

# The FRONT PAGE

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## Court Appears Divided on Anti-Sodomy Case

WASHINGTON (AP) — A gay-rights case before the U.S. Supreme court tests how times have changed for the country and for the court itself, which was widely criticized for a ruling 17 years ago that upheld a ban on homosexual sex. The court could reverse course and declare a similar ban unconstitutional.

Lawyers for two Texas men arrested in their bedroom have asked the court to overturn their convictions for sodomy under a state "Homosexual Conduct" law. The law unfairly treats gay men and lesbians differently from heterosexuals who may engage in the same kinds of sex acts and violates privacy rights, the opponents argued in court filings.

State anti-sodomy laws, once universal, now are rare. Those on the books are infrequently enforced but underpin other kinds of discrimination, lawyers and gay rights supporters said.

Hearing arguments on March 26, the court appeared deeply divided over the Texas law that makes it a crime for gay couples to engage in sex acts that are legal for heterosexual couples.

States should not be able to single out one group and make their conduct illegal solely because the state dislikes that conduct, lawyer Paul Smith argued for the Texas men.

"There is a long history of the state making moral judgments," retorted Justice Antonin Scalia. "You can make it sound very puritanical," but the state may have good reasons, Scalia added.

"Almost all laws are based on disapproval of some people or conduct. That's why people regulate," Chief Justice William H. Rehnquist added dryly.

Justice Stephen Breyer challenged Houston prosecutor Charles Rosenthal to justify why the state has any interest in peeping into the bedrooms of gay people.

"Why isn't that something the state has no business in, because it isn't hurting anybody?" Breyer asked.

The state has an interest in protecting marriage and family and promoting the birth of children, Rosenthal replied. "Texas can set bright line moral standards for its people."

### *Bowers v. Hardwick*

In 1986, a narrow majority of the court upheld Georgia's sodomy law in a ruling that became a touchstone for the growing gay rights movement.

Even then the court's decision seemed out of step and was publicly unpopular, said Harvard law professor Laurence Tribe, who argued on the losing side of the case.

"We're now dealing with a very small handful of statutes in a circumstance where the country, whatever its attitudes toward discrimination based on sexual orientation, (has reached) a broad consensus that what happens in the privacy of the bedroom between consenting adults is simply none of the state's business."

As recently as 1960, every state had a sodomy law. In 37 states, the statutes have been repealed by lawmakers or blocked by state courts.

Of the 13 states with sodomy laws, four — Texas, Kansas, Oklahoma and Missouri — prohibit "deviate sexual intercourse," or oral and anal sex, between same-sex couples. The other nine ban consensual sodomy for everyone: Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah and Virginia.

Various groups filed briefs with the high court either opposing or supporting the Texas law.

Opponents include the American Bar Association, historians, the NOW Legal Defense and Education Fund and libertarian organizations, such as the Cato Institute and the Institute of Justice.

A brief filed by the Human Rights Campaign and other gay-rights groups evoked Mark Bingham, a gay man believed to have been among passengers who fought terrorists aboard United Flight 93 before it crashed in a Pennsylvania field on Sept. 11, 2001.

"To his country, Mark Bingham is a hero; in Texas, he is a criminal," the brief said.

An unusual array of organizations is backing the two Texas men. In addition to a long list of gay rights, human rights and medical groups, a group of conservative Republicans and the libertarian Cato Institute and Institute for Justice argued in friend of the court filings that government should stay out of the bedroom.

"This case is an opportunity to confirm that the constitutional command of equal protection requires that gays be treated as equal to all other citizens under the law, subject to neither special preferences nor special disabilities," the brief for the Republican Unity Coalition

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John Lawrence, left, and Tryon Garner, right, arrive at the state courthouse in Houston to face charges of homosexual conduct under Texas' sodomy law, in this Nov. 20, 1998 photo. Their case went before the U.S. Supreme Court on Wednesday, March 26, 2003. Gay rights groups hope the court will rule that sodomy laws in Texas and other states are unconstitutional. (AP Photo/David J. Phillip)

## Accidental Activists

**Lawrence, Garner keep a low profile; South Carolina activists ponder outcome of Supreme Court action**

John Lawrence and Tyron Garner could be called accidental activists.

More than four years ago, police burst into Lawrence's apartment — sent there by a bogus report of an armed intruder — to find the two men engaged in consensual sex. The pair were jailed overnight and charged with breaking Texas' Homosexual Conduct Law, which bans oral and anal sex between people of the same gender.

These days Lawrence and Garner keep a low profile, but their case challenging the Texas statute — and by extension, sodomy laws in 12 other states — has made it all the way to the U.S. Supreme Court.

Gay-rights activists regard Wednesday's arguments as one of the most important legal challenges for decades: In 1986, the high court upheld a now-defunct sodomy law in Georgia. To the Texas government and its allies, the case is about the right of states to promote the moral standards of their communities.

"It's one more battle, one more step," said Annise Parker, the only openly gay member of the Houston City Council. "I think there will be a huge celebration if we win it."

The men's arrest in September 1998

attracted relatively little attention, and they declined through attorneys to be interviewed. But from the start, they felt their arrest was unfair.

Garner said in court in 1998 that he hoped the law would change and, "I feel like my civil rights were violated and I wasn't doing anything wrong." Lawrence called his arrest "sort of Gestapo."

But once they pleaded no contest and each paid \$200 fines, Lawrence and Garner faded out of public view.

"These are people who were arrested in their bedroom," said Patricia Logue, an attorney with the Lambda Legal Defense & Education Fund, which has handled the case since early on. "They never chose to have that invasion of privacy. This is something they believe in, of course, but it's not a battle they chose."

Logue and the men's other attorneys contend the Texas law is unconstitutional for two reasons: it authorizes impermissible intrusion into citizens' private lives and violates the Equal Protection Clause by criminalizing certain behavior only for same-sex couples, not for heterosexuals.

Texan Connie Moore, a lesbian who runs a small law practice with her partner, is outraged by the statute. The idea that she could be considered a criminal "because I loved a 'her' instead of 'him'" just doesn't cut it, she said.

On Tuesday, March 18, in Columbia, there was a town hall meeting to dis-

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