INTRODUCTION

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Gay and lesbian people in the United States currently enjoy the most respected position, legally and socially, since coming out as an identifiable group. However far we may have come, we are still often vilified and remain one of the last minority groups to achieve full equal rights. Recent events have caused me to reflect on the gay and lesbian community by recounting two philosophical phrases which I often use in describing my life, to-wit :"sometimes dreams come true," and "be careful what you wish for, because you may get it." Both of these propositions have direct application to the *Lawrence v. Texas*[2] Supreme Court decision. When John Lawrence and Tyron Garner were arrested late in the evening on September 17, 1998, no one ever imagined that their case would go from the lowest criminal court in Texas to the highest court of our country and change the legal landscape for gay and lesbian people forever. Of course, that is what we wished for. At the time of their arrest, Texas had a statute called the "Homosexual Conduct" statute found in § 21.06 of the Texas Penal Code.[3] The criminal statute was punishable by a maximum fine of $500.00. The statute had rarely been enforced, although it was selectively used as a badge of dishonor to classify all gay and lesbian people in the State of Texas as "per se" criminals. Many other states had similar statutes.

The statute was enacted in 1973 when the Texas legislature decriminalized oral and anal sex among heterosexuals, but created a cause of action against individuals who desired to have intimate sexual contact with persons of the same sex.

In 1986, the United States Supreme Court issued its horrific decision in *Bowers v. Hardwick*.[4] *Bowers* was characterized by the Court to hold that the United States Constitution does not protect

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[2] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[3] "Homosexual Conduct" statute § 21.06 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 (1986).

homosexual sodomy. The decision was littered with inaccuracies and homophobic conclusions. The decision in *Bowers* was often credited as being the "gay exception" to the United States Constitution. The decision in *Bowers* permitted state and local governments to treat gay and lesbian people as second class citizens, as well as to invade the private lives of heterosexuals in circumstances when their private conduct offended the morals of someone in authority. *Bowers* was also often used in the area of family law, as I understood it was often cited as authority to deny custody and/or restrict visitation to gay and lesbian parents when involved in litigation with a prior spouse of heterosexual persuasion.

Subsequent to the arrest of Mr. Lawrence and Mr. Garner, they were referred to me for legal assistance. At first, I found it hard to believe that anyone would be arrested simply for violating the Texas Homosexual Conduct statute. To my surprise and astonishment, I learned that in fact, the only charge levied by the arresting officers against Mr. Lawrence and Mr. Garner was the violation of the Homosexual Conduct statute. No other allegations or charges of any other kind were brought. Accordingly, it appeared to me that the facts presented a unique opportunity to once and for all challenge the Texas Homosexual Conduct statute. During years preceding the arrest of Mr. Lawrence and Mr. Garner, I had come to know and respect a national gay and lesbian legal organization in New York named Lambda Legal Defense and Education Fund, Inc. Upon being contacted by Mr. Lawrence and Mr. Garner, I quickly obtained their permission to bring Lambda Legal into the case as the constitutional law experts. Lambda Legal quickly agreed to serve as lead counsel in the case and I would serve in a capacity of local cooperating attorney.

Lawrence v. Texas spent approximately four years winding its way through the Texas judicial system until ultimately being denied by the Texas Court of Criminal Appeals leaving John and Tyron convicted of the crime of homosexual conduct. A petition for writ of certiorari was filed with the United States Supreme Court and requested three questions be accepted by the Court. Those questions were as follows:

1. Whether petitioners' criminal convictions under the Texas Homosexual Conduct law-which criminalizes sexual intimacy by same sex couples, but not identical behavior by different sex couples-violate the Fourteenth Amendment guarantee of equal protection of the laws?

2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interest in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986) should be overruled?

At first, the Harris County district attorney's office waived filing a reply to the petition for a writ of certiorari. The first indication that *Lawrence v. Texas* might be heard by the United States Supreme Court was when the court ordered the district attorney's office to file a reply. Shortly

thereafter, we received word that our petition for a writ of certiorari had been granted and we were headed to Washington, D.C.

Oral arguments could not have gone better. Our side of the case was presented by an openly gay attorney named Paul Smith who had appeared numerous other times before the Supreme Court. The questioning by the Justices during oral argument was unusual, informative, and entertaining. Due to the tension of the topic and the numerous gay and lesbian citizens present in the audience, various questions, as well as responses, often resulted in restrained laughter, as well as sighs, depending on the question or verbal interaction.

On June 26, 2003, I was sitting at my desk in my office in Houston, Texas waiting for word on the decision. I had notified the clients that a decision would be coming down, but to remain reserved due to the serious possibility that we could lose. At approximately 9:12 a.m., my telephone rang and I received the news of our victory from my retired mother from Fort Lauderdale, Florida. She had been watching television and received word of our victory through television news. My telephone call reaction to my mother's news was recorded by numerous television cameras and newspaper reporters who were stationed in my office to capture my immediate response. After receiving the word of victory from my mother, I received more detailed information on the depth and breadth of the decision.

Justice Kennedy delivered the opinion of the court. The language used by Justice Kennedy in the majority opinion of *Lawrence v. Texas* was sweeping, historic and left little room for doubt as to the commitment of the United States Supreme Court in protecting the lives and relationships of gay and lesbian people. "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."[5] Of equal significance in having the court declare the Homosexual Conduct statute to be unconstitutional, the court expressly overruled the decision in *Bowers v. Hardwick* by stating that "Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[6] "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. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[7] And finally, the last substantive sentence of the opinion embodies the essence of the entire majority decision by stating "As the Constitution endures, persons in every generation can invoke its principals in their own

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[5] *Lawrence* at _____ (2003).

[6] *Id*. at _____.

[7] *Id*. at _____.

search for greater freedom."[8] Upon reading the decision in *Lawrence v. Texas*, I had finally had a dream come true. The United States Supreme Court had declared that gay and lesbian people were no longer exempt from the protections of the United States Constitution, and the highest court in our country acknowledged the rights of all homosexual people to engage in intimate association with one another without being or feeling less of a citizen than their heterosexual neighbors.

A few months after the *Lawrence v. Texas* decision was decided, the Supreme Judicial Court of Massachusetts issued its historic decision in *Goodridge v. The Department of Public Health.*[9] The decision was based upon the Massachusetts Constitution, but began its opinion by citing the *Lawrence v. Texas* decision. With regards to *Lawrence*, the Supreme Judicial Court of Massachusetts stated that the Supreme Court in *Lawrence* "affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expression of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life. Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our communities most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principals of respect for individual anatomy and equality under law."[10] The Supreme Judicial Court of Massachusetts in the *Goodridge* decision goes on to "declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[11] By overruling *Bowers v. Hardwick*, and setting forth judicial principals of equality, privacy, and liberty with regards to gay and lesbian relationships, I feel as if the *Lawrence* decision paved the way for the Supreme Judicial Court of Massachusetts to issue its historic decision legalizing gay and lesbian marriage in the State of Massachusetts.

Unfortunately, the Massachusetts decision, as well as the events involving San Francisco and other state and local activities surrounding gay and lesbian marriages, provided a perfect opportunity for the conservative Republican party to seize an opportunity to gain a political advantage in the election of George W. Bush. As has been reported by numerous sources, many voters explained their decision for voting for President Bush based upon the moral issues involved in the campaign. Had the *Lawrence* decision not come out when it did, followed by the *Goodridge* decision, the

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[8] *Id*. at _____.

[9] 440 Mass. 309 (2003).

[10] *Id*. at _____.

[11] *Id*. at _____.

Republican party would not have been able to take advantage of the opportunity to use gay and lesbian marriages as a catalyst to motivate its conservative on election day. Hence, the election between George Bush and John Kerry may have had a different outcome were it not for *Lawrence v. Texas* and *Goodridge v. The Department of Public Health* decisions. Accordingly, we got what we had wished for, and now we must deal with the backlash.

Nevertheless, it has long been my belief that there will be many cases won and many cases lost in the fight for equal rights for gay and lesbian people. The true advancement of this civil rights movement is not through winning cases, but is in winning the hearts and minds of America. In order to do so, gay and lesbian issues must be openly discussed and debated, and stereotypes must be dissolved. For example, during the weeks in which gay and lesbian couples and families were permitted to marry in San Francisco, California, the citizens of the United States saw in the media for the first time true gay and lesbian families and realized that the individuals who were seeking equal rights of marriage did not appear to be any different than themselves. Those events and the media exposure was priceless.

This issue of the St. Louis University Public Law Review sets forth numerous articles discussing various developments in our country and around the world with regards to the fight for equal rights of gay and lesbian people. As is demonstrated throughout the following articles, with the removal of *Bowers v. Hardwick*, and with the Supreme Court holding in *Lawrence v. Texas* that moral disapproval alone is not sufficient to criminalize or demean homosexual relationships, gay and lesbian people can now fight, for the first time, for their true constitutional rights on equal footing with other oppressed groups.

Unfortunately, there have been a number of subsequent court decisions which have declined to follow the principals of *Lawrence v. Texas*. I believe it will take at least one, if not more, subsequent decisions by the United States Supreme Court to reaffirm that the court truly meant what it said in the *Lawrence* decision. The Supreme Court will have an opportunity to readdress the issues of *Lawrence v. Texas* in the area of gay and lesbian adoptions. In a case styled *Loften v. Secretary of the Department of Children and Family Services*, 358 F.3d 804 (11th Cir. 2004), the Eleventh Circuit has upheld the Florida law which prohibits gay and lesbian people from adopting children and asserted that *Lawrence v. Texas* was not applicable because the case involved children. I believe that the Eleventh Circuit is wrong and that it failed to understand the broader principals set forth in the *Lawrence* decision. A petition for writ of certiorari has been filed in the *Loften* case and hopefully will be granted in order for the United States Supreme Court to reaffirm the principals set forth in the *Lawrence* decision.

As with other civil rights victories, once freedom has been tasted, it is often impossible to reverse and restrict the liberties enjoyed. As the youth of today mature, their opposition to gay and lesbian marriage is far less prevalent than of their parents and grandparents. Accordingly, the future is very bright for gay and lesbian civil rights. As the Supreme Court said in *Lawrence*, persons in every generation can invoke the principals of the United States Constitution in their own search for greater freedom. As a relatively new parent, I am encouraged and excited for my small children to

live in a country where all people are judged based on what they do and how they act, as opposed to who they love.

John Lawrence and Tyron Garner were two individuals who were faced with an unfortunate situation and chose to fight for what they believed was right and just. Had they made a different decision to remain quiet and unnoticed, the world would literally be a different place today. I often encourage people to immolate Mr. Lawrence and Mr. Garner when confronted with a difficult decision. Mr. Lawrence and Mr. Garner made the decision to follow what they believed was right, and because they did, the Supreme Court was able to issue a decision which makes the world a much better place for all people to live. It has been my privilege and honor to know them and assist them along their journey.

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