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***ESSAY***

# REMAKING *LAWRENCE*

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> It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[1]

THESE sentences appeared in the Supreme Court's decision *Lawrence v. Texas*, which struck down sodomy laws as violating liberty protections for private sexual conduct. The decision was a watershed moment for civil rights and civil liberties advocates. For gay rights activists, the decision represented a movement toward sexual equality: "when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America."[2] For civil libertarians, *Lawrence* marked another victory for

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[1] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[2] Laurence H. Tribe, *Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1895 (2004); see also Nan D. Hunter, Living with *Lawrence*, 88 Minn. L. Rev. 1103, 1137 (2004) ("*Lawrence* is a breakthrough. It ends our wandering in law's wilderness, uncertain in each case whether we would be treated with respect or contempt. . . . *Lawrence* made lesbians and gay men citizens instead of criminals. . . . For the gay civil rights movement, *Lawrence* is the end of the beginning."); Dean E. Murphy, Gays Celebrate, and Plan Campaign for Broader Rights, N.Y. Times, June 27, 2003, at A20 ("Gay activists, many in tears, called the ruling the most significant legal victory in the gay rights movement, likening the decision to the seminal civil rights case, *Brown v. Board of Education of Topeka, Kan.*").

privacy rights, namely that consenting adults have the right to engage in relations free from government intrusion. One article aptly described the decision as the Court drawing "a thick constitutional curtain around the nation's bedrooms."[3]

Fast forward ten years. Arguments for the freedom of sexual expression, intimate association, and individual liberty that successfully prevailed in one set of circumstances—the decriminalization of sodomy—have been put to use in legal challenges involving gay and lesbian adoption, military service, and same-sex marriage. While *Lawrence* is invoked quite frequently and almost reflexively, lower courts rarely cite it as controlling precedent, and some have scoffed at attorneys for drawing on the decision to make their case.[4] In the instances in which *Lawrence* takes center stage in a decision, its meaning either has a different application than when it was decided in 2003, or it is used in large part to strike down morality-based laws.[5] These developments raise an important question only Tina Turner could style: What's *Lawrence* Got to Do With It?

As we approach the ten-year anniversary of *Lawrence*, it is important to examine the decision's career—as doctrine, as a victory for gay rights, and as a symbol of social progress and transformation. Specifically, this Essay is motivated by a series of questions. Doctrinally, does the decision possess the same value for gay rights litigation as it did in 2003? I believe the answer is no. While *Lawrence* moved juridical discourse about homosexuality from conduct to identity, current battles involve transforming homosexuality as an identity in and of itself to an identity recognized by an institution. Put another way, institutional recognition involves pulling back the bedroom curtains and making a case for public acceptance, thereby making privacy public. This shift, consequently, leads courts to consider somewhat different frameworks, including public recognition and Equal Protection.

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[3] Warren Richey & Linda Feldmann, Big Boost for Privacy Rights, Christian Sci. Monitor, June 27, 2003, at 1; see also William Safire, The Bedroom Door, N.Y. Times, June 30, 2003, at A21 ("Sodomy . . . when practiced between consenting adults, straight or gay, is none of the government's business.").

[4] Lofton v. Secretary of the Dep't of Children and Family Serv.s, 358 F.3d 804, 817 (11th Cir. 2004) (noting that "[a]part from the shared homosexuality component," constitutional challenges to anti-gay adoption laws and sodomy criminal statutes are notably different).

[5] See Perry v. Schwarzeneggar, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

Emblematically, does *Lawrence* serve any function in current and future cases involving LGBT rights? I believe the answer is yes. *Lawrence* may be a fading black letter, but it possesses tremendous symbolic power. The decision is a victory for a social movement, the blow to morality-based legislation, and a signal to the broader public that LGBT equality is foreseeable. Putting aside what the decision says and its interpretation of the Fourteenth Amendment, and putting aside the decision's reach, *Lawrence* has become a law that transcends the law itself.

My discussion unfolds in three Parts and examines the decision's short-term impact and long-term potential. The first Part provides a brief history of the case and its immediate impact on privacy, sexual identity, and the interpretation of the Fourteenth Amendment. The second Part focuses on the ways lower courts rejected or reinterpreted *Lawrence*, thereby moving away from the opinion's original holding. I argue that the Court's decision to use a substantive due process framework highlights the short-term impact and difficulty of relying on *Lawrence* for disputes that do not pertain exclusively to matters of privacy. The final Part is a socio-legal evaluation of *Lawrence* in which I contend *Lawrence* remains viable law. Here, I suggest recasting *Lawrence* as a symbol of equality and a beacon for social and institutional transformation. Such a reimagining can play a vital role not just for LGBT rights and other equal rights challenges, but for a more expansive way to use law beyond formal legal channels.

## I. THE READING OF *LAWRENCE*

The case is fairly straightforward. The Court considered the validity of a Texas criminal statute that led to the convictions of John Geddes Lawrence and Tyrone Garner for alleging having sexual relations in a private residence. The plaintiffs offered two constitutional challenges to the statute, both premised on the Fourteenth Amendment: privacy and equality. The Court invalidated the sodomy statutes on the basis that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"[6] and held that the Texas statute, and sodomy laws more generally, furthered "no legitimate state interest which can

[6] *Lawrence*, 539 U.S. at 572.

justify its intrusion into the personal and private life of the individual."[7]

The key word here is private, which was made abundantly clear by Justices who vehemently and repeatedly used the word (forty-four times to be exact). Justice Kennedy's majority opinion framed the interest at stake as one of individual liberty that involved "the most private human conduct, sexual behavior, and in the most private of places, the home."[8] Justice O'Connor's concurrence, grounded in an equal protection, anti-classification framework, similarly framed the constitutional challenge "to private, consensual conduct."[9] These opinions could not have been clear enough in establishing a doctrinal bright-line concerning where *Lawrence* applies or does not apply.

The decision's privacy frame allowed the Court to sidestep whether *Lawrence*'s reach extended to more public forms of homosexual recognition. And the majority and concurring opinions went to great lengths to foreclose the opportunity to reinterpret and extend the opinion's ruling. The majority declared that "the case did not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[10] Even Justice O'Connor's concurrence signaled her unwillingness to have the decision apply in broader contexts; in her view, laws limiting gay rights could pass rational basis so long as they had a legitimate state interest. Her examples included "national security or preserving the traditional institution of marriage."[11] By framing the decision as a private liberty, *Lawrence* relegates and "domesticates"[12] claims of sexual equality to the bedroom, a location isolated from public exposure.[13]

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[7] Id. at 578.
[8] Id. at 567.
[9] Id. at 585.
[10] Id. at 578.
[11] Id. at 585.
[12] Katherine M. Franke, The Domesticated Liberty of *Lawrence v. Texas*, 104 Colum. L. Rev. 1399, 1400 (2004); see also Mary Anne Case, Of "This" and "That" in *Lawrence v. Texas*, 2003 Sup. Ct. Rev. 75, 80.
[13] Larry Cata Backer, Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration, 45 Fla. L. Rev. 755, 765–71 (1993).

## II. THE FADING OF *LAWRENCE*

The Court's ruling resulted in debates concerning the constitutionality of other matters involving sexuality, including open military service, gay and lesbian adoption, and same-sex marriage. These cases leave lower courts with the uncomfortable task of fitting the square peg of *Lawrence* into the round hole of public recognition. The result is *Lawrence*'s original meaning becoming somewhat less relevant to current disputes.

### *From Private to Public*

Sexuality, unlike race or gender, often requires a person to declare their orientation in a public arena in order to receive institutional recognition, a setting beyond *Lawrence*. Indeed, the boundary between public and private is a messy one, and one that Lawrence and Garner's attorney, Paul Smith, explained during oral argument before the Supreme Court:

> [T]he opportunity to engage in sexual expression as they will in the privacy of their own homes performs much the same function that it does in the marital context; that you can't protect one without the other; that it doesn't make sense to draw a line there and that you should protect it for everyone.
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> That is a fundamental matter of American values.[14]

When it comes to matters of sexual identity and expression, matters of privacy often become coterminous with public matters by virtue of state-supported relationships and family formation.

This tension is quite clear in *Lofton v. Secretary of the Department of Children and Family Services*,[15] where the Court of Appeals for the Eleventh Circuit upheld an antigay adoption statute, but more importantly, highlighted the distinctions between *Lawrence* and the case at bar. Aside from the obvious factual distinctions (adoption petition versus sodomy arrest), the public-private dichotomy prompted the court to disregard *Lawrence*. For the court, adoption is a process of family formation as well as a public act. Through an adoption petition, individuals "ask[] the state to confer official recognition—and, consequently, the highest level of constitutional

[14] Transcript of Oral Argument at 4, *Lawrence*, 539 U.S. 558 (No. 02-102), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_02_102.

[15] 358 F.3d 804 (11th Cir. 2004).

insulation from subsequent state interference on a relationship where there exists no natural filial bond."[16] In this case, the ability to adopt children and respect for familial privacy "is not the negative right to engage in *private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition*."[17]

Likewise, even victories for same-sex marriage following *Lawrence* demonstrated its limited application. The first court to address same-sex marriage post-*Lawrence*, *Goodridge v. Department of Public Health*,[18] cites the decision a number of times but ultimately relies on the Commonwealth of Massachusetts Constitution to invalidate prohibitions against same-sex marriage. In fact, a dissent alleged that the majority's rationale contradicted *Lawrence* because "[i]ronically, by extending the marriage laws to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs' lives."[19]

*From Intimate Association to Personal Autonomy*

The Court invalidated sodomy laws on the grounds that they violated an individual's right to engage in private, intimate conduct. This rationale, as explained earlier, hones in on the privacy rights conferred by substantive due process under the Fourteenth Amendment. More recent legal challenges, particularly in cases involving gays and lesbians in the military, continue to cite *Lawrence* because its substantive due process discussion remains somewhat relevant. However, the framing of substantive due process in gay rights cases has become more about personal autonomy and the right to self-definition free from government intrusion, rather than intimate association.[20]

This shift is a subtle one but one that moves privacy rights, and due process, away from the text of the decision. Even though there was a circuit split in the cases challenging Congress' "Don't Ask, Don't Tell,"[21] both the Ninth and First Circuits treated *Lawrence* as a

[16] Id. at 810 (internal citation omitted).

[17] Id. at 817 (emphasis added).

[18] 440 Mass. 309, 312–13, 349 (2003).

[19] Id. at 357 (Spina, J., dissenting).

[20] I am not suggesting that *Lawrence* did not feature discussions of autonomy. Indeed it did. See *Lawrence*, 539 U.S. at 562, 574. However, the decision focused more on private sexual activity rather than the personal autonomy and choice.

[21] Compare Witt v. Dep't of the Air Force, 527 F.3d 806, 819–821 (9th Cir. 2008) (holding that "Don't Ask, Don't Tell" violated substantive Due Process in an as-applied

case of personal autonomy. For example, in *Witt v. Department of the Air Force*, the Ninth Circuit acknowledged *Lawrence*'s privacy discussion under substantive due process, but gave particular attention to personal autonomy: "the right to choose to engage in private, intimate sexual conduct is a constitutional right of a high order . . . ."[22] Likewise, *Cook v. Gates* also focused on the liberty interest of *Lawrence* as one associated with "freedom of thought, belief, and expression."[23]

*From Due Process to Equal Protection*

*Lawrence* made abundantly clear that the government cannot intrude on the intimate lives of one group but not another. Although the Court recognized the applicability of equal protection and substantive due process frameworks in the case—because both recognize fair treatment and respect for the conduct of individuals—the majority believed that prior privacy cases that decriminalized private conduct were based on a logical rationale: "[i]f protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[24] Put another way, the Court believed that the criminalization of private conduct carried social consequences that could not have been remedied simply within an equal protection framework.

The passage of time ushered in increased public support for LGBT rights and same-sex marriage recognition. Judges, lawyers, and the public demonstrate greater concern with broader social equality and greater awareness of the ways gays and lesbians remain a marginalized group. The federal district court's opinion in *Perry v. Schwarzeneggar* aptly shows this shift from privacy rights to equal protection, where Judge Vaughn Walker noted that "the movement of marriage away from a gendered institution and toward an institution free from state-mandated gender roles reflects an evolution in the understanding of gender rather than a change in marriage."[25]

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challenge), with Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (holding that "Don't, Ask, Don't Tell" passes the level of scrutiny established by *Lawrence*).

[22] *Witt*, 527 F.3d at 827.

[23] *Cook*, 528 F.3d at 52 (citing *Lawrence*, 539 U.S. at 562).

[24] *Lawrence*, 539 U.S. at 575.

[25] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010).

## III. THE REMAKING OF *LAWRENCE*

The Essay thus far has portrayed a fairly bleak picture of *Lawrence*. And I believe as doctrine, that is the case, at least in the most recent challenges involving LGBT rights. However, not all is lost. *Lawrence*'s viability can be revived if we consider law and social meaning-making and order as a bidirectional and mutually constitutive relationship. Here, the socio-legal tradition is informative because it recognizes that law and society do not operate independently. Instead, they co-construct and transmit norms and ideas, which ultimately become codified in rules and embodied in public opinion.[26] While the law is a focal point in the creation of social norms, ordinary people and extra-legal institutions are important agents in constructing legal meaning.

As important, by situating *Lawrence* in a broader context, the case (and the law, more generally) has the potential to be a "malleable resource"[27] that can be refashioned in a variety of ways. Most notably, it serves as a useful tool to articulate the shared grievances of a group, and yet it serves as a symbol for progress as well.

### *Lawrence as Aspirational*

If social change is slow, then legal change goes at a snail's pace. However, gradual progression is necessary because a dramatic departure from public opinion could lead to a number of consequences that can retard or derail groups seeking transformation—public backlash,[28] countermovement mobilization, and loss of legitimacy of the courts (the primary symbolic and actual instrument for change). To this end, the Supreme Court recognized that decriminalization of

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[26] See, e.g., Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life (1998); Austin Sarat & Thomas R. Kearns eds., Law in Everyday Life (1993); June Starr & Jane F. Collier, History and Power in the Study of Law: New Directions in Legal Anthropology (1989).

[27] Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization 6–7 (1994).

[28] While opinion polls at the time suggested overwhelming support for legalizing homosexual relations, *Lawrence* caused a sudden public, legal, and political backlash against LGBT rights. See Michael J. Klarman, *Brown* and *Lawrence* (And *Goodrich*), 104 Mich. L. Rev. 431, 443–44, 459–73 (2005). Subsequent media coverage reframing *Lawrence* as a case with public implications—most notably, setting the stage for same-sex marriage—may explain the eleven-point drop in support to decriminalize sodomy. See Stephen M. Engel, Frame Spillover: Media Framing and Public Opinion of a Multifaceted LGBT Rights Agenda, Law & Soc. Inquiry (forthcoming 2013).

sodomy laws was an easier[29] and necessary step to lift the stigma of homosexuality that was a roadblock to broader acceptance: "When homosexual conduct is made criminal . . . that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[30] This incrementalist approach encourages advocates to push the boundaries of *Lawrence*'s interpretation and scope and allows each victory to provide justification for new rights. *Lawrence* was the necessary stepping stone for courts to justify a higher level of scrutiny for sexual orientation-based classifications, as well as to extend rights in other areas of social and economic life such as marriage and family, military, employment, and healthcare.

### *Lawrence As Symbol*

*Lawrence* has become a case beyond law, representing a catalyst for sexual equality. Much like other cases that preceded it—most notably, *Brown v. Board of Education*—the decision has little to do with actual doctrine, but instead is a case that is imbued with symbolic meaning and potential for claims-making.[31] Social movement scholarship illustrates that framing, or the "symbolic package" of beliefs, meanings, and language and so forth, is particularly useful to articulate grievances and objectives of a group, as well as influence others through the strategic use of symbols and rhetoric that touch upon society's deeply held cultural values and ideals such as fairness, equality, or freedom.[32] In particular, the frame of law becomes a tool to identify injustices, raise awareness and encourage mobilization, and to gain public support in a manner that is easily accessible and persuasive to a widespread audience.[33] Even in circumstances where legal victories are short-lived or legal challenges are downright defeats, social movements still leave an imprint on socie-

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[29] *Lawrence*, 539 U.S. at 571–72 (noting nonenforcement and even recent abolition of sodomy laws directed at same-sex relations in multiple states before the decision).

[30] Id. at 575.

[31] Michael J. Gerhardt, The Power of Precedent 147–76 (2008).

[32] See Robert D. Benford & David A. Snow, Framing Processes and Social Movements: An Overview and Assessment, 26 Ann. Rev. of Soc'y 611 (2000).

[33] See, e.g., Ellen Ann Andersen, Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation (2005); Nicholas Pedriana, Intimate Equality: The Lesbian, Gay, Bisexual, and Transgender Movement's Legal Framing of Sodomy Laws in the *Lawrence v. Texas* Case, *in* Queer Mobilization: LGBT Activists Confront the Law (Scott Barclay et al. eds., 2009).

ty and force supporters and opponents to reflect upon the current structure of social relations and the institutions that often create and perpetrate hierarchy and inequality.

## CONCLUSION

In the past decade, the contestation over *Lawrence*'s meaning and scope has shown that its doctrinal relevance was short-lived. As the LGBT social movement progresses and groups seek additional protections beyond decriminalization of sodomy statutes, the factual and legal distinctions compel lower courts to eschew or reappropriate *Lawrence* in ways that the Court expressly did not want to address ten years ago. While sexual identity and expression highlight the difficulty of decoupling substantive due process and equal protection legal frameworks—namely, that the public and private spheres are not mutually exclusive—the decision's meaning has become an unwieldy critical reading exercise or it has taken a backseat all together.

However, if we abandon *Lawrence*'s articulated stated breadth, we see how it lays the integral framework for contemporary discourse about sexuality, specifically, and broader change, more generally. *Lawrence* represents the end of morality-based legislation and a movement toward mainstream acceptance of sexual identity and association. Such a reimagining breathes meaning into a case that can withstand the test of time by being remade for current challenges. What we are left with, then, is a new *Lawrence*, one largely detached from the four corners of the opinion itself.