

## THE BAR COMES OUT IN HOUSTON

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Why was Houston the first city in Texas where lawyers organized a local LGBT bar association? The answer has roots in the 1960s and 1970s, when the City's gay community started to step out of the shadows. A couple of old laws—the 1860 Texas sodomy statute<sup>1</sup> and a 1904 Houston city ordinance banning cross-dressing—also played a part.<sup>2</sup>

### *Early struggles*

Both the sodomy and cross-dressing laws provided the police excuses to harass gay men and lesbians, including an infamous 1967 raid on a lesbian bar in which 25 patrons were arrested. In 1973 Texas adopted the Model Penal Code, yet did not decriminalize sodomy as the Model Code recommended. No longer a felony and under the ominously vague caption “homosexual conduct,” “deviate sexual intercourse”—yet another puritanical comment—between people of the same gender became a Class C misdemeanor in section 21.06 of what is the current Penal Code.

A first attempt to repeal 21.06 was made in 1975 by Houston Rep. Craig Washington, resulting in open derision and gay baiting on the floor of the Texas House of Representatives. Rep. Washington commented, “I debated on the merits, they debated on the prejudice.” 1973 also marked the beginnings of organized gay politics in the City, when gay activists helped elect a progressive mayor, Fred Hofheinz, leading to the 1975 formation by Pokey Anderson, Bill Buie, Hugh Crell, and Keith McGee of the Houston Gay and Lesbian Political Caucus (now the Houston GLBT Political Caucus), the first such group in the American South. Joining Anderson as early and out community activists were Ray Hill, Jerry Miller, and Rev. Bob Falls.

Lawyers and the organized bar made their way into the Houston LGBT story in a big way in 1977. The State Bar of Texas held its annual convention at the downtown Hyatt Regency Hotel featuring a national anti-gay crusader, Anita Bryant. Thousands of gay protesters took over downtown streets, creating what is now considered the first Houston Pride parade. This activism led to the 1979 election of Eleanor Tinsley, a Caucus-endorsed city council member, the 1980 repeal of the cross-dressing ordinance (a fight led by then-law student Phyllis Frye), and the

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<sup>1</sup> Act passed Feb. 11, 1860, 8th Leg., R.S., ch. 74, art. 1, art. 399c, 1860 Tex. Gen. Laws 95, 97, reprinted in 4 H.P.N. Gammel, *THE LAWS OF TEXAS 1822–1897*, at 1457, 1459 (“If any person shall commit with mankind or beast the abominable and detestable crime against nature, he shall be deemed guilty of sodomy, and on conviction thereof, he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years.”).

<sup>2</sup> The source for the much of the article's historical background comes from the author's three decades of experience as an LGBT activist and the fellow travelers he knows. The best general work on the subject is Yale Professor William N. Eskridge Jr.'s *Dishonorable Passions: Sodomy Laws in America, 1861–2003* (Viking 2008). The author is flattered to be mentioned on page 310 as one of a “new generation of legal activists.”

1981 election of Kathy Whitmire as mayor. The gay community in Houston was on a roll.

### *The HIV/AIDS backlash*

What seemed to be a growing progressive acceptance of gays was cut short by the arrival of HIV and AIDS in 1981. In a stunning backlash, a 1984 Houston city ordinance championed by Whitmire and Tinsley that barred municipal or private employment discrimination based on sexual orientation was overturned by Houston voters by a 4-to-1 margin in 1985. It was a new and harsh reality.

Meanwhile in Dallas, a civil lawsuit challenging the “homosexual conduct” statute was brought by lawyers for a group with a closeted name, the Texas Human Rights Foundation (THRF). The plaintiff, Don Baker, sued Dallas County District Attorney Henry Wade, and the district court declared the statute unconstitutional. The attorney general did not appeal, but the Potter County District Attorney did, joined by the group Dallas Doctors Against AIDS. Both the district court and a panel of the Fifth Circuit denied the attempted appeal, but the en banc court found standing for the appeal and in 1985 reversed the district court by a 9–7 vote.<sup>3</sup> On June 30, 1986, the Supreme Court handed down a 5–4 opinion in *Bowers v. Hardwick* upholding Georgia’s sodomy statute, ending any chance for THRF to take *Baker v. Wade* to the high court.<sup>4</sup> *Bowers* profoundly shocked and angered gays with both its result and its dismissive reasoning.

### *A state court assault on the “homosexual conduct” statute*

Patrick Wiseman, the lawyer leading the *Baker v. Wade* case, who was not gay, regrouped and in 1990 filed a new civil test case for THRF in state district court, *Morales v. State*. The State under then-Attorney General Jim Mattox did not actively defend the “homosexual conduct” statute, which the district court ruled to be unconstitutional under the Texas Constitution. Newly elected Attorney General Dan Morales (no relation to the lead plaintiff) actively defended the statute on appeal, but in 1992 the Austin Court of Appeals affirmed, reasoning that the statute violated the right to privacy and that the only reason argued by the State, public morality, was insufficient to justify the intrusion on privacy. In a somewhat tortured 1994 opinion, the Texas Supreme Court held that due to the bifurcation of civil and criminal appeals at the highest level of the Texas court system, the trial and intermediate appellate courts, which have no civil-criminal jurisdictional limitations, had no jurisdiction to declare the “homosexual conduct” statute

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<sup>3</sup> *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 289 (5th Cir. 1985) (en banc).

<sup>4</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986). The author of this article was a Baylor law student when *Bowers* was handed down and that morning announced to his fellow students and professor in a family law class that “The Supreme Court just issued the second worst opinion in the Court’s history.” The author was not yet out of the closet.

unconstitutional under the facts in *Morales*.<sup>5</sup> To LGBT lawyers it was better than a loss on the merits, but a somewhat contrived dodge of the real issue.

*The gay lawyers sort of come out of the closet*

In 1990 Ryan White died of an AIDS-related illness at age 18. It was arguably the first such death that captured the general sympathy of the American public. Treatments for HIV/AIDS were just beginning to be approved by the FDA. It's fair to say that it was a grim period for the LGBT communities.

But change comes out of adversity. Shimon Kaplan, a Beaumont legal aid lawyer with a Ph.D. from Columbia University, decided something had to be done. Kaplan was friends with John Paul Barnich, a Houston lawyer who was a community organizer for HIV/AIDS issues, and the two determined that a local bar association for gay and lesbian lawyers was needed. Neither Kaplan nor Barnich sought the spotlight, and as a result the early history of the association they founded has never been well documented. What is known is that on August 22, 1990 Kaplan and Barnich, joined by lawyers Mitchell Katine—an early leader in HIV law—and Mende Snodgrass, incorporated the Bar Association for Human Rights of Greater Houston, Inc., known as BAHR. Much like THRF, BAHR hid its LGBT nature—as stated in the articles of incorporation, “The specific purpose of the Corporation is to promote human rights through all lawful means.”

The first year was consumed with the board of directors debating membership issues. After much hand wringing, a decision was made to elect the board from the lawyer members, but to keep member names confidential. The board began designating officers in May 1991, choosing Clyde Williams as the first president (1991–1994). Katine was the second president (1994–1995), followed by Chris Bacon (1995–1996).

Despite the concession of a confidential membership list, few if any closeted lawyers actually joined BAHR. In the early years the members consisted mostly of solo practitioners, with the notable exception of Bacon, who was a young associate at Vinson & Elkins and the first out lawyer at a major Houston law firm. BAHR held several CLEs during the year, a holiday party, and a spring annual business meeting. A newsletter began during Bacon's presidency that reported relevant LGBT legal issues. The *BAHR Reporter* was compiled by University of Houston Law Center students under the direction of Prof. Mary Anne Bobinski, filling an important need in the pre-Google world.

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<sup>5</sup> State v. Morales, 826 S.W.2d 201 (Tex. App.—Austin 1992, pet. ref'd [by Court of Criminal Appeals]), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994). The Texas Supreme Court acknowledged that the jurisdictional problem in *Morales* was not present in a similar civil case from the Austin Court of Appeals declaring the statute unconstitutional. 869 S.W.2d at 942 n.5; *see* City of Dallas v. England, 846 S.W.2d 957 (Tex. App.—Austin 1993, writ ref'd w.o.j.).

### *Formation of the State Bar Section*

In May 1996 the first good news from the Supreme Court arrived with *Romer v. Evans*.<sup>6</sup> And things were improving in the fight against HIV, which was no longer a death sentence. There was hope. And BAHR became the vehicle to move forward on a statewide level.

After two unsuccessful challenges by THRF to the “homosexual conduct” statute, Wiseman, voiced his wish that activist gay lawyers branch off from the State Bar Individual Rights and Responsibilities Section and form their own section. In 1996 Katine, then a young associate at the firm of Wiseman’s friend, Gerry Birnberg, collected the 50 signatures then needed to form a new SBOT section and asked BAHR president Connie Moore and BAHR board member Charles Spain to join him in presenting the petition at the October 4, 1996 State Bar board of director’s meeting in Fort Worth. Frye wrote a letter to the board to protest the proposed name, the Gay and Lesbian Issues Section, because it was not transgender inclusive. Despite the trio’s lobbying and advocacy, the board of directors narrowly defeated the measure. Adding to the loss’s sting was a parade of directors who voted against the proposed section, assuring the trio that the rationale was not anti-gay, but instead motivated by the fact that the issues could be “better represented within the existing Individual Rights and Responsibilities Section.”

What seemed like a defeat quickly turned into good news. After the vote against the proposed section, the Honorable Norman W. Black, judge of the United States District Court for the Southern District of Texas and the federal judiciary’s liaison to the State Bar board of directors, pointedly and publically criticized the board. Judge Black was quoted in the *Texas Lawyer* for his rebuke: “I’ve always learned a lot about my fellow members from these meetings. . . . Today’s the first time I wasn’t real proud.”<sup>7</sup> The State Bar promptly regamed the system by passing more stringent rules for forming a section, but the 1997–1998 BAHR president, Anne Pike, another V&E associate, started the process to create a new transgender-inclusive State Bar section. BARH collected the 250 signatures now needed and jumped through the rest of the new hoops. The State Bar board of directors voted on April 17, 1998 to approve the creation of the Sexual Orientation and Gender Identification Issues Section, the first such section of any unified bar in the nation. Judge Black’s 1996 rebuke was republished in the *Texas Lawyer* days before the board meeting.<sup>8</sup>

BAHR recognized Judge Black the year before at its spring 1997 annual meeting for his role as an outspoken guardian of human rights. Judge Black told the BAHR members of his vocal criticism of the State Bar board of directors and explained that his deep personal commitment to

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<sup>6</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>7</sup> Janet Elliott, *Bar Denies Gay Issues Section*, TEX. LAW., Oct. 14, 1996, at 1.

<sup>8</sup> Janet Elliott, *Two New Bar Sections Garner Support*, TEX. LAW., Apr. 13, 1998, at 1. In 2010 the section was renamed the LGBT Law Section.

human rights was kindled during his youth as a Jew growing up in segregated Houston, matured throughout his judicial career, and nurtured through his collegiality with individuals such as Fifth Circuit Chief Judge John Brown, who served during the Civil Rights Era. Judge Black exhorted the BAHR members to continue the fight for an LGBT law section, concluding with the words many have attributed to Winston Churchill, “Never give up.” Unfortunately Judge Black did not live to see BAHR’s success in 1998.

*BAHR comes out and becomes respectable (sort of)*

Over the next seven years BAHR maintained a very close relationship with State Bar section because the first seven section chairs were from the Houston area. BAHR finally dropped the confidential status of its membership. In spring 2000 BAHR changed its name to the Stonewall Lawyers Association of Greater Houston, Inc. To recognize its long tradition of welcoming non-lawyers as associate members, in fall 2002 the name was changed to its current form, Stonewall Law Association of Greater Houston. Stonewall Law is an affiliate of the National LGBT Bar Association, and since 2010 has partnered with other area minority bar associations to promote diversity initiatives.

Stonewall Law’s relationship with the Houston Bar Association has evolved over the years. Stonewall members have always been welcome to participate in the AIDS Outreach Committee of the HBA, and during the presidency of Jerry Simoneaux (2002–2004), the HBA president invited Stonewall Law to participate in the HBA monthly local bar leader lunches. Over the years there have been discussions about Stonewall Law transforming into a LGBT law section of the HBA.

Stonewall Law is now 26-years old, and the current president is Ashlee Dunham. The world has changed for the LGBT community since the 1969 Stonewall riots. The Supreme Court has declared the Texas “homosexual conduct” statute unconstitutional, overruling the regrettable *Bowers* opinion,<sup>9</sup> and recognized marriage equality.<sup>10</sup> The Association today focuses on networking and CLEs for its members, recognizing emerging leaders from recent LGBT law school graduates, and working with other local minority bar associations to improve diversity in the legal profession.

Six sessions after *Lawrence* the Texas Legislature still has not repealed the unconstitutional

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<sup>9</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today.”). The defendants, John Lawrence and Tyron Garner, were arrested in Houston. They called Hill from the Harris County jail, who referred them to Katine, who served as their local counsel. *Lawrence* vindicated the author’s opinion of *Bowers*. See *supra* note 4. The *Lawrence* legal team did not emphasize that the statute was arguably void under *England*, see *supra* note 5, instead successfully going for a nationwide win.

<sup>10</sup> *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

“homosexual conduct” statute, and marriage equality is not altogether welcome in the Lone Star State. The line between zealous advocacy for clients and public LGBT activism remains narrow. And Stonewall Law is proud to have as honorary members Phyllis Frye, Kathy Hubbard, Ray Hill, and Annise Parker. They are role models for us all.

As Judge Black told Stonewall Law members 19 years ago, “Never give up.” We won’t.