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Despite setbacks, sodomy law challenges 'on a roll'

by Lisa Keen

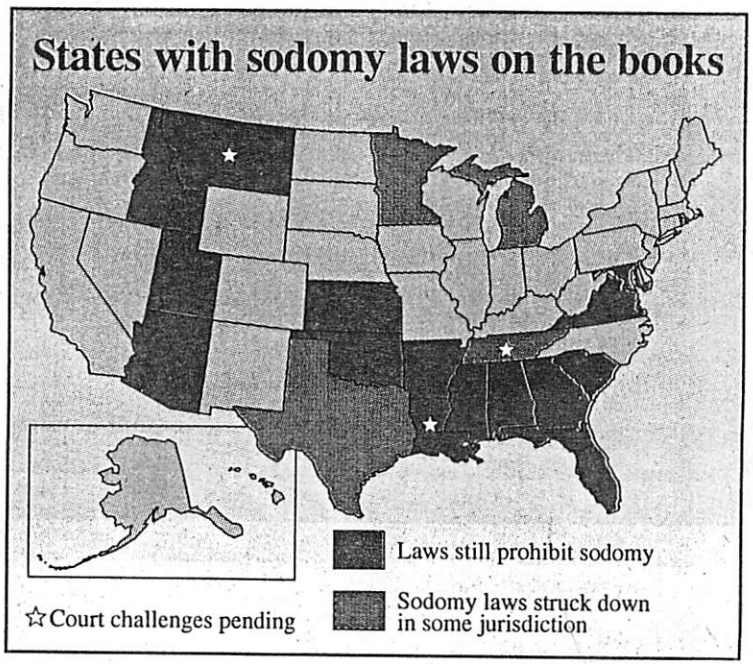
For the second month in a row, a state supreme court has upheld laws prohibiting sodomy between consenting adults in private. But these decisions have bucked a trend: Since 1986, when the U.S. Supreme Court upheld the constitutionality of laws prohibiting sodomy between consenting same-sex couples, five of 24 state sodomy laws have been struck, three have been significantly undercut, and three others are facing serious legal challenges. This past year, the legislature in another entertained a bill to repeal its sodomy law. In short words, of the 23 states and the District of Columbia which had sodomy laws in 1986, all but nine have suffered some kind of challenge.

Ironically, however, sodomy law challenges have held a particular urgency for Gay legal activists since the 1986 decision in *Bowers v. Hardwick*. Generally speaking, explained Matt Coles, head of the ACLU's National Lesbian and Gay Rights Project, prosecutions for sodomy are almost always in conjunction with a rape charge. But the laws still have detrimental and disproportionate impact on Gays — in two ways:

• they are used "collaterally" in such matters as child custody, explained Coles, where courts argue that a Gay man or Lesbian can't be a fit parent because, by virtue of being Gay, they are acknowledging that they break the sodomy law; and,

• they are used against men who go to public places to ask other men to engage in sex. Heterosexuals engage in the same sort of conversation "in singles bars all over America all the time," said Coles, without risking arrest.

For these reasons, said Coles, Gay legal groups still consider sodomy law challenges important, and a "reemerging priority."



The seeds of sodomy

Until the 18th Century, noted historian Dr. Theo van der Meer of

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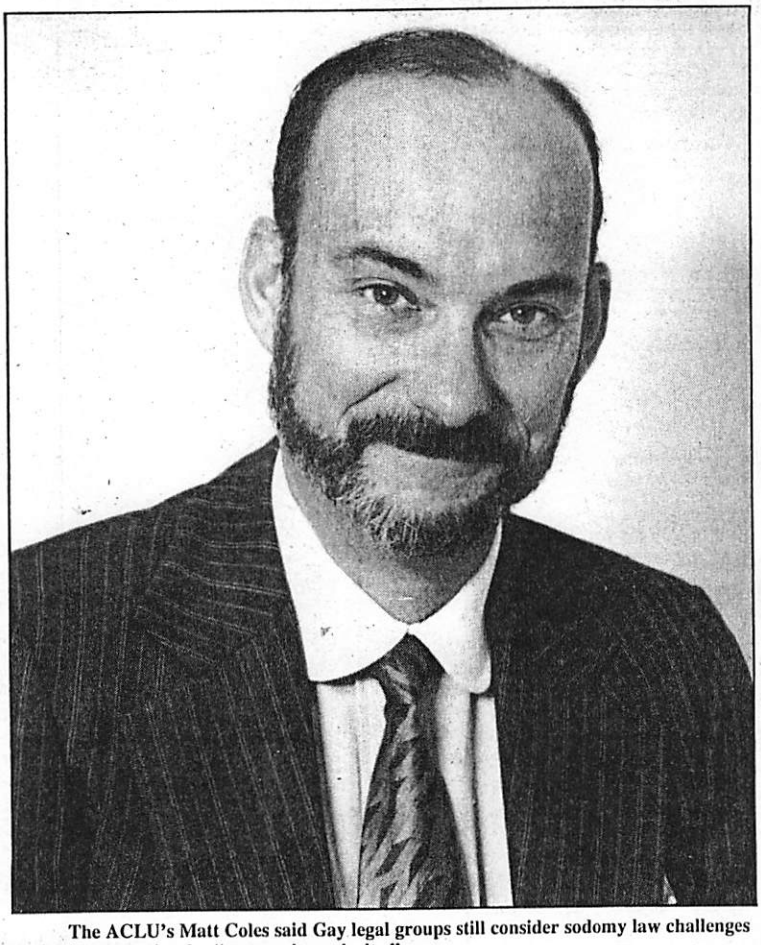
Amsterdam, sodomy "in common language and legal comments stood for any sexual technique that was not directed to procreation: oral and anal intercourse with male or female, masturbation, bestiality, and even sexual intercourse with Jews and [Moslems]."

Early opponents of such acts were frequently persons of authority — such as religious leaders or political officials — who were deeply concerned about preserving a village or country's dwindling population. As U.S. historian Michael Rocke illustrated, a religious leader in Florence in 1424 railed against sodomy after a plague caused that city's population to drop from 120,000 to 40,000 in just three years.

In upholding sodomy laws in 1986, the U.S. Supreme Court referred to the ancient roots of sodomy laws but deliberately eschewed the question of whether such laws "are wise or desirable" any more. It approached the matter from an opposite direction, saying that there was no "history or tradition" of engaging in homosexual sodomy in this country, therefore such conduct could not be considered a "fundamental right," therefore the constitution's implied protection for a right to privacy does not exist in regards to homosexual sodomy.

While that very important battle was lost, the war against sodomy laws was far from over. That same year, two state district court judges — one in Kentucky, one in Minnesota — called their sodomy laws unconstitutional, saying it violated not only the right to privacy but that it was also unconstitutionally broad. In 1990, a state judge in Michigan made a similar ruling. Two years later, the Kentucky Supreme Court struck the law down. In 1993 and 1994, legislatures in Nevada, the District of Columbia, and Missouri repealed or rewrote their laws to undo them. And in the past year, court rulings in North Carolina and Texas have, in the eyes of many, rendered those laws impotent.



The ACLU's Matt Coles said Gay legal groups still consider sodomy law challenges important, and a "reemerging priority."

Bucking the trend

Thus, last week's ruling from the Rhode Island Supreme Court and last month's from the Louisiana Supreme Court seem to be bucking a trend towards the gradual erosion of laws prohibiting sodomy.

On June 22, the Rhode Island court rejected an argument that the state's sodomy law violates an unmarried person's right to privacy or that it violates the constitution's guarantee to equal protection under the law because it is applied only to unmarried people. The case in point, *Rhode Island v. Jorge Lopes*, involved a man accused of raping a woman. In what is almost a classic example of how sodomy laws are used, Lopes denied the rape charge and said, instead, that he engaged in oral and anal sex with the woman with her consent. Once convicted on the sodomy charges, he then sought to argue the sodomy law is unconstitutional.

Gay & Lesbian Advocates & Defenders and other Gay groups submitted a friend-of-the-court brief in the case arguing that the laws do violate privacy and equal protection rights. It was not a case Gay legal activists particularly wanted to join, said attorney Christine Nickerson, then-president of one of the other groups, the Rhode Island Alliance for Lesbian and Gay Civil Rights. But the groups were also concerned about the state court's ruling in a 1980 case, *Rhode Island v. Santos*, that the right to privacy was not applicable to "unmarried" adults.

"We didn't know what that meant," said Nickerson. When they met with the attorney representing the accused rapist, they learned the attorney intended to argue only for unmarried heterosexual couples. A similar scenario in Maryland had resulted in a court ruling that Maryland's sodomy law applies only to homosexuals, she noted.

"We didn't want to be left out in the cold on this one," said Nickerson.

In its ruling in the Lopes case, however, the Rhode Island court stood by its *Santos* ruling.

In a case which involved a man accused of soliciting a male undercover police officer, the Louisiana Supreme Court upheld that state's sodomy law in May.

The case, *Louisiana v. Johnny Baxley*, began in June 1992 when Baxley approached a man sitting on a stoop in the French Quarter of New Orleans. Baxley's attorney, John Rawls, said Baxley simply asked the man to go back to his apartment with him and engage in oral sex. The man in question — an undercover police officer — claims Baxley offered him money to do so. Ultimately, Baxley was charged with solicitation to commit sodomy and a trial court found the law to be an unconstitutional violation of privacy and that it "unconstitutionally discriminates against gay men and lesbians."

"This Court," wrote the trial judge, "specifically finds that those individuals are, in fact, a unique culture, that is, they represent a unique culture, that they represent a class of individuals, and that this sentencing provision then amounts to the discrimination against that particular group or class."

In its May 22 decision, the Louisiana Supreme Court noted that Baxley's attorney did not introduce sufficient evidence that the sodomy statute is used selectively against Gays and that the court found the language of the statute is "neutral."

"It applies equally to all individuals — male, female, heterosexual and homosexual," wrote the court. "...The statute does not single out gay men or lesbians for punishment. Rather, it punishes conduct which the state has deemed to be against the public interest. For these reasons, we hold the [Louisiana sodomy statute] does not, on its face, violate the state equal protection guarantee." Further, noted the court, "the record is devoid of any ev-

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idence that the [sodomy] statute was enacted for the purpose of discriminating against gay men and lesbians."

Baxley's attorney, Rawls, says the case in Louisiana is not over. In fact, he has a second case challenging the sodomy law — this one in civil court. Last June, a state district court judge issued an order that forbids the state from prosecuting any adult human beings for private, consensual, noncommercial oral or anal sex. That case, he said, could go to trial in a few months.

Another case reportedly ready for trial within a few months is in Montana.

There, also last June, a state district court judge refused to dismiss a lawsuit in which three Lesbians and three Gay men are challenging the sodomy law. In that case, *Gryczan v. Montana*, the judge said that even if the state isn't enforcing the law — which prohibits only homosexual sodomy — against Gays, it still "could certainly be said to foster" negative reactions towards Gay people in the state "by condoning the idea that homosexuality is criminal and thus in some way immoral."

The *Gryczan* lawsuit charges that the sodomy law violates the state constitution's guarantee of equal protection, right to privacy, and "individual dignity." It charges that the existence of the sodomy law has caused each of the plaintiffs to suffer emotional injuries "as well as injuries to their dignity and privacy," and that they "fear that they will be targets of violence and harassment because their sexual orientation is classed as a felony."

Holly Franz, an attorney working with the state Gay organization PRIDE and the Northwest Women's Law Center in pressing the case, said the only reason the state has offered, thus far, for needing the statute prohibiting homosexual sodomy is for "public health and morals." In a case scheduled to go to trial there in October, Franz said, the state's only expert witnesses to support this claim are someone from a blood bank and someone to testify about how AIDS is contracted.

The *Gryczan* case, said Franz, challenges the sodomy statute under the state constitution, not the federal constitution, and the Montana constitution, she said, has the "strictest privacy clause in the nation."

That clause, she said, reads: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

Thus, she said, it doesn't matter that the U.S. Supreme Court ruled, in *Bowers v. Hardwick*, that the federal constitution's right to privacy doesn't protect homosexual sodomy.

"The state, she said, will probably argue *Hardwick*," said Franz, "but Montana has a history of privacy rights being revered rights, so it's a real different history than with the federal constitution."

The decisions in Rhode Island and Louisiana during the past few weeks, said Evan Wolfson, an attorney with Lambda Legal Defense and Education Fund, have bucked a trend.

"Those two are clearly unfortunate developments," said Wolfson, "and they mean we're still fighting this state by state." But even with those two losses, he noted, the decisions could not be construed as "squarely anti-Gay decisions." When it comes to challenging sodomy laws state by state, he said, "we've clearly been on a significant roll."▼

Legal Briefs

STRIP SEARCH WAS WRONG: A federal appeals court panel this month ruled that federal marshals violated the constitutional rights of some ACT UP protesters when they subjected the group to strip searches following a protest.

The case arose following a protest in February 1989 when an ACT UP group in Portland staged a protest outside a federal building. The group was upset about delays in AIDS drug approvals. U.S. marshals arrested 10 of the protesters—four womena and six men—and strip searched them even though the protesters arranged with the officials ahead of time to be arrested, cited, then released. According to a press release from Lambda Legal Defense and Education Fund, which represented the arrested protesters, the marshals made the women lift their breasts and rotate in a circle in front of a marshal; the men were subjected to a full body inspection "in clear view of other marshals and detainees."

The protesters filed suit, saying the searches violated their Fourth Amendment guarantee against unreasonable searches and an invasion of privacy.

The U.S. marshal who ordered the strip searches claimed he was concerned one of the protesters was carrying a knife because the marshal heard reports that the protesters had slashed some car tires during the protest and because of the "confrontational" nature of the protest. The marshals argued that they had immunity from charges surrounding the strip searches.

In an order released June 22, the three-judge panel of the 9th Circuit U.S. Court of Appeals in Portland, Ore., said the marshals did not have a "reasonable" cause to strip search the protesters.

Lambda's Suzanne Goldberg said the marshals "clearly used the strip searches as a tactic to intimidate nonviolent protesters and the 9th Circuit makes clear they can't do that."

The appeals panel also referred to ACT UP's protest style a "disruptive version of civil disobedience."

"It seems apparent the marshals had a particular antagonism toward this set of nonviolent protesters because they were perceived to be Gay and AIDS activists," said Goldberg. "The court recognizes that civil disobedience, even with disruptive chants and songs, is not sufficient to suggest that the protesters were carrying weapons or other contraband."

VA. MOTHER STILL FIGHTING: Lesbian mother Sharon Bottoms lost another procedural battle this month in her fight to regain custody of her son. The Virginia Supreme Court issued notice June 12 that it will not rehear her case. The Virginia court in April ruled that Bottoms was not fit to parent her son because her Lesbianism, it said, would "inevitably afflict" the child's relationships in society. The court gave custody of the child to Bottoms's mother, Kay Bottoms.

Steve Pershing, an attorney with the ACLU which has been representing Bottoms in the case, said last week that no decision has been made yet on what to do next but that the case is not over. He said attorneys may appeal the case to the U.S. Supreme Court or may even take it back to the trial court level. In the latter instance, said Pershing, the attorneys may argue that new concerns have arisen over the fitness of Kay Bottoms.

"This issue is not going away," said Pershing, who said he expects there will be other cases in the state to test the right of Gays to parent their own children. "They can't get rid of this issue by deciding against this one parent."

In its 14-page decision, the Virginia Supreme Court said that it was not Bottoms's Lesbianism, but society's negative attitude about homosexuality, which prompted it to believe that her son would be better off in the custody of Bottoms's heterosexual mother.

HARASSMENT SUIT CAN PROCEED: A federal judge last week refused to dismiss a lawsuit against the federal government in which a Gay man says he was harassed by his supervisor because of his sexual orientation.

The employee, Darrell Grant, an illustrator at the federal Armed Forces Radiobiology Research Institute, in Bethesda, said his supervisor made anti-Gay remarks and pointed a gun at him, saying, "This is for anyone who gets in my way."

Grant sued under the Federal Tort Claims Act, saying the harassment inflicted emotional distress. Attorneys for the government asked the court to dismiss the claim, saying that sexual orientation harassment is not prohibited in Title VII of the Civil Rights Act and that that Act pre-empts the Tort Claims law.

But in a memorandum dated June 21, U.S. District Court Judge Edward Northrup (Kennedy appointee) disagreed and said Grant's lawsuit can proceed.

by Kristi K. Gasaway

Lesbian mother Sharon Bottoms, seen here with lover April Wade, lost another procedural battle this month in her fight to regain custody of her son.