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The War Over Gay Marriage

BYLINE: This story was reported by T. Trent Gegax, Debra Rosenberg, Pat Wingert, Mark Miller, Martha Brant, Stuart Taylor Jr., Tamara Lipper, John Barry, Rebecca Sinderbrand, Sarah Childress and Julie Scelfo. It was written by Evan Thomas.

It was a homey scene. Standing in their warm kitchen on a winter's day in 2001, Julie and Hillary Goodridge, a couple for 16 years, played the old Beatles song "All You Need Is Love" for their young daughter, Annie. Hillary asked Annie if she knew any people who loved each other. The little girl rattled off the names of her mothers' married friends, heterosexuals all. "What about Mommy and Ma?" asked Hillary. "Well," the child replied, "if you loved each other you'd get married."

That did it. "My heart just dropped," said Hillary. The gay couple headed for the Massachusetts Department of Public Health to get a marriage license. Julie was optimistic, Hillary less so. "I thought we'd be led away in handcuffs," Hillary recalled. Blood tests and \$30 in hand, they anxiously asked for an application. "No, you're not allowed to," responded the woman behind the counter. "I'll need two grooms first." Hillary and Julie asked to speak to the department's director. The woman politely told them, "No, you can't get married, and there's nothing you can do about it."

Actually, there was. With the help of the Gay & Lesbian Advocates & Defenders (**GLAD**), Hillary and Julie sued for the right to be legally wed. Any day now, the Massachusetts Supreme Judicial Court is expected to decide their case. No court in America has ever recognized gay marital vows. But last week Hillary and Julie--and every gay person who wants to be married or adopt a child or hold a job or receive a government benefit or simply enjoy the right to be respected--received a tremendous boost from the highest court in the land.

The outcome of *Lawrence et al. v. Texas*, handed down on the final day of the Supreme Court's 2002-2003 term, was not unexpected. In a Houston apartment five years ago, Tyron Garner and John Geddes Lawrence had been arrested by police for performing a homosexual act and fined \$200. By a 6-3 vote, the high court struck down the Texas anti-sodomy law. In some ways, the Supreme Court was just catching up to public opinion. In 1986, in *Bowers v. Hardwick*, a decision that lived in infamy among gays in America, the court had upheld a Georgia anti-sodomy law. At the time, 25 states had such laws. Some 17 years later, only four states banned sodomy between homosexuals (an additional nine states had laws, on the books but rarely enforced, barring sodomy between any sexual partners).

What stunned court watchers--and what promises to change forever the status of homosexuals in America--was the far reach of the court's reasoning. Gays "are entitled to respect for their private lives," said Justice Anthony Kennedy, reading from his majority opinion from the high court's mahogany bench. His voice was quiet and he seemed a little nervous, but his words rang with lasting meaning. Under the due-process clause of the

14th Amendment of the Constitution, Kennedy ruled, gays were entitled to a right of privacy. "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime," said Kennedy. In the crowded courtroom, some of the gay activists and lawyers silently but visibly wept as they listened.

Justice Kennedy's ruling in the Lawrence case "may be one of the two most important opinions of the last 100 years," says David Garrow, legal scholar at Emory University and Pulitzer Prize-winning biographer of Martin Luther King Jr. "It's the most libertarian majority opinion ever issued by the Supreme Court. It's arguably bigger than *Roe v. Wade*," said Garrow, referring to the 1973 Supreme Court decision giving women a right to abortion. At least in symbolic terms, Garrow put the decision on a par with *Brown v. Board of Education*, the landmark 1954 ruling declaring that separate was not equal in the nation's public schools.

But it may be years before the ripple effects of Lawrence are felt. Just as schools were still segregated in parts of the South a decade after the *Brown* decision, it is likely that attempts to give gays true legal equality with heterosexuals will encounter fierce resistance from people and institutions that still regard homosexuality as morally deviant. The battle--over gay marriage, gay adoption, gays in the military and gays in the workplace--will be fought out court to court, state to state for years to come. Nonetheless, there is no question that the Lawrence case represents a sea change, not just in the Supreme Court, a normally cautious institution, but also in society as a whole.

In 1986, when the court had ruled in the *Bowers* case, Justice Byron White curtly dismissed the argument that the Constitution protected the right of homosexuals to have sex in their own homes. Writing for the majority of justices, White had called such an assertion "facetious." But social norms have been transformed over the past two decades. How mainstream is the idea of "gay rights"? Of the six justices who voted to strike down laws against homosexual sodomy, four were appointed by Republican presidents. (Kennedy, David Souter and John Paul Stevens all subscribed to a right of privacy for gays; Justice Sandra Day O'Connor stuck to the narrower ground that it was unfair to punish gays but not heterosexuals for sodomy.) Polls showed that the justices have public opinion behind them: some six out of 10 Americans believe that homosexual sex between consenting adults should be legal.

One veteran gay activist could sense the change in the attitudes of the justices. Kevin Cathcart, executive director of the Lambda Legal Defense and Education Fund, has been part of a small but determined circle of lawyers plotting gay-rights strategy since 1984. In the past, he had to deal with what he called the "ick factor"--the revulsion some heterosexuals feel about --homosexual acts. "The Kennedy opinion not only does not have an ick factor," says Cathcart, "but is almost an apology for the ick factor 17 years ago."

One justice was still full of disgust. In a biting, sarcastic voice, Justice Antonin Scalia read his dissent from the bench. He denounced his colleagues for "taking sides in the culture war." He accused the court's majority of having "largely signed on to the so-called homosexual agenda." Most Americans, Scalia warned, "do not want persons who openly engage in homosexual conduct as partners in their business, as scout-masters for their children, as teachers in their children's schools, or as boarders in their homes." Scalia

predicted that the court's decision would cause "a massive disruption of the current social order" by calling into question the government's right to legislate morality. While noting the majority's statement that the case did not involve gay marriage, Scalia scoffed, "Do not believe it."

Scalia's fulmination was impressive, but (as even he might privately concede) it was also an overstatement of the legal and political reality, at least for the immediate future. While gays can now claim some constitutional protection--their new right to privacy under the Lawrence decision--the federal government and the states can override those rights if they have a good enough reason, a "legitimate state interest." Thus, national security could trump privacy in the military and preserve the Pentagon's "don't ask, don't tell" policy on gays. Or the state's interest in preserving "traditional institutions"--like marriage between different-sex couples--might overcome a homosexual's right to not be "demeaned," as Justice Kennedy put it. After Lawrence, gays can no longer be branded as criminals. But that does not mean they will enjoy all the rights of "straight" citizens. The current Supreme Court has shown, albeit erratically, a federalist streak: it will not lightly trample "states' rights"--that is, second-guess the power of states to make up their own rules, especially if popular opinion is running strong.

Inevitably, politics will play a role. Some conservative groups were apoplectic. "People of faith are not going to lie down and allow their faith to be trampled because a politically correct court has run amok," promised the Rev. Lou Sheldon, president of the Traditional Values Coalition. He offered a hint of the battles that lie ahead when a vacancy opens up on the high court. "In this court, you do not have friends of the Judeo-Christian standard. We know who our friends are. And we know who needs to be replaced," said Sheldon. Sandy Rios, president of the Concerned Women for America, predicted moral Armageddon. "We're opening up a complete Pandora's box," she said. Some conservatives, including Justice Scalia, warned that the court's decision would undermine laws barring bigamy, incest and prostitution.

Maybe. But states will still be able to ban sexual practices that are obviously hurtful or exploitative of women or minors. Nonetheless, the fear of legalized wantonness will quickly become a campaign issue. Last week the White House--which decided not to file a brief in the case--was taking cover; White House spokesman Ari Fleischer defensively mumbled that gay rights were a matter for the states to decide. Bush's political handlers were fearful of alienating either gay voters or the legion of Christian conservatives who provided Bush with his electoral base in 2000. "Bush officials apparently think homosexual activists make better leaders than the conservative activists who delivered millions of votes," taunted Bob Knight, director of the conservative Culture and Family Institute.

The fight over gay rights could easily become a "wedge issue" in the 2004 presidential campaign, though Democrats, too, will be wary of getting ahead of public opinion. For the most part, gay rights will be fought out at the local and state level. The struggle will be protracted and there may be a real backlash. An overview of the main battlegrounds:

Gay Marriage. Although gay couples routinely have commitment ceremonies and The New York Times wedding pages now run photos of gay and lesbian pairings, no state in

the country recognizes or grants gay marriages. (Churches are badly split, with some denominations honoring same-sex unions and others vehemently opposing them.) Vermont comes the closest of any state with "civil unions" that bestow many of the same rights and responsibilities as marriage, but give it a different name--for purely political reasons. A few other states, most notably Massachusetts and California, seem to be edging toward the recognition of gay marriage, either by legislation or judicial fiat. But the stronger movement, at least for now, appears to be in the other direction. Some 37 states--and the federal government--have adopted "Defense of Marriage Acts," which define marriage as applying only to a man and a woman, and--significantly--bar recognition of same-sex marriage from other states.

These laws will inevitably be challenged in the courts under the Lawrence decision. On June 11, a court in Ontario, Canada, ruled that same-sex marriages are legal (they are also legal in the Netherlands and Belgium). Last weekend in Toronto, during the city's Gay Pride celebration, the city's marriage office stayed open for extended hours. A dozen of the first 200 customers were Americans who had driven across the border. Legal experts are divided over whether a gay couple with a Canadian marriage license will be recognized back in the States, but they are sure that sooner or later the issue of gay marriage will wind up in the Supreme Court, though probably not for several years.

By then the court may be, as the saying goes, following the election returns. Gary Bauer, the president of American Values and a former presidential candidate, warned that if the Republicans do not take a stand against gay marriage in the 2004 election, then GOP "family values" activists might just sit home rather than work for the party. On the other hand, Bush may pick up votes from libertarians and Republican moderates (the "soccer moms") if he is seen as being compassionate or tolerant of different sexual orientations.

Adoption and Custody. Most states now permit single gays to adopt children. Resistance to gay adoption has waned as studies show that children raised by gays look a lot like those raised by straights--and are no more or less likely to be gay. Still, only 11 states permit same-sex couples to adopt children. The rest of the states are a patchwork of conflicting rules. Florida, swayed by Anita Bryant's 1977 "Save the Children" campaign, is the most restrictive, banning adoption by any gay or lesbian individuals. That law, based largely on moral disapproval, seems vulnerable after Lawrence.

The most immediate impact of Lawrence will be on custody battles. One Virginia judge, for instance, asked a lesbian to detail her homosexual acts in court testimony and then told her she would lose her child because her behavior was immoral. That sort of reasoning will likely no longer pass constitutional muster.

Gays in the Workplace, Schools and the Military. Big employers have already gotten the message. In 1992 only one of the Fortune 500 companies offered benefits to gay partners. Today the number is 197, including 27 of the top 50. Unfounded worries about getting tagged with massive AIDS bills have been replaced by top companies' desire to compete for gay workers.

Schools and the military will be slower going. Teachers fear harassment or retribution if they support student efforts to form "gay-straight alliances" (even so, there are some 1,700 pro-tolerance clubs in 50 states). The Pentagon will argue that "unit cohesion" will

suffer if gays are openly tolerated in the military. Part of the underlying legal basis for the armed services' restrictive "don't ask, don't tell" policy, a federal anti-sodomy law, is likely to be struck down. Still, the courts are very reluctant to interfere with the military.

Despite the challenges ahead, the alliance of gay lawyers who have been working for two decades to overturn discriminatory laws can feel the ground shifting beneath their feet. Last week Susan Sommer, the supervising attorney at the Lambda Legal Defense and Education Fund, went to an early court hearing in a case aimed at overturning New Jersey's ban on gay marriages. The U.S. Supreme Court's ruling in Lawrence "didn't come up," she noted. "But now I feel like when I walk in the courtroom I've got a powerful symbol on our side, the ringing words of Justice Kennedy that *Bowers v. Hardwick* had demeaned gay people."

Lambda is trying to soften up public opinion with town-hall meetings designed to show that gay families are good for the community. "The town halls we're doing tell people, 'Hey, we're just like anyone else--a middle-class, hometown suburban couple that's been called boring'," says Cindy Meneghin, 45, who with her partner, Maureen Kilian, also 45, and their two children, Joshua, 10, and Sarah, 8, are suing to be recognized as a legal family in New Jersey. "You can't look at our beautiful, charming kids and not notice that we're a family, and the myths start tumbling down. What we've found is that people get to know us as people with families and kids, that I coach soccer and take pictures, and Maureen is the best dessert maker in town, and, oh yes, Maureen and Cindy are a gay couple."

At their home in the liberal Boston enclave of Jamaica Plain, Julie and Hillary Goodridge (who adopted the common last name from Hillary's grandmother because it sounded "positive") have found acceptance--except for the time a bunch of high-school kids urinated on their car and yelled "Dyke!" Last week Julie sat down with their daughter, Annie, to explain the Lawrence decision. "I had to do it without talking about sodomy," said Julie. "I mean, she's only 7 and three quarters!" "The Supreme Court made an important decision yesterday," Julie told Annie. "They said it was OK for lesbians and gays to love each other." "That's good," said Annie. But she still wants her parents to be married.