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Tuesday, February 25, 2003

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## LAW OF THE LAND

# High court to give 'gays' their own 'Roe'?

## Case could establish constitutional right to 'homosexual conduct'

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Posted: February 25, 2003  
1:00 a.m. Eastern

By Art Moore

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The U.S. Supreme Court could soon grant homosexual activists their own "Roe v. Wade" decision, a constitutional guarantee that would undermine scores of laws that protect the traditional family, according to some opponents.

At issue is a challenge to a Texas law barring "homosexual conduct," or sodomy, but some legal minds involved in the case believe the stakes are much higher.

Attorneys for two men convicted of sodomy want the high court to expand the "right of privacy" used as the foundation of the controversial 1973 abortion decision, establishing a constitutional right to practice homosexual sex.

This would be a "huge trump card" for homosexual activists, asserts Texas attorney Kelly Shackleford, an "atomic bomb that they could carry around to attack any law that does not treat homosexuality on an equal basis with heterosexuality."



Tyron Garner and John Lawrence were arrested for violating Texas sodomy law.

The case is scheduled to be heard on March 26.

Lawrence v. Texas challenges a 1986 Supreme Court decision, *Bowers v. Hardwick*, which said individuals have no federal constitutional right to engage in homosexual acts. Until the 1960s, every state prohibited sodomy, but Texas is now one of just 13 states in which a law exists. The rarely enforced laws carry penalties ranging from fines to 10 years in prison.

Shackleford contends that a high court establishment of such a right would have "massive implications," jeopardizing, if not overturning, thousands of laws that have a definition of marriage embedded in them, from tax laws to custody laws.

"If you don't have a law that says a man and woman can do something and a man and man can't, then every marriage law is unconstitutional," said Shackleford, who wrote a friend-of-the-court brief on

behalf of about 70 Texas state lawmakers.

Jordan Lorence, a senior attorney for the Alliance Defense Fund of Scottsdale, Ariz., which also filed a brief in defense of Texas, said it is not certain that a decision against the state would result in striking down marriage laws, but believes there is a "good likelihood."

"I think that the true objective of the Lawrence v. Texas case is laws that act as legal obstacles to homosexuals right now, such as the Defense of Marriage Act, 'Don't ask, don't tell' and laws that prevent adoption of children."

### **Right to privacy**

However, Michael Adams, an attorney and spokesman for the Lambda Legal Defense Fund, which brought the case, insists that opponents are overstating the implications.

"We don't think in those terms," he told WND. "For us, the case asks a germane, basic question, which is whether the government has the right to invade the privacy of any citizen in this country."

Issues such as same-sex marriage are separate from this case, Adams contends, but "it would certainly be a major breakthrough for the court to rule that states should not be in the business of making people criminals because of whom they chose to love."

"Nonetheless, winning this case will not open the door for same-sex marriage," he added. "I think that that's an exaggeration and overstatement. There are 13 states that still have sodomy laws, but no state that allows gay and lesbians to marry."

Lorence said it is possible that even if Lambda prevails in this case, courts could decide in future cases that marriage is a legally recognized relationship with definable characteristics – a man can't marry his sister, for example – and thus preserve traditional marriage, "but they might not."

Lambda, he insists, is not being straightforward about its agenda, if it insists this has nothing to do with marriage, noting that the sodomy law is rarely enforced.

"The jailhouses are not going to be emptied from all the people convicted by the Texas sodomy law," he said. "That isn't the legal thing going on."

Along with its "right to privacy" argument, Lambda cites the 14th Amendment's equal-protection clause, contending that same-sex behavior is entitled to the same legal rights as heterosexual behavior.

Texas is one of four states that applies its sodomy law only to homosexuals.

Among the groups backing Lawrence are Log Cabin Republicans, Republican Unity Coalition, the Cato Institute, Institute for Justice, American Bar Association, National Lesbian and Gay Law Association, American Civil Liberties Union and the National Organization for Women Legal Defense and Education Fund.

Backing Texas are the state attorneys general of Alabama, South Carolina and Utah. Supporting groups include the American Center for Law and Justice, American Family Association, Center for Arizona Policy, Center for Law and Justice International, Center for the Original Intent of the Constitution, Concerned Women for America, Family Research Council, Focus on the Family, Texas legislators,

Liberty Counsel, Pro Family Law Center, Texas Eagle Forum; Daughters of Liberty Republican Women of Houston, Texas; Spirit of Freedom Republican Women's Club, Texas Physicians Resource Council, Christian Medical and Dental Association, Catholic Medical Association and United Families International.

### **Regulating bedrooms?**

Lambda represents John Lawrence and Tyron Garner, who were arrested in Lawrence's Houston home Sept. 17, 1998, and jailed overnight after officers responding to a false "weapon's disturbance" report found the men engaged in private, consensual sex. The men were fined \$200 and now are considered sex offenders in several states, Lambda notes.

"This is a tremendously important case for gay people and for everyone who believes in basic freedoms," said Ruth Harlow, Lambda's legal director and the lead attorney in the case. "These laws are an affront to equality, invade the most private sphere of adult life and harm gay people in many ways."

Harlow asserts that the state's power to regulate what happens in a private bedroom is "only the beginning of the damage done by this law and others like it around the country."

"These laws are widely used to justify discrimination against gay people in everyday life," she said. "They're invoked in denying employment to gay people, in refusing custody or visitation for gay parents, and even in intimidating gay people out of exercising their free-speech rights."

Adams points out, for example, that his group defended a Virginia woman who was prevented from adopting a child when it was discovered that she was a lesbian. The argument used against her was that she must be violating the state's sodomy law.

The homosexual advocacy group Human Rights Campaign, or HRC, notes that since the Supreme Court upheld sodomy laws in the Bowers decision, much has changed. Only three justices from that ruling remain on the high court and, since then, 15 states removed their sodomy laws "in large part because of the persistent court efforts of Lambda Legal and the American Civil Liberties Union, as well as state organizations fighting to overturn these laws."

Also, HRC points out, the current court struck down an amendment to Colorado's constitution in 1996 that would have prevented expansion of homosexual rights.

### **State's rights**

Shackleford argues, however, that the high court could cause great harm to itself by taking this deeply contentious issue away from the states, where it has been decided for more than 200 years.

"If you asked people, is there a right to engage in sodomy in the U.S. Constitution, 100 out of 100 would probably start laughing," he said. "So this would be seen as extreme judicial activism. Five people would be ruling our country rather than the elected people in our state legislatures."

Shackleford's brief on behalf of Texas state lawmakers asserts "this case is about the right of the people and their duly elected representatives to determine state policy regarding marriage, the family and sexual conduct outside of marriage."

The lawmakers said the petitioners "seek a new 'right of privacy' in sexual behavior, not the traditional

right grounded in rights of marriage and procreation. There is no natural limitation to the new expansive right sought by petitioners. It is not deeply rooted in the nation's traditions and history and should be rejected."

Shackleford argues that the court essentially could elevate sexual activity to a right equal to free speech, thus undermining laws against incest and prostitution.

The libertarian Institute for Justice, which sides with Lawrence, argues that prostitution is not private, but "public" because it is "commercial." It maintains that incest is an act that can never be properly viewed as consensual, even if between two adults.

But the Alliance Defense Fund's Lorence contends the argument has no "principled stopping point."

"With their argument, they are asking for constitutional protection for all private sex," he told WND. "They are trying to say, if it's commercial, that's different. But why does money changing hands make it any different? I think that is arbitrary line-drawing."

### **A setup?**

Shackleford believes that although the facts of the case are not as important as the principle, the circumstances surrounding the arrest of Garner and Lawrence are suspicious.

"This was a setup to do what they want to do," he said, arguing that the sodomy law is almost never enforced.

An anonymous caller falsely told police that a crazy man with a gun was in the apartment.

"He leads police into apartment," Shackleford recounted, "and they find two men engaged in anal sodomy."

The Texas attorney insists there is virtually no way to enforce the law because the Fourth Amendment "doesn't allow the government to come into people's homes."

"This case is not about privacy," he said. "They could have made a Fourth Amendment claim, but they didn't; they made a privacy claim, to establish that I can do whatever I want."

Shackleford said he has watched homosexual activists bring "lawsuit after lawsuit here in Texas to overturn the law" and the courts have said "it's a problem of standing; if it's not being applied against you, you can't tell us it's unconstitutional."

"What they are arguing for here is sexual freedom, to make every act an elevated right," he contended.

Lambda's Adams insisted that the case was not a setup. The man who alerted police had no association with homosexual-rights groups and was prosecuted for making a false report, he argued.

"He was somebody in the building who had some kind of an axe to grind, not a friend of theirs, not somebody trying to do him a favor," he said. "Nobody opened the door and let the police in – the door was unlocked – and rather than leaving when they didn't find a criminal, they arrested these gentlemen."

Lawrence and Garner are very private people," he said, "They aren't out in front of any gay pride parade."

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