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Supreme Court Seems Set to Reverse a Sodomy Law

By LINDA GREENHOUSE

WASHINGTON, March 26 — A majority of the Supreme Court appeared ready today to overturn a Texas "homosexual conduct" law that criminalizes sexual practices between same-sex couples that are lawful in the state when performed by a man and a woman.

Texas is one of four states to make such a distinction, and one of 13 with criminal sodomy laws still on their books. It appeared from the argument today, on behalf of two Houston men who were prosecuted after the police found them having sex in a private apartment, that the court would follow a path of least resistance and invoke the constitutional guarantee of equal protection to strike down the Texas law.

A decision along those lines would sidestep the more fundamental question of the constitutional status of gay rights. But the fact that such a moment had arrived in a court that only 17 years ago dismissed as "facetious" the notion that the constitutional right to privacy extended to the private sexual choices made by gay men and lesbians invested the courtroom with an air of drama that the lopsided and unsuspenseful argument itself could not dispel.

It was a cultural as well as a constitutional moment, marked by the presence in the courtroom of many gay men and women from among the core of elite Washington lawyers. The seats in the center of the courtroom reserved for members of the Supreme Court bar were all claimed by 6:30 this morning for the 11 o'clock argument.

The argument proved to be a mismatch of advocates to a degree rarely seen at the court. Paul M. Smith, a former Supreme Court law clerk and experienced practitioner there, who argued for the two men, John G. Lawrence and Tyron Garner, was assured and elegant in his presentation. Mr. Smith was unperturbed even while sparring with Justice Antonin Scalia, a predictable adversary whose vote he had no chance of winning and whose questions he was able at times to turn to his clients' advantage.

Charles A. Rosenthal Jr., the district attorney for Harris County, Tex., whose job was to defend the Texas law, was making his first Supreme Court argument, and he made a first-timer's mistakes. He appeared surprised by questions that more experienced lawyers would easily have anticipated and unable to recognize the helping hand that Justice Scalia regularly offered. The justices ended up talking over Mr. Rosenthal, sparring with one another.

Of the 35 questions that the justices asked Mr. Smith during his 30-minute argument — all except Justices John Paul Stevens and Clarence Thomas asked him at least one question — 23 came from Justice Scalia. The others appeared content to let the long colloquies between the two sharpen and showcase the issues.

For example, one of Mr. Smith's goals was clearly to persuade the court that while the concept of gay rights as such did not have deep historical roots, there was a libertarian spirit of personal privacy that

did reach far back to the country's beginnings. "So you really have a tradition of respect for the privacy of couples in their home, going back to the founding," Mr. Smith said. He noted that three-quarters of the states had repealed their criminal sodomy laws for everyone, "based on a recognition that it's not consistent with our basic American values about the relationship between the individual and the state."

"Well, it depends on what you mean by our basic American values," Justice Scalia said, clearly unimpressed by the argument that a newly emerged consensus on any subject should receive constitutional weight. "Suppose that all the states had laws against flagpole sitting at one time" and subsequently repealed them, Justice Scalia said. "Does that make flagpole sitting a fundamental right?"

This gave Mr. Smith an opening, and he took it. "No, your honor," he said, "but the court's decisions don't look just at history, they look at the function that a particular claimed freedom plays in the lives of real people." He offered the rights to contraception and abortion as examples.

"I don't know what you mean by the function it plays in the lives of real people," Justice Scalia said. "Any law stops people from doing what they really want to do."

Mr. Smith replied, "The court has said that it's going to use reasoned judgment to identify a realm that involves matters central and core to how a person defines their own lives."

The case, Lawrence v. Texas, No. 02-102, is an appeal from a ruling by the Texas Court of Appeals, which upheld the law. In bringing the appeal, the Lambda Legal Defense and Education Fund attacked the law both on the basis of equal protection and due process, describing sexual intimacy in the home as an aspect of the "liberty" that the due process guarantee protects. The due process argument, the more far-reaching, would require the court to disavow its 1986 precedent, Bowers v. Hardwick, which upheld Georgia's sodomy law against a due process challenge.

Mr. Smith waited until near the end of his argument to address the 1986 precedent directly, prompted by a question from Justice Ruth Bader Ginsburg. He said the decision was based on faulty "assumptions that the court made in 1986 about the realities of gay lives and gay relationships." The court may not have know it then, he said, but "it has to be apparent to the court now that there are gay families, that family relationships are established, that there are hundreds of thousands of people registered in the 2000 Census who have formed gay families."

For this population, the right to privacy for sexual expression in their own homes "performs much the same function that it does in the marital context," he said, describing his basic argument as "that it doesn't make sense to draw a line there and that you should protect it for everyone."

Mr. Rosenthal had a basic argument to present as well. It was, he said, that "Texas has the right to set moral standards and can set bright-line moral standards for its people." He asked the court "not to disenfranchise 23 million Texans who ought to have the right to participate in questions having to do with moral issues."

Justice Stephen G. Breyer pressed Mr. Rosenthal to explain further. He quoted the old nursery rhyme: "I do not like thee, Dr. Fell/ The reason why, I cannot tell," and asked Mr. Rosenthal how the state's position differed. Justice Breyer said at one point in frustration: "I would like to hear your straight answer to those points," the unintended double-entendre provoking a ripple of laughter in the courtroom.

Justice Sandra Day O'Connor, whose vote is the least predictable and consequently of the most interest

in the case, asked only two questions, both to Mr. Smith. She seemed to be seeking assurance that the court need not issue a broad ruling in order to invalidate the Texas law.