

***Bowers v. Hardwick*: A Legal and Cultural Analysis**

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While most cases decided by the Supreme Court bear a legal significance, some are important because they bear a social and cultural significance. *Bowers v. Hardwick* (1986) is an example of a case that carries important social and cultural implications as well as legal precedent. The issue before the court in *Bowers* is a rarely enforced, mostly forgotten Georgia statute that prohibits sodomy. The court's decision to maintain the sodomy statute did little to help enforce it. It is as barely enforced now as it was before the case went to the Supreme Court. The broader impact on our society is how the Court chose to deal with the issue at hand. In deciding matters of homosexuality and privacy between two consenting adults, the Court looked beyond simple legal issues and chose to take a moral stance against what they deemed improper behavior. This had a negative impact on our society as a whole by bringing mainstream religious values and ideals into the legal system, therefore depriving people of their fundamental rights to privacy and association by instituting a system of heterosexism. Because of the criminalization of private homosexual acts, discrimination against homosexuals became legal and the gay rights movement suffered. These results greatly affected the homosexual community as well as all of society.

The cultural significance of *Bowers v. Hardwick* lies in its perpetuation of discrimination against homosexual men and women in the United States. The legal environment created by policy stemming out of *Bowers* makes it legal to deny homosexuals employment (*Shahar v. Bowers* 1997) and many other rights which are illegal to deny to other protected minorities. Because of these effects, the Supreme Court's decision in *Bowers v. Hardwick* is incorrect and harmful to our society as a whole.

Background and Facts of the Case

Michael Hardwick was arrested for violating the Georgia criminal sodomy statute after the police walked into his bedroom and witnessed a sexual act between him and another male. Both men spent ten hours in jail before they were released. The District Attorney did not press charges against either man, but reserved the right to do so in the future. The Georgia statute carries a punishment of up to twenty years for committing the offense of sodomy. Hardwick sought a declaratory judgement challenging the validity of the law. *Hardwick v. Bowers* (1985) declared the Georgia Statute unconstitutional based on precedent set by the Supreme Court in *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); *Stanley v. Georgia* (1969); and *Roe v. Wade* (1973). The Court held that the Georgia statute violated Hardwick's fundamental rights because his homosexual activities were an

example of private and intimate association, which is beyond the reach of the State. Because several other sodomy statutes came to be challenged around the same time in different Circuits, the Supreme Court granted a writ of certiorari for the case. The Court considered the claim, and overruled the lower court by deeming the Georgia statute valid and constitutional (*Bowers v. Hardwick* 1986). A heterosexual couple, John and Mary Doe, joined Hardwick in the claim, stating that they wished to engage in the sexual activity prohibited by the sodomy statute. The Court dismissed their claim stating that they did not have standing to maintain this action. The only claim before the Supreme Court, therefore, was Hardwick's challenge of the Georgia statute as applied to homosexual sodomy (*Bowers* 1986:188).

The petitioner in the case, Attorney General of Georgia Michael J. Bowers stated in his brief to the Supreme Court that homosexual sodomy is not included in the right to privacy because it is condemned as immoral under Judeo-Christian laws and values. Bowers also stated that no universal principle of morality teaches that homosexuality is acceptable conduct. This belief means that the sexual acts associated with homosexuality are unacceptable and that the Georgia sodomy statute has roots in tradition and morality. Thus, according to the statement of the petitioner, homosexuality is not a historically protected and accepted way of life and there is no fundamental right to homosexual sodomy because fundamental rights must be rooted in traditions and moral values of the people.

The brief of the respondent relied on the fundamental right to privacy of all the citizens of the United States as granted by past Supreme Court decisions such as *Roe v. Wade* (1973) and *Griswold v. Connecticut* (1965). Due to this right to privacy, the brief argued, a heightened scrutiny must be applied in dealing with the Georgia sodomy statute. The brief of the respondent also stated that there is a fundamental right to have the private home be protected against unjustified State intrusion. It stated that if this statute is deemed constitutional, the state of Georgia will have the power to extend its criminal law into the very bedrooms of its citizens, to break up even wholly consensual, non-commercial sexual relations between willing adults. (*Bowers* Brief of the Respondent 1986). The respondent urged the Court to not only focus on homosexual sodomy, maintaining that the Georgia statute applied to all sodomy, performed by homosexual as well as heterosexual people.

The Supreme Court overruled the Appellate Court's judgment and affirmed the constitutionality of the Georgia sodomy statute in question, stating that the Constitution did not confer a fundamental right upon homosexuals to engage in sodomy (*Bowers* 1986:190-191). The Court also stated that the fact that the homosexual conduct occurs in the home does not affect the result (195-196), and that sodomy laws have value because they uphold morality of the citizenry (196).

The Reasoning of the Supreme Court

The Supreme Court declared the Georgia sodomy law to be constitutional on the basis that homosexual sodomy is not a fundamental right protected by the Constitution and that it may be regulated at the discretion of the states. Interestingly enough, the statute in question does not only apply to homosexual men and women, but to all citizens of Georgia engaging in “sexual act[s] involving the sex organs of one person and the mouth or anus of another” (Georgia Ann. Code 1984). This does not distinguish homosexual sodomy from heterosexual sodomy. However, the Court dismissed the claim of the heterosexual married couple that sued along with Hardwick. Because of this, the case became solely about the right of homosexuals to engage in sodomy, and therefore, their fundamental rights to association and privacy. A case solely concerned with homosexuality opens itself to moral judgments because of historical condemnation of homosexuality. The Court used these moral judgments to determine the outcome of this case.

The majority rejected the argument that there is a fundamental right to homosexual sodomy because there is a history of rejection and non-acceptance of such practice, and therefore no tradition of the value of such behavior. Although other cases based on morally unacceptable behavior determined that a sphere of privacy surrounded intimate association, the past cases dealing with this issue deal with matters of the family, such as child rearing, marriage, and procreation. The Court reasoned that since homosexuality does not have any connection to family, marriage, or procreation, the constitutional right to privacy does not apply (*Bowers* 1986:191). This sets a high water mark for determining substantive due process regarding privacy and intimate issues. The Court stated in *Bowers*, “the right to privacy stops here” (Rubinfeld 1989:747). The Court deemed that homosexual conduct does not fall under the protection of the home because other sexual crimes such as prostitution, incest, and child molestation are also subject to prosecution even though they may occur in the privacy of the home. The reasoning of the majority was that if homosexual sodomy falls under the classification of intimate association, then so do the other sexual crimes that need to be prosecuted even though they occur in the home. They were “unwilling to start down that road” (*Bowers* 1986:195-196).

This comparison of homosexuality with sexual crimes such as incest and prostitution effectively labels homosexuality as deviant behavior. If a person is a homosexual, he or she has a propensity to engage in deviant criminal behavior and therefore becomes inherently deviant. In this fashion, homosexuality itself, not the act of sodomy, comes under legal attack (Halley 1990:1734-1735). Because there ceases to be any distinction between homosexual identity and homosexual acts, a person may be labeled a criminal and treated as such although they are not prosecuted for the crime of

sodomy itself. Because “homosexual sodomy” has become “homosexuals as sodomy” an acknowledgement of gay identity is an admission of membership in a criminal class (Halley 1990:1734-1735). This clearly perpetuates heterosexist norms and beliefs through law and the wording of the decision in *Bowers*.

Statements and connotations of morality and traditional values permeate the majority opinion in this case. What seems to be a simple case that deals with an obscure statute, becomes a question of values and morals imposed by the Supreme Court, which states that “the law...is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed” (*Bowers* 1986:196). By this statement, the Court likens the case to an issue of morality and not an issue of law, superceding the right to privacy with the duty to maintain moral order.

Impact of *Bowers v. Hardwick* on the Socio-Legal Environment

Legal scholars as well as civil rights organizations anticipated the broad social and legal implications of this case. Along with the briefs filed by the petitioner and respondent, six *amicus curiae* briefs were filed for the consideration of the Supreme Court. An *amicus* brief is a brief filed in the Court by a separate person or organization, which has an interest in the case. They represent the interest groups involved in the case, and show the broader stakes in question.

Among the five briefs filed in favor of the respondent was a brief from the American Psychological Association and the American Public Health Association. They stated that homosexuality was not a disorder and cannot be cured. They also stated that homosexuality is not a lifestyle choice, but something that is determined in a person by the age of three and is irreversible. Because homosexuality is not a lifestyle choice, as commonly believed by mainstream religious organizations, but an inherent trait, homosexual men and women should be treated in the same manner as any other person, including having the same fundamental rights to privacy and intimate association. According to the American Psychological Association and the American Public Health Association, the freedom to express intimacy through sexual conduct is important to the psychological health of individuals, including homosexual individuals, and if law prohibits that intimacy, it poses harm. Procreation and perpetuation of the family is not the only acceptable form of intimate association. Because homosexual couples cannot have a traditional family, does not mean they cannot have any familial or intimate ties. Modern families have come to include homosexual couples and their adopted children (Michaelson 2000:1561). If the law curtails intimate association simply because traditional religious values are not upheld, this imposes on the mental health of those individuals who are denied the right to have intimate contact.

The Catholic League for Religious and Civil Rights filed

the only brief on the behalf of the petitioner. As a religious organization, they argued that the right to privacy, which is applied only to family matters, should not cover homosexual sodomy. Because homosexual men and women cannot marry or procreate, their relationships do not further the traditional institution of family, and therefore are not part of the fundamental protection from state intrusion into the bedroom. The Catholic League also argued that since traditional Anglo-American tradition and law does not support homosexual behavior it carries with it no fundamental rights to privacy.

The *amicus curiae* briefs give some insight into the broader implications of the decision in this case. Because the Court took a highly moral road to defending the constitutionality of the Georgia sodomy statute, *Bowers v. Hardwick* stands as the high water mark for substantive due process in legislation pertaining to morality. The Supreme Court uses *Bowers* to reinforce matters that could be construed as immoral. For example, in the case of *Michael H. v. Gerald D.* (1988) where the issue was the parental rights of an adulterous father, the Court referred to *Bowers* when it said that there is no historical protection for adulterous behavior. Adultery, like homosexuality is considered immoral and therefore subject to legal measures. In *Planned Parenthood v. Casey* (1992), a case in which the Court upheld abortion rights, the dissent by Chief Justice Rehnquist attempted to classify abortion as immoral and therefore grouped with other immoral acts such as sodomy in *Bowers*, not with fundamental rights such as in *Roe v. Wade* (1973). Justice Rehnquist stated that, because homosexual sodomy in *Bowers* did not fall under strict scrutiny, then neither should abortion in this case (*Casey* 1992:940,953). This is an example of how the Supreme Court may use *Bowers* in the future to limit abortion rights and those rights in general that may be morally suspect.

While most subsequent Supreme Court cases rely on *Bowers v. Hardwick* for guidelines of substantive due process, they do not address issues of homosexuality. Only one subsequent Supreme Court Decision since *Bowers* has addressed homosexuality. In *Romer v. Evans* (1996), a state constitutional amendment banning gay rights ordinances was deemed unconstitutional, which is seemingly contrary to the precedent set in *Bowers*. However, *Romer* was based on different grounds, and while the decision was a victory for homosexual men and women, it only barely grazes *Bowers*. In his dissent to the decision in *Romer*, Justice Scalia stated that the decision “places prestige of this institution behind a proposition that opposition to homosexuality is as reprehensible as racial or religious bias” (*Romer* 1996:636). This is evidence of a turn in social climate of the United States. While the Court cautiously did not overturn *Bowers*, it weakened the argument that homosexuality is immoral and not deserving of protection.

Bowers's focus on only homosexual sodomy had a tremendous impact on the gay rights movement. The gay and lesbian community has been largely ostracized and discriminated against because of the Judeo-Christian views that homosexuality is immoral.

The gay rights movement sought to remedy this, but when the *Bowers* decision was handed down, it set a legal precedent for such discrimination. This affected the gay-rights movement because, “in the years following *Bowers*, courts across the country declined to find constitutional violations in gay-rights cases, often reasoning that because sodomy could be criminalized, discrimination against sodomizers was constitutional” (Michaelson 2000:1569). An example of such discrimination is evident in *Woodward v. United States* (1989), where the Federal Circuit Court allowed a discharge of a navy seaman because he was gay. The majority opinion states, “After *Bowers* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm” (*Woodward* 1989:1076).

Shahar v. Bowers (1997) is another example. The case, which went before the 11th Circuit Court of Appeals, deals with a woman fired from a governmental position because she was a lesbian. The Attorney General of Georgia dismissed this woman from his office because she had a propensity to engage in sodomy, therefore presenting conflict with enforcement of the sodomy statute held constitutional in *Bowers*. She also created a “bad appearance” for the Attorney General Office (*Shahar* 1997:1105-1111). This case is an example of discrimination against homosexuals made legal by the *Bowers* decision. The 11th Circuit Court held that under the *Bowers* precedent, there was no wrongful action committed by the Attorney General of Georgia.

The subsequent case history determined by the *Bowers v. Hardwick* decision shows how that case has negatively affected the socio-legal environment of the United States by instituting a system of legal discrimination against homosexual men and women.

The Cultural Impact of *Bowers v. Hardwick*

While *Bowers v. Hardwick* set a legal precedent that negatively impacts our government by maintaining legal discrimination, the larger impact on our society comes with the cultural connotations of the case. Because the case focuses only on homosexual sodomy and does not take a broader view to encompass heterosexual sodomy as well, the case has been labeled the “gay case” and therefore can be used as a support for feelings of homophobia in the population. The *Bowers* decision, therefore, “is a judicial attempt to legitimize the homophobic tradition and intolerance of minority sexual practices” (Tharpes 1987:541). Homophobia comes across to the larger population as acceptable and supported by law because of the precedent set by the case. This is unacceptable because it is mentally and sometimes physically harmful to a significant portion of the population who are entitled to protection from these harms.

References

- Halley, Janet E. (1990) *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 *Virginia Law Rev.* 1721 at 1734-1735.
- Michaelson, Jay. (2000) *On Listening to the Kulturkampf, or How America Overruled Bowers v. Hardwick Even Though Romer v. Evans Didn't*, 49 *Duke L.J.* 1559.
- Rubinfeld, Jed. (1989) *The Right to Privacy*, 102 *Harv. Law Rev.* 737.
- Tharpes, Yvonne L. (1987) *Bowers v. Hardwick and The Legitimization of Homophobia in America*, 30 *How. L.J.* 537.

Cases Cited

- Barnes v. Glen Theatre Inc.*, 501 U.S. 560 (1991).
- Bowers v. Harwick*, 478 U.S. 186 (1986).
- Cruzan v. Director of Missouri Department of Health*, 497 U.S. 261 (1990).
- Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- Griswold v. Connecticut*, 381 U.S. 479 (1965).
- Hardwick v. Bowers*, 760 F.2d 1202 (1985).
- Michael H. v. Gerald D.*, 491 U.S. 110 (1988).
- Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
- Roe v. Wade*, 410 U.S. 113 (1973).
- Romer v. Evans*, 517 U.S. 620 (1996).
- Shahar v. Bowers*, 114 F.3d 1097 (1997).
- Stanley v. Georgia*, 394 U.S. 557 (1969).
- Woodward v. United States*, 871 F.2d 1068 (1989).

Statute Cited

- Georgia Ann. Code, sec. 16-6-2 (1984).