Lessons Learned: A Reflection upon Bowers v. Hardwick

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Abstract

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Abby R. Rubenfeld is the Legal Director of the Lambda Legal Defense and Education Fund. On October 30, 1986, Ms. Rubenfeld spoke at Nova Law Center on the significance and implications of *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), in which the Supreme Court upheld the constitutionality of the Georgia sodomy statute as applied to private consensual homosexual acts. In addition, Ms. Rubenfeld spoke of a planned challenge to Florida’s sodomy statute, based upon the Privacy Amendment to Florida’s Constitution. Fla. Const. art. I, section 23. The following is an edited version of Ms. Rubenfeld’s remarks.

I

First I want to explain why *Bowers v. Hardwick* is important. Twenty-five states and the District of Columbia still have sodomy laws. These laws criminalize private, consensual sexual behavior be-

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For some reason all of the “M” states in the country, except Maine, have sodomy laws.
tween adults. They are not concerned with sex with minors, coercion, prostitution, or any kind of commercial sex. They affect both men and women. By and large these laws affect gay and nongay people alike.

In effect, they criminalize the sexual activity of most of the people in this country. The Georgia law9 upheld in Hardwick was in many ways a good one to bring to the Supreme Court, because it criminalizes every kind of sexual activity other than married heterosexual missionary position sex. Think about that and the number of people in Georgia who are made criminals by the statute. It is a law that, like those of many other states, carries major criminal penalties. Georgia’s law carries with it a twenty year sentence.9 While here in Florida consensual sodomy is a second degree misdemeanor carrying a penalty of up to 60 days in prison and a $500 fine,10 the range of penalties in other jurisdictions is from 30 days to 20 years in prison and from $50 to $50,000 in fines.

These laws exist all over the country. This is not just a Southern phenomenon. True, the entire Southeast has sodomy laws, but so do two of the states in the Northeast, Massachusetts and Rhode Island. Many of the Western states have them also—Nevada, Utah, Arizona.

It is important to remember that Michael Hardwick was arrested in his bedroom. He was engaging in sexual activity with another person in his own bedroom, and saw a police officer standing in his door. Think about a police officer at the foot of your bed when you are in bed with someone. Keep that in mind when you are talking about this subject. That is what happened to Michael Hardwick.

Sodomy laws are the basis of all discrimination against gay men and lesbians. As long as these laws exist, gay men and lesbians are labeled as criminals because they are violating the law whenever they engage in the very acts that define them as gay men and lesbians. The sodomy laws can be and are used against gay men and lesbians any time they come in contact with the legal system in a state that has a sodomy law.9 They are used in lesbian mother-child-custody cases, in

3. There are still people who say that to commit sodomy one has to have a penis. It is true that the laws of Henry VIII did apply strictly to sexual activity between men, but state laws have been interpreted to include lesbian acts. E.g., State v. Young, 249 La. 1054, 193 So. 2d 243 (La. 1966). Contra Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (Ga. 1939).
5. Id. at 16-6-2(b).
8. See, e.g., California, 70 U.S. 60 (1962).
probating the will of a gay person, and in contract disputes.

In my own experience in private practice in Tennessee, I had a few experiences with the importance of sodomy laws and access to the legal system. In my very first solo trial as an attorney, I represented a lesbian mother in a child custody case. I don’t recommend that you start your trial practice this way. The trial was in Cleveland, Tennessee, a small rural community on the border of Tennessee, Georgia, and Alabama. I was a bit scared, and kept watching my watch. I wasn’t sure if I was more afraid because I am a woman, or because I am Jewish, or because I am a lesbian.

I was a young lawyer, well prepared, and had a great case. There was a five year old child with cerebral palsy who could get all the services and physical therapy he needed in the public school system in Nashville, where his mother lived. The father and the grandparents wanted to bring the child back to Cleveland, Tennessee, and put him in a private school that could not offer the child any of the therapy that he needed. The school was not accessible to the handicapped, so the child could not even get into the school. To me it looked like an easy case. It turned out to be anything but easy.

I put on my case, and the other lawyer stood up and said, “But your honor, this woman is a criminal.” This was basically true. She was a violator of the state’s sodomy law. While status is not a crime, the fact is that gay men and lesbians violate the law by their sexual activity, and they are engaging in criminal acts. We are criminals in the eyes of the law, and that is used against us. That is why these sodomy laws have to go; they are the nails in the closet doors. Until we get rid of sodomy laws, it does not matter how many of us can escape to New York or San Francisco. We are going to be labeled as criminals and we are going to be attacked in the legal system. It doesn’t matter how many $200 a person gay rights dinners are held at the Waldorf—we have to start with basics and get rid of sodomy laws.

After coming to Lambda Legal Defense and Education Fund, I was amazed by how far the gay rights movement had progressed and the types of cases that were being pursued in various “progressive” ju-

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dissenting from denial of certiorari: “the issue posed in this case [concerning a university’s recognition of a gay student group] is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws.”

risdictions—things like gay people adopting their lovers,9 gay people adopting children,10 and gay spousal benefits.11 I came from a different perspective, from Tennessee, a state with a felony sodomy law, where I represented a client trying to gain her parole after serving two and a half years in prison. Her crime: engaging in private consensual sex. In my view we cannot concentrate on things like spousal benefits until we put considerable resources into ridding ourselves of sodomy laws.

II

This is the background and context in which the Harding case arose. People frequently ask why the gay rights movement pushed the Harding case. Would we do it again? I would do it again without hesitation. It was a great case to bring. We had a good shot at winning. It has been reported that at the vote after the oral argument, we had the case won.12 This case presented the best factual pattern. We may never get another one like it. It is not very common that a police officer barges into someone’s bedroom and arrests him for engaging in private sex. Also, the Supreme Court is not getting any more liberal. Antonin Scalia is probably not going to be any improvement over Warren Burger on our issues.

The day after the decision I was getting my hair cut, and my hairdresser is a gay man. He said to me, “Why did Michael Hardy do this, why did he have to push this? If he just stayed quiet we would all be OK. Now we have this decision and this is terrible.” I think that this is an attitude that many people had after the Harding decision. I absolutely disagree. This was the right case, at the right time, and it was right to pursue it. There was a good chance that it could be won. You do not achieve social progress without taking some risks. This was a calculated risk and we lost, but that is the way things get started. I hope that the energy that has been generated from Harding, all that led up to it and all that has followed, will continue, and we will be able

10. In re Pima County Juvenile Action B-10489, 12 Fam. L. Rep. (BNA) 1557
11. Hinman v. Department of Personnel Administration, 167 Cal. App. 3d 516,
12. According to press reports, Justice Powell voted in conference to strike down
   the law. Several days later, though, he changed his mind. See Powell Changed Vote in
to keep the movement for decriminalization going. We can still achieve
dom law reform, even though we were not able to get a quick fix in
the federal courts. But I think it was a correct decision to pursue this
case.

III

So given this context, and given that there is some hostility to the
fact that the case was brought, what does the defeat mean? Where do
we go from here? How can all of us that are interested in the issues be
involved in doing something about it?

To me, the one word I used in almost all of the press interviews
was that the decision was “devastating.” It was a devastating defeat
and a terrible blow to our movement. It is something that we have to
cope with and do something about. But on the other hand, let me tell
you what it was not. It was not a reversal of anything we already had.
We did not already have any sort of definitive ruling that the right to
privacy included homosexual acts. We did not lose anything. It was not
like Roe v. Wade being overturned. We tried to get more than we
already had and we were not successful. It doesn’t reverse any of the
winds that we already had in other areas, such as first amendment rights
of gay students and child custody cases. We still have our victories
and they are still on the books. We have continued to gain victories
since the Hardwick case. Within months of the Hardwick decision we
won an employment discrimination case in the Sixth Circuit involving a
gay man. We are thus not in worse shape than we were before
Hardwick.

However, we still have the twenty-six sodomy laws, and we have a
problem now in gaining access to the federal courts. It is ironic that
traditionally the federal courts have been where people went for re-
course to protect their civil rights. The black civil rights movement af-
ter the civil war found that the federal courts were the only forum open
to black people, as many state courts were not sympathetic to civil
rights issues. This mood continued through the 1960’s and maybe into

14. E.g., Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir.
16. Dorr v. First Kentucky Nat’l Corp., 796 F.2d 179 (6th Cir. 1986). However,
a rehearing en banc was later granted, thereby vacating the panel decision.
the 1970's. This is not true anymore.

It is so ironic to now be considering bringing gay rights lawsuits in state courts, and to have basically written off the federal system. It is so different from everything I learned in law school and everything I geared my career towards. There is a scramble now to read articles about and learn how to use state constitutions and state courts.17

IV

What does the decision mean? You are in law school and can make your own conclusions about the legal reasoning of the Court. I want to suggest three political lessons we can take from the Hardwick decision.

First, Hardwick is a warning to all of us—not just gay men and lesbians—how fragile our civil rights are, particularly in the Reagan, Meese, Rehnquist era. It is no coincidence that the Department of Justice opinion18 about AIDS and Section 504 of the Rehabilitation Act of 1973 came out exactly one week before the Hardwick decision. That was an advisory opinion from the Department of Justice that attempts to restrict the scope of the one federal law that covers disability discrimination so that it basically will not cover any kind of AIDS-based discrimination. To me this is all part of the Reagan administration’s philosophy of restricting, curtailing and ultimately ending civil rights protections in this country. We see what is happening with the Civil Rights Commission under the Reagan administration and Clarence Pendleton. It is all part of a pattern, and Hardwick is one of the most vicious examples. Gay people happen to be the most vulnerable. People, and not just gay men and lesbians, should learn from it. What happened to us in Hardwick can happen to any other minority group.

The second lesson that I have chosen from Hardwick is that the case is a reminder how our political system works. It does not matter if you have the law on your side or justice on your side. The courts in this country are political. The vote in the Hardwick case was political. This is also illustrated by the vote in Baker v. Wade,19 in which a gay man

challenged the constitutionality of the Texas sodomy law. The case was in the lower courts the same time as Hardwick. In Baker, a federal district court judge held that the Texas statute was unconstitutional.20 The Fifth Circuit Court of Appeals, en banc, reversed the lower court and upheld the sodomy law.21 One vote made the difference in the en banc decision; that is, it was a nine-seven decision, and a one vote change would have resulted in a tie, affirming the decision below. It was clearly a political vote. The Republican appointees voted one way and the Democratic appointees voted the other way. That was not how I understood the legal system was supposed to work when I went to law school. Nonetheless, that is something that those of us who litigate in these areas—who do gay rights work, or do civil rights work in general—have to accept: this is a political system, and you have to know the politics of it and you have to have political power.

The third lesson that I’ve taken from Hardwick is that it is a very powerful statement on the powerlessness of the gay community. Hardwick is the decision that Justice White would like to write about abortion rights, but for which he does not have the fifth vote. It is a decision about the extent of the right to privacy, or in Justice White’s mind, the absence of the right to privacy. It was only when gay men and lesbians were involved that he was able to get the fifth vote on this issue. Newspapers reported that Justice Powell switched his vote.22 He listened to Professor Tribe at oral argument, he read our briefs, and he was pursued—until pressure was put on him and he switched his vote. It has not happened yet in the abortion context, but it says something about the power that lesbians and gay men have, and that which we do not have.

The decision teaches us what we need to do in the post-Hardwick world. We need to organize. We need to do grass roots organizing. We need to have people register to vote. We need to change the political system. We need to change which judges sit on the bench. By the time Reagan leaves office, he will have appointed more than half the federal judges in this country. But we can still make a difference in the states where judges are elected. We need to go out and vote and educate our gay rights. We have to be aware of how judges feel and we have to vote

17. E.g., Developments in the Law—The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324 (1982); State Constitutional Law, NAT'L L.J., Sept. 29, 1986 (special section, including bibliography).
19. 769 F.2d 289, reh'g denied, 774 F.2d 1285 (5th Cir. 1985), cert. denied, 106 S. Ct. 3337 (1986).
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accordingly. The system is political; we must accept that and participate in it to make a difference.

V

The implications of the Hardwick decision are far-reaching, but I suggest that there are both positive and negative implications.

On the negative side, of course, the decision is a danger signal about sexual privacy for anyone, gay and nongay, and for civil rights issues in general. The decision says to me something terrible about this Supreme Court and the type of reasoning it brings to these issues. In Hardwick, Justice White's majority opinion and former Chief Justice Burger's concurring opinion are outrageous to read. The legal reasoning is ridiculous. If we are, as former Chief Justice Burger suggests, to base our constitutional law on the "millenium of moral teaching," then we would have to rid ourselves of miscegenation laws, or other laws that discriminate on the basis of race or sex. It is ridiculous to base constitutional analysis on the Justices' sense of the "millenium of moral teachings."

Hardwick also has negative implications in terms of the tone and message it sends to state courts. The Hardwick decision is based upon federal constitutional concepts of privacy. It does not preclude arguing state privacy claims, which hopefully will be the basis of a challenge here in Florida. However, it does send a message to state courts about the reasoning and thoughts of the United States Supreme Court.

Indeed, within two weeks of the Hardwick decision there was a state court decision in Missouri that upheld that state's sodomy law. It too was a devastating decision, although somewhat expected given the historical treatment of gay rights cases by the Missouri Supreme Court. That the law had been declared unconstitutional by a Missouri trial court was a chance event. The case involved a man who was arrested for semi-public, quasi-private sexual acts—that is how we try to describe these arguably public sex cases. His lawyer was reported to be a noted right-to-life advocate, and not a gay rights spokesman. The lawyer went into court and made a routine motion to dismiss, saying that the statute was unconstitutional. The motion was granted, probably much to the lawyer's surprise. The judge, a progressive woman, granted the motion even though it was not very artfully drafted and was seemingly based on an allegation of equal protection rights being violated because of sex discrimination.

Our amicus strategy in the Lambda brief filed with the Missouri Supreme Court was to focus attention on the right to privacy and the forthcoming decision in Hardwick. We did not want the court to deal with the equal protection issues, since the facts of the case were so bad. But the court did analyze the equal protection claim, and held that the sodomy law was not sex discrimination. According to the court, if two women were involved, that was illegal, and if two men were involved, it was illegal, so it could not be sex discrimination. They sort of missed the point that it would be legal for a woman to engage in the sexual act with a man, and it would be illegal for a woman to engage in the same act with another woman. They were not ready for that in Missouri.

The frightening thing about the Missouri decision is that it was so soon after Hardwick and that it brought up AIDS, which is the issue of the '80s. All types of gay rights litigation, and certainly sodomy law cases, must now respond to a purported AIDS issue. In the Hardwick case itself, the American Public Health Association submitted an amicus brief on our side arguing in particular on the AIDS issue, because it was always there beneath the surface of the issues actually presented. The AIDS issue was on everybody's mind. While the Justices probably do not read the Journal of the American Medical Association, they probably do read Newsweek, or even the National Enquirer. They probably know about AIDS, so the issue was there and a response needed to be made. The APHA brief argued that sodomy laws are basically the worst way to try to contain the spread of AIDS, since criminalizing behavior will not encourage people to seek help. Justice Blackmun cited the APHA brief in his dissent.

There are, however, some positive aspects of the Hardwick decision. The reaction to the decision has universally been negative—it has been on our side. We still have the loss, needless to say, but this is a beginning in terms of coalition building. The American Public Health Association is on our side on this issue. In addition, in Hardwick we had a religious brief on our side, while the State of Georgia did not.

24. Missouri v. Walsh, 713 S.W.2d 538 (Mo. 1986).
25. E.g., T.C.H. v. K.M.H., 693 S.W.2d 802 (Mo. 1985).
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This did not help us, it turned out, but it is good for the future that we are beginning to gain these kind of allies. We are starting to make the issue more mainstream. The Hardwick decision has brought the issue of sodomy law reform, and the more general issue of privacy rights, to the forefront of people's consciousness in this country. It has made nongay people aware that in a lot of jurisdictions their sexual behavior is illegal. I'm not saying that the vast majority of nongay people are now in support of gay rights; they're not. But they do understand that there is an issue of sexual privacy here, and once they start along that road I hope that they can be educated about other issues and that we can enlist their support for other issues. We certainly can use their support in trying to get rid of the sodomy laws.

The most important positive implication, or what I choose to view as a positive development from the Hardwick decision, is that it teaches us that we have to go back to grass roots organizing. Litigating is one thing. There will always be lawyers in any movement. There are a lot of gay rights lawyers, and at Lambda, we have been organizing these lawyers for three years around the issue of sodomy law reform. We have been bringing together representatives of all the gay and lesbian legal groups to strategize about discrimination, in a group called the Ad Hoc Task Force to Challenge Sodomy Laws. That group will continue. There will still be litigation. But litigation will not be enough. There are twenty-five states and the District of Columbia that have sodomy laws. There are many places where it is going to be very difficult to litigate. I would not want to argue a sodomy case in the Mississippi Supreme Court. We have to start educating people, we have to start changing voting patterns, and changing elected officials. We have to be in it for the long haul. We tried for the quick fix in the Hardwick case, we tried for a federal decision that would have made a difference, and we did not get it. But that does not mean that the issue ends and it does not mean that our movement ends. It simply means that we need to shift gears and to a large extent shift our focus. We need to focus on education, we need to focus on political organizing.

VI

There are not many paid, full-time positions available for openly gay and lesbian attorneys. Many people make career choices about what they can do for gay rights, and how out of the closet they can be in their work. I understand that a lot of people (particularly those in states with sodomy laws) are not able to make the decision to come out of the closet. But no matter how you decide that issue, you can still be involved in the movement for sodomy law reform. Actually, you do not have to be or identify yourself as a gay man or a lesbian to be involved in the movement. You can go in the voting booth—which is a closet, I might add—and you can pull down the correct levers and nobody will know how you voted. You can write checks to gay organizations like Lambda Legal Defense or to nongay organizations like the American Civil Liberties Union. The ACLU has a gay rights project. Your check does not have to show anything about your sexuality, or even that you support gay rights. But you do have to support these organizations that are doing the work. You have to support those of us who are able to do this work, because the work cannot get done without the money. If we are going to repeal the twenty-six sodomy laws that exist in this country, it will have to be a group effort. It has to involve grass roots support all around the country. It has to involve both gay and nongay people. All of us have to play a part in it. We have to keep the issue in the forefront of people's consciousness. The issue has to stay in the newspapers so that people know that what they are doing in their bedroom is a criminal act, and that they could go to prison for it. Then people will want to do something about these laws.

VII

Finally, we are not the first civil rights movement to have suffered a major defeat. I think every civil rights movement, somewhere along the way, has had a major defeat. In the black civil rights movement, the one most analogous to Hardwick is Plessy v. Ferguson, in which the Supreme Court upheld the separate-but-equal doctrine. It was a terrible decision and is painful to read. It is awful to think that our Supreme Court would have upheld those sorts of laws under our Constitution. Yet it did. Despite that decision, the black civil rights movement continued and ultimately succeeded in overturning Plessy. It took our forty years, and I hope that we do not have to wait that long, but the civil rights movement succeeded. That is what we have to keep in mind.

2. 301 U.S. 337 (1936), 58 S. Ct. 232

of the closet. But no matter how you decide that issue, you can still be involved in the movement for sodomy law reform. Actually, you do not have to be or identify yourself as a gay man or a lesbian to be involved in the movement. You can go in the voting booth—which is a closet, I might add—and you can pull down the correct levers and nobody will know how you voted. You can write checks to gay organizations like Lambda Legal Defense or to nongay organizations like the American Civil Liberties Union. The ACLU has a gay rights project. Your check does not have to show anything about your sexuality, or even that you support gay rights. But you do have to support those organizations that are doing the work. You have to support those of us who are able to do this work, because the work cannot get done without the money. If we are going to repeal the twenty-six sodomy laws that exist in this country, it will have to be a group effort. It has to involve grass roots support all around the country. It has to involve both gay and nongay people. All of us have to play a part in it. We have to keep the issue in the forefront of people's consciousness. The issue has to stay in the newspapers so that people know that what they are doing in their bedroom is a criminal act, and that they could go to prison for it. Then people will want to do something about these laws.

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Attorney General Ed Meese recently said that we do not have to listen to the Supreme Court. Maybe then we shouldn't worry about


\[29\] Meese Says Court Doesn't Make Law, New York Times, Oct. 21, 1984, at
the Hardwick decision. Maybe that is what he had in mind when he made those comments. But we have that decision, and we have to realize that we can change it, and we should want to change it in our lifetimes. There has to be an explosion of energy within the gay community and among our supporters. That is the lesson that I bring to you from the Hardwick case: organize and energize. Everyone has to do something about it in their legal careers and in their political careers. Whatever kind of work you do, you have to help change these laws.

I. Introduction

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, prohibits discrimination in housing. The Act provides that it shall be unlawful:

To refuse to sell or rent after the making of a bona fide offer; or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

In one type of case, the defendant is a landlord or owner of property who has refused to rent to or sell to the plaintiff. In another type of case (referral to the "pregnant zone") the plaintiff is a municipality which has not yet or is not currently constructing a housing development — such as a new apartment complex or an expansion of a housing development — which is open to occupancy within a certain time. This practice will be considered unlawful if the municipality is in the unusual or exceptional case in the usual manner. If the municipality is in the unusual or exceptional case, then the defendant cannot prove that the type of zoning or other restrictions which it has adopted are not substantially related to the achievement of a paramount public purpose. In the usual or abnormal case, the defendant must prove that the type of zoning or other restrictions which it has adopted are substantially related to the achievement of a paramount public purpose. If the defendant cannot prove this, the plaintiff will be entitled to a judgment in his favor.