



LGBTQIQ Reproductive Justice

The Road to Lawrence v. Texas (2003)

Lawrence, the landmark U.S. Supreme Court decision that invalidated a Texas anti-sodomy law as unconstitutional, emerged from Supreme Court reproductive rights precedents, such as *Roe v. Wade*, which established that the U.S. Constitution protects citizens' privacy.¹

- Lawrence overruled the prior precedent of *Bowers v. Hardwick*, which denied the existence of a “fundamental right...to engage in sodomy.”² The legal definition of sodomy includes any sexual act that does not lead to procreation, such as oral or anal sex.
- The decision recognized intimate consensual sexual conduct as a liberty interest protected by substantive due process under the Fourteenth Amendment.³
- Lawrence suggests that moral animus toward same-sex sexual conduct does not sufficiently justify anti-LGBTQIQ legislation,⁴ a possible step toward judicial recognition of a constitutional right to same-sex marriage.⁵
 - However, most federal and state case law following Lawrence has linked marriage and procreation to uphold the traditional model of marriage.⁶

Marriage Equality After Lawrence v. Texas

Even after the U.S. Supreme Court appointments of conservative Justices Samuel Alito and John Roberts, a majority of justices currently on the Court (Stevens, Ginsburg, Kennedy, Souter, Breyer) belong to the majority in *Lawrence v. Texas*. Thus, the current Court probably will not overturn this important LGBTQIQ case. As Justice Scalia notes in his *Lawrence* dissent, the case calls same-sex marriage prohibitions into question. Still, only two states have legalized same-sex marriage, and most states don't legally recognize married same-sex couples.

- Forty-one states have statutory “defense of marriage” acts, which prohibit same-sex marriage. Twenty-seven states have “defense of marriage” constitutional amendments.⁷
- The Massachusetts Supreme Court legalized same-sex marriage in the 2004 case *Goodridge v. Department of Public Health*. In June 2007, Massachusetts voters defeated a constitutional amendment to ban same-sex marriage in the state.
- Maryland's high Court of Appeals upheld the constitutionality of a statute denying same-sex couples' right to marry in its 2007 decision in *Conaway v. Deane*.⁸
- The California Supreme Court recognized a constitutional right to marry for same-sex couples in May 2008. However, conservative groups quickly moved to place a constitutional amendment on the November 2008 ballot that would counteract this landmark decision.
- Nine states and Washington D.C. recognize same-sex civil unions or domestic partnerships.⁹
- In 2007, Rhode Island's Attorney General authorized the recognition of other states' same-sex marriages, saying that RI prohibits discrimination on the basis of sexual orientation.¹⁰

¹ *Lawrence v. Texas*, 539 U.S. 558, 564-65 (2003).

² *Id.* at 566-67. The *Lawrence* court framed the right as one concerning the autonomy and “dignity of free persons.”

³ *Id.* at 578.

⁴ *Id.* at 582 (Justice O'Connor's concurrence).

⁵ See e.g. *Andersen v. King County*, No. 04-2-04964-4-SEA, slip op. at 7 (Wash. Super. Ct. August 4, 2004, West), reversed by *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

⁶ *Id.*; see also *Standhardt v. Superior Court ex rel County of Maricopa*, 77 P.3d 451 (Ariz. App. 2003); *Morrison v. Sadler*, No. 49D13-0211-PL-001946, slip op. at 3-4 (Ind. Super. Ct. 2003) cert. denied (2003); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005).

⁷ National Conference of State Legislatures, Same Sex Marriage, <http://www.ncsl.org/programs/cyf/samesex.htm>.

⁸ Joanna Grossman, Maryland's Highest Court Rules Against a Claim to a Right to Same-Sex Marriage: Why, In This Area, Litigation Still Matters, Findlaw's Writ, <http://writ.news.findlaw.com/grossman/20071002.html>; *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

⁹ National Conference of State Legislatures, *supra* note 7.

¹⁰ National Conference of State Legislatures, Timeline: Same Sex Marriages/Licenses Issued, <http://www.ncsl.org/programs/cyf/samesexetime.htm#2007>.



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- State courts hearing ongoing marriage equality cases include Connecticut (Kerrigan & Mock v. Connecticut Department of Public Health), and Iowa (Varnum v. Brien.)¹¹ In the latter case, the Iowa District Court ruled for the couples; an appeal is pending.¹²

Discrimination Against LGBTQIQ People by Fertility Clinics

Access to assisted reproductive technology (ART) is especially important to LGBTQIQ couples and individuals, many of whom could not have biological children without the help of fertility clinics. Unfortunately, the U.S. government and some fertility clinics discriminate against LGBTQIQ people in this respect as in many others.

- The FDA recommends that any man who has engaged in homosexual sex in the previous five years be barred from serving as an anonymous sperm donor, in place of a more relevant screening process focused on actual high-risk behavior (such as unprotected sex).¹³ This discriminatory policy stigmatizes gay and bisexual men.
- In *Barros v. Riggall*, a man and his partner filed a complaint with the Orlando Human Rights Board after a Florida clinic refused to offer them fertility treatment. The men planned to impregnate a willing surrogate mother, but the clinic claimed FDA guidelines on anonymous sperm donations prevented the treatment.¹⁴
- In *Benitez v. North Coast Women's Medical Group*, a woman has sued a fertility clinic that denied her treatment because she is a lesbian.¹⁵ Now before the California Supreme Court, the suit poses the question of whether religious convictions can exempt doctors from complying with a state law prohibiting discrimination by commercial businesses.¹⁶

LGBTQIQ Adoption

LGBTQIQ couples continue to face discriminatory obstacles, both legal and extralegal, in adopting children.

- California, Colorado, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Pennsylvania, Vermont, Washington, and Washington, D.C. explicitly allow second-parent adoption by the partner of a same-sex parent.¹⁷
- Lesbian, gay and bisexual individuals can adopt in every state other than Florida.¹⁸
- Utah does not allow adoption by anyone cohabiting outside of a legally valid marriage.¹⁹
- In *Finstuen v. Edmondson*, the 10th Circuit Court of Appeals affirmed the unconstitutionality of a state law making adopted children of same-sex couples legal orphans in Oklahoma.²⁰

¹¹ Grossman, *supra* note 8; Press Release, GLAD, GLAD Argues for Marriage Equality Before CT Supreme Court (May 14 2007), available at http://www.glad.org/News_Room/press143-05-14-07.html.

¹² Press Release, Lambda Legal, Iowa Court Issues Decision in Lambda Legal's Historic Lawsuit: Same Sex Couples Must Be Allowed to Marry (August 30, 2007), <http://www.lambdalegal.org/news/pr/iowa-court-issues-marriage-decision.html>.

¹³ The Henry J. Kaiser Family Foundation, National Politics and Policy: FDA To Implement Guidelines Banning Men Who Have Sex With Men From Donating Sperm Because of Perceived HIV Risk, KAISER DAILY WOMEN'S HEALTH POLICY REPORT, May 6, 2005, http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=29867.

¹⁴ Lambda Legal, *Barros v. Riggall*, <http://www.lambdalegal.org/our-work/in-court/cases/barros-v-riggall.html>.

¹⁵ Lambda Legal, *Benitez v. North Coast Women's Care Medical Group*, <http://www.lambdalegal.org/our-work/in-court/cases/benitez.html>; *Benitez v. N. Coast Women's Care Med. Group, Inc.*, 131 Cal. Rptr. 2d 364 (Cal. Ct. App. 4th 2003).

¹⁶ National Center for Lesbian Rights, Case Docket, *Benitez v. North Coast Women's Care Medical Group*, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_benitez.

¹⁷ Wikipedia, LGBT Adoption, http://en.wikipedia.org/wiki/LGBT_adoption.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Lambda Legal, *Finstuen v. Edmondson*, <http://www.lambdalegal.org/our-work/in-court/cases/Finstuen.html>; *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).



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LGBTQIQ Child Custody Obstacles

LGBTQIQ parents struggle to gain legal recognition of their parental relationships with their children.

- In the widely-followed case *Miller-Jenkins v. Miller-Jenkins*, the Virginia Supreme Court upheld a Vermont court order guaranteeing Janet Jenkins regular visits with her ex-partner's daughter.²¹ Janet Jenkins and her former partner, Lisa Miller (the biological mother) had a child while joined in a Vermont civil union, which Virginia law does not recognize.²² The U.S. Supreme Court has declined to hear this case, illustrating the legal difficulties associated with the non-recognition of same-sex civil unions by other states.²³

LGBTQIQ Healthcare

Discrimination and demoralizing treatment by insensitive healthcare professionals can cause many LGBTQIQ people to discontinue regular visits with doctors.

- Physicians often assume LGBTQIQ people don't need reproductive health monitoring, creating a higher risk for STIs and other reproductive health issues.
- Transgender people face particular risks when doctors are not educated about transgender specific healthcare (including routine care, such as transgender men requiring breast and gynecological exams). Additionally, medical information, statistics, and research related to transgender health are hard to access, inconsistent, or non-existent.

LGBTQIQ Definitions

- Asexual: Refers to a person who does not experience sexual attraction.
- Bisexual: Refers to a person who is sexually attracted to more than one gender.
- Gay: Sometimes used to describe homosexuality, or more generally to encompass LGBTQIQ. May be used to refer only to men, as lesbian describes only women.
- Lesbian: Refers to a woman who is sexually attracted to women.
 - Butch describes a lesbian who identifies as a woman but behaves, dresses, and/or acts in a way traditionally coded as masculine. In contrast, a transgender man who has not medically transitioned (i.e. lives in a female body) may behave, dress, and act in similar fashion but identifies as a man.
- LGBTQIQ: An acronym for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Questioning.
- Intersex: Denotes a person born with full or partial male and female sex organs, or with underdeveloped or ambiguous sex organs. About one in two thousand births are intersex to some degree.²⁴
- Pansexual: Refers to a person who is sexually attracted to people regardless of their gender identity or biological sex.
- Queer: Often used in reference to LGBTQIQ communities. Although this term was once considered derogatory and offensive, it has been "reclaimed" and is now widely used within the LGBTQIQ (sometimes called "queer") community.

²¹ *Miller-Jenkins v. Miller-Jenkins*, No. 070933. slip op., (Va. 2008); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 969 (Vt. 2006).

²² Lambda Legal, Breaking News, Virginia Supreme Court Affirms Custody Case Ruling Favoring Lesbian Mother: Lambda Legal Declares Victory, <http://www.lambdalegal.org/news/pr/breaking-news-virginia.html>.

²³ Press Release, GLAD, US Supreme Court Declines to Review Miller-Jenkins Case (April 30, 2007), available at http://www.glad.org/News_Room/press141-04-30-07.html.

²⁴ Advocates for Informed Choice, FAQ, <http://www.aiclegal.org/faq.html>.



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- Questioning: Refers to a person who is questioning their gender identity, sexual identity, or sexual orientation.
- Transgender: This word may denote (1) people who live and work as a member of the sex other than the one they were assigned at birth, and (2) the group of all people who are inclined to cross the gender line, including transsexuals, cross-dressers, and gender benders together.²⁵ “Transgender” is an umbrella term that describes a variety of individuals and groups. The following are words related to this umbrella term.
 - Genderqueer: Refers to gender experiences that do not fit into binary (male/female) concepts.²⁶
 - Transition: Denotes the process of changing sex, including hormones and/or sex reassignment surgery.²⁷
 - Transsexual: Refers to a person who wants to have or has had a sex-change operation.²⁸
 - Transvestite/cross-dresser: Refers to a person who wears clothes considered to be the clothes of the other gender.²⁹
 - FTM/MTF: Describes a person who has crossed from “Female to Male” or “Male to Female.” Many transgender people prefer the abbreviations to the full phrase.³⁰

²⁵ TransProud, Glossary of Transgender Terms, http://www.transproud.com/trans_terms.html.

²⁶ Queers United, <http://queersunited.blogspot.com/2008/06/word-of-gay-genderqueer.html> (June 5, 2008, 08:47 EST).

²⁷ TransProud, *supra* note 24.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*