

2010 INSIGHTS:

In the remaining weeks of this year, the Daily Journal will be featuring columns written by select contributors touching upon this year's legal developments, lessons learned and what's to come.

# A Two-Pronged Strategy Is Key to Protecting Gay Rights

By Ari E. Waldman

The repeal of "Don't Ask, Don't Tell" (DADT) was a sweet and satisfying conclusion to an otherwise frustrating two years of gay politics, or the fight for gay equality in the legislative realm. Since the 1950s, the locus of the fight for gay equality at the federal level has been the judiciary, or what I am calling gay law. Battles were lost, battles were won, and the fight in the courts continued to the point where gay law was running circles around gay politics over the law few years. Stymied by Republican presidents, ascendant conservative control in Congress since 1994 and a demoralizing political loss on military policy and a new discriminatory federal marriage law, a successful legislative strategy seemed out of reach. President Barack Obama's election alongside wide Democratic majorities offered hope that an increasingly successful federal legal strategy could be coupled with a political one. Progress was slow, but the Democratic Congress pushed back against Republican filibusters on the repeal of DADT. Before that, it could hang its hat on a hate crime law, symbolic legislation if there ever was one. Both our missed opportunities and our victories suggest that gay politics needs gay law to succeed.

While gay law forged ahead, thanks to the likes of Mary Bonauro of the Gay and Lesbian Advocates and Defenders (GLAD) and James Esseks of the ACLU's GLBT Project, gay politics floundered. The Human Rights Campaign, a gay rights organization with close ties to the Obama White House, failed to change its lobbying strategy when an election offered new and greater opportunities. The Republican minority took obstruction to new levels and stymied progressive legislation. A persistent economic morass with an aching slow recovery galvanized conservatives, frightened liberals and changed the political meme in an instant.

Those of us who study LGBT legal issues are left to wonder if political failures are systemic — is today's Congress just not a good bet? — or, for that matter, if they are manifestations of an ill-advised strategy — if we seek legislative answers, are we not damaging our search for equality by acknowledging that our rights must be given to us and blessed by a heterosexual majority?

That we have had greater success in the federal courts than in Congress is beyond doubt. Recently, there have been successful federal challenges to state bans on same-sex marriage (e.g., *Perry v. Schwarzenegger*). There have been successful challenges to the Defense of Marriage Act (DOMA) from

individual states (e.g., *Massachusetts v. Department of Health and Human Services*). And, there have been successful as-applied challenges to DOMA, which has the effect of denying federal benefits to gay couples legally married in those states that have marriage equality (e.g., *Gill v. Office of Personnel Management*). Just last month, the American Civil Liberties Union and the Gay and Lesbian Advocates and Defenders filed two more federal lawsuits challenging DOMA, both of which are based on *Gill* and both of which have a high likelihood of success at the district court.

Granted, these district court decisions are up on appeal; but, success at this level is notable not only in comparison to our history of legislative losses, but as a product of a methodical legal strategy. They are the latest salvos in a legal battle whose first shots were fired more than 60 years ago.

As Professor Marc Stein has noted, *Brown v. Board of Education* gave gay rights advocates a model in the legal strategy of the civil rights movement. In 1957, letters to the editor of *One*, a gay magazine out of California, recommended taking gay rights cases "all the way up to the Supreme Court." By 1960, after a series of raids on gay bars in Manhattan, a *One* columnist goaded the bar owners to challenge the raids and fight for their rights and the rights of their customers in the federal courts.

Stein argues persuasively that the Warren Court offered these activists hope with three pro-gay decisions between 1958 and 1963. In *ONE Inc. v. Olesen*, the Court allowed a magazine for gays and lesbians to be sent through the mail. *One Magazine* was dedicated to disseminating information about homosexuality from a critical and historical perspective. Though no rag, *One* was indeed gay. So, the post office tried to shut it down using the Comstock Act, which prohibited sending "obscene, lewd, and/or lascivious" material through the mail. A 1954 issue had a poem about two young male lovers, a joke about John Gielgud and an advertisement for men's pajamas and underwear. That was enough. The Supreme Court issued a one-sentence decision in favor of *One Magazine*. That case, together with the Court's 1962 decision in *MANual Enterprises v. Day*, holding that magazines consisting largely of photographs of nude or near-nude male models were not obscene, allowed pretty much all gay and lesbian magazines to be sent through the mail. And, in *Rosenberg v. Fleuti* (1963), the Court allowed a gay alien to stay in the country despite legislation that would have had him deported.

In this context, gay rights leaders like Frank Kameny and David Carliner wondered why gay and lesbian legal advocates were not bringing more test cases into the federal courts. So, they built a slow

and steady federal litigation strategy outside of the political realm. "Start with the easiest inroad: change in an enlargement of procedural rights in cases of dismissal for homosexuality," proposed one lawyer. Small successes would have the effect of changing attitudes about homosexuality in the courts as attitudes change in the wider population. Eventually, these lawyers and activists formed the National Legal Defense Fund in San Francisco and the Homosexual Law Reform Society in Philadelphia. These organizations would fight for gay rights in the federal courts. Emboldened by *One* and *MANual* and, later, *Griswold v. Connecticut*, more gay rights leaders shifted their focus from the hardly successful strategy of getting pro-gay legislation passed in state legislatures to the increasingly promising strategy of getting anti-gay laws invalidated in the federal courts.

Professor Stein's history paints a compelling picture — starting in the late 1950s, the federal bench looked like welcoming territory for the burgeoning gay rights movement. However, that picture is incomplete. Despite a number of sexual liberation cases after 1968, the federal courts grew increasingly inhospitable, even hostile. In 1986, *Bowers v. Hardwick* effectively permitted the criminalization of being gay and gay sexual conduct, and this bludgeoning defeat encouraged the new generation of gay rights lawyers to shift their attentions once again. A new, yet equally methodical, strategy was devised in the states. This time, it was a dual strategy, a flanking plan joined by gay law and gay politics: in the more progressive states of the east and west coasts, the gay rights movement would push for pro-gay state laws and local ordinances while simultaneously using the progressive judiciaries of these states to invalidate anti-gay laws.

The plan was to out-flank anti-gay forces in politics and in law. The strategy produced great successes (Wisconsin became the first state to outlaw discrimination based on sexual orientation) and astonishing failures (Anita Bryant's bigoted campaign to undo a mild anti-discrimination ordinance in Florida). But, still, the band played on. In the last decade, the hybrid political and legal strategy in the states produced marriage equality in Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia. It produced civil unions and domestic partnership benefits in countless more states and cities. It helped pass anti-discrimination laws, won adoption rights for all gay individuals and elected hundreds of gay politicians. In the last two years, organizations like Fight Back New York have even



ousted anti-gay politicians for being anti-gay.

The hope was that this hybrid state strategy would translate into the federal arena once President Obama and the Democratic majority took control in 2008. This month, it finally did, but only after the gay law paved the way. Thanks to the Log Cabin Republicans and their attorneys and White & Case LLP, the successful challenge to DADT in *Log Cabin Republicans v. United States* not only resulted in a worldwide injunction against the military's discriminatory practice, but frightened an otherwise slow moving institution that it would have to implement openly gay service in an instant if Congress failed to act. Defense Secretary Robert Gates offered full-throated endorsements of DADT's repeal after Judge Virginia Phillips essentially issued him an ultimatum — implement now by court order or implement over time by legislative repeal. Suddenly, congressional action became much more attractive, more realistic and, most importantly, politically viable.

If gay rights successes in the states and the repeal of DADT have taught us anything, it is the benefit of a hybrid political and legal approach. Our accomplished and capable lawyers are doing their part. We need our lobbyists and politicians to do the same.



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# Wrongful Death: The End of Federal Civil Rights Law

By Ben Rosenfeld

If there's one thing lawyers, and particularly judges, are good at, it's torturing the exact opposite conclusion out of a set of facts which any honest witness to the event would reach. This is especially true when the defendant is a police officer. Los Angeles Superior Court Judge Robert Perry demonstrated this when he took the unusual step of tossing out part of the jury verdict against Johannes Mehserle, the San Francisco transit cop who killed Oscar Grant with a bullet through the back while Grant lay prone on a BART platform, in order to sentence Mehserle to the minimum two years — with time off for good behavior.

I sue police under Section 1983 of the federal Civil Rights Act. If I made a television commercial to advertise my services, it would say in a baritone voice: "Have you been injured in an encounter with police? Tough luck." Civil rights lawyers are abandoning the practice because the Supreme Court puts us a little more out of business every time it sits

down. When I decline a case, it goes begging for representation; there's no pool of lawyers hungry to snatch it up. Every week, I tell victims of police brutality, in so many words, they may think they're familiar with the Constitution, but they haven't read its invisible ink: the contorted decisions of countless judges determined to exonerate police at all costs.

Mark Burdett was covering the 2004 anti-war march in San Francisco for Indybay, a Web-based independent news outlet. He wore a San Francisco police issued press pass around his neck. He stood just off the curb in a parking turnout on Market Street, filming police pile on a man 33 feet away and break his arm. Market Street was blocked to traffic, filled with police, bystanders, and other reporters. As Burdett filmed, someone knocked over a police motorcycle next to him. Reacting to the sound, an officer looked up, saw Burdett, and charged toward him, riot stick out, yelling "you knocked over the bike." Burdett retreated a few steps, pleading, "I didn't do it," while others in the crowd shouted, "you've got the wrong guy." Police grabbed Burdett, yanked him to the curb, swept his legs out from under him, flipped him onto his face, and violently handcuffed him, raising a welt on his forehead and breaking his thumb. The cops soon realized Burdett hadn't knocked over the motorcycle, but arrested him for resisting and jaywalking to cover up the beat down.

A federal magistrate threw out Burdett's false arrest claim, and instructed the jury he had been lawfully arrested. He lost at trial, except for winning one force claim against one cop for one dollar. On appeal of the dismissal of his arrest claims, the 9th U.S. Circuit Court of Appeals held that because he stood neither on the curb nor in a crosswalk, police had probable cause, or at least "a reasonable belief that probable cause existed," to arrest him.

And so civil liberties are reduced to a game of inches, your rights forfeit if you step even slightly out of bounds.

Decisions like these have established a *de jure* police state, in which we are all arrestable multiple times a day for the pettiest of offenses (and non-offenses), but we rely on police to use their power sparingly, and to sort the "good guys" from the "bad guys" — even though all of recorded history teaches that absolute power corrupts absolutely.

The idea that an officer who lacks probable cause might reasonably believe she or he had probable cause, as the 9th Circuit held, is judge-made double-speak known as the doctrine of qualified immunity. The Supreme Court invented this doctrine in 1982 to immunize all government officials from suit except "the plainly incompetent or those who knowingly violate the law." Federal civil rights law has been dying a slow death ever since.

Though civil rights lawyers have fastened themselves quixotically to the word "qualified," judges have come to hear only the word "immunity," and to apply it as if it means impunity. The qualified immunity doctrine is so irrational, subjective, and confusing that it operates as little more than a moat around the courthouse to drown police cases that judges don't like — i.e. most of them.

Probable cause means a reasonable if mistaken belief that a suspect committed a crime. Qualified immunity attaches to a reasonable if mistaken belief that an officer acted legally. So according to the 9th Circuit, even if officers did not reasonably believe Burdett jaywalked, they might reasonably have thought so. *Huh?* The purpose behind this sophistry can't be to hold police to any standard at all, but to cloak them in impenetrable judicial armor — more like double indemnity than qualified immunity.

Every time the Supreme Court sets out to clarify the standard, it

licenses more police abuse. In 2001, the Supreme Court held in *Saucier v. Katz* that judges must consider qualified immunity in force cases by evaluating whether an officer reasonably could have believed she or he used reasonable force. Since there is no separate question there for a judge to decide other than the jury's question — whether the force used was reasonable or excessive — judges have applied *Saucier* by throwing out cases involving, in their view, only minor uses of force. The trend, predictably, is dismissal unless a plaintiff can show visible or lasting injury. As a result, *Saucier* has also helped to solidify the routine police practice of grabbing suspects and taking them down to the ground to arrest them for any "offense," including, apparently, standing in a parking turnout just off the curb.

More recently, in *Pearson v. Callahan* (2009), the Supreme Court held that if the circuits are split over the bounds of a particular police power, officers should be immune until the split is resolved. On the surface, it makes sense not to hold police liable for trying to conform their behavior to a standard over which legal scholars disagree. But in practice, the ruling is insidious. *Pearson* instructed lower courts that they need not even resolve constitutional questions in federal civil rights cases. Rather, they can just grant qualified immunity and be done with it. As a result, citizens may have to wait a long time before courts resolve their qualified-immunity-added splits. Also, it is a legal fiction to pretend police, who are increasingly trained under uniform national standards, are hampered in any way by splits of judicial authority.

Cases like *Pearson* are premised on the fiction that police officers suffer any material loss in a civil rights case. Even though Section 1983 prescribes suits against police officers in their individual capacities, they answer, as a practical matter, in their official capacities. The public provides them with government lawyers, pays their litigation costs, and pays any settlement or judgment. They rarely face discipline, let alone termination, even when they lose. Properly understood, therefore, every civil rights case is a vehicle for shaping public policy. So in discouraging courts from deciding constitutional questions in civil rights cases, *Pearson* retards the development of civil rights law without affording any further protection to police which they don't already enjoy.

The Civil Rights Act of 1964 was designed to provide a federal venue for victims of police abuse, especially racial discrimination, who could not expect to get a fair trial in the good-ol'-boy county courthouse. By allowing prevailing plaintiffs to recover attorney fees against the officer/municipality, the Act explicitly encourages private attorneys to step into the shoes of prosecutors to help police the police. Today, it is far more common for the civil rights case to get thrown out on qualified immunity grounds, and for the judge to impose the government's costs on the indigent victim. As such, the federal courts have come to operate as little more than a protection racket for crooked cops, resembling the county courthouses they were supposed to deliver victims from.



Ben Rosenfeld is a San Francisco civil rights lawyer and Board member of the Civil Liberties Defense Center ([www.cldc.org](http://www.cldc.org)).

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