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Law as a Force of Social Change

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Lawrence v. Texas: The Paradox of “Autonomy of Self”

Introduction

In our times and the times of our forefathers, liberty has always seemed to be at odds with government. The state has always been viewed as a sort of necessary evil – necessary enough to protect our liberty from personal encroachment by another, and evil in the sense that it has enough power to strip you of your liberties. Personal liberty has been redefined as the “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹ This more complete description of the personal right shifts the idea of liberty from a struggle between a person and the state, to an arena in which the compelling state interest is to nurture the citizen’s “autonomy of self” for the betterment of society as a whole. Government has now been given this duty of encouraging the healthy development of identity, and that means not only the identity inside one’s self, but the completion of one’s identity in another through a relationship. Government should never have been given the authority to define relationships. In starting down a path toward recognizing the true liberty interests at issue in government’s relationship to individuals’ sexuality, *Lawrence v. Texas* has given the state the chance to take on this new responsibility of challenging its citizens to live their own lives more fully, and, more importantly, to provide the freedom conducive for citizens to live more complete lives through the loving of another.

The following examination explains how Justice Kennedy, the author of *Lawrence v. Texas*, redefined government’s role under the banner of liberty, the integral framework of

¹*Lawrence v. Texas* 539 U.S. 558, 562 (2003).

international law that he used for this claim, as well as the precedent set by his decision and its future implications.

Re-Examining *Bowers*

Lawrence v. Texas set various precedents once it was decided. One of the most important things that it did was overrule the Supreme Court case that outlawed sodomy, *Bowers v. Hardwick*. This case had already dealt with the issue of homosexual sodomy; but during the following decade and a half, its precedent had been eroded by a long string of decisions in opposition to it. *Bowers* incorrectly framed the issue at hand as follows:

The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.²

The Court failed to recognize the true expanse of liberty within this question. In *Lawrence*, Kennedy overrules:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse...

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects... When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.³

²*Bowers v. Hardwick*, 478 U.S. 186, 190, 92 L Ed 2d 140, 106 S Ct 2841 (1986).

³*Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

Within *Bowers* itself, Justice Stevens' dissent addresses the nature of morality and legislation. Although the governing majority views a particular practice as immoral, that does not give it justification to be prohibited. The meaning of liberty describes protection endowed upon a minority, regardless of the changing times and of general morality:

The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law, 'Our obligation is to define the liberty of all, not to mandate our own moral code.' *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)." [Emphasis Added]⁴

Secondly, Stevens claimed that the decisions by a married couple, including whether or not to have a child, are a protected form of liberty by the Due Process Clause of the Fourteenth Amendment. He also took steps to extend this liberty to unmarried persons. Much Justice Stevens dissent in *Bowers* was cited as evidence by Kennedy while writing the majority opinion for *Lawrence v. Texas*. The most important evidence, though, was the European precedent supplied by Kennedy himself for his own scathing re-examination of *Bowers*.

Reference of International Law

In his majority opinion, Kennedy overturned the anti-sodomy case *Bowers v. Hardwick* using extensive reference to international law as justification for his conclusion. This controversial move by the Associate Justice was used to prove that *Bowers*' reasoning was unsound because it was based upon false premises; for example, that homosexual sodomy was a historically condemned act in Western civilization. Kennedy cited a 1981 European Court of Human Rights case *Dudgeon v. United Kingdom* to disprove this assumption made by Burger in

⁴*Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

his invalid majority opinion in *Bowers*.

The legal liberty taken by Kennedy in applying international law in *Lawrence v. Texas* serves as an excellent example of framing a new argument in a different way as it opens the door for the incorporation of international human rights legislation to future Supreme Court cases. This new method of argumentation allows Justices to cite sound international rulings to provide support of their position if our constitution does not elaborate precedent for it.

For example, in *Lawrence* Kennedy cites European legal terminology in saying that “the petitioners are entitled to respect for their *private lives*.” This “respect for private life” is not guaranteed under the Constitution, but it is guaranteed under Article 8 of the European Convention of Human Rights and Fundamental Freedoms, binding precedent in Europe.

This concept is used in Kennedy’s interpretation of the word “liberty” within the Due Process Clause. He states that the state cannot make sexual conduct a crime because such conduct is within individuals’ liberties to control their destiny and make intimate choices on their own. This is interesting because he has begun to make this claim under the banner of liberty from the Due Process Clause and not under the Constitutionally implicit “right to privacy.” This is a departure from *Griswold*’s privacy precedent as well as *Roe*’s procreative precedent in the sense that sexual activity, along with thought and personal expression, is now protected under the substantive due process clause as a valid expression of one’s liberty as a person.

This new intellectual approach to the Constitutional concept of liberty emerged as a reaction to the roadblock the judicial community experienced when trying to apply equal minority rights to a country that can be sometimes irrationally unsympathetic towards homosexuals. Instead of clawing his way through the privacy right or controversial precedent, Kennedy transcended these bounds by approaching the subject from the international

perspective. International law has thus helped set the basis for precedent in United States Courts.

New Era of Precedent and the Fall of *Bowers*

In a more recent decision (*Roper v. Simmons*), Kennedy responded to increasing criticism upon his tendency to rely on international precedent in basing his decisions by saying, “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁵ Referencing international law assisted Kennedy by giving him the legitimacy to argue that sexual intimacy was a protected form of liberty, and not just a shady act shrouded by the “right to privacy,” thus giving homosexuals a sense of respect under the law; this was a long overdue, official recognition of the dignity of a homosexual person. This strategy, however controversial, has worked in setting legitimate U.S. precedent and, more importantly, has allowed justices to approach new cases of sexual minority rights with sound judgment. These new cases may include important issues raised between consenting adults, the most prominent of which is same-sex marriage. The *Lawrence* decision hailed the era of the integration of international common law into the U.S. legal system. This tactic is not just a ploy used by judges to set their personal views into precedent, but rather it is part of the evolution of an ever-growing sense of the universal responsibility between countries for international judicial review:

On September 18, 2003, Justice Ruth Bader Ginsburg delivered a lecture at the University of Idaho titled ‘Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication.’ Her theme was that although the United States was at one time almost alone in “exposing laws and official acts to judicial review of constitutionality,” over the past century a new situation had emerged in which “national, multinational, and international human rights charters and tribunals today play

⁵ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

a key part in a world with increasingly porous borders... We are the losers if we do not both share our experience with, and learn from others.⁶

Globalization has played an instrumental role in this new legal research process. Countries such as South Africa, Canada, Australia, and Great Britain, all ancestors of similar common law heritage can now share their court cases with each other to advise each's constitutional democracy on the best path to take. For example, the Law Committee of Britain's House of Lords cited the New York Court of Appeals' decision *Braschi v. Stahl Associates Co.* concerning the issue of same-sex partner tenant succession rights.⁷ This also allows for the reference of law from the European Court of Human Rights and the United Nations Human Rights Committee, the former of which was cited as support in Kennedy's decision to overturn *Bowers* in *Lawrence*:

Other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct... The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the government interest in circumscribing personal choice in somehow more legitimate or urgent.⁸

Within the Model Penal Code, published by the American Law Institute in 1955, the ALI advised against the criminalization of consensual sexual relations conducted in private for the following reasons. Its criminalization outlawed conduct that many people engaged in, thus undermining respect for the law. It also regulated private conduct that was not harmful to others. In addition, the statutes were arbitrarily enforced, thus leaving the victims open to the threat of

⁶Leonard, Arthur S. "The Impact of International Human Rights Developments on Sexual Minority Rights." 1 Mar. 2005. New York Law School Library. 2005. <<http://www.nyls.edu/pdfslVol49no2p525-536.pdf>>

⁷Leonard, Arthur S. "The Impact of International Human Rights Developments on Sexual Minority Rights." 1 Mar. 2005. New York Law School Library. 2005. <<http://www.nyls.edu/pdfslVol49no2p525-536.pdf>>

⁸*Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

blackmail. All of these were factors which led the Supreme Court in 2003 to overturn their *Bowers* ruling in a 6-3 decision.

Conclusion: Overturn *Bowers*

This is the international legal framework and reasoning that Justice Kennedy applied to the case of John Geddes Lawrence in overturning *Bowers*: “Its continuance as precedent demeans the lives of homosexual persons.”⁹

Liberty After *Lawrence*

Lawrence leaves us with a massive expansion of what is considered protected liberty under the substantive part of the Due Process Clause of the Constitution. Consenting sexual relations between adults of any sexual orientation are now legal in the eyes of the law within private circumstances. Kennedy’s poetic writing has now equated the freedom to express oneself through intimate conduct with the more generally accepted freedoms of thought, belief, and expression. Increasingly during the latter half of the 20th century, the government has stepped further and further away from the regulation of these thoughts and granted them to its citizens as accepted freedoms. The mysterious and internal nature of thought has essentially forced government to abandon its hopes to somewhat control it in the future if need be:

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.¹⁰

Healthy expression of this freedom is permissible because it is an external showing of internalized thought and belief. So far, “thought, belief, [and] expression” are Constitutionally protected under substantive Due Process. Kennedy’s basis for his equation of “certain intimate

⁹*Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

¹⁰*Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

conduct” with the others lies in the 1992 decision *Planned Parenthood of Southeastern Pa. v. Casey*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. [Emphasis Added]¹¹

Thus, “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.”¹² Just as thought, belief, and expression are the substantive traits of a unique individual, the ability to express yourself through intimate conduct with another is central to discovering your own identity, an identity which for some is most complete when physically joined with another in intimacy. This sense of sexual identity is part of “one’s own concept of existence, of meaning.” Liberty is a means to discover yourself and achieve true personality; and the ability to be sexually intimate with a partner is an integral aspect of that.

Liberty Beyond *Lawrence*

Judicially, these are changing times. International law has effectively become a basis for new precedent. A libertarian revolution, led by Justice Kennedy, is under way. Liberty through substantive due process expands more after every issued opinion. We are becoming a much more diverse society, new groups of people are emerging, new demographics that need new types of legal protection. American values guide us to protect these newcomers to our nation by

¹¹*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).

¹²*Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

expanding our Constitution, we are opening their door to freedom from fear, and freedom to love.

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.¹³

In this land of modern leisure and worldwide instant communication, these ancient words resonate with the changing ways in which relationships are created and nurtured in the 21st century. Americans show greater interest in being with someone they love, rather than over-working themselves for a little extra money to spend. The non-traditional family structure has emerged as the typical 21st century American family. New rights need to be provided for these single mothers, gay couples, and children of shared-custody parents. Between 1972 and 1998, the number of single-parent families — most of them headed by single mothers — grew from 5 percent to 18 percent. More than one-third of American children are living apart from their biological fathers, and 40 percent of them have not seen their fathers in at least a year.¹⁴

Homosexuality has become more culturally accepted since the AIDS scare has subsided (the AIDS scare peaked at the time *Bowers* was passed down) and gays have emerged as prominent figures in everyday life, among other factors. This is evidenced by the ability for an opinion like *Lawrence v. Texas* to be written without serious cultural backlash. Agreement that homosexuality is an acceptable alternative lifestyle rose from 38 percent in 1992 to 52 percent

¹³Warren, Samuel D. & Brandeis, Louis D. "The Right to Privacy." Harvard Law Review. Vol. IV. Dec 15, 1890.

¹⁴White, John Kenneth. The Values Divide: American Politics and Culture in Transition. Washington, D.C.: Chatham House P, 2003. 2.

only 6 years later.¹⁵

Lessons Learned in South Africa

The aspiration of a democratic society lies in the embrace and acceptance of every person for who they are. To set a standard for marriage and the traditional family implies the intent of governmental homogenizing of culture. This attempt is at direct odds with equality and exists as a slap in the face to the great potential of the dynamic human personality. In South Africa, a country with like roots in common law, the judiciary recently dealt with a case concerning the issue of same-sex marriage and equated straight-only marriage with blatant disrespect for the infinite diversity of human personality:

Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference... [W]hat is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.¹⁶

This statement is an affirmation of human dignity. Government has a responsibility to not just prevent encroachment, but give people who have been discriminated against, the ability to continue their lives without the slightest hint of fear of discrimination in the future. The people of the world have made great strides in being accepting of homosexuality, and they continue to

¹⁵White, John Kenneth. The Values Divide: American Politics and Culture in Transition. Washington, D.C.: Chatham House P, 2003. 24.

¹⁶Sachs, Albie J. Supreme Constitutional Court of South Africa. CCT 60/04, CCT 10/08.

as well. Law has evolved from public condemnation of their sexual expression to the ultimate acceptance of their presence as well as the legitimacy and integrity of their intimate life.

“Sections 9(1) and 9(3) cannot be read as merely protecting same-sex couples from punishment of stigmatization... Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law.”¹⁷

The purpose of government is to ensure that people under its jurisdiction are treated like human beings. To ensure this respect for human dignity, governments employ the rule of law. Now, this rule of law must be modified through the judicial integration of international human rights legislation into the United States Code in order to provide justice for those in non-traditional relationships.

Conclusions

Government must be used as an instrument to foster public acceptance in order to preserve the dignity of homosexuals as human beings. Government can no longer stand on the sidelines and merely remove barriers to expression; it needs to supplant discrimination by actively pursuing the agenda of human rights within its borders. Pursuing this agenda involves government participation in creating a means for its people to channel themselves to others through their liberty in order to fulfill their personality. Government needs to set an example of toleration by extending to homosexuals the human right to marry in order to propound the diversity of human personality: “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.”¹⁸ Kennedy, a husband with three children, refuses to describe this liberty with legal terms. True liberty grants the citizen enough autonomy for him to discover that he is, in fact not autonomous. That the true

¹⁷Sachs, Albie J. Supreme Constitutional Court of South Africa. CCT 60/04, CCT 10/08.

¹⁸ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

mystery of human life, which lies at the very heart of liberty, is love. In order to fully express yourself, one needs another. The ultimate expression of this indivisible metaphysical connection lies in union. Government cannot rest until its citizens are provided with the opportunity to complete their identity, their destiny in life with another through union. Because not until we are joined with our loved one do we truly achieve “autonomy of self.”

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