

“The Rest of the Closet?”

John Brigham

February 13, 2004

For volume on *Lawrence v. Texas*, Harry Hirsch, editor.

*This chapter is about the Supreme Court learning what it means to be gay. This happened between the Court’s rulings on the Georgia sodomy law in *Bowers v. Hardwick* and the Texas law in *Lawrence*. Oral argument is placed at the center of this process, particularly the work of Paul M. Smith who argued against the constitutionality of the Texas law. Attorney Smith, described as openly gay, was a law clerk to Supreme Court Justice Lewis Powell in 1980-81. Powell’s reassessment of his vote to uphold the Georgia law in *Bowers* laid the foundation for the way *Lawrence* was handled. I will examine the significance of the Court’s public embrace of Smith’s sexual orientation against the backdrop of denial and homophobia that was *Bowers*.*

On December 4, 2002, a few days after the Supreme Court decided to hear the gay rights of *Lawrence v. Texas* and affirmative action cases from Michigan that would define the Court’s 2002-2003 term, Linda Greenhouse of *The New York Times* speculated, in print, on the impact that a justice’s personal life has on his opinions. In particular she focused on Justice Lewis F. Powell, Jr. and his lack of experience with gays, or, in the words of the *Lawrence* argument, persons who have intimate same-sex relationships. This acknowledged lack of familiarity was prescient, prophetic, and, because it was *The Times*, perhaps determinative. It was also about intimacy and intimate in its own way. Ultimately, the case of *Lawrence v. Texas* would be argued by Paul M. Smith, an experienced appellate advocate who has made a point of being openly gay and who is a former clerk to Justice Powell.

As it turned out, in the opinion there is a noticeable shift in the Court’s sensitivity to homosexuality. This leads some to speculate that in the period since *Bowers* the Supreme Court had been transformed and that the familiarity is institutional. It was now comfortable with -- some would even say sensitive to -- the gay community. This chapter examines the institutional dimensions of what seems like a sort of institutional gaydar.

The Court and the Closet

Ms. Greenhouse told her readers, with the gay rights cases of *Bowers v. Hardwick* and *Lawrence v. Texas* in mind, that we should draw “lessons on how life informs” opinions from recent history, particularly the life history of Justice Powell (Greenhouse, 2002). This was an uncompromising reflection on judicial motivation from *The Times’* senior reporter at the Court. But, it also left a bit to the imagination with regard to its own motivation and what it was suggesting.

The piece was a thoughtful article that incorporated commentary from recent scholarship on the Court and its members. It reflected upon the enduring question of how free the justices can be from their bodies. The article also played on the lore of the institution. This included the robing closet that sits just behind the courtroom where oral arguments are held. The closet is the place where the justices have traditionally shaken each other by the hand before going into public to hear arguments on the great

constitutional issues of the day. It is the closet that they come out of when they part the purple curtain and take their seats behind the bench in the courtroom.

Between *Bowers* and *Lawrence*, scholars Joyce Murdoch and Deb Price published an important book. Their *Courting Justice*¹ chronicles the relationship between the Court and the gay community as an increasingly open engagement. Their story begins in what they call the “hyper-closeted days” of the 50s and traces the interaction of the gay and lesbian community with the Court, a place they say “eventually” comes to terms with the forces that blow through American society.² They trace the homosexual cases from Justice Frank Murphy’s tortured relationships with women and Tom Clark’s tortured handling of *Rosenberg v. Fleuti* in 1963 to *Bowers*, *Boy Scouts v. Dale* and *Romer v. Evans*. They make it almost to *Lawrence*, as it turns out. The authors have the Court reacting to the growing legitimacy of legal claims brought by the gay and lesbian community.³ These legal scholars get into the institutional life of the Court as they report on 22 homosexual former Supreme Court clerks, 18 gay men and four lesbians.

Rethinking *Bowers*

In *The New York Times*, Greenhouse was addressing, specifically, how Justice Lewis Powell had dealt with the issue of same-sex intimacy himself after participating in the decision in *Bowers v. Hardwick*. Powell came to the Court in 1975 and he participated in more than two dozen homosexual cases by the time the justices considered *Bowers*. He retired from the Court at the end of the 1986-87 Term, a few days after participating in the gay Olympics decision.⁴

According to biographer and former clerk, John C. Jeffries, Jr., Powell had remarked that he had never known a homosexual.⁵ Greenhouse has him saying, “I don’t believe I’ve ever met a homosexual,” Justice Powell told one of his clerks while the *Bowers* case was pending before the Court. The clerk, who was gay, replied “Certainly you have, but you just don’t know that they are.”

A few years later, on October 18, 1990, in the question period following the James Madison Lecture at New York University Law School which took place after he had retired, Powell had famously commented to the effect that he had made a mistake in that case. Asked about reconciling his *Bowers* and his *Roe* opinions he said about *Bowers* “I think I probably made a mistake on that one.”⁶ Jeffries reports that Lawrence Tribe tried to get Powell to put it in writing but the Justice declined.

Murdoch and Price’s *Courting Justice* came out a decade later and the impact mentioned above was part of the politics of transformation that led to this extraordinary book. Like Bob Woodward and Scott Armstrong’s *The Brethren* and Edward Lazarus’ *Closed Chambers*⁷ before it, the book is full of insider information drawn from interviews with clerks to the Supreme Court’s justices. And like books such as David Garrow’s

¹ *Courting Justice: Gay Men and Lesbians v. the Supreme Court* (New York: Basic Books, 2001) p. 23.

² p. 6.

³ 87 cases with some bearing on the interaction between gay men and lesbians and the Supreme Court.

⁴ *SFAA v. USOC*, June 25, 1987.

⁵ Jeffries, John C. Jr. *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner’s Sons, 1994) p. 528.

⁶ *Id.* 530.

⁷ Bob Woodward and Scott Armstrong (Simon and Schuster, 1979); Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (Penguin Books, 1999).

Liberty and Sexuality,⁸ *Courting Justice* is attentive to the interplay of personal relations, political interests and legal thought that leads to the development of constitutional doctrine.

Addressing the matter of Justice Powell's contact with the gay community, Murdoch and Price state that in each of six consecutive terms in the 1980s one of Justice Powell's four law clerks was gay. But, they support the notion that he did not acknowledge homosexuality. They describe a situation later in his life when one of his former clerks died of AIDS and they indicate that he would not face the disease and its implications.⁹ Jefferies also examines Powell's understanding of homosexuality. He makes the distinction between Powell knowing homosexuals and acknowledging them to be homosexuals. This is the sort of distinction that is at the heart of the institutions embrace of homosexuality in *Lawrence*.¹⁰

What can we say about presenting the experience of being gay, or the human quality of homosexuality, to the Supreme Court (and about how the Court responds)? Necessarily the institution becomes the context rather than the individual justice. The analytic issue becomes how Justices, clerks, secretaries and institutional hangers on convey the message of gayness. It becomes a matter, in this sense, of how the Court comes in contact with the culture. It is a sort of ontology of the closet.¹¹ Rumors of Justice Frank Murphy's homosexuality or those that have swirled around the bachelorhood of Justice David Souter do not constitute the orientation of the Court. That is a matter of institutional action.

Murdoch and Price's reporting is framed by institutional analysis. Much of the discussion calls attention to individual predispositions in a fashion similar to that suggested by Greenhouse. For instance, *Courting Justice* has an extensive discussion of Justice Tom Clark's treatment of homosexuality in *Boutilier v. INS*, where he wrote the majority opinion.¹² This was a 1966 case that considered the constitutionality of a federal statute that barred homosexuals from admission to the United States. Clark coined the phrase "afflicted with homosexuality" to uphold the statute. Murdoch and Price draw on interviews with Clark's children, including former Attorney General Ramsey Clark, to demonstrate that personally Tom Clark was aware of homosexuality and supportive of a much loved nephew who was gay.¹³

The buzz around Paul M. Smith was significant by the time he stood up before the bench in 2003. But when we say or others have said that the gayness of attorney Paul Smith reached the Justices we start with the fact that the Court, as an institution, knew Paul Smith.

Smith graduated from Amherst College in 1976 and received his JD from Yale in 1979. Smith was a clerk for James L. Oakes of the Second Circuit whose clerkships in cozy Brattleboro, Vermont were known as an entrée to the Supreme Court. They are also

⁸ *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Lisa Drew Books, 1994).

⁹ p. 343.

¹⁰ *Id.* 528.

¹¹ See Eve Sedgwick, *The Epistemology of the Closet*, (University of California Press, 1990).

¹² Decided May 22, 1967.

¹³ The authors of *Courting Justice* also note that Justice Fortas used the oral argument in *Boutilier* to try and educate the Court that homosexuality was not a disease, p. 110-111 and they characterize Justice William O. Douglas, who dissented, as "completely comfortable with homosexuality" according to his wife, p. 122.

famously communal in the relationships established between the clerks and Judge Oakes and his family. Smith was a clerk at the Supreme Court for the 1980-81 Term, five years before *Bowers* so it's pretty clear that Smith was not out to Justice Powell, who he served, but who said even years after that he had not met a gay person.

As an openly gay lawyer he came out at some point after he left the Court and came back to argue the case as a gay man. He was described at a Stonewall Bar dinner as an "openly gay partner" at Jenner and Block.

For "the Court" or even a few of the Justices to know the advocate is certainly an asset in any oral argument before the Supreme Court. Familiarity is what gives celebrity its buzz and movie stars their cache. In the case of the Court the unknown attorney presenting before the bench is not without precedent. In many cases, the prestige of an appearance before the Court pushes attorneys to accept the assignment when others are more experienced. The results are mixed with the Justices often complaining about the quality of advocacy. Yet, Sarah Weddington, who argued *Roe*, was unknown and quite young when she stood before the bench. She famously held on to the job when others would eagerly have bumped her for the prestigious assignment.¹⁴

Oral Argument

Oral argument, though often of interest to the public, has not been a focus of much scholarly attention because, in general, the arguments have not been readily available and they are not part of the formal, official record of the cases.¹⁵ There are exceptions. David O'Brien quotes Chief Justice Hughes and Justice Brennan on how much argument meant to them. He mentions that arguments come at a crucial time and "focus the minds of the justices and present the possibility for fresh perspectives on a case."¹⁶ He also says that arguments were more important in the 19th century when they were more extensive and the amount of printed submission was quite a bit less voluminous. I have examined the institutional practices that constitute what I called "the Cult of the Court,"¹⁷ and discussed the unique public phenomenon of oral argument. Later, in 1994, after legal historian Peter Irons had made materials on many of the greatest Supreme Court arguments available, in spite of the preferences of the Court,¹⁸ social science scholars did a panel on oral argument at the Political Science Meeting in New York City in which we discussed ethnographic considerations.

At the very formal and outwardly staid Supreme Court, the justices engage in behavior during oral argument that, in most contexts, would simply seem rude.¹⁹ Attorneys making the most important appearances of their career are routinely and mercilessly interrupted as they "argue" their side in the dispute. Attorneys before the Court are well aware of the tradition although some seem inadequately prepared. The

¹⁴ In her case the juxtaposition of the young woman against the crusty male attorney representing Texas came to personify the case.

¹⁵ John R. Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures*, NY: Holt, Rinehart and Winston, 1963, an early discussion of procedures has little to say about argument.

¹⁶ *Storm Center* (NY: Norton, 2003) p. 249.

¹⁷ *The Cult of the Court* (Philadelphia: Temple University Press, 1987).

¹⁸ Stephanie Guitton and Peter H. Irons, *May It Please the Court* (The New Press, 1994).

¹⁹ Some time ago, in a convention not so far away (NYC), I organized a panel on oral argument. The proceedings were published in *Law and Courts* the newsletter of the Law and Courts Section of the American Political Science Association.

attorneys must shift focus and build on interests expressed by the justices in brief but pithy exchanges. This makes the experience not only intense because of its magnitude but tricky because of the spontaneity involved. This rewards experienced practitioners and the best make a great deal of money for their few minutes before the bench. Indeed, as I argued in *The Cult of the Court*, “practices like oral argument... determine more than who wins and who loses. They affect the substance and the quality of the Court’s work, and ...what we take to be the law.”²⁰

Court arguments are spontaneous and interactive. I think of them as improvisations.²¹ The arguments are sometimes funny and often engaging. There is always an element of theater. But, this is a theater of law and the drama is a function of the stakes and the setting. It is not dramatic in the sense of a Broadway play and the relationship between the Justices and the audience seems to be entirely different. The humor is sometimes intentional but often arises from mistakes. The spontaneity is a function of the practice of proceeding more like a seminar than a lecture. This is important to those who wish the law to be rooted in academic practice or at least to those for whom academic practice is related to inquiry and intelligence. It is also interesting because this somewhat arcane discursive practice has a bearing on the issue of broadcasting these arguments.

The argument in *Bowers* was examined carefully by Jefferies.²² He felt that *Bowers* might have been a replay of *Bakke* with Justice Powell playing a pivotal role, except that he joined the majority. This was a move by Powell that Jefferies calls “the greatest mystery of his career.”²³

There is considerable debate currently as to whether oral arguments should be televised. The full blown visual performance is not available because the justices have not wanted it to be. My analysis of the performance of oral argument suggests that it shouldn’t be televised. However, with available technology and access, you can hear the justices talking about law during arguments.²⁴ The qualities of law as a linguistic activity are more precisely and unmitigatedly evident during oral argument than they are in the written opinions. Argument serves today the way the presentation of opinion in open court did years ago. It links the justices to the ideas and concepts of the law. There is an element of performance but, unlike in the theater, the justices are not directly appealing to the audience in the room. The audience appears to be the other justices and the attorneys as in a conversation. This is why it makes such little sense to televise the proceedings.

In thinking about televising the proceeding and why the Court resists, the distinctive character of this activity deserves note.²⁵ Like athletics, where the outcome is not known prior to playing the game and like “talk” shows where unscripted things are meant to happen, argument before the Court takes form as improvisation. There is a tradition at the Court closely related to that of improvisational theater.²⁶ The huge difference is that the audience, in the traditional sense, has relatively little influence on the proceedings and huge significance for future events. Argument is more like a

²⁰ *Cult of the Court* p. 176.

²¹ See Appendix 1.

²² Jefferies, p. 515.

²³ Id. 526

²⁴ “During the oral argument we see the Court working.” *Cult of the Court*, p. 183.

²⁵ Erin Jackson, Honors Thesis, University of Massachusetts, Amherst.

²⁶ Some background on improv and my experience with it is included in an appendix.

rehearsal or even a script conference. Some of the commentary that is to follow will address how the Court improvises with reference to the nature of debate on the Constitution and the implications for more media attention to this part of the governing process.

The oral argument in *Lawrence* took place March 26, 2003. Paul M. Smith argued for the petitioners and Charles A. Rosenthal for Texas.²⁷ The selections that follow are chosen with an eye to the issue of coming out to the Court, of representing sexual orientation to the Justices so that they might know someone who is gay.²⁸

For John G. Lawrence: Paul M. Smith

MR. SMITH: The one thing, that I submit the court, the state should not be able to come in to say is: We are going to permit ourselves, the majority of people in our society, full and free rein to make these decisions for ourselves, but there's one minority of people [who] don't get that decision and the only reason we're going to give you is we want it that way. We want them to be unequal in their choices and their freedoms, because we think we should have the right to commit adultery, to commit fornication, to commit sodomy. And the state should have no basis for intruding into our lives, but we don't want those people over there to have the same right.

In one sense, the subtlety of Smith's use of terms relating to sex, particularly who is doing it, is significant for what he presents to the Justices who might be expected to discuss them with some awkwardness. Justice Scalia, on the other hand just weighs in, showing a zest for the delicate give and take.

JUSTICE ANTONIN SCALIA: So the same-sex/other-sex aspect doesn't come into it...

MR. SMITH: I think it does come into it, because if you are going to suggest that the state of the law on the books in the 19th century is the touchstone you have to take into account that in the 19th century at least on the face of the law married couples were regulated in terms of their forms of sexual intimacy that were created for them.

In dealing with Justice Scalia there is evidence of the tradition that the argument is focused at the center of the Court. That framework taken in the context of the issue here suggests that Smith might be less interested in coming out to Justice Scalia though sometimes to be subject to his assaults can win favor in other corners, as when Justice Ginsburg follows the above exchange with a much more supportive intervention of her own.

Of course, in most places in the argument, Attorney Smith is not representing gayness. He is demonstrating legal expertise. He is very good at putting a social and political discussion into the language of constitutional rights, but this is the point about how the institution confronts homosexuality in the context of oral argument and the institutional engagement for which it is the centerpiece. For instance, early in the argument Smith had this exchange.

²⁷ *Excerpts as recorded by the [Alderson Reporting Company](#).*

²⁸ The issue arose for me in a presentation by Prof. Jennifer Levi of Western New England College of Law and the Lambda Legal Defense Fund when she said Smith's advocacy brought gayness to the Court. When asked how this worked Prof. Levi seemed vague to me. I think this vagueness arose from the mix of sensitive issues and complex institutional life that constitute this issue.

JUSTICE ANTONIN SCALIA: these moral judgments. You can make it sound very puritanical, the, you know, the laws against bigamy. I mean, who are you to tell me that I can't have more than one wife, you blue-nose bigot? Sure, you can make it sound that way, but these are laws dealing with public morality. They've always been on the book; nobody has ever told them they're unconstitutional simply because there are moral perceptions behind them. Why is this different from bigamy?

MR. SMITH: First of all, the first law that's appeared on the books in the states of this country that singles out only same-sex sodomy appeared in the 60's and the 70's, and it did not — and it does not — go way back, this kind of discrimination.

Now, bigamy involves protection of an institution that the state creates for its own purposes, and there are all sorts of potential justifications about the need to protect the institution of marriage that are different in kind from the justifications that could be offered here involving merely a criminal statute that says we're going to regulate these people's behaviors, we include a criminal law which is where the most heightened form of people protection analysis ought to apply.

This case is very much like *McLaughlin*, Your Honor, where you have a statute that said, we're going to give a specially heightened penalty to cohabitation, but only when it involves a white person with a black person. That interracial cohabitation is different, and the state there made the argument, we're merely regulating a particular form of conduct, and that's a different form of conduct than interracial cohabitation. And this court very clearly said, No, you're classifying people; and that classification has to be justified.

And this court at many times said a merely disapproval of one group of people, whether it be the hippy communes in *Moreno* or the mentally retarded in *Cleburne*, or indeed gay people....

It is a bit unusual for Justice Scalia to listen this patiently once he has engaged with an attorney on a point of law. Scalia represents the old view of homosexuality and what turns out to be the Court's view is dependent on how much or how little he influences his colleagues.

JUSTICE SCALIA: A justification is the same that's alluded to here, disapproval of homosexuality.

MR. SMITH: Well, I think it would be highly problematic, such a custody case.

JUSTICE SCALIA: Yes, it would?

MR. SMITH: If that were the only justification that could be offered, there was no some showing that there would be any more concrete harm to the children in the school. . . .²⁹

Smith's expertise in privacy law and the ways of the Supreme Court seem to have overshadowed his representativeness. He also argued the important case pitting the American Library Association against federal law requiring access to the internet be filtered in Libraries that received federal funds. The following term, in the fall of 2003, Smith argued the political gerrymandering case, *Vieth v. Jubelir*, which is likely to be one of the years most important.

²⁹ A report on the oral argument by Gay & Lesbian Activists Alliance Secretary Barrett L. Brick does not mention Smith identifying himself to the Court as being gay. <http://www.glaa.org/archive/2003/brickonlawrencevtexasorals0326.shtml>.

In April, a few weeks after the argument, Pennsylvania Republican Senator Rick Santorum compared homosexuality to incest, bigamy and adultery, saying “If you have a right to homosexual sex in your home...you have a right to anything.” The comments have become known more for the outrage they produced than the credibility or stature of Santorum’s position.³⁰ His comment, “I have no problem with homosexuality. I have a problem with homosexual acts,” in particular, suggested some confusion in this Republican leader about the nature of homosexuality.

The controversy does, however, speak to the characteristic relationship and sometimes tension between the personal and the institutional. A powerful example came up in the context of the Massachusetts legislature’s debate over how to respond to the states Supreme Court ruling that homosexuals must be given the opportunity to be married. During the debate the week of February 9-13, 2004, Representative Shaun P. Kelly attempted to draw his colleagues to his side by personalizing the discussion. Beginning with “Liz, this is for you,” he invoked his colleague Elizabeth Malia who had spoken of the challenges she would face as a lesbian if her partner of 30 years were to die.³¹

Conclusion

In this collection, others will comment on the decision handed down on sodomy and privacy at the end of June 2003 but the tone much spoken about in Justice Kennedy’s majority opinion reflects the sort of change in the Court’s position that might well be attributed to sensitivities developed in the Court and personified in the evolution of Justice Powell’s thinking, an evolution reflected in the out of body collective expression that is a ruling of the Court written, in this case, by Justice Kennedy.

³⁰ Associated Press interview published April 21, 2003.

³¹ Yvonne Abraham, “Debate Humanized Issue, legislators,” *The Boston Sunday Globe*, February 15, 2004, p. B6.

Bibliography

Greenhouse, Linda "Black Robes Don't Make the Justice, but the Rest of the Closet Just Might," NYT 12/4/2002 A23.

Jeffries, John C. Jr. *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994).

Levi, Jennifer "The Court and Civil Rights: Strange Classmates, Stranger Bedfellows," Supreme Court Review Conference, October 18, 2003, Western New England College of Law, Springfield, Massachusetts.

Murdoch, Joyce and Deb Price, *Courting Justice* (Basic Books, 2001).

Supreme Court, Oral Argument Transcripts,
http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html.

Thomas, Kendall "Beyond the Privacy Principle," *Columbia Law Review* 92 (October 1992): 1431-1515.