

Cultural Daily

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The Case Against 8 — Sweet Justice

Sophia Stein · Wednesday, July 2nd, 2014

Out of awareness of the enormous public interest in the case against Proposition 8 and its outcome, prosecutors originally requested that cameras be permitted to televise the Supreme Court proceedings. Regrettably, the Supreme Court Justices denied their request on the grounds that television cameras would be “too disruptive.” The documentary film *The Case Against 8* indirectly subverts that ruling and feels like justice deferred.

In November of 2008, as the American people elected Barak Obama, the first black President of the United States, while voters in the state of California simultaneously passed Proposition 8, a referendum that banned same-sex marriages in that state. Directors Ben Cotner and Ryan White take us behind the scenes in *The Case Against 8* — from the idea of filing the lawsuit, clear through to the historic Supreme Court ruling striking down the discriminatory statute. The film provides an unprecedented look at the process of waging such a battle for civil rights. It allows one to experience vicariously the depths of despair and euphoric heights of this true-life roller coaster ride.

At its core, the film features an unlikely pair of prosecuting attorneys. Ultra-conservative Theodore Olson teams up with his former liberal adversary, David Boies. The two seasoned Generals who had previously been pitted against one another in *Bush v. Gore* in 2000, herein collaborate, leading the charge to overturn Prop 8. Their mutual respect and gentlemanly spirit of cooperation is as shocking as it is instructive. It is a tribute to what can be accomplished through bipartisan cooperation.

“Marriage is a conservative value,” Olson explains. “It’s two people who love one another and want to live together in a stable relationship to become part of a family, and part of a neighborhood, and part of our economy. We should want people to come together in marriage. Additionally, he cites, “Cheney supports it, and the Cato Institute.” In publicly defending same-sex marriage, Olson has made it acceptable for conservative peers to come out in voicing their own support for this civil liberty.

In *The Case Against 8*, we learn about the exhaustive vetting in the selection of the four articulate, sympathetic, and extraordinary plaintiffs at the heart of this case — Paul Katami and Jeff Zarillo in Los Angeles, and Kris Perry and Sandy Stier in San Francisco. Paul and his partner Jeff had previously rejected a domestic partnership because “(b)y accepting a domestic partnership, we’d also accept being second-class citizens. And that was unacceptable to us,” Paul explains. Kris and Sandy had legally wed in the City of San Francisco in 2004. The following year, they received a

letter from the court informing them that their marriage license was no longer recognized by the State of California and offering to refund their license fees. These couples demonstrate courage, resilience, and generosity in allowing their personal struggles to take center-stage in a fight that resonates with significance far beyond the personal stakes.

The documentary film *The Case Against 8* is a call to action, encouraging all of us to become active participants in our democracy. In watching *The Case Against 8*, we witness the nuanced arguments and moving testimony that swayed the Supreme Court justices to act to safeguard this civil liberty for all. As attorneys will continue to make the case in courthouses in the 31 remaining states across the Nation where same-sex marriage remains illegal, the rest of us are better armed to make the case in the court of public opinion. In the words of Attorney for the Prosecution David Boies, quoting Martin Luther King, Jr., “Civil rights battles are won because you fight them.”

I felt privileged to speak by phone with documentary directors, Ben Cotner and Ryan White on the morning of the HBO broadcast premiere of their significant film, *The Case Against 8*.



Directors Ben Cotner and Ryan White, “The Case Against 8.”

Photo by Austin Hargrave, courtesy of HBO Documentary Films.

Sophia Stein: I was married in December of 2008, at City Hall in San Francisco. As my fiancé and I were filling out the paperwork just beforehand, the Judge confessed to us that the entire reason she had volunteered her services as an officiate, was to assist in performing gay marriages. She was utterly disheartened by the passage of Proposition 8 that had put a cease to all of that the month before. The rotunda that had been so vibrant and filled with joy the month prior, was empty and desolate for her. So in our greatest joy, we felt that profound sense of loss about which she spoke.

Ben Cotner: For us, living in California at the time, it was a big blow. I think so many of us took for granted that Proposition 8 wouldn’t pass — just because we felt like we live in this safe liberal state where people would be more progressive about the issue. So when it did pass, it was a big shock. It became a call to action, for people who hadn’t been that active before.

Sophia: What was the impetus that set making this documentary in motion for each of you? What was your personal connection to telling this story?

Ben: You know, I grew up in Indiana, and Ryan grew up in Georgia. So for us growing up, we really had no idea that we would ever be openly gay filmmakers or that we would certainly ever be able to get married. For us, the decision to make this film was in part very personal. Also, there was this intellectual curiosity about this mysterious institution of our justice system – the Supreme Court, which has such a rich history of civil rights advancements, but is little understood by the general public. Not many people get to see what it takes to put on a case like this. So to be able to pull back the curtain and show how our justice system works, and to do that in a human way — where people can get to know persons like Paul and Jeff and Kris and Sandy in our film, and see how their actions effect a change — this approach could apply to a plethora of issues. When people see how things work, they can take away an understanding of their own access to the justice system.

Ryan White: I grew up in Georgia, so I’m a Southerner. I had just moved to California in September of 2008. Gay marriage was barely legal. I think it was only legal in Massachusetts and

Connecticut before here in California? So while most Californians weren't expecting Proposition 8 to pass — it was polling that it wouldn't pass in the weeks leading up to the election — to me it felt normal that it did pass in that November election.

I have worked on lots of documentaries, but I have never worked on something that was so personal for me, where the outcome of my film directly affected what I could do or could not do with my life. It was a unique way of filmmaking — I had such a personal investment in the story, the characters, the work — I don't know if I could ever match that again in my career. I would like to think that it might happen again at some point, but I can't imagine on what. It was just really a privilege to be a part of that process for five years.

Sophia: Ben and Ryan, how did you both come to partner as co-directors on this documentary film project?

Ben: Ryan and I met at the Sundance film festival in 2009. I was attending for work as a studio executive at Paramount Pictures back then, and Ryan told me about his first feature film that he was in the process of finishing at the time. A few months later we found out that this lawsuit [contesting the constitutionality of Proposition 8] was going to be filed, and we decided to work together. We hadn't previously collaborated on anything, but I think we recognized in each other a similar sense of style and an aesthetic that would make a great compliment for this type of film.

Sophia: I was interviewing Rob Reiner about his new comedy “And So It Goes” that will open next month, and learned that he was in town promoting *The Case Against 8* as the opening night film at Frameline, the gay and lesbian film festival in San Francisco (June 19-29, 2014). Reiner was gushing in his praise for your film. He called it a “documentary that plays like a feature film because you have four Plaintiffs who you are completely invested in, these incredible lawyers, and this great happy ending with the two couples getting married. And it was all real! It really happened.” What was Rob Reiner's involvement in the fight and in the film?

Ryan: Rob Reiner and his wife Michele Reiner, Chad Griffin and Kristina Shake are the original architects of this case. They started the American Foundation for Equal Rights (AFER), the non-profit organization that filed the first federal court challenge for marriage equity. They were the ones who initially learned that Ted Olson was interested in prosecuting this case. They deserve the credit for Ted Olson ever being enveloped in this movement. Rob and Michele played a huge part in setting up the lawsuit and raising the money.



“The Case Against 8.” David Boies, Kris Perry, Sandy Stier, Paul Katami, Jeff Zarillo, and Theodore B. Olson, “The Case Against 8.” Photo by Diana Walker for American Foundation for Equal Rights, courtesy of HBO Documentary Films.

Sophia: One of the biggest revelations in the documentary is the bipartisan support in the case. Ultraconservative lawyer Ted Olson, famed for winning *Bush v. Gore*, teams up with his democratic adversary from that trial, liberal David Boies, to overturn Proposition 8. Why do you think Ted Olson championed this case?

Ben: Ted has a very genuine commitment to the Constitution, and he really believes in civil liberties and the equal protection of all individuals. This is something that we really didn't realize until we had known him for several years. We discovered over time that Ted had never been on

the other side of this issue. His friends and family would all agree. He has always spoken fairly openly about the fact that he believes that gays and lesbians should have access to the same laws as everyone else.

He certainly isn't the first Republican to feel that way, but with his position, he was someone who could bring a considerable amount of attention to the issue. I think that he opened the doors to allow other Conservatives to admit, "It is okay for me to be Conservative *and* pro-gay rights." We saw a coalition grow. Conservatives like Ken Mehlman and Margaret Hoover came out in support of equality. We now have three [Conservative] U.S. Senators, who are in support of same-sex marriage. And the number keeps growing ...

Sophia: Do you think that Ted Olson saw this as an opportunity to be on the right side of history? Did he express an awareness that he might be redeeming his legacy that had been sullied back in 2004 with at least 50% of the population?

Ryan: My guess is that didn't factor into the equation, that it had nothing to do with redeeming himself. I honestly do not believe that his commitment to the cause had anything to do with the glory of winning a big civil rights battle. I think it is something that Ted believes in passionately and always has. As far back as anyone can remember, Ted supported gay marriage — long before any liberals or progressives. I just think that sense of equal rights and civil liberties is part of his DNA. When the case was offered to him, it was obvious to him. It was a fundamental right that people deserve, and he wanted to fight for it.

Sophia: The sincerity of Olson's commitment really shines through in your film. Likewise, the sincerity and integrity of the four Plaintiffs. The attorneys discuss the casting of those Plaintiffs, which was akin to vetting a candidate for political office. Or casting a film. The attorneys were looking for unassailable persons, who could tell the story in just the right way. How did they locate those prospective plaintiffs? Were you privy to that part of the process?

Ben: I wish we could take credit for the casting of the Plaintiffs because they are, in our opinion, such articulate people. They really do convey so many important things, in such a real way. We were watching on behalf of the Foundation, as they were going through this selection process which was a lot harder than you would imagine. There was a point in 2008 where people could get legally married in California. So to find couples who had been in long-term relationships and were wanting to marry but hadn't already tied the knot earlier in the year, was difficult. Also, finding people who were willing to put their lives out in the open like this was challenging.

I think that there is this illusive idea of the quintessential American family, but in reality, that family doesn't exist. Paul and Jeff and Kris and Sandy, they are normal people in the sense that we are all normal people. I struggle, however, when people refer to them as average — because to me, they're anything but average. Their courage and ability to speak so eloquently on these issues really resonates for me in the film. They are complex individuals and I think that people relate to complex individuals even more than somewhat generic stereotypes of normal.

Sophia: One of the questions the case poses is: Do the people have the right to determine civil rights matters by popular vote, or is it the Federal Court's and Judge's responsibility to uphold and protect our constitutional civil liberties? What did you learn in the process of making the film about that issue?

Ryan: We are gay Californians, so we learned how much it hurts when your fellow citizens take away an existing right that you feel you deserve. If you put gay marriage up for a vote in Georgia right now, it would lose. If you put it up in five or six years, it would still most likely lose. So the question is, how long do we subject people to this sort of discrimination in parts of the country that aren't as progressive, where communities are not as supportive of gay rights? How long do you put people through that before someone has to step in and say, "We can't do this!"

Ballot initiatives are important. They have accomplished a lot of great things in states all across the country. But I think it is very dangerous territory when we allow the people to vote on the rights of a minority, when we believe that these are rights guaranteed by the Constitution.

Sophia: When the ruling at the conclusion of the first trial at the District Court level was released, you did not videotape the reaction of the Plaintiffs and Attorneys. You tell that part of the story through still photographs. How did you arrive at that decision?

Ben: In advance of the announcement to the general public, the judge had placed a protective order so that only the Plaintiffs and the Lawyers could hear that ruling. In order to not violate that Court Order and to respect the Judge's wishes, we were not able to be in that room. So we had to find a creative way of expressing the emotion that everyone was feeling when they emerged from that room on that day.

Our movie has several climaxes, one of them being the trial court victory. We wanted to save some of the excitement for the later rulings — especially the Supreme Court ruling, and ultimately, for their weddings. You have all these really heightened emotional scenes, and you don't want to have too many, too early in the film. The still photographs strike a good balance, showing the joy of that moment, but also saving up some of the excitement for what's to come.

Sophia: What were some of the biggest challenges in telling this story as filmmakers?

Ryan: The suspense. We were documenting one of the most documented news stories of last year, and frankly of the last five years in California. Almost any informed Californian and Americans, for the most part, knew the ending of our film. So I think that comes down to great editing. We hired an amazing editor, Kate Amend, and an associate editor, Helen Kearns, who worked extremely hard to build a sense of suspense into each scene so that the audience felt like they were there at that very moment. The Plaintiffs have commented that when they are watching the film, even though they know the ending, they feel as if they are reliving the terror every moment.

When you are filming lawyers, access is a huge challenge. We were filming probably over one hundred lawyers at some point. The work that lawyers do isn't all that cinematic. It's a lot of reading and writing. By its very nature, it's a confidential and sensitive process. So to convince lawyers to literally open up their doors to us was a challenge. We are so grateful to Ted and David for leading that charge. They understood the importance of allowing this case to be documented for the American people. Many of these lawyers who under normal circumstances would not want documentary crews to be filming their process, recognized that it could be very significant. I think that they all share a sense of pride that they were able to do that.

Sophia: As a result of winning the Supreme Court case, Sandy has an epiphany. She realizes that all these years, she has "just been coping," living life tolerating "a very low bar" rather than feeling "happiness, satisfaction and pride" in her situation. Kris observes that "having

legal protections is everything.”

Ben: Those two quotes speak to why this case was so important. Kris and Sandy had been married briefly in 2004, so they knew what that meant to have their relationship affirmed by their city and county in the way that all of their friends and families had experienced. Regardless of the many physical and tangible benefits that one receives from being married — taxes or immigration rights — there is also a more profound, emotional effect of being told that what you have is not as good as what everyone else has. We are coming upon their one year anniversary, and if you asked them today, I believe they would say that knowing that they are accepted as equal does make a big difference.

Sophia: **Do you believe that the documentary will inspire a fictionalized retelling of the story?**

Ryan: We are non-fiction filmmakers. I believe that there is more power in non-fiction. I think that no matter how good the actors are that they would never be able to convey the true emotion that Paul and Jeff do in the film. That being said, it is a wonderful story that has all the elements of a great narrative film, all the challenges, and the happy ending. So if someone did want to adapt it into a narrative feature, I know that Ben and I would definitely tune in to watch ... But it is not something that we are setting out to do ourselves.

Sophia: **19 states and the District of Columbia have legalized same-sex marriage, while 31 states (more than half of the United States), still explicitly ban same-sex marriage. Where do we go from here?**

Ryan: Same-sex marriage is still illegal in 31 states. That statistic is correct. Where we go from here is — we are seeing Federal Judges strike down bans left and right, in states that you would have never expected five years ago. It has happened in Utah, Texas, Tennessee, and most recently, Wisconsin. All these cases are waging at the same time. Ben and I aren’t lawyers, but what we keep hearing is that one of those cases could very well make it back to the Supreme Court. Everyone has bets which state that could be or it might be a bundle of states. So I think that within the next two or three years, we could very well could see the Supreme Court ruling on this issue definitively.

Top Image: Jeff Zarillo, Paul Katami, Sandy Stier, and Kris Perry, “The Case Against 8.” Photo by Diana Walker for American Foundation for Equal Rights, courtesy of HBO Documentary Films.

“The Case Against 8” Official Website.

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