again, the justices challenged them with claims about history. Early on, Chief Justice William Rehnquist interrupted the attorney for Lawrence and Garner to assert, “certainly, the kind of conduct we’re talking about here has been banned for a long time.” Justice Antonin Scalia insisted that “if you have a 200-year tradition of a certain type of law . . . the presumption is that the State can within the bounds of the Constitution . . . pass that law.” When the attorney for Texas later explained that homosexual activity was only specifically criminalized in that state in 1973, Justice Stephen Breyer suggested, “the issue here doesn’t have much of a longstanding tradition specific to this statute, does it?”<sup>19</sup> History stood clearly at the center of the debate.



That the majority of the justices embraced the historians’ contentions in the *Lawrence* decision must be recognized as a success for the gay-rights movement and for historians of sexuality, who demonstrated the profound impact that their scholarship could have. Without question, that success merits eager celebration and congratulation. But the case, and particularly its application of history, also raises at least two broad questions for scholars and advocates.

The first question involves the importance of scholarship used in judicial proceedings. Because scholars regularly frame and make arguments which other scholars then challenge, the scholarly consensus of one decade may be substantially reshaped a decade or two later. But what are the implications when a historical argument that has been embraced by the courts to codify laws is challenged by other historians’ work ten or twenty years later? Is the Supreme Court’s justification for its ruling also then open for challenge? Or is there a less drastic way for jurists, like historians and health professionals, to acknowledge and incorporate new ideas and new theories into their reading of the law?

The argument the historians presented to the Supreme Court is certainly the consensus of the present moment, but even now it is not without its detractors. Indeed, one such detractor wrote an opinion piece for the *New York Times*

within days of the decision, praising the ruling but insisting that it rested on a historical account which was a false “evasion” that “slighted the past,” and that “laws that penalize homosexuality are, indeed, deeply rooted in our shared traditions.”<sup>20</sup> Because Kennedy relied so heavily on the argument articulated in the historians’ brief, having that history challenged on the editorial page of the *Times* seems extremely troubling. More than academic arguments are at stake: history has provided a foundation for declaring sexual rights and freedoms.

Yet there are reasonable arguments and good scholarship with which to critique the Court’s historical reasoning in *Lawrence*. Certainly one could contend, as Justice Scalia did in his dissent, that while homosexual acts were among many non-reproductive sex acts included under a wider umbrella of sodomy, same-sex acts were still quite plainly criminalized. Similarly, while Justice Kennedy clearly understood the difference between the era of early sodomy laws and our own time, his emphasis on the letter of the law seemed to diminish a longer history of homosexual discrimination. In stressing that “it was not until the 1970’s that any State singled out same-sex relations for criminal prosecution,” Kennedy seemed to lessen the importance of the laws that harmed homosexuals much earlier in the century.<sup>21</sup> But should a historian dare to quibble with Kennedy or the brief-writing historians themselves? The political stakes are now quite high.

Historical arguments are, by definition, interpretations, and eventually any analytic consensus will be replaced by another. Certainly, with the facts of this case before them, conservative ideologues and scholars will have every reason to try to hasten that replacement, developing a new interpretation of the historical record in order to justify a different judicial decision in the future. Advocates of gay rights must now hope, therefore, that such a new interpretation somehow does not arise, or that when it does, other historians find a way to defend the crucial historical arguments that new cases will require. In such a context, historical work—and to a degree, contemporary work—on homosexual activity, identity, and discrimination takes on an enhanced political significance. To engage these issues as a

scholar is now explicitly to comment on the foundations of law and public policy: the future of gay rights and the protection of sexual health may well continue to be bound up with shifting scholarly debates and interpretations. Such a prospect, while intimidating to some scholars and inspiring to others, demands a heightened level of self-consciousness while mapping the research agendas of scholars of sexuality.

The second question that the *Lawrence* decision raises is how gay-rights advocates should use history when the U.S. courts rely on history in competing ways. One goal of gay-rights advocates has been to obtain a special protected status within the court system, marking gays and lesbians as a group likely to be subject to discrimination and therefore in need of heightened protection by the courts.<sup>22</sup> In general, U.S. courts try to respect the reasoning of legislators and not tamper with the laws they write. If laws focus on certain protected groups, however, namely racial groups and women, the courts pay much closer attention and require legislators to justify the laws much more cogently. Granting gays and lesbians a similar protected status would be a boon to gay-rights advocates in challenging state codes that prohibit gay adoptions, for instance, or gay marriages. But one requirement for obtaining that kind of protection is "a history of discrimination."<sup>23</sup> Herein lies the complication: in the context of protected-status discussions, a long-standing history of discrimination can provide the foundation for judicial intervention; at other times, as *Bowers* made clear, that same history can be viewed as a *tradition* that warrants no judicial interference. A history of mistreatment could be used both ways.

In *Lawrence*, the plaintiffs convinced the justices that there was not a long-standing history of discrimination against homosexuals as a specific group of people in order to provide the grounds for overturning *Bowers*. But doubtless attorneys in other cases will want to press the argument that homosexuals *have* long been discriminated against as a group. Will they be constrained by the historical narrative relied on in *Lawrence*? Certainly they could find historians, like the *New York Times* writer, who would push the case for long-standing discrimination. But what will it mean for different advocates to be offering varying historical narratives?



Likely, attorneys and judges will embrace the historical argument that best serves their purposes. To a degree, that is what Justice Sandra Day O'Connor did in the *Lawrence* case when she joined the vote of the majority, but on grounds different from Kennedy. She rejected the challenge to *Bowers*' history, affirming that sodomy laws did fall within the traditional purview of states regulating sexuality. But she also embraced a reading of the Texas code, she said, as "directed toward gay persons as a class," and therefore evidence of the kind of discrimination that "runs contrary to the values of the Constitution and the Equal Protection Clause."<sup>24</sup> In essence, O'Connor chose among the historical material, using the interpretations that best fit her argument.

That she used the historians' analysis selectively, but nevertheless supported the challenge to the Texas law, was the best possible outcome. But it seems equally possible that hostile attorneys could use the historians' work calculatingly to challenge gay rights efforts. The narrative of a "short, not millennial" history of discrimination, for instance, may well be used to undercut a suspect-class claim.<sup>25</sup> Thus while last year's legal-historical argument allowed for a victory in the U.S. Supreme Court, in another courtroom or in the hands of another attorney that same argument might set the stage for tomorrow's defeat. There is little controlling how historical arguments will be used. But putting even well-intentioned, competing historical arguments to work in the legal arena may pave the way for conflicting judicial opinions.



How should these concerns be viewed by scholars whose research about sexuality, or other topics, might have advocacy implications? Certainly these cautions are not intended to discourage historians or other scholars from bringing their work into the advocacy arena. In fact, the courts may well be the most exciting place for scholarship to be used. It is clear that *Lawrence* has marked an enormous shift in sexual rights and sexual health in the U.S.

But the implications for doing this work are quite dramatic, both for scholars and advocates. While academic debates continue unresolved for years, Supreme Court cases

result in decisions that control American lives for a generation or two. They are powerful; and as academic work becomes increasingly intertwined with those outcomes, it will be hard to de-politicize the scholarship. At the same time, as advocates increasingly bring scholarship into their work, it will be difficult to prevent the disagreements among scholars from translating into potentially competing advocacy agendas.

Fundamentally, the experience of the historians in the *Lawrence* case exemplifies more broadly how scholarship and advocacy can affect each other. As the scholarship becomes freighted with political meaning, the advocacy arguments become tied to scholarly debates. In a sense, the fights within the two seemingly distinct arenas merge into one. For public health workers, particularly those who have worked on HIV/AIDS, this overlap of politics and scholarship is not new. Indeed, it is a demonstration of the familiar complications involved in work at the borders of the academy and public policy.

These, though, are simply the complications: the challenge is to do work that acknowledges the risks and still aims for the greatest impact.

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## References

1. C. Lochhead, "Gay Rights Affirmed in Historic Ruling," *San Francisco Chronicle*, 6/27/03; J. Biskupic, "Decision Represents an Enormous Turn in the Law," *USA Today*, 6/27/03.
2. R. Perlstein, "What Gay Studies Taught the Court," *Washington Post*, 7/13/03.
3. One of the cited sexuality historians, John D'Emilio, later wrote that "it was a dizzying, heady moment for me when I saw the citation and quote from *Intimate Matters* . . . 'Oh my god,' I thought, 'History really does matter.'" J. D'Emilio, "The Day the Supreme Court Quoted My Book," *History News Network*, 7/14/03. Available at: <http://hnn.us/articles/1563.html>.

4. The implications of historians' participation in U.S. courtroom battles has received interesting discussion after historical work on the cases *Webster v. Reproductive Health* and *Equal Employment Opportunity Commission v. Sears, Roebuck Company*. See the various "Roundtable" essays in *Public Historian* 12/3 (1990); A. Kessler-Harris, "Equal Employment Opportunity Commission v. Sears, Roebuck Company: A Personal Account," *Radical History Review* 35 (1986): pp. 57-79; R. Milkman, "Women's History and the Sears Case," *Feminist Studies* 12/2 (1986).
5. See W. Eskridge, "Hardwick and Historiography," *University of Illinois Law Review* (1999): pp. 631, 680; D. Ogden and M. Ewing, "Brief of Amici Curiae American Psychological Association and American Public Health Association," *Bowers v. Hardwick*, 1985 U.S. Briefs 140. Both groups made similar arguments in briefs for the *Lawrence* case. See "Brief of the American Public Health Association, et al." and "Brief of Amici Curiae American Psychological Association, et al." 2002 U.S. Briefs 102.
6. *Bowers v. Hardwick*, 478 U.S. 186 (1986), p. 191. The Georgia law in fact prohibited oral and anal sex, whether homosexual or heterosexual, and a heterosexual couple had initially joined Hardwick's challenge. The Supreme Court determined, however, that the only issue they would consider was that of homosexual activity. See W. Eskridge (see note 6) and N. Hunter, "Life After *Hardwick*," *Harvard Civil Rights-Civil Liberties Law Review* 27 (1992): pp. 531-554.
7. *Bowers v. Hardwick* (see note 6), pp. 191-192, citing *Palko v. Connecticut*, 302 U.S. 325 (1937), and *Moore v. East Cleveland*, 431 U.S. 503 (1977).
8. *Bowers v. Hardwick* (see note 6), pp. 192-193, 196.
9. Among the key works, see J.N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A., A Documentary* (International Publisher: New York, 1976); J. Weeks, *Coming Out: Homosexual Politics in Britain from the 19th Century to the Present* (New York: Quartet, 1977); M. Foucault, *History of Sexuality* (New York: Knopf, 1978); J. Boswell, *Christianity, Social Tolerance, and Homosexuality* (Chicago: University of Chicago, 1980); J. D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970* (Chicago: University of Chicago, 1983).
10. See E. Stein (ed.), *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (New York: Routledge, 1992).
11. This historical distinction between behavior and identity is similar to the difference health researchers and educators see between contemporary gay men and MSMs (or "men who have sex with men"). While the latter do not necessarily view their sexual activities as defining who they are as people, gay men explicitly see their sex lives as a core element of their personal identity. Foucault's argument, in a sense, was that prior to the 19th century a Western man who had sex with another man would not have had any special identity: he would have simply been a man who had sinned. M. Foucault (see note 9), p. 43. See also J. D'Emilio, "Capitalism and Gay Identity," *Making Trouble: Essays on Gay History, Politics, and the University* (New York: Routledge, 1992), pp. 3-16.

12. J. N. Katz (see note 9) and J. Boswell (See note 9).
13. Interestingly, Chauncey's own book, *Gay New York*, made a powerful argument similar to that of the brief, namely that the social opprobrium attached to homosexual behavior in the second half of the 20th century was hardly so rampant in the first half. G. Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994).
14. G. Chauncey, N. Cott, J. D'Emilio, et al., "Brief of Professors of History," *Lawrence v. Texas*, 2002 U.S. Briefs 102, p. 2.
15. Chauncey et al. (see note 14), pp. 7, 10, 29.
16. Chauncey et al. (see note 14), pp. 13-20, 20.
17. Chauncey et al. (see note 14), p. 29.
18. Importantly, significant historical arguments were also present in the *amicus* briefs of the American Civil Liberties Union and the Cato Institute.
19. Oral Argument, *Lawrence v. Texas*, 02-102, pp. 2-3, 37, 39-40. Scalia, who has publicly mocked the Court's decision, did so specifically on its reading of history. The ruling, he said to a group of some 800 conservative activists, "held to be a constitutional right what had been a criminal offense at the time of the founding and for nearly 200 years thereafter." A. Gearan, "Scalia Ridicules Court's Gay Sex Ruling," *Associated Press Online*, 10/23/03.
20. A. Goodheart, "The Ghosts of Jamestown," *New York Times*, 7/3/03.
21. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), p. 2479.
22. Advocates came closest to achieving this in *Romer v. Evans* 517 U.S. 620 (1996) when the Supreme Court struck down a Colorado state constitutional amendment banning any legal protection based on sexual orientation. In that case, however, the Court ruled the law discriminatory at the most basic level and did not deem gays and lesbians as meriting special judicial protection. See E. Gerstman, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (Chicago: University of Chicago Press, 1999) and W. Eskridge (see note 5).
23. This language is from the Ninth Circuit Court of Appeals in *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990), as cited in E. Gerstman (see note 22), p. 28.
24. *Lawrence v. Texas* (see note 21), pp. 2486-2488.
25. Chauncey et al. (see note 14), p. 29.