Homosexuality and Texas Law: An Analysis of *Texas v. Morales* and Its Implications

*by Michael H. Garbarino**

I. INTRODUCTION

For some twenty years, civil liberties and gay rights attorneys have challenged the so called "sodomy"[1] laws of various states. These laws are enforced almost exclusively against homosexuals, and even where not directly enforced, they are used to justify policies that discriminate against homosexuals. Hence, legal challenges to such laws are often deemed a necessary first step in advancing the cause of equal rights for gay men and lesbians in American society.

Probably the most well-known such challenge was the case of *Bowers v. Hardwick*,[2] in which the Supreme Court denied a fourteenth amendment due process challenge to Georgia's sodomy statute. The *Bowers* case foreclosed challenges to state sodomy laws under the U.S. Constitution.[3] Because the federal Constitution only provides a floor for individual rights beneath which states may not sink, however, individual challenges on a state-by-state basis have continued.

One such challenge, the case of *Texas v. Morales*,[4] was the second case sponsored by the Texas Human Rights Foundation to challenge § 21.06 of the Texas Penal Code.[5] The *Morales* case, having worked its way through the Texas court system for nearly five years,[6] was recently dismissed on procedural grounds by the Texas Supreme Court.

As is the case with most sodomy statutes, the Texas sodomy statute was challenged not because it was enforced regularly against homosexuals, but because it has been used as justifica-

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[1] In the legal context, the term refers to laws that criminalize certain sexual acts, even when performed in private and between consenting adults. Such laws remain on the books in twenty-three states. In seven states (Texas, Arkansas, Kansas, Maryland, Missouri, Montana, Tennessee), the impermissible conduct is defined in such a way as to criminalize only homosexual conduct. Similar acts, when performed between persons of opposite sexes, are not criminalized.

[2] 478 U.S. 186 (1986).

[3] In its 5-4 ruling, the Supreme Court declined to include consensual homosexual conduct as a protected right within the unenumerated right to privacy. Recent evidence of homosexuality as an immutable trait, coupled with recent holdings in cases against the military may at some point open the door for an equal protection argument against those sodomy statutes that criminalize *only* homosexual conduct. It is in challenging the statutes of these twenty-three states referred to in *supra* note 1 that an equal protection argument is most viable.

[4] 869 S.W.2d 941 (Tex. 1994).

[5] Section 21.06 provides as follows:

> Homosexual Conduct:
>
> (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
>
> (b) An offense under this section is a Class C misdemeanor.

TEX. PENAL CODE ANN. § 21.06 (Vernon 1989). "Deviate sexual intercourse" is defined in § 21.01(1) as:

> (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
>
> (B) the penetration of the genitals or anus of another person with an object.

TEX. PENAL CODE ANN. § 21.01(1) (Vernon 1989).

[6] The case was originally filed April 12, 1989 before the 200th District Court in Austin.

tion for both private and public policies that discriminate against homosexuals.[7] The Attorney General, as defendant in *Morales*, stipulated to the fact that § 21.06 had not been enforced recently, and that Texas prosecutors in all probability would not enforce the statute in the future.

The non-enforcement of the statute has served to complicate any prospective legal challenge to its constitutionality. In Texas' bifurcated court system, the possibility of challenging the statute in a criminal court (and ultimately before the Court of Criminal Appeals) was completely foreclosed. Without enforcement of the statute, no individual could have standing as a defendant in a criminal case. The only remaining possibility, then, was to bring a challenge under the equity jurisdiction of a Texas civil court (and ultimately the Texas Supreme Court). The *Morales* plaintiffs chose this latter route, but the case was nevertheless dismissed for lack of jurisdiction. The case dismissal presents two predominant problems. First, whether Texas' sodomy statute is nevertheless unconstitutional; and second, whether the *Morales* opinion forecloses judicial review of *any* criminal statute that the State chooses not to enforce. Before discussing these two problems, it is helpful to review the Court's opinion.

II. THE *MORALES* OPINION

The Texas Supreme Court decision in *Morales* never reached the merits of the claim regarding the statute's constitutionality. In its 5-4 opinion,[8] the Court held that under the circumstances of the case, the *Morales* plaintiffs (two gay men and three lesbians) could not obtain equity relief because they had neither proven sufficient harm nor deprivation of a vested property right.

Plaintiffs' counsel in *Morales* argued in favor of equity jurisdiction by citing the precedent of *Passel v. Fort Worth Independent School District*.[9] In that case, Texas civil courts employed equity jurisdiction to review the constitutionality of an unenforced criminal statute that prohibited fraternities, sororities, and secret societies in public schools below the rank of college. Although the statute had not been enforced directly, suit was brought to challenge a school administrative rule that was based on the statute.

The *Morales* majority, in holding against the availability of equity relief for the plaintiffs, distinguished *Passel*, stating that it did not extend the scope of equity jurisdiction to include the protection of personal rights, and that equity jurisdiction would flow only from the actual or imminent deprivation of a vested property right.[10] Responding to the majority's reading of *Passel*, the dissent stated that "[s]uch reasoning ignores the rule that an equity court's primary concern in enjoining a criminal statute is whether there is irreparable harm. That issue — not whether property is involved — is and should be the overriding question."[11]

The *Morales* majority also held against the availability of equity relief because, they claimed, the plaintiffs had not proven sufficient harm:

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[7] For example, the statute was cited during that last legislative session as justification for cutting AIDS-related funding to "gay identified" groups. Likewise, the statute was cited during hearings on the contents of health textbooks for Texas public schools in support of removing all references to homosexuality except as illegal conduct.

[8] Justice Cornyn wrote the majority opinion and was joined by Justices Gonzalez, Hightower, Hecht, and Enoch. Justice Gammage wrote the dissent, joined by Chief Justice Phillips as well as Justices Doggett and Spector.

[9] 440 S.W.2d 61 (Tex. 1969), on appeal after remand, 453 S.W.2d 888 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.), *cert. denied*, 402 U.S. 968, 91 S. Ct. 1667, 29 L. Ed. 2d 133 (1971).

[10] 869 S.W.2d at 945.

[11] *Id.*

> [T]here is no record of even a single instance in which the sodomy statute has been prosecuted against conduct that the plaintiffs claim is constitutionally protected; none of the plaintiffs claims a specific instance of career or employment opportunities having been restricted by the existence of the statute; none of the plaintiffs alleges having been the victim of a hate crime, or the fear of becoming the victim of any specific threatened future event.[12]

The dissent responded eloquently to this claim:

> The court confuses harm with prosecution by asserting there is no harm when it means there is no actual or threatened prosecution . . . . If there is any need for more than an allegation of harm, it was satisfied in this case. The State *stipulated* that plaintiffs' job choices are limited, that they face discrimination in housing, family, and criminal justice matters, and that they suffer psychological harm to their relationships because they are labeled criminals by the very existence of the statute.[13]

Given the majority's disingenuous claim of no harm, some have viewed the majority holding in *Morales* to be dishonestly motivated by the desire of some justices to sidestep a politically controversial issue. Regardless of whether this is true, the ruling, as it turns out, will not be the final say on whether § 21.06 of the Texas Penal Code is unconstitutional.

III. STATUS OF THE TEXAS SODOMY STATUTE

The dismissal of the *Morales* case left intact a lower court ruling in a different case that declared the statute unconstitutional. That case, *City of Dallas v. England*,[14] was pending while *Morales* was making its way through the Texas courts.

In *England*, the plaintiff, a lesbian, filed suit against the Dallas police department to challenge their policy of not hiring homosexuals. Because the Dallas police explicitly relied on § 21.06 as the justification for the policy, the merits of the statute were at issue in the case. Relying in part on its own *Morales* precedent, the Third District Court of Appeals upheld the ruling of the District court that § 21.06 is an unconstitutional invasion of privacy under the Texas Constitution.[15]

Because the defendant in *England* failed to file a timely motion for rehearing with the Texas Supreme Court, the writ was dismissed and the ruling of the Third District Court of Appeals became the final judgment. Hence, despite the ultimate disposition of *Morales*, § 21.06 remains unconstitutional as a matter of law.[16]

Because the ruling of unconstitutionality was made by neither of Texas' highest courts, and because it relied in part upon precedent which was later dismissed, the status of § 21.06 remains controversial. Although gay rights and civil liberties groups can now cite *England* in response to those who would use the statute to justify discrimination, the persuasive force of

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[12] *Id.* (footnotes omitted).

[13] *Id.* (emphasis in original).

[14] 846 S.W.2d 957 (Tex. App.—Austin 1993, writ dism'd w.o.j.).

[15] Although the Texas Constitution does not expressly provide for a right to privacy, it has been recognized through the concomitant zone of privacy created by sections 6, 8, 9, 10, 19, and 25 of the Texas Bill of Rights. Texas v. Morales, 826 S.W.2d 201, 205 (Tex. App.—Austin 1992).

[16] In the *Morales* opinion, the court explicitly stated that it was not addressing the merits of the *England* case. 869 S.W.2d 941, 942 n. 5. Interestingly, the *England* facts more closely resemble those of *Passel* because *England* was not a direct challenge to the statute but instead was a challenge to the City of Dallas police department policy of excluding homosexuals.

their argument is diminished in light of the Texas Supreme Court's ruling in *Morales*. In all likelihood, the controversy will continue until another legal challenge to the statute is brought which ends in a ruling by the Texas Supreme Court or the Texas Court of Criminal Appeals. Thus, the problem becomes one of bringing the challenge in such a way that it falls within the equity jurisdiction of Texas civil courts.[17]

IV. AFTERMATH OF *TEXAS V. MORALES*

As the *Morales* dissent states, the holding of the majority "could have an impact far beyond the class of citizens immediately affected."[18] Of concern to civil liberties attorneys is the notion that *Morales* ostensibly forecloses the possibility of judicial review of any unenforced criminal statute. The dissent points out that, if the majority opinion is taken at face value, the Texas legislature could conceivably pass all manner of criminal statutes that limit personal freedoms, and, as long as the statutes are not enforced directly and no individual can prove deprivation of a vested property interest, judicial review would be unattainable.[19]

The fact that such a result, in all likelihood, was not the intention of the Texas Supreme Court lends credence to the claims of those who call the *Morales* opinion "dishonest" and politically motivated. As a practical matter, however, it will probably be a long time before the court again has the opportunity to review it's equity jurisdiction under facts similar to *Passel* or *Morales*. Including *Morales*, the Texas civil courts have reviewed the constitutionality of unenforced criminal statutes only three times in the last century.[20]

Should the Texas Human Rights Foundation sponsor a third civil case to challenge Texas' sodomy law, the *Morales* outcome appears to require locating a plaintiff who has been deprived of a vested property interest as a result of a rule or policy that is based upon the statute. Should such a plaintiff be located, he or she would fit squarely within the requirements for equity review outlined by the *Morales* majority.

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[17] As long as the statute remains unenforced, a challenge can only be brought in civil court. Further, in the unlikely event that a defendant were charged with violating the statute, there is no guarantee that such a defendant would want the publicity and notoriety inherent in being a named party to a controversial lawsuit.

[18] 869 S.W.2d at 954.

[19] *Id.*

[20] These cases are *Morales* (1994), *Passel* (1971), and *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528 (1894).