Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-99-00109-CR & 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 & 98-48531

CONCURRING OPINION
ON MOTION FOR REHEARING EN BANC

Today the Court holds that section 21.06 of the Texas Penal Code is not unconstitutional. I join in the court's opinion, however I write separately to make the following comments.

First, once the decision is made that the classifications in section 21.06 are not gender based, the analysis is relatively straightforward. A gender-based classification would require a heightened scrutiny of section 21.06 because gender is a protected class. However, sexual preference has not been designated a protected class by the United States Supreme Court, the Texas Supreme Court, or the Texas Court of Criminal Appeals. *See* Majority Op. n.8 *supra*. Consequently, in deciding whether 21.06 is constitutionally sound, we look only for a rational relationship between section 21.06 and the State's reasons for enacting it.[1]

The State argues that 21.06 is directly related to the legislature's right to legislate morality. The United States Supreme Court has held that it is within a State's legitimate police power to legislate on grounds of morality. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Berman v. Parker*, 348 U.S. 26, 32 (1954). Thus, we need only determine if section 21.06 is related "to the pursuit" of implementing morality.

The United States Circuit Court for the Fifth Circuit has already held that 21.06 concerns issues of morality. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985). In reviewing section 21.06, that court held, "[i]n view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that section 21.06 is 'totally unrelated to the pursuit of,' implementing morality, a permissible state goal." (internal citations omitted). That is the same justification upon which the majority relies to reach the conclusion that the Texas Legislature was exercising valid legislative powers in enacting section 21.06. I agree that the justification is legally sound. It is not our duty to assess the wisdom or desirability of the law, *see New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), nor does "[t]his court ... invalidate bad or foolish policies, only unconstitutional ones; we may not 'sit as a superlegislature to judge the wisdom or

[1] The dissent argues that the rational relationship test we are to use here is a higher standard than the rational relationship test normally is; however, that distinction is not apparent in the case law, and the dissent does not point to any particular language that supports this argument.

desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" *Id.* As the majority states, "our power to review the moral justification for a legislative act is extremely limited."

Secondly, I concur with the majority in its rationale and holdings as to both the Equal Protection and Privacy sections of the opinion. I would only add that, as to whether section 21.06 unconstitutionally discriminates on the basis of gender, it clearly does not. This is not merely because of the equal application of the statute to men and women, but because this statute does not contain a discriminatory classification based on gender.

The dissent contends that, like the statute struck down in *Loving v. Virginia*, this statute "equally punishes," in this case, based on gender classification, which makes the statute gender based. 388 U.S. 1 (1967). That argument is creative, but misguided. In *Loving*, the Court struck down a statute because the statute furthered a loathsome discrimination — racism that implied a "superior" white person marrying an "inferior" black person does so at the risk of both being punished. The *Loving* court correctly recognized that this was the kind of discriminatory law sought to be vanquished by the Fourteenth Amendment; one that advanced the fallacy of racial superiority. However, *Loving* is not on point in this case because section 21.06 does not advance the fallacy of gender superiority. It prohibits a same-sex sexual relationship. The fact that sexual orientation necessarily depends upon the sex of the parties does not mean that section 21.06 is the kind of statute that *discriminates* on the basis of gender. Gender is treated as an elevated class under the Fourteenth Amendment because this country saw a need to rid itself of outdated notions of a woman's inferiority to a man.[2] *Reed v. Reed*, 404 U.S. 71 (1971); *Phillips v. Marietta Corp.*, 400 U.S. 542 (1971); *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F.Supp. 593

[2] As the majority stated, "neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a 'suspect class.'"

(S.D.N.Y. 1970); *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971). There is nothing in section 21.06 that furthers any unequal treatment between the sexes. The dissent's argument to the contrary is not a legally sustainable one.

Finally, I also take issue with the dissent's treatment of the majority's reliance on *Bowers v. Hardwick*. The dissent correctly points out that *Bowers v. Hardwick* deals with the Due Process Clause, while the majority's analysis depends upon the Equal Protection Clause of the Fourteenth Amendment. The dissent remarks that "[t]his blending of quite distinct elements of the Federal Constitution blunts the force of the majority's equal protection arguments." I disagree.

First, the dissent overlooks the fact that the ultimate analysis in both *Bowers* and this case turns on the application of the rational basis test. This test does not differ depending on whether it is applied in a "due process" or an "equal protection" context. The test remains the same: does the statute further some legitimate, articulated state purpose? *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 461-62 (1988) (analyzing a Fourteenth Amendment Equal Protection claim based on whether the statute at issue had a "rational relation to a legitimate government objective . . ."); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488, (1955) (analyzing a Fourteenth Amendment Due Process claim under the rational basis test by stating, ". . . to be constitutional, [i]t is enough that there is an [issue] at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *see Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (analyzing a Fifth Amendment Due Process claim using a rational basis test drawn from Equal Protection cases that stated the statute must be "rationally based and free from invidious discrimination . . ."). *Bowers* holds that states are within the scope of legislative authority – and further a legitimate state purpose – when their legislatures base laws on concepts of morality. Therefore, the application of *Bowers* does not "blunt[] the force of the majority's equal

protection arguments."

Secondly, the dissent charges that the majority merges *Bowers*' due process analysis with the equal protection issue in this case. That statement is incorrect. The majority cites *Bowers* only three times: (1) in reference to legislating on notions of morality; (2) in reference to the privacy issue; and (3) for the contention that sodomy was an offense in all fifty states and in the District of Columbia prior to 1961. The majority's analysis of whether section 21.06 should be subject to some level of heightened scrutiny in an equal protection analysis does not depend on the *Bowers* decision. The dissent's implication to the contrary is inaccurate.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.

En banc.

Publish — TEX. R. APP. P. 47.3(b).