BRIEF CASES

Hardly cracking the club doors

BY HARVEY SILVERGLATE

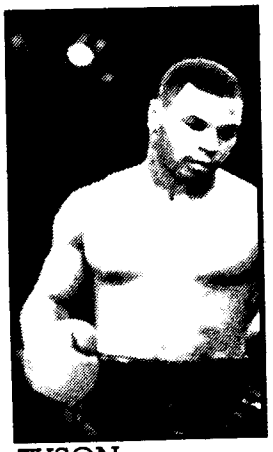
One would have thought, from reading the effusive editorial comments in some of our major dailies recently, that the Nixon/Burger/Reagan/Rehnquist Supreme Court had changed its stripes virtually overnight.

"The Court has well served men and women, majorities and minorities," gushed the *New York Times* in its reaction to the unanimous decision of June 20, which affirmed the constitutionality of New York City's ordinance banning race and sex discrimination by private clubs with memberships of more than 400. The *Times* was particularly pleased by the unanimity, as was the *Boston Globe*, which took special note that the Court's newest member, Justice Anthony M. Kennedy, had voted on the pro-civil-rights side of the issue. The paper's editorialists described this as "a promising sign that he will silence those who predicted his appointment was the beginning of the end of individual rights and freedoms."

To paraphrase Mark Twain, reports that the Supreme Court is going to do its job of protecting the Bill of Rights are highly exaggerated at best, and probably dangerously myopic. The private-club discrimination case is a very poor barometer of the Court's attitude toward civil rights; the same holds true of another decision handed down around the same time, proclaiming that an admittedly gay CIA employee is entitled to a court hearing on his claim that he was improperly terminated from the agency on the basis of his sexual orientation. The Court's decision in that case rests on procedural grounds alone; it says nothing about the Court's attitude toward the rights of gays. Any hasty conclusion that this opinion signals a turn toward protecting the rights of gays should be treated with a healthy skepticism since the majority opinion was penned by none other than the infamous chief justice, William Rehnquist, for himself and five other justices. Only Justices Sandra Day O'Connor and Antonin Scalia dissented. (Justice Kennedy did not participate in the

CONTEN

NEWS



TYSON

LIFESTYLE

case.)

The gay agent joined the CIA in 1973 as a clerk-typist. His periodic fitness reports rated him excellent or outstanding. By 1977 he had been promoted to covert-electronics technician. But when in January 1982 he voluntarily told a CIA security officer of his sexual preference, he was immediately placed on leave, given extensive polygraph tests on the question of whether he had breached security (which he passed), and then fired. He asserted that the constitutionality of his claim of unjust dismissal was reviewable by the courts, and it was this assertion that the Supreme Court upheld, noting that Congress, in establishing the legislation covering CIA personnel decisions, did not state an intention to exclude such decisions from judicial review for constitutional claims.

Nothing in the opinion gives so much as a hint as to what the majority of the justices would say if the case comes back before the high court on the employee's claim not that the CIA's decision is judicially reviewable, but that the decision to terminate an employee solely on grounds of sexual orientation is an unconstitutional deprivation of rights. The way the Court would likely come out on that one is disturbingly easy to predict, in fact, by looking at how it has dealt with other gay-rights cases that have come its way.

For example, in one of the most infamous homophobic decisions to disgrace the Supreme Court, a bare majority held in the 1986 case of *Bowers v. Hardwick* that Georgia's consensual-sodomy law was constitutional. That opinion carried the imprimatur of Justices Rehnquist, O'Connor, Warren Burger, Byron White, and Lewis Powell. Since then, Justices Burger and Powell have been replaced by Justices Scalia and Kennedy — not likely to change things for the better. (Justice Powell has expressed reservations about casting his vote on the anti-gay side, and taken the extraordinary step of acknowledging that at first he had voted the other way but later changed his mind.)

In a 1985 gay-rights case, a teacher who had been fired after telling co-workers that she was bisexual sued and won in front of a jury. The Court of Appeals threw out her victory, and the Supreme Court refused to step in and return it to her.

In one 1978 case where the Court refused to get involved, the University of Missouri denied recognition to a gay student group, which sued and eventually won in the Court of Appeals. The Supreme Court denied review and thus left the victory standing, though the denial of review makes no statement as to how the Court would have decided the case if review had been granted. What was remarkable in this case was Justice Rehnquist's dissent. He wanted the Court to review the victory of the gay-rights group. Rehnquist, casting aside his usual façade of "judicial restraint," argued that it was

Continued on page 21

(The author wishes to acknowledge the research assistance of law student Jonathan Handel in the preparation of this piece.)

KIDS

ARTS

ICA

SAVOR

Think it's been a hot summer so far? This month's Savor ste summer barbecuing in the city. Plus, a taste of soft-shell c Cambridge, and some of the better jugs to chug.

COMING NEXT WEEK!

In Lifestyle: a few perspectives on smoking. In Arts: Owen

Credits: AP/Wide World (with News) and Heidi Stetson (w

Cases

Continued from page 3

very important for the Court to get involved in the gay-rights controversy, especially since one of the goals of the student group was to promote repeal of the state's anti-sodomy laws. Rehnquist reasoned as follows.

> *Expert psychological testimony . . . established the fact that the meeting together of individuals who consider themselves homosexual in an officially recognized university organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute. As the University has recognized, this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood.*

Rehnquist went on in this vein to analogize homosexuality to disease.

> *From the point of view of the University . . . the question is*

Continued on page 24

Cases

Continued from page 21

more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined.

Although one may be tempted to say that these are only the ravings of the extreme anti-libertarian Rehnquist, his rhetoric is but slightly less homophobic than the Court's majority opinion in *Bowers v. Hardwick*, the Georgia sodomy-statute case. More to the point, however, is that these ravings come from the same man who wrote the majority "pro-civil-rights" opinion in the case of the gay CIA agent, casting grave doubt on the true meaning and intent of that opinion.

But what about the New York private-clubs case? Why can it not be seen as a harbinger of a new civil-rights attitude by the Court, at least when sexual orientation is not at issue?

The quick and easy answer is to look at another civil-rights case that was decided a mere four days after the private-clubs case. On June 24 a 5-4 majority of the Court, in an opinion written by Justice O'Connor, ruled that a child in North Dakota, who lives 16 miles from school, does not have a constitutional right to utilize for free a school-bus service her family could not afford to pay for. Justice O'Connor reasoned that since the school system did not have to provide transportation to school at all, it surely did not have to provide it for free.

The import of the ruling was

correctly understood by Stuart Taylor Jr., who reports on the Supreme Court for the *New York Times*. Taylor noted that the decision continues a trend wherein the Supreme Court has reasoned that the Constitution's guarantee of "equal protection of the laws" does not give poor people any special constitutional protection against having to pay the same amounts for access to education and other basic services that others do. Taylor's observation is right on the mark; Justice O'Connor's opinion specifically rejects "the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subject to" special scrutiny under the Constitution's clause that purports to guarantee all citizens the "equal protection of the laws."

In other words, poor people have the same right to educate their children as rich people — if only they can afford to get the kids to school. It reminds one of the notion that the law in its majesty treats poor and rich alike: stealing a loaf of bread is equally illegal for both.

What was most disturbing about the school-transportation case, however, was that it appeared to veer away from the Court's 1982 ruling in which the state of Texas was required to give illegal-alien children the same free public education it offered to other residents. "We decline to extend the rationale of that decision to cover this case," wrote Justice O'Connor. What has happened to make the Court unwilling to apply the same principle to the poor child trying to get to school?

It would appear that three events since 1982 have affected how the Court will rule in the kinds of cases that concern access of the disadvantaged to social and economic benefits enjoyed by the more fortunate. First, Rehnquist replaced Warren Burger as chief justice, giving the

Continued on page 26

Cases

Continued from page 24

reactionary forces on the Court more determined and effective leadership. Second, Scalia joined the Court to take the seat vacated when Rehnquist moved over to replace Burger. Third, Kennedy replaced the somewhat more moderate (though hardly vigorous in the protection of civil rights and liberties) Powell.

The message is clear. The Supreme Court cares less and less about how the castouts and shutouts of our society are treated. This was stated with depressing accuracy by Justices Thurgood Marshall and William Brennan in their dissent from the Court's decision in the busing-fee case.

> *A statute that erects special obstacles to education in the path of the poor naturally tends to consign such persons to their current disadvantaged status. [The majority decision] not only militates against the ability of each poor child to advance herself; but also increases the likelihood of a discrete and permanent underclass.*

In other cases where race and class were at issue, the Court has of late been alarmingly consistent in its insensitivity to the civil-rights claims of litigants. Last year the Court ruled that Georgia's death penalty was constitutional even though clear statistical evidence demonstrated that death was inflicted disproportionately, depending upon the race of the victim. In other words, killing a white was more likely to lead to the electric chair than killing a black. A black who kills a white is the most likely of all to be executed.

This shocking opinion an-

nulat-
; books
NETICS
look at

ıtains
: the
een
. discov-
l or fire.

read
; and use

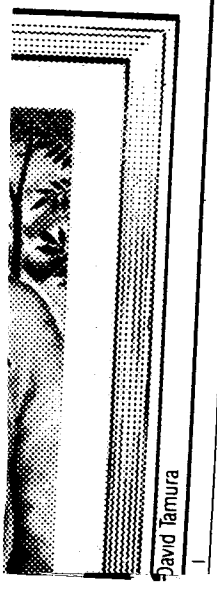
nounced to the country that the highest court in the land was not disturbed that the death penalty was being inflicted on the basis of race. The Court's message was that we must get on with the task of clearing the backlog on death row, even if we have to overlook some rough edges in an essentially racist society's administration of the death penalty. The later decision in the busing-fee case demonstrates that the Court can be as callous to the claims of minority schoolchildren as it is to those of minority death-row inmates.

And then there's the major technique the Burger/Rehnquist Court has used in recent years to eviscerate the civil-rights claims of group after group of disadvantaged or put-upon citizens: proceduralism. The justices have erected an enormous number of sophisticated procedural barriers one must hurdle before one can seek relief from the courts.

In some cases, for example, the Court has declared that certain citizens do not have "standing" to raise an issue — that is, they are not sufficiently affected by a particular law or practice to have the right to challenge it. In other situations, the Court has declared certain controversies not "ripe" for judicial intervention, meaning that the citizen has not yet been hurt badly enough to complain in court. And when the citizen waits until he or she is seriously hurt and then complains, the Court may invoke the doctrine of "mootness," meaning that the citizen has waited too long and has let pass the window of opportunity for judicial review. In other cases the Court has interposed the doctrine of "exhaustion of administrative remedies." This means that before a citizen may complain in court, he or she must first go through a rat's maze of procedural rules established by the Reagan administration to handle citizen complaints of abusive treatment. The message couldn't have been

Continued on page 28

r and more con-
lives.


David Tamura

Cases

Continued from page 26

written clearer by Franz Kafka.

If all of this weren't bad enough, the Court, by a bare majority, with Justice Kennedy supplying the crucial fifth vote, recently announced that in a pending case it would revisit its decision in 1976's *Runyon v. McCrary*. In that landmark civil-rights case the Court ruled that the Civil Rights Act of 1866, enacted in the wake of the Civil War, could be used to prevent *private* discrimination. The 1976 interpretation of the 1866 statute is vitally important to minority groups, particularly blacks, as the latter is the only federal statute that prohibits racial discrimination in such vital areas as employment, admission to private schools, purchase and sale of real estate (including housing), and other private commercial transactions.

What most disturbed civil-rights advocates was that none of the parties to the pending case, *Patterson v. McLean*, asked the Court to reconsider the *Runyon* interpretation of the Civil Rights Act. This was because, until the Court spontaneously announced its intention to re-think the 1976 interpretation, everyone in the country assumed that this statute — the oldest civil-rights law on our books — clearly prohibited private discrimination. Now this fundamental underpinning of our national commitment to racial equality in private commercial and educational life has been called into question by five of the nine justices.

How then can all of this bad news on the civil-rights front be squared with the Court's upholding of New York's ordinance barring race and sex discrimination in private clubs?

The answer becomes painfully clear: the Court's principle of selectivity has not been weakened at all by the Court's decision; only the criteria for selection and exclusion have changed a bit. Black and female lawyers, media moguls, surgeons, judges, entertainers, and business executives now will have to be admitted to private clubs, since their exclusion will not be readily justifiable. But blacks and women who have not arrived will still be excluded from such clubs — and their children will still have problems getting to school.

This is not to say that the case was decided wrongly; it wasn't. Nor is it to minimize the possible symbolic value of the decision. But in the face of the Supreme Court's hostility and indifference to racial and sexual equality where it really counts, it would be foolish to read too much into the Court's unanimity in the private-club decision. It hardly signals a fundamental determination by the Supreme Court to read the equal-protection clause of the Bill of Rights as a tool for forcing the inclusion of all Americans in the economic and social mainstream. Rather, it is an affirmation of the right of a legislative body — in this case the New York city council — to establish rules of fairness to govern life at the very top, so that at least within the ruling class the appearance, if not always the reality, of meritocracy might prevail. This is not likely to go very far toward curing the nation's tragic legacy of hundreds of years of racial, religious, sex, sexual-orientation, and class discrimination.

* * *

The ironies that attended the Court's "pro-civil-rights" stand in the private-clubs case were poignantly matched in the aftermath of the decision in the gay CIA employee's case. Within days of that decision, the newspapers carried a report of the death, from AIDS, of Leonard P.

MAINE

HUTE

Jacket design and illustration

obvious when one steps back a bit from the private-clubs controversy. That celebrated case, notwithstanding all the public and media interest it's attracted, is at bottom what columnist George F. Will has called "intramural roughhousing in the ruling class, a battle between two briefcase brigades." Or as Charles Paul Freund of the *New Republic* has written, "The struggle between women and private clubs smacks of the Iran-Iraq war; neither side is very appealing. Certain rich women want to get richer. Good for them. But what about the rest of us? These women are happy to keep the clubs' class discrimination. In fact, that's sort of their point."

Indeed, a major premise of the New York ordinance, and of the Supreme Court's rejection of the clubs' constitutional claim that it violates the men's right to associate with whom they please, is that in the larger private clubs admission entitles one to participate in more than mere socializing. People network, make contacts, eat power breakfasts and business lunches. They do deals.

In short, the rich get richer. The Matlovich, at age 44. Matlovich was the former Air Force sergeant whose 1975 discharge from the military because of his admission that he was gay sparked a national controversy. During the years he was in the closet, Matlovich had been awarded a Bronze Star and a Purple Heart for his combat service in Vietnam, but he ultimately gave up his battle for re-instatement and settled his claim, recognizing how predisposed the courts were against claims of anti-gay discrimination in the military services. He was buried in Washington. Before his death he had arranged for a black granite tombstone with the inscription "A gay Vietnam veteran. When I was in the military they gave me a medal for killing two men — and a discharge for loving one."

Matlovich's final inscription tells it the way it really is these days. Don't be fooled by the Supreme Court's' procedural meandering or by its refereeing the "intramural roughhousing in the ruling class." It's all very much an illusion and should not for a minute lull civil-rights advocates into a false sense of accomplishment or security. □

99
CD
IOVEN

ear at the
n July 7 and
ing Room in
e on July 8.

anta Cruz, the
arly-acclaimed
releases have
bed to a major
yphen-hyphen
ng descriptions
e to Camper's
and enjoyable
ings.

the
oop