PROCEDURE AND STRATEGY IN GAY RIGHTS LITIGATION

THOMAS F. COLEMAN

This morning we heard Cary Boggan, chairperson of the A.B.A. Section of Individual Rights and Responsibilities, discuss the right to privacy as a matter of substantive constitutional law. Again this afternoon, Professor David Richards spoke about the right to privacy as a matter of substantive law. I too will speak about constitutional law, but from a different perspective.

I will focus on some practical aspects involving constitutional litigation—strategy and procedure. I would like to do this by analyzing the way in which two important sodomy cases have been handled within the past few years. Each of those cases involved an attempt to have the federal courts recognize the principle that private sexual conduct between consenting adults is constitutionally protected. Although each case was handled differently, each ultimately was rejected by the United States Supreme Court. These cases had the same objective—a recognition of constitutional right to privacy for consenting adult behavior. The different procedural tactics and strategy used in these cases, however, is worthy of our closest attention and analysis.

In the first case, *Buchanan v. State*,[1] the defendant was prosecuted under the Texas sodomy law. Rather than exhausting his remedies in the state courts by facing trial and then appealing to the state court of appeals after conviction, the defense filed a lawsuit in federal district court. The federal court was requested to issue an injunction against the pending state prosecution and to declare the Texas sodomy law unconstitutional. The then Texas sodomy law prohibited all forms of sodomy, even if the sexual acts were performed in private between consenting adults. The law also prohibited both homosexual and heterosexual sodomy even if performed between husband and wife. Consequently, Mr. Buchanan was not the sole plaintiff in his federal lawsuit. Others were granted permission to intervene as plaintiffs. These intervenors included a heterosexual married couple, a heterosexual unmarried couple, and a homosexual couple. These couples claimed that this law infringed on their right to privacy and they too requested injunctive and declaratory relief. In this case, *Buchanan v. Batchelor*,[2] a three-judge district court declared the Texas sodomy law unconstitutional and granted the requested injunctive relief. The State of Texas then took a direct appeal to the United States Supreme Court in *Wade v.*

* Partner, Coleman & Kelber, Los Angeles, California. Co-chairperson, National Committee for Sexual Civil Liberties. Publisher and Managing Editor, *Sexual Law Reporter*.

1. 471 S.W.2d 401 (Tex. Crim. App. 1971).
2. 308 F. Supp. 729 (N.D. Tex. 1970).

Buchanan.[3] The Supreme Court vacated the judgment and remanded the case to the district court, with directions to reconsider its injunction against this pending state prosecution in light of a recent pronouncement by the Supreme Court regarding federal abstention, in *Younger v. Harris*.[4] The *Younger* case basically held that, except in the rarest of circumstances, the federal courts should not interfere with pending state prosecutions. The defendant must first exhaust his state remedies of trial and appeal before seeking federal relief. Accordingly, the injunction was lifted, the state prosecution resulted in a conviction, and the Texas Court of Criminal Appeals affirmed the conviction.[5] The defendant petitioned the United States Supreme Court for a writ of certiorari, and on February 22, 1972, the petition was denied.[6]

In the second case, *Doe v. Commonwealth's Attorney*,[7] an entirely different strategy and procedure was used by the plaintiffs. The plaintiffs were residents of Virginia. Rather than disclosing their identity, they used fictitious names for this litigation. They claimed that they were practicing homosexuals and that they engaged in sexual acts in private with other consenting adults. They said they feared possible prosecution under the Virginia sodomy law, which they argued was an unconstitutional violation of their right to privacy. The plaintiffs asked a three-judge federal district court for injunctive and declaratory relief. The majority opinion of that court upheld the statute and recognized the right of the state to regulate private homosexual activity. It should be noted that heterosexual intervenors were not used in this case, and only one expert witness, a gay activist, testified before the district court.

Rather than petitioning the Supreme Court for a writ of certiorari, the plaintiffs *appealed* to that Court from the adverse judgment of the district court. The Supreme Court refused to grant plenary consideration to the appeal, summarily affirming the judgment of the district court.[8]

At this point, we should consider the significant difference between petitioning the Supreme Court for a writ of certiorari, and appealing to that Court. In *Hicks v. Miranda*,[9] the Supreme Court discussed the difference between a denial of certiorari and a summary disposition of an appeal. The Court held that if a federal constitutional question is properly presented and if it is within the Court's appellate jurisdiction under 28 U.S.C. § 1257(2), the Court may not avoid adjudicating the case on the merits, as would be true had the case been brought to the Court under its certiorari jurisdiction. Although the Court need not grant plenary consideration to every appeal, the Court must deal with every such appeal on the merits. In *Hicks*, the Supreme Court stated that lower courts are bound by summary decisions of the Supreme Court until such time as the Court informs them that they are not.

---

3. 401 U.S. 989 (1971).
4. 401 U.S. 37 (1971).
5. Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971).
6. Buchanan v. Texas, 405 U.S. 930 (1972).
7. 403 F. Supp. 1199 (E.D.Va. 1975).
8. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976).
9. 422 U.S. 332 (1975).

So what does the summary affirmance by the Supreme Court in *Doe v. Commonwealth's Attorney* actually mean? First, it means that the United States Supreme Court was not ready to give plenary consideration to the issues presented in the appeal. Second, it means that the Supreme Court agreed with the result, although not necessarily the reasoning of the district court. Third, it seems that, under the doctrine of *Hicks v. Miranda*, lower courts are bound by that summary affirmance, at least with respect to the issues which were actually decided by the district court. *Doe* would not be binding as to issues that were neither raised nor discussed by the district court in its opinion. The Supreme Court has stated, despite the existence of the *Doe* affirmance, that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults."[10] The Court could have dismissed the appeal for want of a substantial question, thereby branding the constitutional issue presented to it as insubstantial, but it did not. Apparently, the Court was not yet ready to tackle these controversial questions by granting plenary review, and so it took the least drastic measure that it could—summary affirmance.

It seems that several lessons can be learned about securing gay rights through constitutional litigation by analyzing the strategy and procedures used in the *Buchanan* case and in the *Doe* case. I would like to offer some suggestions regarding the handling of future cases based upon my analysis of these two cases. But before I do that, I would like to give you some additional information about the track record of the United States Supreme Court in cases involving sexual civil liberties issues, such as private sexual behavior, employment rights of persons with unconventional sexual lifestyles, and the rights of gay activists.

I have reviewed nineteen cases involving such issues which have eventually found their way to the United States Supreme Court during the past twelve years. In only three cases did the Court grant plenary consideration and write an opinion.[11] In the remaining cases, the Court either denied certiorari, or summarily disposed of an appeal. Reviewing the votes of the justices may give us a hint as to the current position of members of the Court, and the prospects of a favorable ruling in the near future. Although this may be an oversimplification, I have attempted to categorize any particular vote as being either positive or negative with respect to sexual civil liberties.

Here is what I have found. Justices Brennan and Marshall each have cast seven positive votes. Justices Stevens and Stewart each have cast two positive votes. Justice Powell has cast a positive vote only once, and that was at the request of the Solicitor General. Justices Rehnquist, White, and Burger have never cast a positive vote; in fact, they have joined in at least two rather vigorous dissents, and have even opposed a request by the Solicitor General to summarily reverse an anti-gay lower court ruling. Justice Blackmun voted favora-

10. Carey v. Population Services Int'l, 431 U.S. 678, 694 n.17 (1977). *But see id.* at 718 n.2 (Rehnquist, J., dissenting).

11. Rose v. Locke, 423 U.S. 48 (1975); Wainwright v. Stone, 414 U.S. 21 (1973); Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967).

bly only once, and that too was at the request of the Solicitor General. He also voted negatively once, along with Rehnquist and Burger, in what may have been an attempt by the conservative members of the Court to put a halt to the growing body of federal case law which has been favorable to gay student organizations.

From this tally, I feel that, at this time, we can count on two solid votes on the Court—Justices Brennan and Marshall. Justice Stevens might rule favorably given the right factual situation. Justices Stewart and Blackmun seem to be borderline. At this time, I do not think we can put much hope in Justice Powell, and I think that Justices Burger, White, and Rehnquist are against gay rights or sexual civil liberties.

From this information about the Supreme Court and from an analysis of the *Buchanan* and *Doe* cases, along with my experiences over the past several years in handling sexual civil liberties litigation (in large measure at the appellate level) and publishing the *Sexual Law Reporter*, I would like to offer some suggestions.

Certiorari v. Appeal

In sexually-oriented cases, there appears to be no good reason at this time to appeal to the Supreme Court from an adverse ruling of a lower court. If the Court wants to take a case, it may do so by granting a hearing on a petition for a writ of certiorari. We are not going to force the Supreme Court to give plenary consideration to a case simply because an appeal was filed instead of a petition for certiorari. Since a summary disposition of an appeal is a decision on the merits, but a denial of certiorari is not, it seems that litigants should use the Court's certiorari jurisdiction whenever possible. This will avoid foreclosing lower courts from developing constitutional issues because of a plethora of summary dispositions of appeals to the United States Supreme Court. We already have enough summary dispositions by that Court on sexual civil liberties issues without adding to this problem any further.

Anonymous Plaintiffs

Although there may be instances where the use of anonymous plaintiffs would be appropriate, litigants should be cautious about using this approach. Many judges do not seem to be very sympathetic to a case when it seems to be an attempt to secure an advisory opinion from a court. An anonymous plaintiff seeking declaratory relief against potential future prosecution may not receive the same treatment by a judge as a person who has actually been prosecuted, or has actually suffered some demonstrable damage. Judges avoid serious consideration of hypothetical cases or controversies. The use of an anonymous plaintiff, however, may be appropriate where a person has suffered actual harm, but further harm would result from being named as a plaintiff as a matter of public record. For example, a teacher who wants to challenge a statute restricting the rights of gay teachers may win a lawsuit at the expense of irreparable social and economic harm if he were to be named as a plaintiff. A court could well understand the need to use a ficticious name under such circumstances.

Using Heterosexual Cases

One goal of gay activists is to have the courts recognize that private homosexual acts between consenting adults are constitutionally protected. Reaching that goal without major setbacks and without undue delay is certainly desirable. However, we must also consider the present state of the law with respect to heterosexual conduct when we develop our strategy in securing gay rights. The United States Supreme Court has not yet declared that private heterosexual conduct is constitutionally protected. Is it likely that the Supreme Court would rule favorably in a gay case before it acknowledged such a constitutional right for heterosexual conduct? This question is even more sobering when we consider the current make-up of the Supreme Court.

No state supreme court has yet declared that private homosexual conduct is constitutionally protected. The highest courts of two states, however, have recognized sexual privacy rights in the context of heterosexual cases.[12] One of the cases, *State v. Saunders*,[13] a New Jersey Supreme Court decision, became the basis some two years later for the recognition of the sexual privacy rights of homosexuals by an intermediate New Jersey appellate court.[14] In short, it is often easier for judges to create precedent in a heterosexual case, and then for gay rights to be recognized shortly thereafter.

Often, a lawyer may not choose a heterosexual case to pave the way because a homosexual case presents itself first, and the client needs representation. The client simply cannot wait for the rights of heterosexuals to be decided first. In such a situation, I would suggest using heterosexual intervenors or *amici* such as was done in the *Buchanan* case. This affords a judge an opportunity to decide the rights of both heterosexual and homosexual persons at the same time.

Creating a Record for Appeal

When it comes to litigation involving gay rights, we must recognize that judges are human beings and have their own prejudices and attitudes concerning homosexuality. They may adhere to many of the myths concerning homosexuals; *e.g.*, gays are child molesters, gays are oversexed, gays are mentally ill, homosexuality is unnatural.

Expert witnesses should be used, whenever possible, to educate trial judges. Simply presenting legal arguments, no matter how eloquent, usually will not be enough. The time to create a record for a possible appeal is at the trial court level. Appellate courts do not hear testimony from expert witnesses for the first time on appeal. Furthermore, appellate courts are usually bound by the factual record created in the trial court. Having expert witnesses testify in the trial court enables one to argue from that testimony in an appellate brief. A transcript of such expert testimony may then be considered by the reviewing court as a part of the record on appeal.

---

12. State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977); State v. Pilcher, 242 N.W.2d 348 (S. Ct. Iowa 1976).

13. 75 N.J. 200, 381 A.2d 333 (1977).

14. State v. Ciuffini, 164 N.J. Super. 145, 395 A.2d 904 (Super. Ct. App. Div. 1978).

Further duplication of the *Doe v. Commonwealth's Attorney* approach should be avoided. The testimony of one gay activist, no matter how well intended, is just not the same as testimony from a battery of experts from a variety of disciplines. We should remember that the record created in a trial court may very well be the record that is presented to the United States Supreme Court when it is requested to give plenary consideration to a gay case. Do we want that record to be devoid of expert testimony?

State Courts and State Grounds

With decisions of the United States Supreme Court in cases such as *Younger v. Harris*, limiting intervention by federal courts in pending state prosecutions, and *Stone v. Powell*,[15] restricting collateral attacks on convictions in state courts, litigants are being forced to pay more attention to the state courts as a forum for raising federal constitutional issues. Also, with the current make-up of the Supreme Court, it is likely that substantive federal constitutional protections will be very slow to expand beyond their current scope. As a result of these procedural and substantive considerations, litigants should consider using state constitutional provisions for attacking unfair statutes which regulate sexual behavior or speech. The United States Supreme Court has acknowledged that states are free to confer more freedoms on their citizens under their state constitutions than are currently afforded under the federal constitution. A decision concerning sexual privacy rights which is decided by a state court under *both* state and federal constitutions, as was done by the New Jersey Supreme Court in *State v. Saunders*,[16] insulates that decision from reversal by the United States Supreme Court. The doctrine of "adequate and independent state grounds" was expounded by Mr. Justice Brennan in *Henry v. Mississippi*[17] when he stated, "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds even where these judgments also decide federal questions."[18]

It is suggested that attorneys analyze state constitutions very closely to see what additional protections may be available under them. Furthermore, attorneys should avoid raising only federal constitutional provisions if there may be a corresponding state protection which applies. This will give a state court the option of deciding the case strictly on the state constitutional provision or on both state and federal grounds.

Priorities and Test Cases

Appealing to the United States Supreme Court from a judgment of a state supreme court that refused to recognize a constitutional right for same-sex marriages seems to be putting the cart before the horse.[19] When it comes to cases

15. 428 U.S. 465 (1976).
16. 75 N.J. 200, 381 A.2d 333 (1977).
17. 379 U.S. 443 (1965).
18. *Id.* at 446.
19. Baker v. Nelson, 409 U.S. 810 (1972), *dismissing appeal from* 291 Minn. 310, 191 N.W.2d 185 (1971).

involving marriage or child custody, the Supreme Court is very unlikely to recognize the rights of gay persons, at least at this time. When it comes to this area of the law, the Supreme Court will probably follow the popular trend rather than take a leadership role. An officer of the Supreme Court told my law associate recently that the Court was more interested in what state legislatures were doing in this area than what state courts were doing.

After the Supreme Court has recognized sexual privacy rights or first amendment rights of gays, it is more probable that other rights will be recognized. We should provide the Court with opportunities to grant plenary consideration in cases involving private sexual behavior or freedom of speech and association before seeking plenary review of more sensitive areas.

I suggest that one of our best chances for a favorable decision by the Supreme Court would be in a gay student organization case. The federal courts have developed a significant body of progressive decisions in cases involving the right of gay student groups on state university campuses to organize and receive university recognition.[20] If the Supreme Court were to take such a case for full review, our chances of obtaining a favorable ruling from that Court would be significantly greater than if the Court reviewed a gay case involving military or tax law. Even the conservative members of the Court are likely to vote for a full review of such a student case.[21]

What I have attempted to do today is to demonstrate that securing gay rights through constitutional litigation involves much more than merely having a grasp on substantive constitutional principles. The procedures and strategy used in each case are as important as the legal principles raised in briefs. Gay people have received little recognition of their constitutional rights. If we are going to secure that recognition in the near future, we must be more selective in our test cases, prepare our cases more thoroughly, use expert witnesses more often, and place more emphasis on state courts and constitutions.

Eventually, we will succeed in having the United States Supreme Court take a gay case, allow oral argument, and write an opinion. Whether that opinion is favorable or not to gay rights may depend, in large part, upon what cases we present to that Court and how thoroughly those cases have been prepared.

---

20. Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977), *cert. denied* 435 U.S. 981 (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Students Organization of Univ. of N.H. v. Bonner, 367 F. Supp. 1088 (D.N.H. 1974), *aff'd*, 509 F.2d 672 (1st Cir. 1974); Wood v. Davidson, 351 F. Supp. 543 (N.D. Ga. 1972).

21. *See* Ratchford v. Gay Lib, 435 U.S. 981 (1978) (Rehnquist, J., dissenting) *denying cert. to* Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977).