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# High Court to Hear Texas Gay Rights Case

Review of Sodomy Conviction Seen as Important by Both Sides of Issue

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What legal observers are calling one of the most significant Supreme Court gay rights cases in recent history began almost by accident.

On the night of Sept. 17, 1998, Harris County sheriff's officers entered an apartment at 794 Normandy St. in Houston, looking for what a neighbor had told them was a man with a gun "going crazy." Instead, they found the tenant, John Lawrence, having sex with another man, Tyron Garner.

The person who called in the phony information was later convicted of filing a false report -- but Lawrence and Garner were also punished. Booked and jailed overnight on charges of violating the state's law against "deviate sexual intercourse with another individual of the same sex," they were each fined $200 and made to pay $141.25 in court costs.

The two men's appeals have now made it to the nation's highest court: On Wednesday, the justices will hear Lawrence and Garner's argument, previously rejected by a Texas state appeals court, that the state's homosexual sodomy ban violates both their constitutional right to privacy and their right to be treated equally with heterosexuals.

Reflecting an increasingly laissez-faire attitude toward private homosexual and heterosexual acts between consenting adults, most states have abandoned sodomy laws. Only 13 states still ban private anal or oral sex between consenting adults; of those, only four, including Texas, criminalize homosexual sodomy exclusively. None of the laws is regularly enforced.

But the case retains enormous importance both for gay rights advocates, who say that laws such as the one in Texas make it easier to justify general discrimination against gays, and for opponents of gay rights, who say the states have the right to register official moral opposition to homosexual conduct.

"Texas's law and the few other remaining consensual sodomy statutes -- both those that discriminate and those that do not -- trample on the substantive liberty protections that the Constitution erects . . . to preserve a private sphere shielded from government intrusion," Lawrence and Garner's lawyer, Ruth E. Harlow of the Lambda Legal Defense and Education Fund, told the justices in her brief.

In its brief, Texas, represented by William J. Delmore III, assistant Harris County district attorney, argued that no precedent "supports recognition of a constitutional right to engage in sexual misconduct outside the venerable institution of marriage." The state added that its law, which specifically bans oral- or anal-genital conduct between persons of the same sex, is "applicable to both persons of exclusively homosexual orientation and persons who regard themselves as bisexual or heterosexual."

Adding to the anticipation surrounding the case is the fact that the court decided a similar issue 17 years ago, ruling in a 1986 case that Georgia's sodomy law, which banned both homosexual and heterosexual conduct, did not violate a constitutionally protected right to privacy. That law has since been repealed.

Gay rights advocates and civil libertarians still clench their teeth over the language of Justice Byron R. White's majority opinion in that case, which said that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."

That case was decided 5 to 4, with Justice Lewis F. Powell Jr. wavering until the last minute before joining the majority. Powell, who, like White, is now deceased, later said he had reread the case and "thought the dissent had the better of the arguments."

In the current case, attorneys for Lawrence and Garner propose two ways to invalidate the men's convictions. One would be to overrule the 1986 ruling, known as *Bowers v. Hardwick,* holding that the Constitution does implicitly enshrine the right to engage in unrestricted private consensual sexual conduct -- a right so fundamental that no one can be deprived of it even through otherwise fair legislative or judicial processes. All state sodomy laws would be voided as a result.

The court has a narrower option, however. It could strike down the convictions because Texas's law and others like it in Kansas, Oklahoma and Missouri penalize only homosexual sodomy, without including the same conduct by heterosexuals. That ruling -- tantamount to an instruction that states are free to criminalize sodomy so long as they criminalize it for everyone -- would place gay and straight sex on an equal constitutional footing for the first time, but without enshrining a broad right to sexual privacy for everyone.

Of the current members of the court, three were on the bench in 1986: Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor voted in the Bowers majority. Justice John Paul Stevens was in dissent.

Ten years after Bowers, however, the court ruled 6 to 3 that Colorado's voters could not amend their state constitution to prohibit antidiscrimination laws protecting gays. O'Connor, Stevens and Justices David H. Souter, Stephen G. Breyer and Ruth Bader Ginsburg joined that opinion, which was written by Justice Anthony M. Kennedy and concluded that the Constitution's guarantee of equal treatment under state law means that no state can act based on "animus" against gays.

Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented.

Though it offers a full defense of its law on the merits, Texas is also suggesting a procedural escape hatch from the case, asking the court to consider dismissing it for lack of information in the record to answer to such questions as whether Lawrence and Garner are actually exclusively gay or whether their encounter was indeed consensual.

The case is *Lawrence v. Texas, No. 02-102.* A decision is expected by July.