Implications of Dobbs for the (Re)Criminalization of Intimacy Among LGBTQ Individuals

In the short time since the US Supreme Court abolished the federal constitutional right to abortion by reversing Roe v Wade and Planned Parenthood v Casey in its Dobbs v Jackson Women’s Health Organization decision, several states have banned abortion.1 In a few states, courts are also considering whether pre-Roe abortion bans—older abortion prohibitions that were invalidated by Roe but never formally repealed—can now be revived and enforced. Although there is some debate about whether states can enforce their pre-Roe bans, courts recently allowed Texas and Arizona to do so, and litigation on this point is ongoing.1 The threat of these pre-Roe bans, sometimes described in the legal literature as “zombie laws” because of their potential to come back to life if constitutional precedents are overturned,2 deservedly garnered much attention prior to the release of Dobbs.

Less well known is the continued existence of zombie sodomy bans. Like states that preserved their pre-Roe abortion bans, several states retained their laws criminalizing same-sex physical intimacy despite a landmark 2003 Supreme Court decision, Lawrence v Texas, invalidating these laws. Because of the Dobbs decision’s potential to erode other rights,3 including the right to engage in same-sex physical intimacy, these pre-Lawrence sodomy bans may pose a renewed threat to the security, dignity, and health of LGBTQ communities. The medical profession can play an important role in taking preemptive steps to address this threat.

In Lawrence, 2 men were convicted of engaging in “deviate sexual intercourse” in violation of Texas’ anti-sodomy law. The constitutionality of this law was ultimately considered by the Supreme Court. Building on a line of earlier cases under the due process clause in the federal constitution that protected the right to make personal decisions relating to intimate and family life—including, notably, both Roe and Casey—the Supreme Court concluded that gay persons have a constitutionally protected right to make decisions with respect to sexual conduct without government intervention. The Texas law, which criminalized private, consensual sexual activity between persons of the same sex, violated this right.

In its decision, the Court was especially attentive to the harms of antisodomy laws, noting that they demeaned and stigmatized gay people and invited discrimination against them in the public and private spheres. In the nearly 20 years since Lawrence was decided, laws that marginalize, target, and discriminate against LGBTQ individuals have been the subject of substantial research, and the health harms associated with such laws are well documented.4 As demonstrated by Hatzenbuehler and Pachankis4 and others these laws constitute a form of structural stigma that contributes to a range of LGBTQ health inequities. In countries in which sodomy bans are still enforced, research also shows that LGBTQ persons are less likely to seek and receive HIV testing, preexposure prophylaxis, and treatment for other sexually transmitted infections,5 thereby further exacerbating health inequities and disrupting access to necessary health care.

At the time of Lawrence, 14 states had laws that criminalized private, consensual, anal or oral sex between adults. Although only 4 of those laws applied exclusively to same-sex partners, sodomy bans have long been employed to stigmatize and criminalize homosexuality and have codified and reinforced the “social otherness”2 of gay and bisexual persons. Twelve states, including Texas, have retained their bans even though they could not be enforced following the Lawrence decision. The wording of these bans, which include prohibitions on “unnatural and lascivious” acts, “detestable and abominable crime(s) against nature,” and “unnatural or perverted sexual practice(s),”6 reflects and conveys the states’ moral repugnance toward gay people; abhorrence is written into the very text of these bans. Although legally unenforceable, the continued presence of sodomy bans in state codes has been described as a form of “institutionalized homophobia”5 and “recreational stigmatization.”7 Pre-Lawrence sodomy bans have occasionally moved beyond recreational stigmatization and have been used to arrest or threaten men for engaging in consensual sexual activity with other men.7 For example, police in Louisiana (as part of a sting operation), in Texas (in response to a complaint that 2 men were kissing in a restaurant), and in Maryland (for activity in a locked room in an adult bookstore) have invoked their states’ de-funct antisodomy laws as the basis for criminal charges that were subsequently dropped. Although the laws are invalid, they are far from benign.

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The retention of pre-Lawrence sodomy bans, like pre-Roe abortion bans, is legally possible because Supreme Court decisions do not remove unconstitutional laws from state codes. These laws remain on the books, present but unenforceable, until repealed by state legislatures—or possibly, until revived by a reversal of underlying precedent. The Dobbs opinion may constitute just such a precedent, providing an incentive to lawmakers and courts to reconsider Lawrence and serving as a fulcrum to reinvigorate state laws that criminalize physical intimacy among LGBTQ individuals.

As others have noted, Dobbs has implications not only for abortion but for other rights that, like abortion, are not expressly mentioned in the federal constitution and are similarly anchored in the due process clause, including the right to engage in same-sex physical intimacy. Although the Court in Dobbs asserted that its reversal of Roe and Casey applies only to abortion and does not implicate Lawrence or other protected rights in this shared constitutional lineage, the reasoning in Dobbs suggests otherwise. In particular, the Lawrence decision explicitly adopted and expanded on the analysis in Roe to protect the right to engage in same-sex physical intimacy, and this analysis was forcefully repudiated in Dobbs. Moreover, in his concurring opinion in Dobbs, Justice Clarence Thomas argued that the Court must go beyond reversing Roe and Casey and reconsider all the cases in their constitutional lineage, including Lawrence.

Dobbs has exerted a swift and dramatic toll on the health and lives of pregnant individuals and has unleashed tremendous tumult, uncertainty, and hardship. Although the full reach of Dobbs—and the extent to which it may extend beyond abortion to reshape or undo other precedents—will play out over the next months and years, action can be taken now to address the threat Dobbs poses to the revival of pre-Lawrence sodomy bans. In contrast to the time required for state legislatures to enact new anti-sodomy laws to test the scope of the post-Dobbs constitutional landscape, pre-Lawrence bans constitute a present threat. They can be revived and enforced quickly and without the usual safeguards of the political process that accompany the enactment of new laws.

To this end, the medical profession is well positioned to marshal the biomedical literature on the health harms of sodomy bans and argue that the expeditious abolition of these bans is an important component of health care and necessary to address LGBTQ health inequities.

The recent experience of the human monkeypox outbreaks among gay and bisexual men and the need for timely clinical care and contact tracing underscores that the health implications of antisodomy laws, if revived, can be many, detrimental, and varied. Health care clinicians and their professional associations can use their expertise and platform to work with state lawmakers and LGBTQ organizations at the local level and advocate for the preemptive repeal of these bans before Dobbs can be deployed to revive them. The reversal of Roe and Casey may be just the beginning, not the end, of a substantial constitutional reordering.

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REFERENCES

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