

## Sexualities and the Law: Final Paper

## **Introduction**

The law moves in mysterious ways. Throughout the course of history there have been many Supreme court cases that have set a precedent for how the law handles the topic of sexuality, but also how sexuality can move the law. For many people, sexuality is an important aspect of identity. It can shape who a person is and can also influence how society sees them. In many ways this makes the personal political. Because sexuality can be seen as an aspect of identity, when matters of sexuality are taken in the court it can make it political. Take *Roe v. Wade* for example. The termination of a pregnancy is a tough decision, but *Roe v. Wade* and other cases that followed essentially brought that case into the courtroom. The Supreme Court has seen many cases revolving around how a person's identity and behavior can be treated under the law. Despite the fact that sexuality is often treated as a very personal aspect of a person, there have been many Supreme Court cases revolving around it. The three cases discussed in this essay, *Roe v. Wade*, *Stanley v. Georgia*, and *Oncale v. Sundowner Offshore Services, Inc.*, do exactly that. These three cases focus on the importance of behavior within sexuality as well as the system of Law.

## **Roe v. Wade**

*Roe v. Wade* is often seen as a landmark case in the fight for the right to abortion. *Roe v. Wade* was argued at the US District Court for the Northern District of Texas on October 11, 1972. Jane Roe, an unmarried pregnant woman, "sought an abortion in the

State of Texas and was denied it because of the Texas abortion statute which provides an abortion is lawful only for the purposes of saving the life of the woman” (Sarah R. Weddington, October 11, 1972). Jane Roe wished to terminate her pregnancy but was refused by physicians because of the Texas law. Her life was not in danger and because of that she was unable to get an abortion within the state of Texas. Sarah R. Weddington argued that the law was unconstitutional because the statute was unclear and because “it interfered with the Ninth Amendment right for a woman to determine whether or not she would continue or terminate her pregnancy” (Sarah R. Weddington, October 11, 1972). Weddington argued that the statute doesn’t stop women from seeking abortion, it just requires them to either leave the state or participate in “some other very undesirable alternatives” (Sarah R. Weddington, October 11, 1972). Justice Stewart then began to raise the question of the right of the unborn children. Weddington brought up two other cases in which the court ruled “that a fetus has no constitutional rights” (Sarah R. Weddington, October 11, 1972). She went on to say, “that it is critical that we prove this is a fundamental interest on behalf of the woman” (Sarah R. Weddington, October 11, 1972). Sarah R. Weddington argued that the statute was unconstitutional, and that “there is no indication to show that the constitution would give any protection prior to birth” (Sarah R. Weddington, October 11, 1972).

Robert C. Flowers, the lawyer representing the District Attorney of Dallas County, argued that “it is the position of the State of Texas that upon conception we have a baby, a person within the concept of the Constitution of the United States and that of Texas also” (Robert Flowers, October 11, 1972). Flowers argued that the definition of a person is so basic that “the framers of the constitution had not even set out to define” (Robert C. Flowers, October 11, 1972). Justice Blackmun asked Flowers “is it not true or is it true

that the medical profession itself is not in agreement as to when life begins?” (Harry A. Blackmun, October 11, 1972). Flowers replied stating that “medically speaking, we would say that at the moment of conception from the chromosomes, every potential that anybody in this room has is present from the moment of conception” (Robert C. Flowers, October 11, 1972). Flowers based his argument on the fact that if the definition of a person begins with conception. Justice White asked him “You’ve lost your case if the fetus or the embryo is not a person is that it?” (Byron R. White, October 11, 1972). Flowers followed and said that that would be correct. Justice White followed to clarify that he was arguing the rights of an unborn fetus versus the right of the pregnant woman. Flowers brought up other cases across the United States where an unborn child’s rights were protected when a mother’s health or religious beliefs affected that child. Overall, Flowers argument focused on when life began. He believed that even unborn fetuses have certain rights because they are people at the time of conception.

In a 7-2 decision, the court “struck down an 1857 Texas statute that made abortion illegal except when the life of the mother was in danger” (*The Social History of the American Family: An Encyclopedia*, 2014). The court decided that a woman had the right to an abortion within the fourteenth amendment as well as privacy rights. The ruling ensured that a woman has a right to decide within the first trimester of the pregnancy, while the second and third trimester were treated differently based on state interest (*Roe v. Wade*, Oyez). According to the Social History of the American Family the decision was in a way a compromise. This is because “antiabortion

This specific case has a large impact on the allowed behavior of a women specifically within the law. It is no secret that there are unwanted pregnancies. The reason a pregnancy is unwanted is different for every situation. It may have to do with

the circumstances in which the child was conceived, the time and money that it takes to care for a child, or even the fact that sometimes people just aren't ready to be parents. This decision expanded a woman's right to choose. Rather than regulating a women's actions, this decision allowed for those actions to be in the hands of the person it is most affecting. This case informed many other cases that revolved around further regulating the right to abortion. This includes but is not limited to "parental notification laws, spousal consent laws, laws requiring abortions to be performed in hospitals and not in clinics," and many more that further regulated but did not ban abortion (*The Social History of the American Family: An Encyclopedia*, 2014). This case was instrumental in moving the law towards a women's rights to choose what she does with her body, but the feelings around this case are not too different from current feelings about the right to abortion in America. While it seems as if this case could have moved the law towards a better understanding of how behaviors should be left up to the person they are affecting, the arguments made in this case are not different from the current ones. Future cases about the right to abortion can involve many of the same subjects such as when a fetus is considered a person, and even whether theological differences can inform decisions regarding abortion.

### **Stanley v. Georgia**

Stanley v. Georgia was argued on January 13-14, 1969. Robert Eli Stanley was caught with obscene materials within his home. When the police entered with a search warrant, they discovered three rolls of film they later determined to be obscene. At the time there was a law in Georgia which made the possession of obscene material a crime.

Wesley R. Asinof, Robert Eli Stanley's lawyer, states that he is arguing "that the statute violates the First Amendment" (Wesley R. Asinof, January 14, 1969). He goes on to explain that "it punishes the possession of obscene material without requiring any further overt act on the part of the possessor or intent to do anything with it" (Wesley R. Asinof, January 14, 1969). Asinof goes on to explain his argument by saying "whether or not that can be squared with the First Amendment whether mere possession of material alleged to be obscene pictures or writings can be constitutionally made a criminal offense" (Wesley R. Asinof, January 14, 1969). Overall, Wesley R. Asinof argued that the Georgia statute prohibiting the possession of obscene material was vague, unclear, and violated the first amendment.

J. Robert Sparks argued for the State of Georgia. He argues that Stanley had the films in his house knowing they were prohibited under the law. The law enforcement officers first entered the house with a warrant for a different illegal activity. Justice Marshall asked Sparks "But why did they show the film? They were looking for what? The search warrant was limited to what?" (Thurgood Marshall, January 14, 1969). Sparks went on to explain why the officers viewed the films by claiming that "they wanted to look at the films for the reason that the films might have been records, they were authorized for bookmaking records..." (J. Robert Sparks, January 14, 1969). Sparks made the argument that it could be inferred that the films had either been seen before, because they were "badly scratched, that they were dirty, that one of the films had been wound backwards", or that "the jury could have drawn that these three films were to be shown at the party" (J. Robert Sparks, January 14, 1969). Overall, J. Robert Sparks argued that Stanley knew what was on the films and had probably watched them or planned to watch them, and that the statute was constitutional.

In a unanimous decision, “the U.S. Supreme Court ruled on First Amendment grounds that the private possession of obscene materials cannot be made a crime.” They also decided that the way that law enforcement acted in taking the films and arresting Stanley “violated the Fourth Amendment” (*Encyclopedia of the Fourth Amendment*, 2013). The decision also included the fact that Stanley had the right to view and own those films within the privacy of his home, and because the case had little to do with distribution of the films, it was also a privacy matter (Stanley v. Georgia, *Oyez*).

Just as Roe v. Wade did, this case set up future cases involving obscenity laws. The cases that followed helped to create a sort of guideline as to what materials were acceptable, and which are not. This case also moved the law and will continue to further the movement of the law, in terms of what kinds of obscene materials are accepted. Some material that may seem to be obscene can be considered art or can have some kind of value to them. It also raised an interesting question on materials with certain topics. This includes obscene materials that involve children, and maybe even material that includes subjects such as rape. It also sets a precedent for sexuality in terms of behavior. It is not uncommon for individuals exploring sexuality to choose to view obscene materials. It is an important aspect of how we think about sex as a society, and rather than fearing it embracing it as a natural human process. In some way, obscene material can be a way for individuals to express their sexuality.

### **Oncale v. Sundowner Offshore Services, Inc.**

The case of Oncale v. Sundowner Offshore Services, Inc. was argued on December 3, 1997. Nicholas Canaday III, Joseph Oncale’s lawyer, argued that “Same-sex sexual

harassment claims are actionable under title VII” (Nicholas Canaday III, December 3, 1997). Joseph Oncale worked on an oil rig for Sundowner Offshore Services and claimed that he was sexually harassed by a co-worker who was also male. Canaday stated that the lower court “decided as a matter of law that same-gender causes of actions do not exist” (Nicholas Canaday III, December 3, 1997). Justice Rehnquist summed up Canaday’s argument by saying he was “simply asking [them] to say the fact that it was male on male does not prevent there from having been discrimination” (William H. Rehnquist, December 3, 1997). In order to win the case, Canaday explained that “[he] would have to show that discrimination because of sex, as defined by this Court in the Meritor case, did in fact occur” (Nicholas Canaday III, December 3, 1997). Canaday went on to further explain that “there is discrimination because Joseph Oncale in this case, alone among men in a workplace, was selected by his supervisor, a male, to be the victim of that male supervisor's unsolicited, unwanted, and obnoxious sexual advances. That is sexual harassment (Nicholas Canaday III, December 3, 1997).

Harry M. Reasoner represented Sundowner Offshore Services in this case. He argued that if “there's a homosexual harassment, then they can meet the because-of-sex requirement” (Harry M. Reasoner, December 3, 1997). He goes on to explain “that there are no findings, anywhere, that suggest that Congress needs to pass a statute to regulate discrimination among males, or to regulate male conduct” (Harry M. Reasoner, December 3, 1997). Reasoner’s argument seemed to have a basis on the fact that neither of them men identified as homosexual, meaning he believed it could not be considered discrimination. He argued that “the Fifth Circuit is saying that discrimination because of



sex was not intended to comprehend relationships between the same sex” (Harry M. Reasoner, December 3, 1997).

The case was decided on March 4, 1998. In a unanimous decision, the court held the Title VII prohibited discrimination because of sex. This meant that Oncale was indeed discriminated against even if the discrimination had anything to do with sexual desire or not. Overall, “the Supreme Court’s decision in Oncale makes it clear that both harasser and victim may be of the same sex without defeating a cause of action based on sexual harassment” (Sandra J. Perry, Ross L. Fink, *Labor Law Journal*).

This case is sometimes thought of as a win for the LGBTQ community. Because same-sex sexual harassment was deemed sexual harassment whether there was sexual desire or not, individuals not identifying as heterosexual could get justice for workplace discrimination based on their sexuality. In a way this case also may have shaped how behavior fits in with gender roles. Generally, we think of sexual harassment as a man harassing a woman. This maybe the most common or most talked about, but that doesn’t mean other forms of sexual harassment don’t exist. Not only can men harass women, but women can harass men, women can harass women, and men can harass men. This ruling meant that anyone experiencing sexual harassment, no matter the gender or sexuality of the victim or perpetrator, would be able to seek justice on the grounds of sexual harassment. Just because men harassing women is seen more often or talked about more prevalently, doesn’t mean that other forms of sexual harassment don’t happen. This case allowed for individuals that didn’t fit into the stereotype to still seek justice against their perpetrators.

## **Conclusion**

It is a very common saying that we take past mistakes and learn from them. It is extremely beneficial to look at how those before us handled situations and use that as a way to grow. While none of these cases were recent, the subjects they cover are still seen within the court system today. As society changes the subject matter of the cases may change, but when looking at these particular topics these cases can be used as a way to look at how we used to think about them and how we think about them now. Cases such as *Roe v. Wade* are still considered extremely important cases, and in America abortion rights and funding are still being discussed within the court system. Every case in the past can help to inform other cases in the future. Sexuality is an important topic in America right now. Only recently did the Supreme Court rule that same-sex marriage should be legal nationwide. The law regarding sexuality has made great strides over the past few years, but many of these topics may not be completely accepted by everyone. Cases such as these have helped shape how we see sexuality, but also how important it is for aspects of sexuality, such as behavior, to be fought for. *Roe v. Wade* helped to solidify the idea that women have a choice. Pregnancy is not something to be taken lightly but women are able to act for themselves, choosing the option that is best for them and their baby. Cases such as *Stanley v. Georgia* and obscenity cases after it showed the fact that some people enjoy expressing their sexuality through films and photos, and it is a healthy way to express sexuality. *Oncale v. Sundowner Offshore Services, Inc.* helped to show that if someone decides to act out and sexually harass someone, it doesn't matter their gender or the victim's gender, it is still sexual harassment. These cases have shaped

how we see sexuality and how sexuality can be shaped by the law. Aspects of sexuality have definitely become political. What seem like basic aspects of sexuality are being argued in front of judges and juries. However, it is important to remember that every case involving sexuality has shaped the next.

## References

- Roe v. Wade. (n.d). *Oyez*. Retrieved June 2, 2018, from <https://www.oyez.org/cases/1971/70-18>
- Ganong, L. H., & Coleman, M. (2014). Roe v. Wade. In *The Social History of the American Family: An Encyclopedia*. Thousand Oaks, California: SAGE Publications, Inc.
- Stanley v. Georgia. (n.d). *Oyez*. Retrieved June 2, 2018, from <https://www.oyez.org/cases/1968/293>
- Vile, J. R. & Hudson, D. L. (Eds.) (2013). *Encyclopedia of the fourth amendment* (Vols. 1-2). Washington, DC: CQ Press doi: 10.4135/9781452234243
- Oncale v. Sundowner Offshore Services, Inc. (n.d). *Oyez*. Retrieved June 2, 2018, from <https://www.oyez.org/cases/1997/96-568>
- Perry, S. J., & Fink, R. L. (1998). Resolving the legality of same-sex sexual harassment: The case of "oncale v. sundowner offshore services, inc.". *Labor Law Journal*, 49(4), 949. Retrieved from <https://search-proquest-com.du.idm.oclc.org/docview/1290658602?accountid=14608>