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

*VIEWPOINT*

Joanne D. Rosen, JD, MA
Center for Law and the Public’s Health, Johns Hopkins Bloomberg School of Public Health, Baltimore, Maryland.

Chris Beyrer, MD, MPH
Duke Global Health Institute, Duke University, Durham, North Carolina.

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. 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whether pre-*Roe* abortion bans—older abortion prohibitions that were invalidated by *Roe* but never formally repealed—can now be revived and enforced.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. 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, 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, 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. As demonstrated by Hatzenbuehler and Pachankis 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; 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” 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 practices,” 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” and “recreational stigmatization.”

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. 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’ defunct antisodomy laws as the basis for criminal charges that were subsequently dropped. Although the laws are invalid, they are far from benign.

[T]he medical profession is well positioned to marshal the biomedical literature... and argue that the expeditious abolition of [sodomy] bans is an important component of health care...
Roe

Clarence Thomas argued that the Court must go beyond reversing Dobbs and this analysis was forcefully repudiated in lives of pregnant individuals and has unleashed tremendous turbulence, 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.

ARTICLE INFORMATION
Published Online: November 1, 2022. doi:10.1001/jama.2022.20609

Conflict of Interest Disclosures: None reported.

Additional Contributions: We thank Lainie Rutkow, JD, PhD, Department of Health Policy and Management, Johns Hopkins Bloomberg School of Public Health, and Kellan Baker, PhD, Whitman-Walker Institute, Washington, DC, for their helpful comments on earlier drafts of this article, neither of whom received compensation.

REFERENCES