The Legal Reasoning in *Lawrence* and the Prospect of Social Change

The case of *Lawrence v Texas* is considered to be a landmark case for gay-rights activists. Decided in 2003, *Lawrence* was the first Supreme Court case to rule in favor of same-sex rights. Stemming from a 6-3 majority, Justice Kennedy methodically crafted the opinion for the Court. The opinion was surprisingly based on due process and privacy rather than equal protection. This logic confused legal scholars many of whom believed that *Lawrence* was an obvious equal protection case. The *Lawrence* opinion was a unique opinion for the Court since it violated many unwritten rules: first, Justice Kennedy described homosexual relationships as being a fundamental right, but he never clearly stated that they were; second, Kennedy never clearly stated which standard of review he had used and consequently allowed lower courts to interpret *Lawrence* how they please; lastly, the Court legalized a defining act (sodomy) which criminalized a whole class and affected the social perception of homosexuals. These unusual characteristics in *Lawrence* show that this case was groundbreaking. The language that Kennedy used in the *Lawrence* majority is probably as important as the case itself. The *Lawrence* decision was decided correctly; however, the narrow ruling in the case, along with equivocal wording, did not advance gay rights as much as people had hoped.

Lawrence definitively overruled the 1986 case *Bowers v Hardwick*, in which the Court had found that a Georgia sodomy law concerning homosexual couples did not violate the Constitution. The *Lawrence* decision was primarily based on the Constitutional rights of privacy rather than homosexual couples being equal to heterosexual couples. The holding was not decided on equal protection grounds because if that were so, then *Bowers* could not have been

explicitly overturned—a major intention for the *Lawrence* Court. Also, Kennedy ambiguously described the future for social change concerning same-sex marriage. On the one hand, he purposely wrote that this decision was not to rule on same sex-marriage, "[*Lawrence*] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" (*Lawrence* 11). On the other hand, he specifically writes that homosexual couples:

> …are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government (*Lawrence* 11).

Since heterosexual couples have the power to marry granted by the state, and if homosexual couples deserve the same respect and dignity from the state, it could be argued that homosexuals should have the ability to marry. Some scholars claim that Kennedy wanted his ruling to be broader, but he would not have kept the majority if his opinion included same-sex marriage rights. As a result, Kennedy vaguely describes the Court's feelings on same-sex marriage, perhaps hoping that lower courts will adopt these rights for homosexuals. After the *Lawrence* ruling, some lower Courts have followed Kennedy's wishes and others have not. Since Kennedy wrote a vague, narrow ruling, lower courts have interpreted this opinion in different ways. The holding permits homosexual adults who, "may choose to enter upon this [homosexual] relationship in the confines of their homes and their own private lives" (*Lawrence* 4) and allows homosexuals to have private consensual sex only when "absent injury to a person or abuse of an institution the law protects" (*Lawrence* 4) is evident.

Kennedy derives the right to have a homosexual relationship on the bases of privacy and not on the bases of homosexuals being equal to heterosexuals. The *Lawrence* opinion cites two major Supreme Court decisions, *Griswold v Connecticut* and *Eisenstadt v Baird*, as its legal premises, "one of the questions on which the Court granted certiorari was whether the Texas statute violated the rights to liberty *and privacy*" (Franke 1403). *Griswold* was the first major decision from the Supreme Court concerning privacy. It held that a Connecticut law prohibiting married couples from using contraceptives violated the spouses' right to privacy. *Eisenstadt* held that unmarried couples had the right to privacy regarding the use of contraceptives. Both of these cases established an unwritten right to privacy that does not explicitly appear in the Constitution. This distinction that *Lawrence* is ruled on the principle ground of privacy and not equal protection is an important distinction to make because it constricts the holding to affect less social change than most gay-rights activists had hoped.

The language of *Lawrence* (or lack thereof) provides an interesting analysis of a case that pits future equality against the nation's conservative mentality. The discussion of liberty in *Lawrence* is completely different than the discussion of liberty in *Planned Parenthood v Casey.* Also, the lack of a definitive statement for a fundamental right of same-sex couples allows lower courts to interpret the *Lawrence* decision how they would like to. Kennedy begins *Lawrence* by saying that, "liberty protects the person from unwarranted government intrusions into a dwelling or other private places" (*Lawrence* 1). However, in *Casey*, Kennedy along with O'Connor and Souter (all three were in the majority for both cases) described liberty as a structure of autonomy, "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State" (*Lawrence* 18). The

two different definitions of liberty illustrate the two different states of mind of the Justices. The narrow holding in *Lawrence* is evident with Columbia Law School Professor Katherine M. Franke, "[Kennedy's] reasoning depicts a more confined conception of liberty" (1402). Along with the limitations that Kennedy describes about the liberty for same-sex couples, he creates uncertainty by not clearly stating the basis of review that the Court used, "one aspect of Lawrence [sic] that was bound to draw criticism and is likely to generate confusion…is the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue" (Tribe 7). This confusion leads to lower courts essentially deciding what standard they want to use and implementing the law using their own interpretation.

The only rights *Lawrence* provides homosexuals are the protection from the government from intruding in their private lives. The holding states, "the Texas statue furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" (*Lawrence* 11). The state does not have a legitimate interest in prohibiting private, consenting homosexual conduct. The importance of Kennedy's language in the holding implies that he believes the rational-basis test should be used to determine if laws against homosexual relationships further a legitimate state interest. He finds that they do not. Since *Lawrence* is evaluated with the rational basis test (the lowest level of scrutiny applied by the courts) and not with strict scrutiny (the highest level applied by the courts), Kennedy, by default, determines that Lawrence's rights in question are not fundamental. This being the case, it is easier for future courts to rule that the government only needs to meet the rational basis test in order for their laws to be upheld. This sets up future rulings about homosexual conduct and gay marriage which significantly impact the ability for *Lawrence* in order to provide a gateway for social change.

Many cases were impacted by *Lawrence,* but not all of them were impacted in a positive way. In the case *Limon v Kansas*, Kennedy's intended ruling in *Lawrence* is (purposefully) misinterpreted. Matthew Limon, an eighteen-year-old man, had been convicted of having oral sex with a fourteen-year-old boy in a school which they both attended. Kansas law punished homosexual sex with a minor more harshly than heterosexual sex with a minor before *Lawrence*. After the *Lawrence* ruling, the Supreme Court told the Kansas court to reconsider its decision. But the Kansas court reaffirmed its decision on the premise that *Lawrence* said, "all adults may legally engage in private consensual sexual practices common to a homosexual lifestyle" (*Limon* 83). Thus, *Lawrence* had no application to the case since it was not between two adults. Furthermore, the Kansas court noted that preference can be given to heterosexual couples because "throughout history, governments have extolled the virtues of procreation as a way to furnish new workers, soldiers, and other useful members of society" (*Limon* 85). The argument that homosexual couples cannot procreate is a tactic which most anti-same-sex marriage supporters use. This argument, albeit a marriage being more than just procreation, is still common and has been found in the courts. As follows, *Standhardt v Arizona*, a case decided after *Lawrence*, upholds a law against same-sex marriage. The Arizona Supreme Court held that, "the [*Lawrence*] Court applied without explanation the rational basis test, rather than the strict scrutiny review" (*Standhardt* 4). The Arizona court found that prohibiting same-sex marriage did legitimately protect a state interest. Specifically, the state interest at stake was preserving the connection between marriage and encouraging procreation, an event which is not possible between two members of the same sex. *Standhardt* also reinforces its ruling by quoting "'absent injury to a person or abuse of an institution the law protects.' It therefore follows that the Court did not intend by its comments to address same-sex marriages" (*Standhardt* 4). The Arizona

Supreme Court took Kennedy's language in *Lawrence* to mean that "abuse of an institution the law protects" means the institution of marriage—arguably the most sacred institution in America. This is proof that *Lawrence* does not constitute the allowing of same-sex marriage but only the privacy and respect for homosexual acts in the home.

One landmark case that was pro same-sex marriage was *Goodridge v Department of Public Health* in Massachusetts. *Goodridge*, argued just months after the *Lawrence* decision, finally followed Kennedy's intent. The Massachusetts Supreme Court ruled that the federal government left the question of whether homosexual couples could marry or not up to the states. And Massachusetts, somewhat mocking the Supreme Court, says "the Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life" (*Goodridge* 4). The Massachusetts Supreme Court interpreted *Lawrence* as an opinion which left the question of same-sex marriage open for the states to decide in favor of, as long as the states respected homosexual couples. Massachusetts granted the ability to marry to homosexual couples because it inferred that being in a homosexual relationship was a fundamental right which the state must protect.

One tool for social change is the dissenting opinion. Justice Stevens' dissent in *Bowers* was referenced in the majority in *Lawrence*, and in response to the majority in *Lawrence*, Justice Scalia writes a scathing dissent. Scalia is concerned that the majority opinion will lead to a legal path for same-sex marriage. Scalia, in his dissent, argues, "[*Lawrence*] dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and

homosexual unions, insofar as formal recognition in marriage is concerned" (*Lawrence* 16). The *Lawrence* decision did not address equal protection for two reasons. First, in order for the Court to overturn *Bowers*, it had to evaluate *Lawrence* on the same basis as *Bowers* was decided. *Bowers* was not decided on terms of equal protection but rather the legality of the state being able to intrude on a personal and intimate conduct in the home. This is what *Lawrence* specifically addresses and is thus able to overturn *Bowers*. Second, if the Court were to evaluate the case on grounds of equal protection, it would allow states to create alternate legislation in order to make sodomy illegal for both same-sex and different-sex partners. This empowerment would create a problem because potentially only same-sex participants would be charged with sodomy. If not evaluated on equal protection, the Court is able to outlaw sodomy laws altogether. This being the case, the Court did not say that same-sex couples are equal to different-sex couples under the constitution. The ruling allows same-sex couples to privately and respectfully engage in sodomy in their home.

Scalia also uses a slippery-slope argument in his dissent to say that *Lawrence* would require the state to overturn laws against bigamy and polygamy if same-sex marriage were to be legalized. This is a difficult statement to analyze since it is not based on any type of actual law or precedent. Even if a petitioner were to argue that *Standhardt* was ruled on the basis of same-sex couples being unable to procreate, the petitioner would have a hard time arguing that this is the only basis needed for marriage. In *Standhardt,* procreation was one of the main reasons Arizona denied the petitioner a right to marry; it was not the only reason. The courts would probably find that there is longstanding history and tradition in the United States of only being married to one person at a given time. In addition to judicial precedent not overturning laws against bigamy, a federal constitutional amendment could, hypothetically, be written to say: Any

marriage is legal as long as it is only to one person, same-sex or different-sex, at a given time. This would legalize gay marriage, but also prevent bigamy. Since it is a constitutional amendment it is not up for judicial review and therefore would stand as good law. Without any type of precedent to base this claim, it is extremely difficult to logically conclude what would happen.

The language Kennedy used in *Lawrence* has the ability to bring about social change. "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v Hardwick* should be and now is overruled" (*Lawrence* 16). These strong words that Justice Kennedy wrote in his majority opinion of *Lawrence* brought force into the opinion. However, as strong as these words are, in a democracy, the courts are usually not the last judge—the people are. And, after these ardent words by Kennedy, the legislatures created strong backlash in order to please their constituents. Social and political change is difficult to measure from the *Lawrence* opinion not only because the opinion itself was written just five years ago but also because the gay-rights movement is just becoming a relevant issue in the US. It seems as though *Lawrence* is only talked about in regards to the ability to marrry even though the opinion is about much more than just a single issue. The opinion as a whole is about a relationship that the government must respect. The legal question of same-sex marriage is left unclear by Kennedy, but he believes *Lawrence* is about more than just a sexual act. He believes that *Lawrence* is about protecting an individual choice. The state of marriage legitimizes a private relationship and makes it public. Marriage is a ceremony in a church, in a synagogue, or in a courthouse, that signifies to the public two people making their private relationship public. Kennedy writes, "the present case does not involve public conduct…it does not involve whether the government must give formal recognition to any relationship that homosexual persons seek

to enter" (*Lawrence* 11). Clearly, marriage would qualify as being public conduct. *Lawrence* does not even consider the question of legitimizing a private homosexual relationship and establishing public marriage. It also does not suggest giving a private, consensual homosexual relationship formal recognition. The open-endedness question of same-sex marriage has already created social change in many states—both in the way Kennedy envisioned and also in the complete opposite way.

In Alaska and Hawaii, the high courts in both states ruled that same-sex couples should have the right to marry. After these rulings came out, legislatures responded to their constituents in both states and passed constitutional amendments nullifying the decisions. This type of backlash is not uncommon for an issue that has many negative connotations associated with it since an issue "of homosexual rights may elicit passionate opposition because of its relation to deep-seated religious, social, and moral beliefs" (Butcher 1426). The impact of social change depends greatly on the political culture of a state. The political culture in Alaska and Hawaii vehemently opposed same-sex marriage, and even though *Lawrence* provided homosexuals with some rights, it was not enough. But the political culture in Vermont and Massachusetts was more tolerant of gay rights and accepted the decision in *Lawrence*. The legislatures in Vermont, understanding that gay rights were now expanded under *Lawrence*, took action to create the nation's first civil union law. And, Massachusetts' Supreme Court ruled that a ban on same-sex marriage was unconstitutional in *Goodridge*.

Some scholars argue that "it is conceivable that the Court chose the more limited Due Process Clause to avoid provoking political backlash" (Butcher 1428). *Lawrence* was written to overturn *Bowers* which was probably the most important part of the case, "the Court's decision

to…overrule *Bowers* eliminated what was perhaps the most significant impediment to homosexuals: the criminalization of a definitive behavior of the class" (Butcher 1428). The Justices understood that by allowing homosexual conduct to remain illegal, it would only further the problem of integrating a homosexual lifestyle into a normal lifestyle. Whether it be trying to obtain employment, housing, or acceptance into any group, having sodomy laws criminalizes homosexuals and defines them by an illegal act. Justice O'Connor commented in her concurring opinion in *Lawrence* that "brand[ing] all homosexuals as criminals, [sodomy laws] thereby mak[e] it more difficult for homosexuals to be treated in the same manner as everyone else" (*Lawrence* 23). The Supreme Court needed to craft an opinion in *Lawrence* to try and change the social perception towards homosexuals, and this was what they did.

Because *Lawrence* is a milestone opinion for a new generation, the influence it will have in the future is difficult to measure. Unlike *Brown v Board,* which was a milestone decision that ultimately put an end to racial segregation in schools, *Lawrence v Texas* is a decision that will only begin to end homosexual discrimination. The Supreme Court in *Lawrence* was not able to terminate discrimination against homosexuals, to allow them to marry in every state, or to create equal opportunities for them when applying for housing. But the Supreme Court was able to overturn hundreds of years of laws that make homosexual conduct a crime and a shame. Future Courts will have greater ability to bring about social change because of to the majority in *Lawrence*.

Works Cited

Bowers v. Hardwick, 478 U.S. 186 (1986).

Brown v. the Board of Education, 347 US 483 (1954).

Butcher, Adrienne. "Selective Constitutional Analysis in *Lawrence V. Texas*: An Exercise in Juridical Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals." Houston Law Review 7.1 (2004): 1407-35.

Eisenstadt v. Baird, 405 U.S. 438 (1972).

Franke, Katherine M. "The Domesticated Liberty of *Lawrence V. Texas*." Columbia Law Review 104:1399 (2004): 1399-1426.

Goodridge v Dept of Public Health, Massachusetts Supreme Court (2003).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Lawrence v Texas, 539 U.S. 558 (2003).

Limon v Kansas. Kansas Supreme Court (2005).

Planned Parenthood v Casey, 505 U.S. 833 (1992).

Standhardt v Arizona, Arizona Court of Appeals (2003).

Tribe, Lawrence H. "Lawrence V. Texas: The 'Fundamental Right' That Dare Not Speak Its Name." Harvard Law Review. 117:1893 (2004) 1-49.