

THE OHIO STATE UNIVERSITY
Moritz
College of Law



Sodomy Politics in *Lawrence v. Texas*

Marc Spindelman

Published in Jurist (June 12, 2003)

**Public Law and Legal Theory
Working Paper Series
No. 14**

**Center for Law, Policy and Social Science
Working Paper Series
No. 10**

June 2004

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=556724>

Sodomy Politics in *Lawrence v. Texas*^s

Marc Spindelman *

This essay—originally published before the Supreme Court issued its decision in Lawrence v. Texas—examines the gay rights litigation strategy pursued in the case, and questions its sexual politics from a sex equality perspective.

John Geddes Lawrence and Tyrone Garner are sexual criminals unless the U.S. Supreme Court decides otherwise. Late last March, the Court heard an appeal of their convictions under the Constitution for breaking Texas's sodomy law, which makes same-sex sexual activity a crime. Many in the gay community have rallied around them, praying they will win. But the sweeping consensus of gay opinion covers up another closet, one inside the lesbian and gay community, where sexual violence is hidden and discussion about it is silenced. The *Lawrence* case has, unfortunately, been no exception, leaving this secret closet's door firmly closed.

Obviously, whatever expectation of privacy Lawrence and Garner had was thwarted when Texas police entered Lawrence's apartment to investigate a weapons report (that turned out to be false) and spied the two having anal sex. Back in 1986, in *Bowers v. Hardwick*, the Supreme Court rejected a privacy plea in a similar case. Michael Hardwick's lawyers had argued to the Court that Georgia's criminal sodomy law offended the constitutional right to privacy just as much as other laws that regulated consensual, non-commercial sexual relations in the home did. But Justice Byron White, speaking for the Court, dismissed the privacy argument as ridiculous; it was "at best, facetious," he said. Many found the Court's opinion to be, in the words of one thoughtful commentator, "stunningly harsh *and* dismissive." Even more harsh and dismissive, though, was the concurring opinion of then-Chief Justice Warren Burger, which appeared to endorse Blackstone's description of sodomy as "an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' *and* 'a crime not fit to be named.'"

Not surprisingly, a large segment of the gay community had some pretty aversive reactions to *Hardwick*, concluding that it was not only about the constitutional status of sodomy laws, but that it also made anti-gay animus constitutionally legitimate. Not a few responded to *Hardwick* as UCLA Law Professor William Rubenstein did: "I don't think about sex when I read *Hardwick*, and I don't think about what sex acts are at issue [in the case]. I think *how they hate me*." Joining the gay community were—and are—our many liberal (and libertarian) allies who correctly recognized that *Hardwick's* refusal to extend the right to privacy to gays and gay sex imperiled their own (heterosexual) sexual rights. Indeed, although Georgia's sodomy law had

* © Marc Spindelman, 2003. All rights reserved.

** Assistant Professor of Law, The Ohio State University Moritz College of Law. This essay was originally published on June 12, 2003, with JURIST, and is also available at <<http://jurist.law.pitt.edu/forum/forumnew115.php>>.

prohibited sodomy across the board, whether engaged in by homosexuals or heterosexuals, the Court treated the statute as if it were only a same-sex sodomy ban, without providing any principled justification for doing so. This move caused numerous constitutional scholars to maintain that *Hardwick* undermined the secure foundations of the right to privacy that heterosexuality had formerly been able to take for granted.

In a sense, *Lawrence* fits the *Hardwick* rationale better than *Hardwick* itself did. The Texas sodomy law in *Lawrence* is expressly written in sex-specific terms, banning sodomy *only* when two people of the same sex engage in it. This makes it just like the law that the Court manufactured, and then affirmed, in *Hardwick*.

These are among the reasons *Lawrence* has become a fountain of hope especially in the gay community. It's the perfect vehicle for the Supreme Court to reconsider and to reverse *Hardwick*. If *Hardwick* was the case in which the Court toe-kicked gays in the face, *Lawrence*, some think, may turn out to be the one in which the Court finally recognizes our dignity. *Lawrence* could be the opinion in which the Supreme Court first respected gays' rights to be—and act—gay, sexually.

It is thus easy to perceive why some have been enticed by the sweet aura of possibility that surrounds *Lawrence*. But much more difficult to understand—and largely unnoticed so far—is how *Lawrence's* possibilities look to people concerned with inequality between the sexes. From the standpoint of these concerns, *Lawrence*, and the way it was litigated in the Supreme Court, raises unmistakable danger signs. In particular, it poses the risk that the Court may stake out a constitutional path to gay rights in *Lawrence* that unwittingly creates a new set of protections for perpetrators of sexual violence. If and when that happens, *Lawrence* will be more than the case that recognized gay rights. It will be the decision that gave gays their rights at the expense of victims of sexual violence—women and men alike. If so, the question becomes this: is there a way to recognize gay rights in *Lawrence* and avoid injuring victims of sexual violence at the same time?

How have the gay rights arguments in *Lawrence* come into conflict with the rights of survivors of sexual abuse? In addition to privacy rights, lawyers in *Lawrence* contend that the convictions and the sodomy law infringe constitutional equality guarantees. Broadly speaking, what unites these privacy and equality claims as presented in the case is a seductively simple proposition: *gays are just like heterosexuals*. The power of this “like straight” idea comes from the presumptive goodness of heterosexuality, a sexual status that is socially sacrosanct and legally protected. If gays are just like heterosexuals, the “like straight” notion typically goes, gays should have all the same rights that heterosexuals do, and for the same reasons. The peril here is that heterosexuality and its laws have long rationalized and concealed sexual violence and silenced its victims. Is homosexuality now poised to gain legitimacy by going down this same road?

Praise for heterosexuality surfaces throughout the gay rights *Lawrence* briefs. One romantic depiction of heterosexual (and by extension, homosexual) “domestic bliss” appears in the brief filed by eighteen of our country's leading constitutional law scholars. This Law Professors' Brief tells us that: “By interfering with the interest gay people share with all other adults in making

choices about their private consensual sexual activity, [Texas' sodomy law] also interferes with the relationships gay couples develop." For a long time, the Brief goes on to explain, the Supreme Court has recognized how important sexual intimacy is to heterosexuals. And "[t]his is true," the Brief intones, "for gay people no less than for heterosexuals."

Just in case anyone (or anyone who happens to sit on the Supreme Court) should be unaware of the breezy similarities between homosexuals and heterosexuals, the Law Professors' Brief details some of the ways that "gay people," just like heterosexuals, "form couples and create families that engage in the full range of everyday activities, from the most mundane to the most profound." Gay people, for example, "shop, cook, and eat together." Who knew? They "celebrate the holidays together, and share one another's families." And they even "make financial and medical decisions for one another[.]" and "rely on each other for companionship and support." In sum, "[m]any gay couples share 'the duties and the satisfactions of a common home.'" In these and other ways, the Law Professors' Brief affirms, as do many other gay rights briefs in *Lawrence*, that homosexuals are *just like* heterosexuals and, consequently, deserve all the same rights *and privileges* that heterosexuals have. Guess what: We're human.

All the same, the ways in which the gay rights *Lawrence* briefs repeatedly make their "like straight" arguments leads a feminist like me to raise his brow. For years now, feminists have exposed the violence of male sexuality and criticized the notion that to be afforded their rights, members of socially subordinated groups—be they women or gays—must be "just like" members of socially dominant groups. Such formal equality logic can be—and often is—a kind of "unreason," a cover for social dominance posing as "equality" that is anything *but* a way to eradicate social hierarchy. It delivers rights only on the terms that the socially privileged have set. In doing so, formal equality assumes that socially dominant groups—whether for men, or in *Lawrence*, heterosexuals—should be the standard against which equality claims are judged and equality rights distributed. As legal theorist Catharine MacKinnon has observed: concealed in this approach "is the substantive way in which man has become the measure of all things." And this man has, substantively, been heterosexual.

What might this mean for a feminist—that is, a realistic—understanding of the "like straight" arguments in *Lawrence*? Apart from reinforcing the abstract logic that to be equal one must be the same, which makes it harder for all unequal groups to gain equality through law, the "like straight" arguments are substantively dangerous when they uncritically embrace and advance the idea that heterosexuality (at least at its core) is all good, all happy, making the legal and social mistreatment of gays, one guesses, an exceptional deviation from heterosexuality's—or at least its Constitution's—internal equality norms.

Not so. As feminism has shown, the institution of heterosexuality has hardly been so egalitarian. At its foundation, feminist investigation has revealed, heterosexuality has largely been defined in male supremacist terms—terms that include both the massive production and the massive denial of the sexual abuse and other violence that women suffer at men's hands, along with the sexualized dimensions of the homophobic violence that lesbians and gay men suffer at the hands of heterosexual men. These are some of the

not-so-pretty pictures of heterosexuality that, in various ways, the gay rights briefs in *Lawrence* occlude. Additionally, the upbeat analogy between homosexuality and heterosexuality that the gay rights *Lawrence* briefs widely purvey also implies that homosexuality, like heterosexuality, should be ignored when it involves sexual injury. It suggests that prohibitions on sexual abuse among gays, like those on sexual abuse among heterosexuals, are of marginal importance within a legal debate about the constitutional right to sex, and really maybe none at all.

These initial concerns with the “like straight” arguments are underscored by the gay rights briefs in *Lawrence*. A number, including the Lambda Legal Defense and Education Fund’s principal brief, cite approvingly, and none criticize, a case called *Powell v. State* decided by the Georgia Supreme Court in 1998. In *Powell*, the Georgia high bench invalidated the state’s sodomy law—the same law affirmed by the Supreme Court in *Hardwick*—under the Georgia constitution’s privacy protections.

Lambda’s enthusiasm for *Powell* didn’t start with its *Lawrence* brief. Shortly after the Georgia Supreme Court issued its *Powell* decision (a case in which Lambda had filed a friend-of-the-court brief urging reversal of the states’ sodomy ban), Lambda’s Stephen Scarborough was reported as cheering the decision. “This,” he said to *The New York Times*, “is especially sweet.” It “really sends the signal to other states [that] may be considering similar challenges that we are in a day and age when the government simply does not belong in bedrooms.”

But the victory in *Powell* was more aptly described as “bitter sweet”—for reasons that neither Scarborough in *The Times* nor the gay rights briefs in *Lawrence* have paused to mention. Anthony Powell, the defendant, was accused of having intercourse and oral sex with his 17-year-old niece *against her will*. She testified at trial that the sex acts she engaged in with her uncle were *forced*, that she didn’t consent to them, and that, during the encounter, she wept. While this was happening, Powell’s wife, the girl’s aunt, a month shy of delivering Powell’s child, was asleep in the next room. Gay rights organizations have scandalously failed to engage these facts. Certainly, the invalidation of Powell’s conviction was not “[e]specially sweet” for the seventeen-year-old girl who said she was sexually violated.

It is embarrassing that we in the gay community have unqualifiedly heralded *Powell* as a political victory for gay rights. No less disturbing, however, is a sodomy ruling that the New York State Court of Appeals (the state’s highest court) delivered back in 1980: *People v. Onofre*. The gay rights briefs in *Lawrence* that mention *Onofre* have lopsidedly noticed what great news it was for sex, but not what it meant for efforts within the gay community to recognize—and stop—sexual abuse.

In *Onofre*, the New York Court of Appeals overturned the state’s sodomy ban on privacy and equality grounds. Integral to the court’s conclusion was that the sex that the thirtysomething Ronald Onofre had had with 17-year-old Russell Evans was consensual. The sexual acts for which Onofre was initially convicted came to police attention when Evans told them what he and Onofre had done together. Evans explained that he hoped by telling the police what Onofre had done with him, Onofre might be kept from similarly injuring others through sex. Among other things, Evans told the police: “my anus was

bothering me and I even at one point went to a doctor . . . and got treatment because my rearend was tore up.”

The relationship didn’t begin this way. At its inception, Onofre, a self-described “minister and assembler,” was attempting to help Evans, who was experiencing family problems. At some point in its course, the relationship between Onofre and Evans took a different turn. “Before I knew what was happening,” Onofre told authorities, “things started happening between us.” Though both Onofre and Evans eventually agreed the relationship, including the sex it entailed, was consensual, Onofre wondered in writing to the police: “Russell know [sic] that I am gay, so h[e] may have thought to repay me for my kindness, that he had to have an intimate relationship with me.”

There is plenty amiss here, including a range of inequalities and abuses of power, as well as physical harms. How, then, one might ask, has the New York high court’s opinion *Onofre* become a political symbol for gay rights? The answer is that the sex in *Onofre* was consensual (we know this because they both said so), and that *Onofre* protects sexual rights. Never mind that the “consent” in *Onofre* was stacked on top of inequalities and abuses of power. Never mind that *Onofre*’s respect for sexual rights was achieved on the back of the multiple sexual injuries to the less powerful person that the sex it protected involved.

If nothing else, *Powell* and *Onofre* and their reappearance in the *Lawrence* litigation before the U.S. Supreme Court highlight the urgency of determining what exactly it means to say, as gay rights briefs in *Lawrence* do, that gays are “just like” heterosexuals. Is it meant by this that we, like heterosexuals, do not and will not take claims of sexual abuse seriously? That we, like heterosexuals, ignore relations of unequal power between sexual partners? That we, too, ignore physical injury so long as it is sexually inflicted? De-sexualize it to recognize it as harm? That we will regard any victory for sex as sweet, even when the sex that prevails is (or includes) sexual violation?

One searches the gay rights *Lawrence* briefs largely in vain for answers. In their zeal to decriminalize gay sodomy, nowhere do those briefs seriously engage the well-documented problems of sexual violence *within* the lesbian and gay male communities beyond the predictable—but insufficient—platitudes about “consent.” Not even the “international law” brief in *Lawrence* does, though this is a problem that transcends borders. This is not to say that *Lawrence v. Texas* itself presents a problem of consent. Nor that sodomy should remain criminal. It is, however, to ask whether we have been, or are, arguing for gay liberation in a way that builds a future we wish to inhabit.

One of the few briefs in *Lawrence* that in any way crafts an argument for gay rights around same-sex sexual violence as such is almost enough to make one yearn for the distant past. Yale Law Professor William Eskridge for the CATO Institute submits that, in the nineteenth century, sodomy laws were partly an attempt to address same-sex sexual abuse. If this is true, it is all the more extraordinary that a complete analysis of the problems of same-sex sexual violence has been elided in the contemporary rush to void sodomy laws. Indeed, the CATO Brief itself does not explore the possibility that this historical purpose may have been implicated in *Powell* and *Onofre*, both of which it mentions approvingly.

The CATO Brief's short discussion of the historical relationship between sodomy laws and sexual violence comes in a larger argument about why sodomy laws, though they once may have conformed to the Constitution, no longer do. (This is ingenious.) Today's sodomy laws, it is argued, are not intended to serve the reasonable purposes, including protecting victims of sexual violence, that historically they did; nowadays, they're "understood" to be about something else again: homophobia. By uncoupling homophobia from sexual abuse the way it does, the CATO Brief can take aim at homophobically-underwritten sodomy laws without having to consider what should be done about the problem of same-sex sexual injury. In this respect, the CATO Brief is not alone: The other gay rights briefs in *Lawrence*, including the ACLU's Brief and the "Historian's Brief," which echo its historical claims, don't either.

This is not to say that sodomy laws, as framed and enforced today, should not be overturned. It *is* to say that any serious discussion of why needs prominently to engage, rather than obscure, to confront, rather than avoid, the sexual abuse that not only is there, but that may even historically have been part of their purpose to address. So far, the discussion occasioned by *Lawrence*, though serious, hasn't done this. This sheds light on what gay rights advocates do and do not mean when they criticize sodomy laws as a form of coercion.

In any event, homophobia isn't so easily divorced from sexual abuse as the gay rights briefs in *Lawrence* may make it seem. Leaving victims of same-sex sexual violence to suffer in silence can be homophobic, too. For years, male supremacy has policed a certain silence around same-sex sexual harm, including same-sex domestic violence, stalking, prostitution, and rape. It has rendered them ineffable in law and in life. The notion has been pervasive that gay men *as gay men* have tacitly consented to acts of sexual violence and perhaps may even have desired them—in much the way the same attributions are made to women who are sexually violated. The tightlipped silence in the gay rights *Lawrence* briefs around the current realities of same-sex sexual violence within the gay community keeps them exactly where male supremacy does and would keep them among heterosexuals: invisible, hidden from public view.

The "like straight" argument in *Lawrence* is in this respect more than tacit. Paul Smith, Lambda's representative before the Supreme Court during the oral arguments in *Lawrence*, was asked by Justice Antonin Scalia: "What about rape laws? There are . . . rape laws . . . that only apply to male/female rape . . . [Are they] unconstitutional?" "Suppose the State has a rape law that—that, you know, that really requires the penetration of the female sex organ by—which is the classic common-law definition . . . of rape, and it has no law of . . . homosexual rape. You think that that law would be unconstitutional?"

This was a perfect opportunity to point out that yes, gays, just like heterosexuals, have a problem of sexual violence, and to say, yes, laws that do not offer meaningful and equal protection to gays and straights from sexual abuse should be regarded as unconstitutional. Indeed, Smith might have reminded the Court that, under Texas law, men and women, straight and gay, are already at least formally protected against acts of sexual assault, and that most states have gender-neutralized their rape laws. The Lambda Brief in

Lawrence that Smith signed, after all, had made direct (albeit passing) reference to Texas's sexual assault law, one of only two gay rights briefs in *Lawrence* to do so.¹

Smith might also have returned Justice Scalia's volley, asking, What, exactly, Justice Scalia, do you mean by "homosexual rape"? Same-sex sexual assault generally? Same-sex sexual assault committed by straight men? Against them? Is "homosexual rape" only rape that's committed by "provably" or out gay men? Does it refer to a form of sexual violence that, socially speaking, can make a heterosexual victim wonder whether he is, or might be, gay? Does the term construe any man who sexually assaults another as, by definition, gay? Does it make same-sex rape a crime that only gay men commit? Is there any room in the notion of "homosexual rape" for lesbian women at all?

Smith instead said: "I didn't suggest that [laws prohibiting only male-on-female rape] were unconstitutional." The reason Smith offered to shore up his view was this: A State might justify a law that prohibited only male-on-female rape by coming forward with evidence that "homosexual rape" "is not a problem that needs to be addressed or that the victims are more able to protect themselves." To repeat the relevant point: A State may justifiably choose not to regulate so-called "homosexual rape," either because there's "evidence that this is not a problem that needs to be addressed or the victims[—presumably men, including gay men—]are more able to protect themselves."

But what of victims of male-on-male rape—the very people who have not been able to protect themselves? Should we maybe believe that they wanted it, so weren't raped, but were sexually actualized? How circular, providing evidence that same-sex rape is "not a problem that needs to be addressed[.]" If one believes that men "are more able to protect themselves," and so is willing to disbelieve men's claims of rape when they haven't been able to prevent it, the problems of same-sex sexual violence disappear. All men, gay or straight, are apparently alike: sexually inviolable and unviolated.

Leaving aside how Smith's remark naturalizes, hence justifies, male sexual aggression, and how it reinforces the notion that women are defined by their capacity to be sexually violated by men, it is also the case that the invisibility of male-on-male sexual violence is the very position that male supremacy would like to occupy—and often has—when it comes to male-on-female sexual abuse. That is, that it's "not a problem that needs to be addressed," at least not as a problem of inequality. Following the "like-straight" reasoning of the briefs in *Lawrence*, why should same-sex sexual violence be any different?

While it may initially seem that, during oral arguments in *Lawrence*, Smith made a strategic choice to limit the "like straight" analogy, on closer inspection, he took the "like straight" position that gays can leave the problems of sexual violence un-addressed, its victims without (meaningful) legal

¹ The other direct reference in the gay rights briefs in *Lawrence* to Texas's law against sexual assault appears in a footnote in the Law Professors' Brief. In that footnote, the Law Professors observe that Texas's sexual assault law, like the state's ban on public sex and its ban sex with minors, applies "to heterosexual and homosexual conduct alike." Needless to say, this is hardly an analysis of how that law has operated in practice or how the acts it addresses are related to male supremacy.

recourse. So much for *Lawrence* being the case that asks the Court to liberate all gays from “the closet.” For victims of male-on-male sexual abuse, the message that emerges is clear: *Lawrence* is not for you. It’s about freeing and protecting what was done to you.

No one has yet publicly suggested that an apology to victims of same-sex sexual violence is in order, among other things, for this display of insensitivity and obliviousness to the reality of the abuse that they’ve suffered. Nor (so far as I’m aware) has one been forthcoming on its own.

Smith was no doubt caught off guard by the Court’s question precisely because, when defending gay sex, it does not occur to gay rights advocates, straight or gay, to criticize sexual abuse. They do try to avoid airing the gay community’s “dirty laundry,” so as not to draw homophobic rebuke. Implicit in this thinking, though, is that we can and should live with the male supremacist protections that have long been accorded to those who deserve it *least*: those who misuse and hide behind the right to sex that’s being argued for in *Lawrence*, meaning, of course, perpetrators of sexual abuse.

To argue for a right to sex this way may be a luxury that gay rights advocates can afford. But survivors of sexual violence, as well as those who love them and those who work with them cannot. For they know that there is a relationship between sex and sexual violence—in the gay community and beyond it—that has to be exposed, spoken about, and spoken against, in order to be broken. *Lawrence* is about them, too.

Had advocates of the “like straight” arguments in *Lawrence* taken the advice of those who are committed to ending the inequality between the sexes, they could—and would—have developed their arguments in a fashion that would have made this clear. In fact, it is one more way that homosexuality *is* like heterosexuality. But in light of their very “like straight” avoidance, if not wholesale denial, of the problem of sexual violence, it is hard to be overly hopeful that the Supreme Court will write an opinion that is good for women, lesbian or not, and gay men who have been sexually violated.

Because I want sodomy laws to be struck down, too, but in the right way, I am pleased to report that the brief filed in *Lawrence* by the NOW Legal Defense and Education Fund holds out a key that can spring gay rights and the rights of victims of sexual violence at the same time. Although it doesn’t address sexual violence explicitly as such, the NOW Brief does argue that sodomy laws violate the sex equality rights of lesbians and gay men. In doing so, the NOW Brief directly reveals the male supremacist underpinnings of sodomy prohibitions, and effectively calls upon the Court to strike them down *on those very grounds*. Should the Court be wise enough to follow the course that NOW has opened up to it most explicitly, it will have done more than most of the gay community as a whole has yet done to take seriously the problems of sexual violence, and to recognize that in the debate over the government’s authority to regulate sexuality, the rights of victims of sexual violence, of all sexual orientations, deserve to be heard.