Sodomy and the Supremes

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By David J. Garrow, Garrow is the author of Liberty and Sexuality: The Right to Privacy and Making of Roe v. Wade (University of California Press)

Legal expert DAVID J. GARROW counts the potential votes in the upcoming Supreme Court decision on sodomy laws

It's been more than four years since John Lawrence and Tyron Garner were arrested and charged with violating Texas's Homosexual Conduct Law, which prohibits "deviate sexual intercourse"—anal or oral sex—between people of the same sex. Now their challenge to that law, rejected by a local judge and twice turned aside by Texas appellate courts, is before the U.S. Supreme Court, which will hear arguments March 26.

Lawrence v. Texas confronts the nine justices with an obvious equal protection challenge to the law: How can Texas criminalize anal and oral sex for same-sex couples only, not for heterosexuals? Yet Lawrence also invites the justices to revisit, and perhaps reverse, the court's infamous 1986 decision in Bowers v. Hardwick, where a narrow 5–4 majority—including the late Justice Lewis F. Powell Jr., who subsequently expressed regret for his vote—upheld traditional antisodomy statutes.

Only 13 states and Puerto Rico still criminalize any private, consensual, adult sex. Nine of those —Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia—retain old-fashioned anti-sodomy statutes that ostensibly apply to gays and straights alike. But four others—Texas, Kansas, Missouri, and Oklahoma—apply their criminal penalties only to same-sex conduct. Texas altered its law in 1974 to decriminalize heterosexual sodomy, and local prosecutors energetically defend the state's prosecution of Lawrence and Garner. "There is plainly a rational distinction to be made between heterosexual and homosexual conduct," they argue.

Lawrence and Garner's lawyers, led by Ruth E. Harlow of the Lambda Legal Defense and Education Fund, strongly disagree. "Petitioner Lawrence would not be guilty of a criminal offense if Petitioner Garner were a woman rather than a man (and vice versa)," Harlow noted in Lambda's first petition to the Supreme Court.

When the justices agreed early last December that they would hear the case, many observers said the court would not take up the issue unless a majority of the justices was ready to void the Texas law. But while five votes are necessary to win, as few as four votes can suffice to accept a case, according to the rules that govern the justices' private deliberations.

That five or more justices will side with Lawrence and Gamer is thus no sure thing.

Optimists can point to one promising precedent. Seven years ago in Romer v. Evans, a surprising 6–3 Supreme Court majority voided Colorado's Amendment 2, an initiative that would have

outlawed gay-inclusive nondiscrimination laws or policies adopted by governmental entities. Justice Anthony M. Kennedy, writing for his fellow moderate conservative Sandra Day O'Connor and the court's four relatively liberal justices—John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer—declared that the measure made gays "unequal to everyone else" and was "inexplicable by anything but animus toward the class it affects." Dissenting justices Antonin Scalia, Clarence Thomas, and William H. Rehnquist replied that Coloradans are "entitled to be hostile toward homosexual conduct."

But 2½ years after Romer, when an almost identical case challenging an antigay enactment in Cincinnati came before the justices, Romer's majority silently dissolved, with only Stevens, Souter, and Ginsburg protesting their colleagues' refusal to hear the case. And in June 2000, in Boy Scouts of America v. Dale, Justices Kennedy and O'Connor sided with the Scalia-Thomas-Rehnquist trio to endorse the Scouts' exclusion of openly gay members.

Yet limited optimism may be in order. Justice Kennedy could join with the four liberals to void Texas's explicitly antigay law without having to confront Bowers or strike down nondiscriminatory sodomy prohibitions. And while Justice O'Connor backed Bowers in 1986, last year both she and Kennedy changed their minds on another high-visibility issue, voting against capital punishment for mentally retarded convicts—even though they had endorsed that practice in a 1989 case.

A decision in Lawrence v. Texas will be announced sometime in June. As law professor Arthur S. Leonard, editor of Lesbian/Gay Law Notes, rightly says, justices Kennedy and O'Connor "could go either way on this case."