Law and the Public's Health

LAWRENCE V TEXAS: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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The final week of the Supreme Court's 2003 term witnessed two momentous decisions: the Michigan affirmative action case (whose implications for the public health workforce will be discussed in an upcoming column); and *Lawrence v Texas*, which struck down Texas' anti-sodomy statutes as in violation of the Constitutional right to individual liberty. This issue of *Law and the Public's Health* explores the *Lawrence* decision and its implications for public health policy and practice.

The decision

As is the case with so many landmark decisions involving personal civil liberties, *Lawrence* began its life in a relatively mundane fashion. Responding to a criminal public disturbance call that allegedly involved weapons, the Houston police found two men, Eric Lawrence and Tyrone Garner, engaged in a sexual act. The two men were arrested, charged, and convicted of "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." The Texas Penal Code provides that a "person commits an offense if he engages in deviate sexual intercourse [such as anal sex] with another individual of the same sex" and classifies such conduct as misdemeanors.

The men then appealed their conviction and challenged the constitutionality of the law. Their conviction was affirmed by the Texas courts, citing *Bowers v Hardwick*,² a 1986 Supreme Court decision in which Georgia's anti-sodomy statutes were upheld against a Constitutional challenge.

The Supreme Court granted certiorari to determine whether the Texas statute violated the liberty and equal protection clauses of the 14th Amendment to the U.S. Constitution, and furthermore, whether *Bowers* should be overruled. (Today only 13 states have sodomy laws and four enforce their laws only against homosexual conduct.) The stage thus was set for another in a long line of decisions examining the Constitution's meaning of personal liberty in such matters as contraception, abortion, assisted suicide, and private consensual adult sexual conduct.

Justice Kennedy, one of the Court's conservative members, wrote the decision for a five-Justice majority

(himself, and Justices Stephens, Souter, Ginsberg and Breyer). Justice O'Connor separately concurred on narrower grounds. Justice Scalia wrote the dissent for himself, Chief Justice Rehnquist, and Justice Thomas.

The majority decision was astonishing for its sweep, its global and historical perspective on human sexuality and the evolution of social culture and tradition, and its emphasis on the Constitutional proscription against state interference in matters of consensual and private personal relationships. The stinging dissent characterized the majority decision as contrary to law, history, and national values. In the dissent's view, the decision opened the doors not only to overturning all laws aimed at proscribing deviant sexual conduct, but also to sanctioning same-sex marriage. The scope of the majority opinion—and the "no holds barred" analysis found in the dissent—inevitably will be debated for years, particularly in the realm of same-sex marriage.

Justice Kennedy began with an eloquent explanation of the rights secured by the Constitution:

. . . Freedom extends beyond spatial bounds. 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.

He then made the remarkable admission that in *Bowers*, the Court had focused on the wrong question:

The Court began its substantive discussion in *Bowers* 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." [citation omitted] That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. 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. . . . The statutes . . . seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Without ever noting whether the liberty rights at issue are "fundamental" and thus deserving of particularly strict scrutiny, Justice Kennedy then observed:

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. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice. [emphasis added]

Justice Kennedy then explored not only the legal, but as significantly, the social and moral underpinnings of the *Bowers* decision and found them wanting, particularly in a modern context. In his view, Bowers rested on an essentially incorrect reading of the history of the law of sodomy (particularly private consensual sex acts involving adults) and social attitudes toward homosexuality. In misreading both the law and social mores, *Bowers* essentially overstepped the bounds of law by impermissibly legitimizing, through criminal law, self-proclaimed majoritarian sexual attitudes:

. . . [T]he Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. 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.

Examining the evolution of international human rights laws and practices, Justice Kennedy found a pronounced worldwide shift in attitudes toward human sexual conduct and in the laws that governed it. It was in part this global social redefinition of acceptable human sexual conduct that appeared to persuade the majority that *Bowers* had to fail as an incorrect view of personal liberty. The majority also underscored the enormous consequences of criminally sanctioning human sexual conduct as evidenced in its own "Megan's Laws" cases also decided in the 2003 term,³ thereby emphasizing the importance of confining such laws to conduct that truly involves a public threat.

In her concurrence, Justice O'Connor found the Texas statute impermissible on narrower equal protection grounds, since the statute applied its proscription only to adults of the same sex. She thus would have simply sidestepped the question of whether Bowers (which involved a law that covered both sexes but was differentially applied) should be overruled.

But for Justice Scalia, even this more narrowly circumscribed opinion was intolerable. His dissent attacked every portion of the majority decision as well as the O'Connor concurrence. Terming the majority's decision a "massive disruption of the current social order," Justice Scalia argued that the majority had simply "bought into the homosexual agenda" and essentially had overruled *Bowers* by bending its own line of personal liberty decisions. In his view, the Court's previous decisions collectively stood for the proposition that strict scrutiny of state laws is inappropriate unless a fundamental personal liberty interest is identified, which in his view, the majority specifically refused

Justice Scalia was particularly incensed that the majority was so willing to overturn the Bowers precedent, since in Planned Parenthood of Southeastern Pennsylvania v Casey4 (which affirmed the right to abortion established in Roe v Wade⁵⁵), the majority had argued the need for stability in the law as a key basis for trimming but not overturning Roe's central holding. In his view, the majority decision opened the door to the elimination of virtually all laws regulating sexual conduct and would inevitably lead to the legal sanctioning of same-sex marriage. For Justice Scalia, the legislatures, not the courts, are the forum in which social mores should be debated.

Implications for public health policy and practice

As is true with so many cases that focus on the intersection of individual liberty and state regulation, understanding the policy implications of Lawrence depends on whether one reads the majority or dissenting opinions. The majority considered its decision to be the result of a long line of previous cases and as one confined to private and consensual relations between adults:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. 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. The petitioners 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. . . .

The majority also saw its decision to overturn *Bowers* as simply eliminating an isolated, biased decision that no longer enjoyed currency as a proper legal view, given the evolution of both national and, indeed, worldwide

The dissent on the other hand, viewed the majority opinion as so legally and morally shaky that it is impossible to contain it to private adult consensual acts:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . .

The dissent's assertion that the Lawrence majority opinion legitimizes such conduct as incest and other non-consensual sexual conduct appears to be at odds with the majority's own limits on the scope of its opinion. Indeed, the majority took care to clarify the power of government to regulate personal sexual conduct (including imposing criminal sanctions); in pointing to its own Megan's Law decisions earlier in the term, the majority underscored its approval of government action designed to protect the public from harmful conduct. Other forms of sexual conduct cited by the dissent, such as sex for hire and incest, even where nominally consensual, raise such potential for harm and sexual victimization that they appear to fall well outside the bounds of the consensual adult conduct that was the focus of this case.

As social mores continue to evolve worldwide, the "rational basis" for drawing marital rights distinctions based on the sex of the partners may fade, particularly as other forms of social conduct, such as same sex parenthood, grow increasingly common. But by steering clear of labeling adult sexual privacy a "fundamental" right, the majority appears to have left the door open to upholding the power of government to distinguish among the types of human conduct that it will affirmatively sanction through marriage.

The decision is particularly noteworthy in its illus-

tration of the link between the evolution of social values and mores and the evolution of law. Notice, too, the majority's citation to international law and human rights, a point of view that elicited much commentary regarding the Court's expanded view of U.S. law as part of a worldwide social order.

Whether the decision could make it easier to overturn Roe v Wade is also a matter of debate. Some commentators have noted that in overruling Bowers, the Court signaled its willingness to upend precedent in the face of shifting attitudes and beliefs. The majority was careful to note that, in its view, no broader social harm would come from overturning Bowers. But this assertion of "no harm" clearly depends on one's worldview about the various types of harms caused by human sexual conduct and, perhaps more importantly, one's views about abortion. As the latest articulation of the eternal tension between personal liberty and state regulation, Lawrence may serve as reaffirmation of the right to personal liberty; at the same time, it may represent powerful precedent for erasing earlier "legal errors" when the times compel it.

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- 4. Planned Parenthood of Southeastern Pennsylvania v Casey, 505 U.S. 833 (1992).
- 5. Roe v Wade, 410 U.S. 113 (1973).