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Cover Page Footnote

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WHAT *LAWRENCE v. TEXAS* SAYS ABOUT THE HISTORY AND FUTURE OF REPRODUCTIVE RIGHTS

Cynthia Dailard*

On the final day of its term this June, the U.S. Supreme Court handed down its long-awaited decision in *Lawrence v. Texas*, a case challenging a Texas law criminalizing consensual sex between gay adults.¹ Writing for the Court, Justice Anthony M. Kennedy invalidated the law on the grounds that the Constitution's guarantee of "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" and that this liberty extends to gays and lesbians.²

For reproductive rights advocates, *Lawrence* is notable because it is grounded in cases dating back to the 1960s that protect the right to use contraception and the right to choose to have an abortion.³ As a result, it implicitly reaffirms a line of cases—at the heart of which is *Roe v. Wade*—that has been consistently called into question.⁴ However, in reaching its decision, the Court explicitly overturned an earlier decision allowing states to criminalize gay sex,⁵ and its discussion about when judges should adhere to or abandon legal precedent could be used by reproductive rights opponents to argue for a reversal of *Roe*.⁶ Finally, with the future composition of the Court in question, the case is noteworthy for what it says—or does not say—about what key Justices may think about personal autonomy, the interest that lies at the heart of reproductive rights.

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1. *Lawrence v. Texas*, 123 S. Ct. 2472, 2475-76 (2003).

2. *Id.* at 2480.

3. *See id.* at 2476-80.

4. 410 U.S. 113 (1973).

5. *Lawrence*, 123 S. Ct. at 2484 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

6. *Id.* at 2483.

I. RIGHT TO PERSONAL AUTONOMY

The Court's decision to strike down a state law criminalizing gay sex between consenting adults is a virtual primer on almost all the major reproductive rights cases of the past four decades.⁷ As the Court notes, "the most pertinent beginning point [for our discussion in *Lawrence*] is our decision in *Griswold v. Connecticut*,"⁸ a 1965 case striking down a state law prohibiting the use of contraceptives by married couples.⁹ Finding the law unconstitutional, the Court in *Griswold* held that although the law did not directly implicate any right explicitly spelled out in the Constitution, various "penumbras, formed by emanations" from specific guarantees in the Bill of Rights create "zones of privacy" into which the government cannot intrude.¹⁰ In *Griswold*, the Court was referring to a right of privacy surrounding the marital relationship.¹¹

As the Court in *Lawrence* notes, this right was extended to unmarried people several years later in *Eisenstadt v. Baird*.¹² This 1972 case involved a challenge to a Massachusetts law prohibiting the distribution of contraceptives to unmarried people.¹³

While the Court decided the case on equal protection grounds,¹⁴ *Eisenstadt* further explicates the right to privacy:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁵

These cases, as *Lawrence* explains,¹⁶ formed the basis for the 1973 landmark decision, *Roe v. Wade*, which struck down state laws prohibiting abortion and upheld a woman's constitutional right to choose an abortion.¹⁷ *Roe* grounded the right to privacy in the pro-

7. See *id.* at 2476-80.

8. *Id.* at 2476.

9. 381 U.S. 479 (1965).

10. *Id.* at 484.

11. *Id.* at 485-86.

12. See *Lawrence*, 123 S. Ct. at 2477 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

13. *Eisenstadt*, 405 U.S. at 440-42.

14. *Id.* at 453-55.

15. *Id.* at 453.

16. *Lawrence*, 123 S. Ct. at 2477.

17. *Roe v. Wade*, 410 U.S. 113 (1973).

tection of personal liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, and it recognized a notion of liberty that includes a woman's right to make "fundamental decisions affecting her destiny," such as whether or not to terminate a pregnancy.¹⁸

In its 1977 case, *Carey v. Population Services International*, the Court subsequently struck down a law prohibiting the sale of non-prescription contraceptives to minors younger than sixteen.¹⁹ In *Carey*, as in *Eisenstadt*, the Court held that the privacy right found in *Griswold* was not limited to married adults.²⁰

Finally, in *Lawrence*,²¹ the Court arrived at its 1992 decision, *Planned Parenthood v. Casey*, which reaffirmed what it deemed the central holding of *Roe*—that a state may not prohibit abortion prior to fetal viability.²² At the same time, *Casey* elevated the state's interest in protecting fetal life, and thus upheld some restrictions on women's access to abortion contained in the Pennsylvania statute.²³

However, most important for the Court in *Lawrence* was Justice O'Connor's decision in *Casey* articulating the most expansive notion of liberty to date, reaffirming that the Due Process Clause of the Constitution protects personal decisions regarding family relationships:

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.²⁴

Moreover, she wrote, "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."²⁵

This line of cases has been controversial from its inception. Conservative judges, scholars, and politicians contend that the right to privacy, or, at the very least, a right to choose abortion, is Court-invented and cannot fairly be said to be found in the general lan-

18. See *Lawrence*, 123 S. Ct. at 2477 (discussing *Roe*, 410 U.S. 113).

19. 431 U.S. 678, 681-82 (1977).

20. See *Carey*, 431 U.S. at 687.

21. See *Lawrence*, 123 S. Ct. at 2481.

22. See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992).

23. *Id.* at 878, 899.

24. *Id.* at 851.

25. *Id.* at 847.

guage of the Constitution.²⁶ They argue that judges who find otherwise are imposing their own personal, normative beliefs about sensitive issues on American society and thus act more as legislators than jurists.²⁷

Yet the Court in *Lawrence* does not retreat from the expansive notion of liberty articulated in *Casey*. Instead, it further broadens that right, explaining what liberty means in its more transcendent dimensions: “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”²⁸ The Court continues, “[w]hen 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.”²⁹

II. THE ROLE OF PRECEDENT

By reaffirming and validating this expansive notion of personal autonomy, *Lawrence* helps to rehabilitate the long-criticized lineage of reproductive rights cases, placing them on a firmer legal footing than ever before. At the same time, the Court explicitly overruled its 1986 decision in *Bowers v. Hardwick*, in which it held that there is no constitutional right to homosexual sodomy.³⁰ Justice Scalia’s dissenting opinion in *Lawrence* largely focused on what he characterizes as the Court’s “surprising readiness” to reject its relatively recent *Bowers* decision.³¹ He attempted to use the majority’s logic against itself, arguing that that *Lawrence* articulates a standard for overturning precedent that, if consistently applied, demands the overthrow of *Roe v. Wade*.³²

According to Scalia, *Lawrence* spelled out a three-part test under which it would be appropriate to take the unusual step of abandoning precedent: when a previous decision’s “foundations have been ‘eroded’ by subsequent decisions,” when it has been subject to “‘substantial and continuing’ criticism,” and when “it has

26. See *Roe v. Wade*, 410 U.S. 113, 172 (1973) (Rehnquist, J., dissenting); see, e.g., Douglas W. Kmiec, *America’s “Culture War”—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 St. Louis U. Pub. L. Rev. 183 (1993).

27. See, e.g., Kevin F. Ryan, *Lex Et Ratio . . . Courts and the Culture Wars*, 29 Vt. B.J. 5 (2003).

28. *Lawrence v. Texas*, 123 S. Ct. 2472, 2475 (2003).

29. *Id.* at 2478.

30. *Id.* at 2477, 2484 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

31. *Id.* at 2488 (Scalia, J., dissenting).

32. See *id.* at 2489 (Scalia, J., dissenting).

not induced 'individual or societal reliance' that counsels against its overturning."³³ Scalia forcefully argued that *Roe* meets the three prongs of this test.³⁴

While it is undeniable that *Roe* has been and continues to be the subject of substantial criticism, whether it meets the other two prongs is at least questionable, and the third of these prongs deserves particular attention. Scalia argued that because overturning *Roe* would not outlaw abortions outright but leave that decision in the hands of individual states, women who lived in a state that proscribed abortions could simply travel to another.³⁵ Accordingly, he contended, there is no detrimental reliance that counsels against its overturn.³⁶

That would appear to put him in direct conflict with Justice O'Connor, whose 1992 opinion in *Casey* squarely addresses the extent to which *Roe* had already become part of the fabric of American society:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.³⁷

III. THE COURT'S COMPOSITION

Whatever its legal merits, Scalia's dissent suggests a roadmap for overturning *Roe* should the composition of the Court change.³⁸ In that regard, there are a few things to take away from *Lawrence* in terms of what it says—or does not say—about the thinking of those sitting Justices with whom *Roe's* fate appears to hang in the balance.

For example, O'Connor, often predicted as the swing vote should the Court reconsider *Roe*,³⁹ wrote her own concurring opin-

33. *Id.*

34. *Id.* at 2489-90.

35. *Id.* at 2491.

36. *See id.*

37. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

38. *See Lawrence*, 123 S. Ct. at 2488 (Scalia, J., dissenting).

39. *See, e.g.,* Christopher Crain, *Judicial Restraint and the Non-decision in Webster v. Reproductive Health Services*, 13 Harv. J.L. & Pub. Pol'y 263, 316 (1990); Emily Bazelon, *Sandy's Choice* (Oct. 17, 2002), available at www.slate.msn.com/?id=2072662.

ion in *Lawrence*, expressing an entirely different rationale for striking down the Texas law.⁴⁰ She did not ground her decision in the jurisprudence of reproductive rights and said nothing about her current thinking on that front. Instead, she found the law unconstitutional under the Constitution's Equal Protection Clause because, in her view, moral disapproval of a group is an inadequate justification for treating individuals who have same-sex partners differently than those who have opposite-sex partners.⁴¹ Despite O'Connor's failure to embrace the reproductive rights line of cases in the *Lawrence* opinion, she is unlikely to supply a vote to directly overturn *Roe*, given her strong statements in *Casey* on autonomy and precedent.⁴²

What is perhaps more surprising is Justice Kennedy's position in *Lawrence*.⁴³ Reproductive rights advocates may find some comfort in the reassuring tone and substance of Kennedy's opinion, particularly in light of his vociferous dissent in *Stenberg v. Carhart*.⁴⁴ In that 2000 case, Kennedy disagreed strongly with the majority's decision to strike down a Nebraska law banning "partial-birth" abortion because the law was overly broad and did not include an exception to protect a woman's health.⁴⁵ Kennedy argued that the liberty to choose an abortion is not absolute and the states' interest in protecting fetal life deserved greater deference.⁴⁶ Because the ban might criminalize procedures considered by a physician to be the safest for a pregnant woman in a specific circumstance, he also appeared to be turning his back on the long-standing principle that states may not restrict abortion in a way that endangers women's health—a key tenet of *Roe* and its progeny.⁴⁷

To many, this signaled Kennedy's possible retreat from his position in *Casey*, in which he cast a decisive vote for the majority.⁴⁸ But his heavy reliance on *Casey* and other reproductive rights cases in *Lawrence*⁴⁹ makes it clear that he still supports their legal underpinnings and, therefore, suggests that he would be unlikely to vote to criminalize all abortions.

40. *Lawrence*, 123 S. Ct. at 2484 (O'Connor, J., concurring).

41. *Id.* at 2486 (O'Connor, J., concurring).

42. *Casey*, 505 U.S. at 851.

43. 123 S. Ct. at 2475.

44. 530 U.S. 914, 956 (2000) (Kennedy, J., dissenting).

45. *Id.*

46. *Id.* at 957-60.

47. *See, e.g., Roe v. Wade*, 410 U.S. 113, 164 (1973).

48. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (5-4 decision).

49. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2481-82 (2003).

Only time, however, will tell the extent to which *Lawrence* has a practical impact on the jurisprudence of reproductive rights and on abortion rights in particular. Ultimately, whether *Roe* is to stand or fall will depend on the Court's composition at such time that question may be presented to it. But one thing is clear: the retirement of Justices O'Connor or Kennedy, or of any of the remaining four justices who support a woman's right to choose, would provide the anti-choice Bush administration with the opportunity it is seeking to appoint a like-minded Justice, making the scenario that Justice Scalia predicted—namely, *Roe's* demise—more likely than ever before.

