

We Won! Activists Prepare For Backlash and New Battles After Lawrence vs. Texas Ruling

BY EUAN BEAR

"Today [June 26, 2003] the U.S. Supreme Court closed the door on an era of intolerance and ushered in a new era of respect and equal treatment for gay Americans. This historic civil rights victory recognizes that love, sexuality and family play the same role in gay people's lives as they do for everyone else."

— Ruth Harlow, Legal Director at Lambda Legal Defense & Education Fund, lead counsel in *Lawrence v. Texas*

"Government has just lost its weapon of mass destruction. It can no longer use the existence of sodomy laws to justify discrimination. As of today, all sodomy laws are unconstitutional."

— Chai Feldblum, a law professor at Georgetown University, co-author of an amicus brief in the *Lawrence* case.

On June 26, the United States Supreme Court by a 6-3 vote declared unconstitutional state laws criminalizing private consensual

sexual behavior among adults. By a narrower 5-4 vote, the Court overturned its infamous 1986 *Bowers v. Hardwick* ruling, which had declared "facetious" any claim by homosexuals to a right of privacy.

The majority decision, written by Justice Anthony Kennedy, declared the Texas sodomy law unconstitutional — and overturned the *Bowers* decision — on the grounds that it infringed on the petitioners' Fourteenth Amendment "liberty" rights under the Due Process clause.

Immediate reaction to the Supreme Court's landmark ruling in Vermont was muted — as residents of the only state currently giving full legal recognition to same-sex relationships, Vermont's gay men and lesbians experience less of an impact on their daily lives. Vermont repealed its sodomy law in 1977.

R.U.1.2? Community Center Director Christopher Kaufman said that although an open invitation was extended to the glbtq community to celebrate at the Center's waterfront headquarters, few people came. "People seemed to feel that they didn't need to come down because we won."

He continued, "It is very exciting, very surprising to have this leap

forward by a conservative court. It's a very libertarian decision, based on the right to liberty rather than equal protection."

Kaufman echoed national speakers' concerns over a conservative backlash. "We've got a long way to go, we can't be complacent. There's an awful lot to be done in workplace discrimination, for example. R.U.1.2? will be working on H.366, the bill to make illegal any discrimination on the basis of gender identity and presentation. There's a lot more to be done at the community level."

And as the NGLTF noted, he said, "this decision is really the result of 20 years of grassroots organizing."

Vermonters for Civil Unions attorney Beth Robinson was more impressed with the potential positive impact of the Supreme Court's decision. "*Lawrence v. Texas* is huge! It's huge, not just in terms of results, but in what the Court said and how they said it. They basically acknowledged the humanity of gays and lesbians and the importance of our dignity as people. And they made the connection between gay sexual relationships and love."

Robinson likewise cautioned the community to prepare for backlash.

"These kinds of victories are definitely a good thing, but there is no question in my mind that these events are going to be used to mobilize the right wing. It's tempting to celebrate and think that the battles are over, but it's similar to *Brown v. Board of Education* [declaring 'separate but equal' schools by race unconstitutional], where the heavy lifting came after the decision, the litigation, social change and political work."

At the same time, Robinson added, "Even though we're looking at a lot of work [to consolidate these gains], I'd rather be in this position of looking at a lot of work because we won." She characterized Justice Antonin Scalia's dissent as "a call to arms for the conservatives."

"The court could have written a narrow decision on the basis of privacy," she concluded, "but instead, the Court apologized for *Bowers*. I wept when I read the decision."

Keith Goslant, official liaison from the lgbtq communities to the Governor's office, said he was "encouraged" that America is finally recognizing gays and lesbians with full citizenship rights. "I was incredibly pleased to see that the Supreme Court justices got it, and that Justice Kennedy used such

strong language in affirming our dignity and humanity. It was incredible to hear."

Both Goslant and Robinson commented on the similarity of language in the *Lawrence* decision to that used by Vermont Supreme Court Chief Justice Jeffrey Amestoy in *Baker v. State*.

Rep. Bill Lippert (D-Hinesburg), executive director of the Samara Foundation (Vermont's glbtq grant-making foundation), likened the decision to an earthquake. "The significance of this ruling is earthshaking. Its implications are so profound and positive, it will help shift the culture toward openness and acceptance," he said.

"I am thrilled that the decision was as broad and affirming as it was, and to have such a decision from this conservative court is even more gratifying." And, Lippert said, the decision should "keep us on high alert for the importance of nominees to the Supreme Court. Future nominees could be very dangerous to our future as a community."

Joy Around the Country

According to press releases and news reports from around the country, gay men and lesbians celebrated the *Lawrence v. Texas* ruling.

In San Francisco, "gay men and lesbians poured into the streets today to celebrate a Supreme Court decision striking down or strictly limiting the country's last remaining sodomy laws in

Quotes from the Majority Opinion Written by Justice Anthony Kennedy

"[T]his Court's obligation is to define the liberty of all, not to mandate its own moral code."

"The stigma the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law."

"In his dissenting opinion in *Bowers* JUSTICE STEVENS concluded that (1) the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of "liberty" protected by due process. That analysis should have controlled *Bowers*, and it controls here. *Bowers* was not correct when it was decided, is not correct today, and is hereby overruled."

"[This case] does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. Petitioners' right to liberty under the Due Process Clause gives them the full right

to engage in private conduct without government intervention. The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life."

"Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."

"The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."

"When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."

"When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."

"[The *Bowers* ruling's] continuance as precedent demeans the lives of homosexual persons."

From the Dissent Written by Justice Antonin Scalia

"What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails. Not so the overruling of *Roe*, which would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State."

"The Fourteenth Amendment <l>expressly allows States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided ..."

"[H]omosexual sodomy is not a right 'deeply rooted in our Nation's history and tradition.'"

"This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. JUSTICE O'CONNOR seeks to preserve them by the conclusory statement that 'preserving the traditional institution of marriage' is a legitimate state interest. ... But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."

"Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."

"[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive."

"Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. That homosexuals have achieved some success in that enterprise is attested to by the fact that Texas is one of the few remaining States that criminalize private, consensual homosexual acts. But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more require a State to criminalize homosexual acts — or, for that matter, display any moral disapprobation of them — than I would forbid it to do so. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."