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VERMONT'S VOICE FOR THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY

OUT IN THE MOUNTAINS

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BY EUAN BEAR

One of the most damaging Supreme Court rulings in the history of gay activism was issued in 1986 in *Bowers v. Hardwick*, upholding Georgia's sodomy law. But now, says Lambda Legal, the Supreme Court has the chance to rectify that antigay miscarriage of justice in *Lawrence & Garner v. Texas*. The Court heard oral arguments on March 26, with a ruling expected in June.

The *Hardwick* ruling, said Ruth Harlow of Lambda Legal in a press briefing, "has been used to deny gay men and lesbians jobs, housing, and custody of their children."

Gay bartender Michael Hardwick was arrested for sodomy in his own bedroom by a policeman executing an expired bench warrant for a misdemeanor public drinking offense. *Hardwick* filed suit to overturn the law and won in the 11th Circuit Court of Appeals. State Attorney General Michael Bowers then appealed that verdict to the U.S. Supreme Court. The 1986 case became infamous for its stridently anti-gay wording and its chilling effect on gay rights struggles across the nation.

While that case (and another in which he fired an attorney because she was a lesbian) helped end *Bowers'* political career, unfortunately Michael Hardwick did not live to see the ruling overturned: he died in 1991. Georgia's own Supreme Court ruled that its sodomy law violated the state's constitution in 1998. But the U.S. Supreme Court's *Hardwick* ruling remains an influence supporting anti-gay prejudice in the 13 states and one commonwealth (Puerto Rico) that still have sodomy laws on their books. In four of those states and in Puerto Rico, sodomy laws apply only to same-sex conduct. In the others, the laws are rarely enforced against anyone except homosexuals.

The current case, *Lawrence & Garner v. Texas*, has a familiar ring. Police received a report - later proved false - of a gun-waving "crazy man" in John Lawrence's apartment. But instead of leaving the apartment when no gunman was found, the officers cited Lawrence and Tyron Garner for being two persons of the same gender having anal sex, prohibited under the state's same-sex only sodomy statute.

Lawrence and Garner eventually pled *nolo contendere* and paid \$200 each in fines



BLIND JUSTICE? Supreme Court Revisits Landmark Rulings on Race and Sex; Lawrence & Garner Ruling May Overturn Legalized Discrimination

above: Embattled Partners Tyron Garner and John Lawrence

before appealing their convictions. Under those convictions, the two men are now legally identified as sex offenders in some states.

The Supreme Court accepted Lambda Legal's entire case for consideration and could rule on either of its two claims. The first is that sodomy laws of any kind are an unwarranted intrusion by the government into the privacy of consenting adults. This claim is based on what is called the "due process" clause of the Fourteenth Amendment to U.S. Constitution, sometimes referred to as the "liberty" or "privacy" rights provision.

The second claim is that

sodomy laws criminalizing only same-sex behavior violate the equal protection clause of the Fourteenth Amendment. A favorable ruling on this claim would overturn the sodomy laws in Texas, Kansas, Missouri, Oklahoma, and Puerto Rico, while leaving general sodomy laws intact in Idaho, Utah, Louisiana, Mississippi, Alabama, Florida, South Carolina, North Carolina, and Virginia.

Vermont and Wyoming repealed their states' sodomy laws in 1977, the 19th and 20th states to do so. The first was Illinois in 1962.

Lambda Legal's Ruth Harlow said in a press briefing

that a favorable ruling by the Court on either claim would be a victory by either overturning *Hardwick* or abolishing the double standard of same-sex only laws. Although Harlow is the counsel of record, she did not argue the case in the Supreme Court. Paul Smith, who is an experienced Supreme Court litigator in the firm of Jenner & Block and also gay, took on that task.

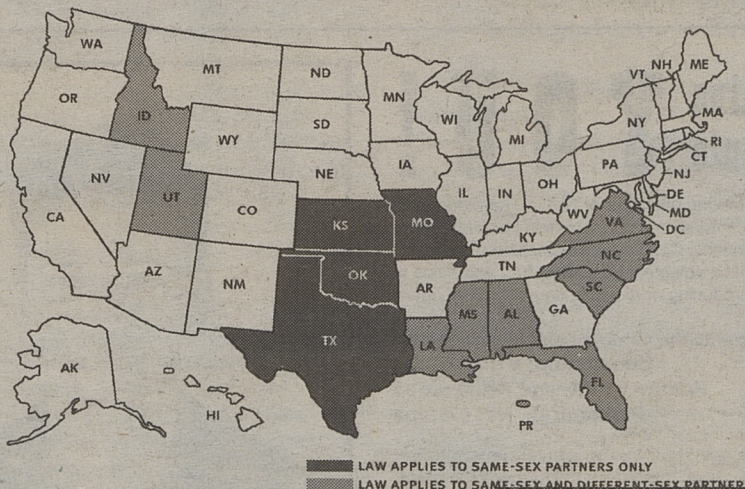
Beth Robinson, who became famous as one of the two lawyers arguing *Baker v. State* (the lawsuit against the state for denying same-sex couples the right to marry) before the Vermont Supreme Court, says she has been following the *Lawrence* case closely. "For well over a decade courts have beaten us over the head with *Bowers v. Hardwick* - not just in connection with sodomy laws, but with respect to our basic rights to hold down a job, serve our country, and protect our families. The *Lawrence* case offers the United States Supreme Court the chance to undo one of its most tragic decisions in modern times," she wrote in answer to an email query.

Lambda Legal is optimistic about its chances of winning its case. The Texas attorney general declined to take on the appeal, leaving it to the Harris County district attorney. The Texas case relies heavily on *Bowers v. Hardwick*. The *amicus* brief by 63 of 150 members of the Texas House and six of 31 members of the Texas Senate rests on the "traditional" right of state legislatures to regulate marriage, procreation and acts - such as same-sex sodomy - that "endanger public health." And the U.S. Solicitor General has not weighed in on the side of Texas.

Lambda Legal attorney Ruth Harlow said that Texas's brief also cautions the Court to "be very careful" because overturning its sodomy law will "lead to same-sex marriage." But, she added, "The Court will narrowly decide this case on its own four corners. Here we have the government saying we are criminals. We have support from Republicans on our side who agree that the government does not belong in our bedrooms. This is the most important case in a generation.

"I'm not really a Supreme Court handicapper," Harlow declared just before giving her most optimistic expectation: "a 7-2 vote in our favor." ▼

STATE-BY-STATE MAP OF SODOMY LAWS



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Beyond Bakke: University of Michigan Law School Makes Its Case for Saving 'Race-Conscious' Admissions, see page 8