Twenty-five years of courtroom trauma

Compiled by Jim Schroeder

Drag performers with names like Michelle Mouth, sex-change dads, transvestite civil servants, and Twinkie-crazed politicians: It's the job of the legal system to give serious scrutiny to the topics that daytime talk shows play for ratings. Americans love to litigate almost as much as they love to talk about sex, and when those two passions collide, the results can be frustrating or uplifting, heartbreakingly tragic or unintentionally hilarious. In the 25 years since the Stonewall riots, America's attitude about sex has changed dramatically, as has the legal environment surrounding sex. As our informal, admittedly incomplete, and sometimes irreverent review of the past quarter century of legal developments in the world of sex shows, sometimes the law breaks down stereotypes and leads us to a new respect for sexual diversity. But more often it is we who lead and the law that follows.

'69

In the most controversial bar raid ever, New York City police raid the Stonewall Inn, a gay bar in Greenwich Village, setting off three days of rioting by gays, lesbians, drag queens, and street people. It was the sixth raid of a gay bar in New York City in three weeks. The disturbance, in which rioters pelted officers with stones and parking meters, is credited with sparking the modern gay rights movement.

In *Stanley* v. *Georgia* the Supreme Court rules that states cannot outlaw possession of pornography at home for private use. A home, the Court rules, is part of its occupant's "zone of privacy."

A federal appeals court in Washington, D.C., grapples with questions regarding the rights of civilians who work for and with the government. In *Adams* v. *Laird* the denial of a security clearance to an openly gay employee of a defense contractor is upheld. In *Norton* v. *Macy,* however, the court reinstates a civilian National Aeronautics and Space Administration employee who was forced to resign after his supervisors learned he was accused of picking up a man in a park for sex.

In *Morrison* v. *State Board of Education,* the California supreme court rules that engaging in same-sex intercourse doesn't automatically make one unfit to teach.

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Nixon

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President Richard Nixon's blue-ribbon commission on obscenity and pornography, chaired by former University of Minnesota law school dean William Lockhart, finds no link between the use of sexually explicit material and criminal conduct, sexual deviance, or emotional disturbances among youths or adults. Nixon and congressional leaders vehemently reject the commission's conclusions, and Nixon angrily disbands the panel.

In *Buchanan* v. *Batchelor* a federal appeals court panel declares that Texas's felony sodomy law, which applies to both heterosexuals and homosexuals, violates constitutional free-expression guarantees. The Texas legislature eventually replaces the statute with one that makes same-sex sodomy a misdemeanor.

The country's first legislative hearings on gay rights, convened by New York State assemblymen Franz Lichter, Anthony Olivieri, and Stephen Solarz, are held in New York City.

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In *Baker* v. *Nelson* the Minnesota supreme court upholds the rejection of a gay couple's application for a marriage license. The couple argue that the state's refusal to issue them the license violates their right to equal treatment under the law. The court acknowledges that state law does not explicitly forbid same-sex marriages but rules that there are plenty of instances in which it refers to wives as women and husbands as men.

The National Organization for Women (NOW) approves its first resolution supporting lesbian rights. A similar resolution was introduced the previous year but was withdrawn after it was attacked by NOW founder Betty Friedan.

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Friedan

In *Younger* v. *Harris* the Supreme Court rules that a state law cannot be challenged in federal court by people who had not previously been indicted, arrested, or credibly threatened under it. The decision scuttles a nascent federal appeal of the *Buchanan* v. *Batchelor* ruling and complicates other sodomy-law cases.

72

The Senate approves the Equal Rights Amendment (ERA), which would prohibit gender-based discrimination, and sends the measure to the states for ratification. At first it's thought that passage of the ERA will be a breeze, but in the end enough state legislatures are persuaded by Eagle Forum founder Phyllis Schlafly and other conservative organizers to withhold their OK that the amendment dies. Many of the right-wingers then turn their attention to fighting gay rights protections.

In *Stanley* v. *Illinois* the Supreme Court rules that unwed fathers cannot automatically be assumed to be unfit parents. The ruling will often be cited by gay and lesbian parents in child custody disputes.

East Lansing, Mich., becomes the first city in the United States to ban antigay bias.

In *People* v. *Triggs* the California supreme court rules that routine police spying on public rest rooms violates the privacy rights of patrons. Police had been using the practice to catch gay men having sex.

John Wojtowicz robs a bank in Manhattan to pay for his boyfriend's sex-change operation. The incident becomes the basis for the Sidney Lumet film *Dog Day Afternoon.*

73

In *Roe* v. *Wade* the Supreme Court rules that constitutional privacy rights include a woman's right to a first-trimester abortion. Gay rights supporters express hope that the Court will use the broad definition of privacy it embraced in *Roe* to overturn existing sodomy laws.

The Supreme Court dramatically restricts the availability of sexually explicit material with rulings in *Miller* v. *California* and *Paris Adult Theater I* v. *Slaton.* In decisions written by Chief Justice Warren Burger, the Court drops its national standard for defining obscenity, which had been in use since the '50s, in favor of one that allows communities to define obscenity according to local standards. For the first time, works not considered obscene in one locality may be considered obscene in other localities.

Lambda Legal Defense and Education Fund is formed as a nonprofit gay rights legal group in New York City. The group is initially denied permission to incorporate and is subsequently forced to obtain a court order to do so.

In *In re Kimball* the New York State court of appeals orders the admission of an openly gay attorney to the bar. It's said to be the first time any state bar had ever admitted an openly gay person.

BETTMANN-UPI

Abzug

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A bill that would prohibit antigay discrimination across the country is introduced in the House of Representatives but gets little response from lawmakers. Twenty years later its main sponsors, New York Democrats Bella Abzug and Edward Koch, are long out of office, and the House has yet to act on their bill.

Federal appeals courts deal with a rash of cases involving sexuality and public education. In *Acanfora* v. *Board of Education of Montgomery County,* the dismissal of a teacher for advocating gay rights is overturned. In *Gay Students Organization of the University of New Hampshire* v. *Bonner,* an attempt to stop a gay student group from having parties is blocked. But in *In re Grossman,* the dismissal of a tenured elementary school teacher who changed his sex is upheld.

In *Singer* v. *Hara* a Washington State appeals court rules that the state's approval of the ERA doesn't authorize same-sex marriage.

75

In *Doe* v. *Commonwealth's Attorney for the City of Richmond,* a federal appeals court panel rejects a challenge to Virginia's sodomy law. The Supreme Court refuses without comment to consider an appeal of the ruling, making the *Doe* decision the federal court's authoritative word on sodomy laws until the Supreme Court's *Bowers* v. *Hardwick* decision in 1986.

Ex-marine Oliver Sipple sues 50 publishers for invasion of privacy after media reports reveal that he's gay. Sipple became a hero after saving President Gerald Ford's life by knocking aside would-be assassin Sara Jane Moore in San Francisco. When members of Sipple's family—who didn't know about his sexual orientation—saw the media reports, they disowned him.

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Ford

Santa Cruz County, Calif., becomes the first U.S. county to ban antigay discrimination.

76

In *Marvin* v. *Marvin,* a palimony lawsuit that captured the nation's attention, the California supreme court rules that contract law may be applied to the breakup of heterosexual domestic partnerships. The lawsuit was filed by Michelle Marvin, the longtime lover of actor Lee Marvin, who asserted that she had an understanding with Marvin that they would share their assets. The actor unsuccessfully argued that the nonmarital nature of their relationship made the agreement invalid. In its decision the court doesn't address similar questions surrounding the rights of gay and lesbian domestic partners.

In *Lovisi* v. *Slayton* a federal appeals court rules that the constitutional right to marital privacy doesn't apply to group sex.

In *Rose* v. *Locke* the Supreme Court summarily rules that cunnilingus is covered by Tennessee's "crimes against nature" statute even though it is not explicitly mentioned in the statute.

In *Singer* v. *United States Civil Service Commission,* a federal appeals court rules that civilian federal employees can be dismissed for gay-related political activities only if the activities impair the agency's work, not if they merely have the potential to do so. But the court also rules that flaunting one's sexual orientation is forbidden.

77

In *Richards* v. *United States Tennis Association,* a New York State superior court rules that transsexual tennis player Renee Richards may play in women's competition in the U.S. Open tennis tournament.

Bryant

After a high-profile campaign led by fundamentalist singer Anita Bryant, voters in Dade County, Fla., decide by a 2-1 margin to repeal a gay rights law.

Patrick Kearney and David Hill, two gay men, are arrested in Los Angeles for the dismemberment murders of 28 men found dead in trash bags along freeways.

In *State* v. *Saunders* the New Jersey supreme court declares the state's fornication law unconstitutional, saying that it violates state and federal privacy guarantees. The decision is one of the first to assert that a state's privacy guarantee can be broader than the federal government's.

In *Board of Education of Long Beach Unified School District* v. *Jack M.,* the California supreme court rules that an arrest for public gay sex is not necessarily grounds for dismissal of a teacher.

78

Carlin

In *Federal Communications Commission* v. *Pacifica Foundation,* the Supreme Court OK's restrictions on the broadcast of material that is indecent but not obscene. The case involves a sexually explicit routine by comedian George Carlin but will also be used to block the broadcast of gay-themed programming.

Under Anita Bryant's spell voters in Eugene, Ore., St. Paul, Minn., and Wichita, Kan., repeal gay rights laws.

The public-interest law firm National Gay Rights Advocates (NGRA) is formed in San Francisco.

The FCC refuses to yank the license of Boston public television station WGBH for airing *Monty Python's Flying Circus.* A citizens group complained that the show "relies primarily on scatology, immodesty, vulgarity, nudity, profanity, and sacrilege for 'humor.' "

In *Smith* v. *Liberty Mutual Insurance Co.,* a federal appeals court rules that laws against sex discrimination do not prohibit bias against effeminate men.

79

In *DeSantis* v. *Pacific Telephone & Telegraph Co.,* a federal appeals court rules that antigay bias is not a form of sex discrimination. The case was the most concerted effort to apply sex-discrimination laws to antigay bias—and the judicial system's most ringing rejection of the idea.

California governor Jerry Brown appoints attorney Stephen Lachs to a state judgeship, making him the nation's first openly gay judge.

In *Gay Law Students Association* v. *Pacific Telephone & Telegraph Co.,* the California supreme court rules that being openly gay or lesbian on the job is protected by a state law ensuring the right of employees to engage in political causes.

Former San Francisco supervisor Dan White is acquitted of murder in the killings of openly gay city supervisor Harvey Milk and Mayor George Moscone. He's convicted instead of manslaughter after his lawyer argues that his mental capacity was diminished by his consumption of Twinkies and other snacks.

Milk

'80

In *People* v. *Onofre* the New York State court of appeals voids the state sodomy law, ruling that it violates due-process, equal-protection, and privacy guarantees.

California voters reject the Briggs Initiative, which would have barred gays and lesbians from teaching in public schools.

In *Beller* v. *Middendorf* a federal appeals court upholds the Navy's discharge of three gay and lesbian sailors.

In *Van Ooteghem* v. *Gray,* a federal appeals court rules that free-speech rights bar public employers from keeping their employees from supporting gay rights causes on their own time.

In *Fricke* v. *Lynch* Rhode Island high school student Aaron Fricke obtains a court order allowing him to take a male date to his prom.

In *Bezio* v. *Patenaude* the Massachusetts supreme judicial court rules that a biological mother may not be denied custody of her children merely because she is a lesbian. The court's ruling applies only to Massachusetts, however.

In *Commonwealth* v. *Banadio* the Pennsylvania supreme court voids the deviate-sexual-intercourse convictions of exotic dancers who had oral sex with patrons as part of their act.

'81

The Department of Defense revamps its policy on gay and lesbian service personnel. The new policy strictly and unequivocally bars all gays and lesbians from joining the armed forces and requires potential recruits to be questioned about their sexual orientation before signing up.

ELLEN SHUB

O'Connor

President Ronald Reagan appoints Arizona jurist Sandra Day O'Connor to the Supreme Court. She is the Court's first female justice. Meanwhile, California governor Jerry Brown appoints openly lesbian attorney Mary Morgan to a superior court judgeship, making her the nation's first openly lesbian judge.

A female lover files a palimony suit against tennis star Billie Jean King, who says she is heterosexual but acknowledges having had a relationship with the woman.

Californian Timothy Curran sues the Boy Scouts of America for ousting him because of his homosexuality. Thirteen years later the case is still in the courts.

In *Florida Board of Bar Examiners re N.R.S.,* the Florida supreme court rules that private, consensual sexual conduct of bar applicants is not relevant to fitness to practice law.

'82

Wisconsin enacts the nation's first statewide ban on antigay discrimination.

In *In re Adult Anonymous II,* a New York State appeals court panel allows a gay man to adopt his adult lover. The man had sought to adopt the lover, who was mildly disabled, so they could be legally identified as a family and avoid eviction from their apartment under New York City rent-control laws.

A Los Angeles man files a palimony lawsuit against Liberace. The pianist denies that the man was his lover, and the suit is eventually settled out of court.

Liberace

Federal appeals courts send mixed signals over sexual orientation and immigration law. In *Hill* v. *U.S. Immigration and Naturalization Service,* a court rules that a 19th-century policy denying visas to gays and lesbians (including them in the broad category of "psychopaths") violates free-association rights. But in *In re Longstaff,* another court upholds the policy. Congress rewrites the policy in 1990.

'83

In *People* v. *Uplinger* the New York State court of appeals voids a law that made it illegal to inoffensively solicit consensual sex "of a deviate nature" in public. The statute had been used primarily against gay men cruising for sex in public places.

In *Sommers* v. *Iowa Civil Rights Commission,* an Iowa court rules that the firing of a preoperative male-to-female transsexual for using the women's rest room at work does not constitute illegal sex discrimination.

In *In re Reed* the California supreme court ends the state's long-standing practice of permanently tracking people convicted under misdemeanor solicitation, lewdness, and sodomy statutes. Under the practice, offenders—primarily gay men ensnared in raids on public rest rooms—were required to register changes of address with the state department of justice and provide fingerprints and photos to local law enforcement officials.

MARC GELLER

Silverman

'84

In a controversial attempt to slow the spread of HIV, San Francisco health department head Mervyn Silverman orders the closing of 14 gay bathhouses after investigators repeatedly observe high-risk sexual behavior in them. The bathhouses fight the order, but the courts back Silverman up.

In *Ulane* v. *Eastern Airlines Inc.,* a federal appeals court upholds the firing of a male-to-female transsexual who as a man was a Vietnam War hero and commercial airliner pilot. Federal law prohibiting sex discrimination doesn't apply to transsexuals, the court rules.

In *Dronenburg* v. *Zech* a federal appeals court upholds the discharge of a soldier who admitted to having had gay sex in his barracks.

In *Rowland* v. *Mad River Local School District,* a federal appeals court upholds the dismissal of an Ohio public-school guidance counselor because she told colleagues she was bisexual.

STEVE ZIFFER

Protesting the *Hardwick* ruling

'85

At the prodding of Gov. Michael Dukakis, the Massachusetts department of human services devises a hierarchy for the evaluation of adoption applications. Married heterosexual couples are placed at the top, while single people and gay and lesbian couples are relegated to the bottom.

Released from prison, Dan White kills himself.

In *Olivieri* v. *Ward* a federal appeals court refuses to allow the gay Roman Catholic group Dignity to stage a demonstration outside St. Patrick's Cathedral during New York City's gay pride march.

In *Roe* v. *Roe* the Virginia supreme court strips a gay father of custody of his daughter, ruling that "continuous exposure of the child to his immoral and illicit relationship [with his lover] renders him an unfit and improper custodian."

In *Baker* v. *Wade* a federal appeals court dissolves a district judge's decision voiding the state's misdemeanor sodomy law, apparently leaving the law in force.

In *Madsen* v. *Erwin* the Massachusetts supreme judicial court upholds a Christian Science Church policy barring the employment of gays and lesbians.

'86

In *Bowers* v. *Hardwick* the Supreme Court finally speaks on sodomy laws—and the result is a big setback for gay rights. A bitterly divided court upholds the constitutionality of the laws, sparking a rash of protests.

Attorney general Edwin Meese's blue-ribbon panel on pornography concludes that use of sexually explicit materials is linked to violent crime. The report presages a federal crackdown on pornography.

Closeted gay attorney Roy Cohn dies of complications related to AIDS, insisting to the end that he doesn't have the disease.

The justice department drops its policy of asking prospective prosecutors if they are gay or lesbian.

Californians reject an initiative that would quarantine people with AIDS.

In *Daly* v. *Daly* the Nevada supreme court rules that a father's parental rights may be terminated when he has a sex change.

In *D.C. and M.S.* v. *City of St. Louis,* a federal appeals court rules that a drag show performed by dancer Michelle Mouth did not violate a city indecency ordinance.

'87

Judge Robert Bork, who outlined his opposition to gay rights in the 1984 *Dronenburg* decision, is tapped for the Supreme Court. His nomination is rejected.

Delta Air Lines publicly apologizes for arguing in plane-crash litigation that it should pay less in compensation for the life of a gay passenger than for a heterosexual one because he may have had AIDS.

In *Gay Rights Coalition of Georgetown University Law Center* v. *Georgetown University,* a federal appeals court rules that a Washington, D.C., gay rights ordinance requires religious schools to provide benefits and services to gay student groups. Congress later exempts religious schools from the ordinance.

The New Hampshire supreme court OK's a newly passed law barring gays and lesbians from adopting children, becoming foster parents, or running child-care agencies.

In *Blackwell* v. *United States Department of the Treasury,* a federal appeals court rejects a fired civil servant's argument that his transvestism is a disability protected by federal antibias law.

In *S.E.G.* v. *R.A.G.* a Missouri appeals court rules that societal prejudice is a sufficient reason to deny child custody to a lesbian mother.

'88

Oregonians surprise the rest of the nation by voting in a referendum to repeal Gov. Neil Goldschmidt's year-old ban on antigay job discrimination. The victory will embolden the referendum's backer, archconservative Lon Mabon, to pepper local ballots throughout Oregon with antigay initiatives in the early '90s.

DONNA BINDER/IMPACT VISUALS

Mabon

In *Gay and Lesbian Students Association* v. *Gohn,* a federal appeals court rules that the denial of funding to a gay group at the University of Arkansas violates free-speech rights.

In *Elden* v. *Sheldon* the California supreme court vacates a loss-of-consortium award to a man whose domestic partner, a woman, was killed in a car accident. Such an award would routinely have been made to a married man whose wife was killed under similar circumstances, and the decision marks a significant turning point in the court's previously liberal attitude regarding domestic partnerships.

'89

In *Braschi* v. *Stahl Associates Co.,* the New York State court of appeals rules that domestic partners of gays and lesbians should be considered family members under New York City rent-control and rent-stabilization laws.

After months of intense criticism from the media and the departure of three top staffers, high-profile NGRA head Jean O'Leary resigns.

In *Watkins* v. *United States Army,* a federal appeals court orders the reinstatement of an openly gay soldier whose commanding officers—aware of his sexual orientation—repeatedly allowed him to reenlist.

A Los Angeles jury awards compensatory damages to an ex-lover of Rock Hudson who said the actor endangered him by not telling him he had AIDS.

Hudson

In *Price Waterhouse* v. *Hopkins,* the Supreme Court rules that an accounting firm violated sex-discrimination laws by denying a partnership to a woman because of her masculine behavior.

'90

Cincinnati museum director Dennis Barrie is charged with obscenity for booking a traveling exhibit of works by Robert Mapplethorpe that includes homoerotic photos. He is acquitted.

Massachusetts drops the hierarchical evaluation system that kept gays and lesbians from becoming adoptive and foster parents.

The Americans With Disabilities Act, which prohibits AIDS-based discrimination, is signed into law.

The Supreme Court refuses to hear an appeal of the dismissal of Miriam Ben-Shalom, discharged from the Army for saying she is a lesbian.

In *Alison D.* v. *Virginia M.,* the New York State supreme court rules that the former lesbian partner of a child's biological mother has no legal basis to pursue visitation rights. It's one of the first lesbian-versus-lesbian child-custody cases to make it to a state appellate-level court.

In *In re Adoption of Charles B.,* the Ohio supreme court voids a lower court's ruling that adoption by a gay man could never be in the best interest of a child.

In *In re Estate of Cooper,* a Kings County, N.Y., surrogacy court rules that a same-sex domestic partner cannot be considered a spouse for inheritance purposes, at least in New York State.

'91

In *In re Guardianship of Sharon Kowalski,* the Minnesota court of appeals awards guardianship of a woman severely injured in an automobile accident in 1983 to her lesbian lover over the objections of the woman's parents. Kowalski's lover, Karen Thompson, had demonstrated she was better able to care for Kowalski, the court ruled.

REUTERS-BETTMAN

Thomas

Judge Clarence Thomas is confirmed as a Supreme Court justice after charges that he sexually harassed a female subordinate bitterly divide the nation.

In *Barnes* v. *Glen Theatre Inc.,* commonly known as the Kitty Kat Lounge case, the Supreme Court OK's Indiana's ban on nude dancing.

In *Soroka* v. *Dayton Hudson Corp.,* a California appeals court rules that requiring job applicants to take psychological tests that include questions about sexual orientation violates their privacy rights.

In *Schowengerdt* v. *United States,* a federal appeals court refuses to reinstate a civilian defense worker who was fired after supervisors found swinger magazines and evidence of his bisexuality in his desk.

'92

Colorado voters pass Amendment 2, an addition to the state constitution that would repeal gay rights laws on the books in three cities and prohibit the enactment of such laws in the future. A similar statewide measure fails in Oregon. Implementation of the Colorado measure is delayed while it's challenged in the courts.

NGRA—once one of the nation's wealthiest gay groups but now more than $200,000 in debt—ceases operations.

Aileen Wuornos, said to be America's first lesbian serial killer, is sentenced to death in Florida.

Wuornos

Jeffrey Dahmer is convicted of raping, killing, and cannibalizing 15 young men and boys in Milwaukee.

In *In re Jacobson* the Supreme Court voids the child-pornography conviction of a Nebraska farmer who was ensnared by a federal sting operation.

In *Gay Men's Health Crisis* v. *Sullivan,* a New York supreme court judge strikes down a congressional ban on federal funding for AIDS education materials that explicitly discuss homosexuality.

'93

Trying to keep a campaign promise, President Clinton announces days after his inauguration that he'll lift the Pentagon's ban on gay and lesbian service personnel. He immediately hits a congressional brick wall, waffles for six months, and finally announces the "don't ask, don't tell" plan, a so-called compromise that differs little from the original ban.

The Hawaii supreme court sparks hope that it will approve same-sex marriages when it rules that a lower court improperly dismissed a lawsuit challenging the state's policy of denying marriage licenses to gay and lesbian couples.

Prosecutors in *California* v. *Menendez,* the year's hottest murder trial, try desperately to introduce evidence regarding codefendant Erik Menendez's sexual orientation into his parricide trial. They fail but assert in closing arguments that Menendez and his brother killed their parents because they disapproved of Menendez's homosexuality. Jurors fail to reach a verdict.

KEN LEVINE/REUTER

Menendez

'94

DON LONG/KRTN

Bottoms

An appellate judge in Virginia voids a lower-court ruling that stripped lesbian Richmond resident Sharon Bottoms of custody of her 2-year-old child because of her sexual orientation.

The first lawsuits challenging the constitutionality of the "don't ask, don't tell" policy are filed.

A bill that would prohibit antigay employment discrimination is introduced in the House of Representatives.

Openly lesbian San Francisco police officer Stephanie Thorne announces a planned sex change, making her the city's first openly transsexual cop.

A gay man in Philadelphia accuses Chicago Roman Catholic cardinal Joseph Bernardin of molesting him as a child but later recants.

John Wayne Gacy, convicted of raping and killing 33 young men and boys in the '70s, is executed in Illinois.

Superior court judges void gay rights ordinances in Atlanta and Minneapolis.

Court session was calm before the storm

Continued from page 1

what some Gay legal activists identified as the most important decision did not involve Gays. Instead, it addressed the question of whether a prosecutor can reject a potential juror on the basis of gender. The case, *J.E.B. v. Alabama*, was appealed by a man who was fighting a paternity suit. In ruling for the man, the Supreme Court decried "intentional discrimination ... particularly where ... the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes ...." It expressed concern about the "real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations." And it argued that while some forms of discrimination have "never reached the level of discrimination against African Americans," the courts need not determine which groups have suffered more in recognizing the existence of discrimination.

The decision stood out to some for a number of reasons. First, noted Evan Wolfson of the Lambda Legal Defense and Education Fund, the language in *J.E.B.* "reinforces the importance of probing the stereotypes," which are at the root of much anti-Gay discrimination. And second, according to Chai Feldblum, a Lesbian professor of law at Georgetown University Law Center, the *J.E.B.* decision "rejects the approach of comparing oppressions."

The abortion connection

Also of potential importance to Gays — though not specifically Gay in content — were four cases surrounding abortion protests. In one, *National Organization for Women v. Scheidler*, the high court said that certain tactics used by antiabortion protesters could be prosecuted as violating racketeering laws because the tactics could force the closure of abortion clinics. In the second, *Madsen v. Women's Health*, the court said that a judge could impose some limits on protest tactics that some might consider offensive or disruptive.

Both cases found Gays split. For instance, in *NOW v. Scheidler*, the Lambda Legal Defense and Education Fund took the side of NOW, while the Gay and Lesbian Task Force of People for the Ethical Treatment of Animals sided with the antiabortion protesters. The PETA group was concerned that the racketeering laws might be turned against Gays protesters and others with "unpopular causes," while Lambda argued that groups can protest for unpopular causes without resorting to such tactics as arson, murder, and mob violence.

The Supreme Court refused the remaining two abortion protest cases — one, *Operation Rescue v. Women's Health*, which also tested limits on protests outside abortion clinics, and one, *Capital Area Right to Life v. Downtown Frankfurt*, from an antiabortion group which tried to operate a booth at a pumpkin festival in Kentucky. The festival organizers refused to allow the group to set up its booth to distribute plastic models of fetuses in little baskets, saying that its tone was incompatible with the "fun and entertainment" atmosphere of the pumpkin festival.

The Supreme Court issued decisions in only two other cases of interest to Gays. In *Schiro v. Farley*, it upheld the death penalty for a man convicted of brutally raping and killing a Lesbian in Indiana. And, in *Farmer v. Brennan*, it ruled that, in some circumstances, placing a male-to-female transsexual prisoner into a male prison population would constitute cruel and unusual punishment, in violation of the constitution. The high court sent the case back to the district court level to determine whether prison officials knew and disregarded the risk to the prisoner when they assigned her to a male population.

In almost all the other cases, the Supreme Court simply refused to review the appeals:

* In *Stassis v. Hartman* it refused to review an Iowa Supreme Court decision that declared that a man who had sex with a Lesbian was the father of the child and had to pay support;

* In *Allied War Veterans v. Irish-American Gays*, it refused to review a Massachusetts Supreme Judicial Court ruling that prevented the war veterans from excluding a Gay Irish contingent from Boston's annual St. Patrick Day parade;

* In *Crouch v. U.S.*, it refused to hear the plea of an HIV-infected prisoner who hoped to gain an early release on his 16-year sentence as a result of his illness;

* In *Bradley v. University of Texas*, it refused to hear the appeal of a hospital surgery technician who was reassigned out of the operating room after acknowledging to a Houston newspaper that he was HIV-infected;

* In *Welsh v. Boy Scouts of America*, it refused to review the case of a boy who was rejected for the Boy Scouts in California because he would not swear his allegiance to God;

* In *Doe v. CIA*, it refused to examine the case of a 20-year veteran covert employee of the CIA who was fired after voluntarily acknowledging he was Gay and that he was out to his family and friends; and,

* In *Jan Krc v. USIA*, it refused to hear a case of a foreign service officer who was fired from the U.S. Information Agency after acknowledging he was Gay.

The Supreme Court rejects the vast majority of appeals it gets, so Gay legal activists do not read too much into those rejections.

Nevertheless, the high court also refused, in a way that benefited Gays, to hear appeals surrounding two anti-Gay initiatives — one in Tampa, Fla., and the other from Colorado. Suzanne Goldberg of Lambda Legal Defense and Education Fund said it would have been "very surprising" to have the Supreme Court take either of those cases at the time. The Tampa challenge was based on Florida election law details that were "very procedural" in nature, said Goldberg, and the Colorado case challenged a preliminary injunction.

by Kristi K. Gasaway

Chai Feldblum, a law professor at Georgetown, said the *J.E.B.* decision "rejects the approach of comparing oppressions."

But the court did choose to get involved in the preliminary stage of a military fight. In *U.S. v. Meinhold*, it granted the Clinton administration's request for an emergency order to block a California federal judge's ruling that stopped the Department of Defense from enforcing its ban on Gays in the military anywhere in the country.

"There's no doubt from this term that the Supreme Court is very deferential both to the military and to the government as an employer," said William Eskridge, a Gay professor of law at Georgetown University Law Center. He was referring to its action in *Meinhold*, as well as its rejection of appeals in the CIA and USIA cases and others. But in granting an emergency order to the government in the *Meinhold* case, said Eskridge, the Supreme Court was probably just "buying time" before having to make a ruling on either the old military ban or the so-called new one, fashioned under the Clinton administration.

"I wouldn't be critical of that," said Eskridge, who, like a number of other Gay legal activists, believe Gays should steer clear of the Supreme Court as much as possible, particularly on the military ban.

Steering clear of the Supreme Court has been the conventional wisdom among most Gay legal activists since 1986, when the high court voted 5 to 4, in *Bowers v. Hardwick*, to uphold laws prohibiting sodomy between consenting same-sex couples in the privacy of their own homes.

"This is a term thoroughly dominated by conservatives," said Eskridge. "It's not a good time to take any Gay or Lesbian issue to the Supreme Court."

Be that as it may, the most notable aspect of the 1993-94 term for Bill Rubenstein, head of the ACLU's National Lesbian and Gay Rights Project, was the composition of the bench—it changed. Ruth Bader Ginsberg replaced Byron White, and the Senate is expected to easily confirm Stephen Breyer within the next week to replace Harry Blackmun.

"The potential positions those two take far outweigh any decision that came down this session," said Rubenstein. Unfortunately, Rubenstein and other Gay legal activists feel they have little sense of how the two new justices will weigh in on Gay issues.

But the 1993-94 term was also one, said Arthur Leonard, a Gay professor at New York Law School and author of the monthly *Lesbian and Gay Law Notes* publication, that ran "true to form" with the previous benches.

The Supreme Court, he said, has always been "reluctant to take on Gay issues. It acted on only two of six specifically Gay cases this term, and both of those were emergency order requests which required response. And that's been the most action it's taken on Gay cases in 10 years, when it began rendering a string of decisions that had considerable impact on Gay civil rights litigation and the movement. In the 1984-85 term, the Supreme Court coughed up a tie vote in *Oklahoma v. National Gay Task Force* which had the effect of striking a state law which called for the firing of teachers who advocated or encouraged homosexuality. The following term, the high court upheld the Georgia sodomy law in *Hardwick*. In the next term, it ruled that the U.S. Olympic Committee could prohibit the Gay Games from calling itself the Gay Olympics. Prior to that three-year rush, the high court had taken no meaningful action on a Gay-specific case for seven years.

But over the next three years, the Supreme Court is expected to face another wave of Gay cases that many believe it will be compelled to act on — cases involving the anti-Gay initiatives around the country, Gays in the military, and same-sex marriages. As Gay legal activists near that point, said Beatrice Dohrn, legal director for the Lambda Legal Defense and Education Fund, they are becoming more and more "ambivalent" about the strategy of staying away from the Supreme Court.

"We've reached a point," said Dohrn, "where Gay rights and Gay people are the topic of discussion in the nation. I think this has the effect ... of bringing the court along eventually. The court is not usually way out in front on these issues ... [and] it may be uncomfortable imposing huge social change on society. But," said Dohrn, "it's also uncomfortable going against something happening in American society. So as the momentum shifts, the likelihood is the court will shift, too."▼

Part II: As Gay legal activists tape up for their next major bouts in the Supreme Court, some fear the Gay community and its political machinery may not yet be fit enough for the fight, and may end up costing the movement any points it scores in the courtroom.

Viewpoint

High court's ruling could be a mixed blessing

Arlene Zarembka

The Supreme Court's April decision in *J.E.B v. Alabama el rel T.B.* was a crucial victory for sex discrimination litigation under the Equal Protection Clause. For the first time, a clear majority of the Supreme Court (6-3) treated sex discrimination by the government with almost the same disdain it accords to race discrimination by the government. But this bellwether decision may prove a mixed blessing for litigation challenging government-supported discrimination based on sexual orientation.

The court ruled in *J.E.B.* that sex discrimination by government attorneys in jury selection is a violation of the Equal Protection Clause. In a paternity action, the state used virtually all of its peremptory challenges to strike nine out of 10 men from the jury pool. (Peremptory challenges allow attorneys to strike prospective jurors without having to give any reason.) The defendant objected, arguing that the State's strikes against men were solely based on sex, and therefore violated the Equal Protection Clause. The trial judge overruled the defendant's objections, an all-female jury found him to be the father of the child, and the judge ordered him to pay child support.

The prospects for winning the *J.E.B.* case had not been especially bright. Two of the last three court decisions concerning government-authorized sex discrimination had found no violation of the Equal Protection Clause. While the court had, in 1982, struck down a Mississippi statue that excluded men from a state-supported nursing home as violating the Equal Protection Clause, it had upheld government policies that clearly discriminated based on sex in two other cases in 1981. In one of these cases, the Court had upheld a statutory rape law that made only males criminally libel when an unmarried male and an unmarried female, both under the age of 18, had sexual intercourse. In the other case, the Court had upheld the draft registration law requiring only males to register for the draft.

The tradition of allowing peremptory challenges in jury selection is at least as well-entrenched as the all-male draft. Moreover, attorneys commonly use stereotypes in jury selection (the great Clarence Darrow regularly used stereotypes about all sorts of groups in deciding who to strike from a jury). Thus, the Court easily could have used the *J.E.B.* case to carve out yet another exception to the Equal Protection principle. But it did not.

Instead, the Court harshly condemned the use of sex-based stereotypes by government agents. It followed previous rulings holding that use of racial stereotypes to strike jurors violates the Equal Protection Clause. It referred to state-sponsored gender discrimination that perpetuates "invidious, archaic, and overbroad stereotypes about the relative abilities of man and women" as especially violating the Equal Protection Clause. It wrote that it was "axiomatic" that "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause."

Justice Blackmun's majority opinion condemning sex-role stereotyping was so strong that it should lead the Court to strike down virtually all sex-based discrimination by the government. Joined in the opinion by Justices Stevens, O'Connor, Souter, and Ginsburg (Justice Kennedy wrote an opinion concurring in the judgment), Justice Blackmun wrote eloquently about the harm that "the State's participation in the perpetuation of invidious stereotypes" causes:

Justice Blackmun's majority opinion condemning sex-role stereotyping was so strong that it should lead the Court to strike down virtually all sex-based discrimination by the government.

"Discrimination in jury selection, whether based on race or gender, causes harm to litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process ...

"Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system ... It reaffirms the promise of equality under the law — that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy ... When persons are excluded from participation in our democratic process solely because of race or gender, this promise of equality dims ...."

Justice Blackmun's condemnation of government perpetuation of group stereotypes seems to auger well for challenges to anti-Gay laws. So does his inspiring language about the Equal Protection problems with excluding people from participation in the democratic process. The legal challenges against Colorado's Amendment 2 and Cincinnati's Issue 3 come quickly to mind.

The difficulty, however, is that Justice Blackmun went out of his way to state that the *J.E.B.* decision does not apply to those characteristics that are not subject to heightened or strict scrutiny by the Court. He wrote that lawyers may continue to use peremptory challenges to remove "any group or class of individuals normally subject to 'rational bias' review." Government discrimination based on sexual orientation has not yet been subjected to heightened scrutiny by the Supreme Court. Thus, Justice Blackmun's language implicitly approving bias in the exercise of peremptory challenges against any groups that are not included in higher levels of scrutiny could haunt future challenges to anti-Gay laws. Indeed, the Court might find that government discrimination based on group stereotypes is acceptable, so long as it is not the type of discrimination that is subject to higher scrutiny by the Court, and is not, in the Court's thinking, totally irrational.

If, in the future, the Supreme Court limits its interpretation of the *J.E.B.* decision to the question of peremptory challenges in jury selection, then the *J.E.B.* case will not hurt challenges to anti-Gay laws. But if the court treats *J.E.B.* as justifying government laws or actions that are based on stereotypes, so long as the stereotypes do not concern characteristics subjected to higher scrutiny, then *J.E.B.* will be a serious blow to the quest for equal protection for all.

Arlene Zarembka a Gay civil rights attorney in Missouri where she is president of Missouri Pro-Vote and a member of the legal team that is challenging the anti-Gay initiative in Missouri.

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Another yank in tug-of-war over Cammermeyer

by Lisa Keen

A federal appeals court panel late yesterday rejected a request from the Clinton administration that Col. Margarethe Cammermeyer be kept out of the military while her case in on appeal.

The Clinton request represents the latest yank in an increasingly passionate tug-of-war over the military's policies banning Gays from the armed forces and the plight of the highest-ranking officer to be given the boot over such policies. And it is a struggle that has pitted Gay activists against President Clinton, who only a year ago switched sides — from supporting an end to the ban during his election campaign to supporting a bill to codify the ban into law.

"I don't believe the leadership of the Department of Justice's heart and mind is behind this decision," said Michelle Benecke, co-director of the Servicemembers Legal Defense Network. "But they are taking steps that they perceive to be politically necessary. I don't think [Attorney General Janet] Reno is a homophobe, but I think she will aggressively pursue this case because the administration has made a political decision to do so. DOD has pushed them into a position where they be-

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lieve it's a political necessity to do so. But that is not to say that [the Clinton administration] is not responsible. I hold them responsible for making that decision."

"What it really shows is that this new policy was not a good faith compromise, it was a capitulation to the pro-ban forces," said Gregory King, communications director for the Human Rights Campaign Fund. "They basically are enforcing the ban more strenuously than they would have us believe that they're doing .... Even Dick Cheney [Defense Secretary under President Bush] didn't ask people to pay back their scholarships, yet the minute the new people came in, they reverted back to the old policies."

King and others said many people believe that the administration is reluctant to express disagreement with Senate Armed Services Committee Chair Sam Nunn (D-Ga.) or the military "so," said King, "the President's commitments are falling through the cracks."

But at a fundraiser for the Servicemembers Legal Defense Network Wednesday night in D.C., Cammermeyer herself was reluctant to blame the Clinton administration.

"I happen to be pro-Clinton," Cammermeyer told a gathering of about 70 Network supporters. "I think he wasn't as powerful as he thought he was."

The latest go-round intensified last month when a federal judge in Seattle ruled in Cammermeyer's case that a person's homosexual orientation is not "reliable evidence" that he or she will engage in homosexual activity. Cammermeyer, the highest-ranking servicemember to challenge the military's ban on Gays, was discharged after she was asked about her sexual orientation in April 1989 during a security check for a top secret clearance. She answered honestly, that she is a Lesbian, but there was no evidence that she ever engaged in any homosexual acts.

In his decision, Judge Thomas Zilly (a Reagan appointee) said that Cammermeyer's "acknowledgment of her lesbian orientation itself is not reliable evidence of her desire or propensity to engage in homosexual conduct."

"...Thus, to the extent the Government's policy is based on the unfounded presumption that servicemembers with a homosexual orientation will engage in proscribed homosexual conduct, the policy is not rationally based."

Zilly's opinion declared the military's policy and its application to Cammermeyer were in violation of the constitutional guarantee of equal protection and to due process. He ordered that she be reinstated to her position with the Washington State National Guard and that her record be cleared of any mention of her sexual orientation.

Much to the chagrin of Gay legal activists, the Clinton administration immediately filed a motion asking the court to postpone enforcement of its order until the case winds its way through the appeals courts. On June 24, Zilly denied that motion, saying the government had failed to "make a strong showing that it is likely to succeed" on appealing the merits of the case. The Clinton administration then filed an appeal of that ruling to the 9th Circuit, arguing that even temporary reinstatement of Cammermeyer during the appeal "will risk a serious and disruptive impact on the military by placing in a position of senior leadership an officer who has not occupied that position for two years...."

Ironically, Cammermeyer noted at Wednesday's reception that following Zilly's original June 1 decision, her former unit telephoned her with congratulations and said "we're waiting for you."

Mary Newcombe, an attorney representing Cammermeyer on behalf of Lambda Legal Defense and Education Fund, said she "can't see any difference" between how the Clinton administration is opposing the Gay military cases and how previous administrations have opposed them.

"Having litigated these cases prior to [Clinton's election in] 1992 and now, I can't tell any difference in the government's position. Their litigation posture is identical as before, and just as aggressive."

Keith Boykin, a spokesperson for the White House, had no comment.

Meanwhile, although Cammermeyer's case is among the most high-profile of Gay military lawsuits, a number of other servicemembers have important challenges in various courts around the country. One of those servicemembers, Navy Lt. Tracy Thorne, is scheduled to face a board of inquiry Monday, July 11, at the Washington Navy Yard, to evaluate his status under the military's "new" policy concerning Gays. Navy Lt. (jg) Dirk Selland is scheduled for a board of inquiry under the new policy Tuesday, July 12, in Norfolk.

Most Gay activists say the new policy, which Clinton endorsed and Congress codified last summer, is essentially identical to the old policy. Benecke says her group is helping about 130 servicemembers who are under seige currently because of the ban. ▼

LEGAL BRIEFS

MONTANA SODOMY SUIT BOOSTED: A state district court judge in Montana last week refused to dismiss a lawsuit challenging the state's sodomy law, saying that, even though the state is not enforcing the statute, it poses a threat to Gays. The judge said the sodomy law "could certainly be said to foster" negative reactions towards Gay people "by condoning the idea that homosexuality is criminal and thus in some way immoral." Three Lesbians and three Gay men filed the lawsuit last December, charging that the sodomy law violates the state's constitution's guarantee to equal protection, right to privacy, and individual dignity. The group of plaintiffs is being represented by the Northwest Women's Law Center, which has also been active in challenging ballot initiatives in Washington state, and by the Montana Gay organization called PRIDE.

WITCHCRAFT WINS IN SCHOOL: A federal appeals panel last month ruled that a California public school program which includes discussion of witchcraft does not violate the First Amendment provision which prohibits government from advancing or opposing a particular religious practice. The parents of two children in a school district near Sacramento, Douglas and Katherine Brown, said an elementary level program did just that by having students role-play witches and sorcerers.

In a unanimous decision released June 15, Judge Diarmuid O'Scannlain (a Reagan appointee) said the program reflects "a broad range of North American cultures and traditions" and that the panel would "assume, without deciding, that [witchcraft] is religion for the purpose of this appeal." The program in question, wrote O'Scannlain, "was not authored or adopted for the purpose of aiding witchcraft," does not endorse witchcraft, and "does not use any actual witchcraft ritual. The use of exercises that coincidentally resemble practices of witchcraft, therefore does not teach the religion of witchcraft even indirectly." O'Scannlain was joined in the opinion by Reagan appointee David Thompson and Carter appointee Warren Ferguson. — Lisa Keen