

John Caher: Welcome to Amici, News and insight from the New York Judiciary and the Unified Court System. I'm John Caher.

On July 3rd, 1973 — 45 years ago — the Court of Appeals issued two rather brief opinions, both per curium, on separate issues of intense interest to the gay community. In Application of Thom, the judges in Albany overturned the lower court and recognized Lambda Legal Defense and Education Fund as a legitimate corporation entitled to practice law. In Application of Kimball, the court reinstated the license of a gay man who had been disbarred for committing an act "contrary to the good morals" of the state of Florida.

To the LGBTQ community those decisions represented a small but vital stepping stone toward equality. Today, July 3rd, 1973 is viewed in that community as "the day the Court of Appeals made Pride possible in New York."

The Richard C. Failla LGBTQ Commission of the New York State Courts is presenting a Pride Month program Tuesday June 19th in the rotunda of the Supreme Court facility at 60 Centre Street in Manhattan. Matthew J. Skinner executive director of the commission, has graciously agreed to this podcast interview.

Matt, welcome to Amici. First the details on the June 19th program if we could, just a nutshell — who, what, when, where, why?

Matt Skinner: Our program is at 5:30 PM on Tuesday June 19th at the 60 Centre Street courthouse in Manhattan. I always jokingly call 60 Centre Street the Law and Order courthouse where they're always walking out on Law and Order after court.

John Caher: Sure. The Mariska Hargitay program.

Matt Skinner: Yes. There's a big rotunda in 60 Centre Street where there's a lot of ceremonial events right after you walk through security. The event will be right in there. We've got a wide variety of speakers coming.

William Thom, who is the founder of Lambda Legal and, later, became the first openly gay judge in New York, is the highlight of the evening, and a lot of the event is going to be about what he did. But we'll also have Judge Paul Feinman from the Court of Appeals, Judge Rosalyn Richter from the Appellate Division, First Department, retired Judge Michael Sonberg and then Rachel Tiven from Lambda Legal and Arthur Leonard, professor from New York Law School.

John Caher: It sounds like a good line-up. Now you're going to be talking about mainly two cases, two seminal Court of Appeals cases.

Matt Skinner: Yes.

John Caher: Almost exactly 45 years ago.

Matt Skinner: Right. We thought about July 3rd, but we didn't think we could get much of a crowd out on July 3rd. We're having it a couple weeks early, but it's just about 45 years.

John Caher: That's a good idea. Let's start with Thom. Why does it matter?

Matt Skinner: In the years after the Stonewall Riots, which took place in 1969, gay people in New York City started to form organizations to work on fighting for equality and civil rights. One of those organizations a group of lawyers, gay lawyers here in New York City, decided to form. Inspired by organizations like the NAACP during the African-American civil rights movement, they thought that there should be a similar organization for gay people to also work on advancing their civil rights. At the time, there was a complicated process for formally incorporating as a legal assistance corporation in New York. It involved getting approval of an application from various bar associations, then getting your application approved by the Appellate Division, First Department.

This small group of gay lawyers, led by William Thom, looked at what the lawyers at the Puerto Rican Legal Defense and Education Fund had filed to get their organization approved and basically just changed the word "Puerto Rican" for "homosexual" basically throughout their application. They submitted all their papers to the Appellate Division. Unfortunately, the Appellate Division, in a unanimous five judge panel, turned them down. The buzz words were "benevolent" and "charitable." They looked at the papers and said, "On their face, this organization is neither benevolent or charitable."

John Caher: What were they concluding, that it was a lobbying organization or something?

Matt Skinner: They said the Puerto Legal Defense Fund talked about how so many folks in that community did not have the resources to obtain lawyers. They strangely they felt that there was no evidence of that in the gay community, at least in their eyes. They said there was not really a need for this organization, in the same way that thought that there was for other communities.

I was able to pull some of the papers from the records, thanks to the librarian at the Court of Appeals [Julianne Claydon]. I know you saw them too, John.

The City Bar and NYCLA both ultimately said they supported the application, but they had some things in their letters to the Appellate Division that I think the Appellate Division found and used to write their opinion. Unfortunately, there wasn't a lot of guidance as to what "benevolent" or "charitable" meant. For whatever reason, they didn't see the evidence before them that the organization was necessary.

John Caher: Let's back up a second. Do you know if the NAACP faced similar problems when they were getting incorporated?

Matt Skinner: I don't know. I don't think they were formally incorporated here in New York. I think they may have started in another [state], although I don't know this off the top of my head.

I do know that later, when this got to the Court of Appeals, the concurrence by Court of Appeals Judge Adrian Burke, was joined by Stanley Fuld. He wrote a lengthy concurring opinion citing a couple of Supreme Court cases, one of which involved the NAACP. He really talked about the First Amendment implications of just denying Lambda Legal incorporation. There had been a lot of games played in a couple Southern states when the NAACP would try to start a chapter or whatever. The rules were suddenly drawn up to thwart them from doing that. Eventually the Supreme Court had said there's major First Amendment implications from denying someone, an organization like the NAACP, from forming a chapter in a state. Other considerations cannot outweigh the First Amendment rights of a private organization like the NAACP and now Lambda Legal from forming.

John Caher: By the way, what does "Lambda" mean? What does that word mean?

Matt Skinner: It's interesting. I believe it was an ancient Greek letter in the language and came to have a special meaning to the gay community. But I think another reason they chose this name was they were trying not to put the word "gay" in their name. I've heard this from other folks that started gay organizations in the 70s. A lot of people were just scared of being involved with an organization that would have the word "gay" in its name. It was a way to start an organization that wouldn't immediately scare off a lot of people that you're hoping will become supporters.

John Caher: Oh okay. So, the court in an unsigned opinion sides with Lambda. We've got a concurrence by ... was it by Adrian Burke or by Stanley Fuld?

Matt Skinner: Burke wrote it and Fuld joined it. They really did a much further analysis.

When I sat down and had lunch with Bill Thom a few weeks ago, he was telling me he thinks that the concurrence was originally the majority opinion. They may have lost some judges along the way. They couldn't get to four for whatever reason. But originally, they were hoping and the lawyer that had helped Bill Thom take this to the Court of Appeals, were hoping to get the regulations for forming these organizations just completely struck down altogether. It looks like had the concurrence been the majority opinion, they may have gotten there, but unfortunately or for better or for worse, Judge Burke could not get four judges to join the opinion. That became just a concurrence. The brief reversal that was just a few sentences long became the majority opinion if you will.

John Caher: I see. What about Kimball, what was that all about?

Matt Skinner: Kimball, Harris Kimball, was originally admitted to the Florida Bar in 1953 and he'd established a law practice there. In 1955, he was accused of engaging in oral sex with another man in Orlando, which at the time violated a city ordinance concerning sodomy. He was arrested, released on bond. He forfeited the bond, which he claimed was equivalent under local law to a plea of nolo contendere. The Florida Bar conducted a hearing at which the police officers, the other participant in the beach incident.

Matt Skinner: The incident where he got arrested, Kimball and his witnesses testified. The Florida Bar was satisfied that there was cause to initiate a formal disbarment proceeding. Kimball represented himself before a referee. There were several sessions. Eventually the referee found that Kimball had committed an act contrary to the good morals and the law of the state and recommended disbarment. The Florida Bar Board of Governors concurred with the referee. They referred the matter to the Florida Supreme Court. At that point, Kimball did not argue any further and the Supreme Court adopted the report and ordered Kimball disbarred.

John Caher: Was the issue that he engaged in sodomy or the issue that he did it in public.

Matt Skinner: Both. Sodomy was illegal no matter where you did it. He was found on a beach.

John Caher: Okay. So, it's not a matter of where it occurred, it would have been a crime under Florida law at the time.

Matt Skinner: I believe in, this was 1955, it was illegal in all 50 states at that point.

Anyway, he eventually left Florida, did some other things. But over the next few years actually there was an effort started to start repealing the sodomy statutes. The model penal code actually that came out later from the American Law Institute recommended repeal of these sodomy statutes. There was I think one, maybe a small handful of states had started to repeal the statutes by 1972— 1973. New York had not been one of them.

In any case, Kimball eventually moved to New York. He got caught up in the growing gay rights movement at the time. He decided to try to become a lawyer again. He applied for admission to the New York Bar in 1972. He took and passed the Bar exam.

He received a favorable report from the Committee on Character and Fitness for the Appellate Division, Second Department, but the committee felt stymied by an old New York Court of Appeals decision, *In Re Peters*, which the committee felt precluded a positive recommendation until Kimball could get himself readmitted to the Florida Bar. The committee issued its report without having made a recommendation and referred Kimball's application to the Justices of the Appellate Division, Second Department in Brooklyn.

Then, a five-judge panel voted three to two to deny the application in a per curiam opinion dated January 3rd, 1973. All five judges agreed that the Character Committee had misconstrued the *Peters* precedent since that case had concerned really specific facts. Although the Florida disbarment and the incidents that led up to it were facts to be considered, it was up the New York court to satisfy itself independently as to his fitness to practice law.

Then, the majority and the dissent diverged pretty sharply. The majority rejected Kimball's argument that the Florida Supreme Court's decision finding the sodomy law of that state unconstitutionally vague, which had happened since his arrest, made that disbarment now irrelevant to his New York Bar application. Furthermore, they said they this is still a felony in New York at the time of Kimball's Florida disbarment. Had Kimball committed the offense in New York, he would have been subject to automatic disbarment and later changes to the law didn't detract from the validity of the original disbarment proceeding.

They said, "Moreover we cannot overlook his trifling, the conduct of the applicant attempting to mislead the authorities in Florida by giving false testimony in the disbarment proceedings."

The majority also found implicit in his application the idea the social change in the intervening years justified overlooking his Florida Bar history, a fresh look. The majority rejected this approach and remarked that so long as sodomy remained a crime in New York," homosexuality, which, in its fulfillment, usually entails commission of such a statutorily prescribed act, is a factor which could militate against the eligibility of an applicant for admission to the Bar, who proposes to pursue this way of life in disregard of the statute."

The dissenters, and ultimately the dissenting opinion was adopted by the Court of Appeals, said the Character Committee had unanimously found that Kimball otherwise had the character and fitness required for admission to the Bar. They didn't agree with the majority that the old Florida disbarment should stand in the way. Let's see if there's a good quote here...

They say: "To us it seems clear that the social and moral climate in New York has in recent years changed dramatically with respect to homosexuality and consensual homosexual acts. In our opinion, an applicant for admission to the Bar in New York in 1972 cannot be considered unfit or lacking the requisite character to practice law merely because he is an avowed homosexual and we agree with the Character Committee's finding that this applicant is fit for admission."

That's the three-two split on the Appellate Division in Brooklyn. There was a lot of fear within the gay community at the time. They were alarmed by the dicta in the Appellate Division majority, which implied that openly gay people could be considered unfit to practice law in New York.

John Caher: Inherently.

Matt Skinner: Yeah. They wanted to appeal this and they got up to the ... Because I think it was 3-2, you get an automatic right of appeal to the Court of Appeals.

John Caher: It would have been more interesting if the court granted leave.

Matt Skinner: Right. Right. Anyway, as you mentioned this was another really brief per curium opinion by the Court of Appeals. It appeared to be six to one.

There was just a short quote here. "While Kimball's conduct may be now and has been in the past violative of accepted norms, they're not controlling albeit it relevant in assessing character bearing on the right to practice law in this state. Notably the Committee on Character and fitness found appellate to be of good character and qualified at this time."

Matt Skinner: Then they note their agreement with the dissent that I spoke about just a minute ago.

Judge Gabrielli, Dominick Gabrielli, really focused on the fact that we still had a sodomy statute in New York that could be enforced. Gabrielli said, "The Appellate Division has full and complete authority to deny admissions to Bar to one who is an avowed and admitted persistent violator of any criminal statute." He really did not think they could just overlook the fact that this sort of activity was still a criminal offense in New York.

John Caher: I guess the question wasn't exactly before them, but it would have been interesting to see if the court at that time had taken up the question of whether the sodomy statute was constitutional.

Matt Skinner: Right. Then they would do that seven years later and strike it down in a case called *Onofre* [*People v Onofre*, 51 NY2d 476 (1980)].

John Caher: I'm a little surprised it was only seven years later.

Matt Skinner: Right.

John Caher: At the same time, I'm surprised it wasn't 50 years earlier, but you know what I mean.

Matt Skinner: What made it possible for the lawyers to get organized enough to have that fight in the court system was really these two decisions because you couldn't, if you couldn't even form an organization like Lambda Legal to fight for justice within the courts, getting a decision like that is much more difficult.

John Caher: Oh yeah.

Matt Skinner: Also, many of the lawyers that would be involved in the eventual fight to get the sodomy statute declared unconstitutional wouldn't have been able to be open about their sexual orientation had we not had this Kimball decision from the Court of Appeals that made that clear.

It's interesting how these little opinions that were just a couple of sentences long really did a lot more than is just on the surface. They really made it possible for the gay legal community at the time to get organized and be open about their sexual orientation and to come back and have the fights that would come later for full equality under the law.

John Caher: I guess there's no way really to tell, but I wonder if the Court of Appeals at that time realized that they were changing the course of the ship?

Matt Skinner: Right. It's so interesting to me too that these decisions came out in the same day, sort of like a double whammy here in terms of injecting some lifeblood into the small but growing movement at the time. They must have been, on some level, aware of that and it may not have been entirely clear to them what they were doing or what this would be. But I think the small decision to put them out in the same day was also very interesting.

John Caher: In my experience that does not happen accidentally.

Matt Skinner: Right. Right.

John Caher: Do you think at the time the gay community really appreciated how important this was?

Matt Skinner: Yes. As I mentioned, when I was talking about Kimball, there was a lot of fear by the lawyers that were involved with Lambda Legal. One of the folks who was ... There was three people on the incorporation papers for Lambda Legal. One of those individuals, his name was Cary Boggan [E. Carrington Boggan]. He wrote an amicus brief for Harris Kimball at the Court of Appeals. It was just, it's wild to me how far ahead of his time he was in some of the arguments he was making.

John Caher: On the other hand, there was a certain risk, a certain danger in going to the Court of Appeals with these cases because a loss could have set things back a generation.

Matt Skinner: I had said to Thom, to Bill Thom at lunch a couple weeks ago, "Did you have a backup plan if you didn't get the Appellate Division reversed here?" He said, "Everyone we were working with at the time was in New York. We wanted this to be a New York organization. It would have been just really strange to try to incorporate it in another state."

He said there was no back up plan if they lost at the Court of Appeals. For better or for worse, there's always been, depending on where you want

to start considering when gay history started, a big gay population in New York City. It really would have been devastating if those individuals couldn't start their own organizations or openly practice law. It would have been, as you said, a real setback. Of course, I don't think people would have just totally given up and gone home, but it could have greatly affected how things played out.

John Caher: Certainly. I was doing some reading recently on Thurgood Marshall and how cautious he was in not going to the Supreme Court with a case unless he was very, very confident he could win.

Matt Skinner: Right.

John Caher: Anyhow I think we've covered the past, let's move onto the future. June 19th, what are we going to see? Remind us again who's going to be speaking.

Matt Skinner: Roz Richter, Justice Rosalyn Richter, who is now an Associate Justice of the Appellate Division, First Department. She actually worked at Lambda Legal in the early years. She was one of their first employees. The first few years they really just were operating out of Bill Thom's apartment and they had no staff for a number of years. It was all *pro bono* volunteers writing amicus briefs and helping people where they could. They did not have a lot of infrastructure.

Justice Richter is going to speak about what it was like to work there in the early days. Ironically, she later became the first openly gay judge at the Appellate Division, First Department. It's an irony of history that after the Appellate Division turned down the Lambda application, Judge Richter would later work there and then eventually work at the First Department herself.

Judge Feinman is going to talk about some more gay history, gay rights history at the Court of Appeals.

Arthur Leonard, who is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School, is going to tell us more about the history of the Kimball decision. He later founded, it's gone through a few names, but what we now call the LGBT Bar Association of Greater New York. He would later found that Bar Association in 1978. He's told me about how the Kimball decision made it possible for a Bar Association like that to exist.

The other interesting piece of this story is that Bill Thom would later also become the first openly gay judge at any level in New York in 1984 after an appointment from Mayor Koch, Ed Koch.

Michael Sonberg, recently retired in December from the bench here in New York City, is the unofficial historian of the LGBTQ judicial community here in New York. He's going to talk about Bill Thom's role in gay judicial history later on in his life.

That's the lineup. We'll also have the current CEO of Lambda Legal, Rachel Tiven, who will talk about how the spirit of the early founders and the spirit of the decision from the Court of Appeals that they had to be allowed to incorporate still lives on within the organization.

John Caher: It sounds like a great event. What does it cost to get in?

Matt Skinner: It's going to be free.

John Caher: Wow. If somebody wants to attend, what do you do, just show up?

Matt Skinner: Yes exactly. Perhaps folks should arrive a little bit early just to get through courthouse security, but everyone is welcome to join us for free.

John Caher: That sounds like a terrific program. Thanks so much for your time Matt.

Matt Skinner: Thank you.

John Caher: Thanks for listening to Amici. You find all of our recent podcasts on the court system's website at www.nycourts.gov. Most are also on the iTunes podcast library. If you have a suggestion for an Amici podcast please let me know. I'm John Caher and I can be reached at 518-453-8669 or jcaher@nycourts.gov. In the meantime, stay tuned!