

## A LEGAL PERSPECTIVE

### SEXUAL ORIENTATION AND GENDER IDENTIFICATION ISSUES

#### **LANDMARK SUPREME COURT DECISION REVERSES *BOWERS V. HARDWICK* AND SETS THE STAGE FOR THE FUTURE OF GAY AND LESBIAN CIVIL RIGHTS**

By: Mitchell Katine

On June 26, 2003, (just two days before most annual gay pride celebrations in America), the Supreme Court of the United States issued a landmark gay rights decision in *John Geddes Lawrence and Tyron Garner v. State of Texas*.<sup>1</sup> John Lawrence and Tyron Garner had been arrested in Houston for engaging in anal intercourse, which is defined as “deviate sexual intercourse”<sup>2</sup> and constitutes a violation of the Texas “Homosexual Conduct”<sup>3</sup> statute only when performed by persons of the same sex. On June 25, 2003, thirteen states had laws that made private sexual activity between consenting adults a crime. As a result of *Lawrence*, all such laws have been declared unconstitutional.

In 1986, the Supreme Court issued its most famous anti-gay decision, *Bowers v. Hardwick*,<sup>4</sup> which ruled that homosexual sexual intercourse was not protected by the United States Constitution, and thus, opened the door for states to pass laws and freely engage in various forms of discrimination against gay and lesbian people without fear of federal constitutional consequences. With *Bowers* as the “green light,” the intimate personal lives of GLBT<sup>5</sup> citizens throughout this country were brought into numerous court proceedings as relevant, while the true purpose for invading their privacy was to gain tactical advantage via bias, prejudice, and homophobia. *Bowers* has not only been used to oppress and harass GLBT people in their employment and family law situations, but has also been

used against non-gay people to punish what some consider to be morally disliked behavior such as adultery.<sup>6</sup>

*Lawrence* is the most important decision in the history of gay and lesbian civil rights. The Supreme Court's majority opinion in *Lawrence* unabashedly stated that its 1986 decision in *Bowers* was not correct when it was decided and it is not correct today. The Court expressly overruled *Bowers* and declared all sodomy laws unconstitutional.<sup>7</sup> The continuance of *Bowers* as precedent would "demean the lives of homosexual persons." The constitutional law question presented by the *Lawrence* case was "whether the petitioners' were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."<sup>8</sup> For this inquiry, the court found it necessary to reconsider its holding in *Bowers*. As part of the *Lawrence* analysis, the Court took issue with the fundamental underpinnings of *Bowers*. While *Bowers* described a longstanding history against homosexual conduct, in *Lawrence*, the Court stated "[a]t the onset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."<sup>9</sup>

The majority opinion in *Lawrence* used sweeping, bold and clear language to overturn *Bowers* and to establish the propositions that homosexual persons are protected in their right to liberty under the Due Process Clause and have the right to engage in private, consensual homosexual conduct without intervention of the government. The Court stated as follows:

It suffices for us to acknowledge that adults may choose to enter upon this relationship<sup>10</sup> in the confines of their homes and their own private lives and still retain their dignity as free persons. 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.<sup>11</sup>

In citing *Planned Parenthood of Southeastern Pa. v. Casey*,<sup>12</sup> the Supreme Court in *Lawrence* stated “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” *Lawrence* determined that the Texas homosexual conduct statute proposed no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>13</sup> The *Lawrence* opinion concludes with a historic sentence directed at future generations: “As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>14</sup>

It often takes years after a decision in order to appreciate and understand its true meaning. The Court waited only one day before the implications of *Lawrence* would be felt for the first time. On the day after *Lawrence* was decided, the Court issued a decision in a Kansas case styled *Limon v. Kansas*.<sup>15</sup> Mathew Limon was convicted of engaging in underage sex with someone of the same gender and was sentenced to 17 years in prison. Had Limon had the same underage sex with someone of the opposite gender, his crime and punishment would have been less severe under Kansas law. The Supreme Court granted the writ of certiorari in *Limon*, vacated the 17 year judgment, and remanded the case to the Kansas court for further proceedings consistent with *Lawrence*.

The *Lawrence* decision is as significant to ending discrimination against GLBT people as the decision in *Brown v. Board of Education*<sup>16</sup> was for African-American people in the United States. There are many steps which remain to be taken to help GLBT people achieve equality. None of that work could have been done while *Bowers* remained good law. Now that the Supreme Court has overruled *Bowers* and declared that homosexual persons have the same right to liberty and other protections offered by the United States Constitution as other citizens, GLBT people can start to

move forward in achieving full equality in America. For as the Constitution endures, GLBT people in every generation can now invoke its principles in their own search for greater freedom.

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#### NOTES

1. \_\_\_ U.S. \_\_\_, 123 S.Ct. 2472 (June 26, 2003).
2. Texas Penal Code § 21.02(1) provides “Deviate sexual intercourse” means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person, or (B) the penetration of the genitals or the anus of another person with an object.”
3. Texas Penal Code § 21.06 (“Homosexual Conduct”) provides: (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor.”
4. 478 U.S. 186, 106 S.Ct. 2841 (1986).
5. “GLBT” is the common acronym used to refer to gay, lesbian, bisexual, and transgendered people.
6. *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996).
7. *Lawrence* at 2482, 2484.
8. *Lawrence* at 2476.
9. *Lawrence* at 2478.
10. The relationship referred to by the Court is “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”. *Lawrence* at 2478.
11. *Lawrence* at 2478.
12. 505 U.S. 833, 112 S.Ct. 2791 (1992).
13. *Lawrence* at 2484.

14. *Id.*
15. \_\_\_ U.S. \_\_\_, 123 S.Ct. 2638 (June 27, 2003).
16. 347 U.S. 483, 74 S.Ct. 686 (1954).