

4-2014

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## Jo Becker's "Forcing the Spring: Inside the Fight for Marriage Equality"



Posted on: April 27th, 2014 by Art Leonard [No Comments](#)

Jo Becker's book about the Proposition 8 lawsuit that restored same-sex marriage to California was released this week to near-unanimous condemnation from gay bloggers and critics. I am providing a partial dissent here, having just finished reading the book. I think at least some of the criticism misses the mark, because it faults the book for not being the book that the bloggers and critics wanted.

Part of the fault belongs with Becker and her publisher for the way the book was titled, introduced and promoted. The title suggests that the book is an inside look at the struggle for marriage equality, an effort stretching back several decades and ongoing as I write this, when actually it is nothing of the sort and not really intended as such by the author. Instead, this book is a journalist's account of the lawsuit conceived initially in 2008 by Chad Griffin, then a Los Angeles-based publicist and media consultant and now the Executive Director of Human Rights Campaign, intended to reverse the verdict of California voters and get Proposition 8, an anti-same-sex-marriage constitutional amendment, quashed while achieving marriage equality nationwide through a Supreme Court ruling. Becker was assigned by The New York Times to write a profile of Ted Olson, the former Solicitor General of the U.S. who had been recruited by Griffin to represent the plaintiffs in the case. As Olson was a noted conservative legal advocate, it was intriguing and newsworthy that he would have agreed to take on this case. After Becker wrote her piece for the Times, she approached Olson and Griffin about attaching herself as an observer to the lawsuit with the idea of writing a book about it when it was all over. They agreed to this, but the lead counsel for the defendants, Charles Cooper, did not, so the book ended up being an inside-account of one side, with occasional interjections from Becker's later interviews with Cooper (and the judge, retired U.S. District Judge Vaughn Walker) conducted after the case was over.

I found Becker's account of the Proposition 8 litigation to be enthralling, packed with interest details that were not generally known until her book was published this week, and really worth reading for anybody at all interested in the marriage equality struggle. She does a good job of introducing and explaining the legal theories of the case, describing what it feels like to be involved in a big case drawing lots of passionate attention from advocates and the public, and communicating in particular the emotions of the direct participants: the plaintiffs, the lawyers, the judge. In her account of the litigation itself, she has produced a thrilling work.

What has drawn brickbats is the context in which she puts it, and in this regard I think the main problem is that she has taken on — or at least transmitted as if it were her own considered judgment — the attitudes and opinions of her main subject, Chad Griffin, and those working with him on the case. Griffin evidently concluded on the night of Nov. 5, 2008, when Proposition 8 was approved by a comfortable voter margin, that the existing strategy for achieving marriage equality was inadequate and had failed, and that a new approach — a direct frontal assault in federal court with a goal of getting quickly to the Supreme Court — was the way to go. This was a sharp departure from the strategy being pursued by the LGBT public interest lawyers who had been litigating on this issue since the early 1990s, when Evan Wolfson, then a Lambda Legal attorney, joined the ongoing Hawaii lawsuit, *Baehr v. Lewin*, as co-counsel. This effort had achieved some success. By the time of that Prop 8 vote, the strategy had won same-sex marriage in three state high courts — Massachusetts, California and Connecticut — and momentum seemed to be building. After that unfortunate defeat putting a temporary end to marriages in California, a unanimous decision from Iowa's highest court got the movement lawyers back on track, and in the years between then and the Supreme Court arguments in the Prop 8 case, the state-by-state movement strategy had continued to move forward, branching out to achieve some legislative victories and even several victories at the polls in 2012, such that the landscape for same-sex marriage was much advanced by the time the case was argued, including moving from state courts into federal courts with specific challenges to Section 3 of DOMA. The preferred strategy of the LGBT legal organizations was to proceed by stages and not to bring the direct marriage demand to the Supreme Court until the effort had advanced to the point where it would not be a big stretch for the Supreme Court to rule in their favor because a substantial portion of the country would be living in jurisdictions where same-sex couples could marry. DOMA would have been dispensed with, and legislative and electoral victories would have mainstreamed the issue. This, indeed, is what they had accomplished by June 2013, when the Prop 8 and DOMA decisions were announced, and the payoff came later that year and in 2014, as the DOMA decision, *US v. Windsor*, led to state high court victories in New Mexico and New Jersey, new marriage equality laws in Hawaii and Illinois, and then a string of federal district court marriage equality rulings, relying heavily on *Windsor*, starting in Utah. As this is written, the court of appeals arguments in those cases are getting under way.

In other words, in some respects the Prop 8 litigation has been a side-show. In other respects, it has been front and center. Due to the extraordinary media campaign spearheaded by Griffin, the trial and travails of that case as it progressed through the courts, culminating in restoration of same-sex marriage in California when the Supreme Court voted 5-4 to dismiss the appeals on a procedural/jurisdictional ground rather than to rule on the merits, helped mightily to sway public opinion in favor of same-sex marriage. Becker's account of this takes the insider's view and, as such, tends to downplay or omit the roles of other actors and organizations and overly magnify the role of Griffin and counsel Ted Olson and David Boies. Her abbreviated account of the DOMA case and of the legislative struggle for marriage equality in New York do not do either development justice, and in the struggle for marriage equality both loom large as crucially important, as does the earlier-filed DOMA case in the 1st Circuit, brought by Mary Bonauto for Gay and Lesbian Advocates and Defenders, an organization largely responsible for achieving the first multi-state region of the country to complete a sweep for marriage equality. (To add insult to injury, Becker even gets the name of that organization wrong when she mentions it.) Becker's account makes it sound like the most crucial player in the NY

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### ABOUT THE AUTHOR



Arthur S. Leonard, a professor at New York Law School since 1982, edits the monthly newsletter *Lesbian/Gay Law Notes*, and is co-author of *Sexuality Law* (Carolina Academic Press) and *AIDS Law in a Nutshell* (West Publishing Co.). He writes on legal issues for *Gay City News* (New York), and serves as a trustee of the Jewish Board of Family & Children's Services of New York.

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### LEONARD'S LINKS

marriage equality struggle was former Republican party chair Ken Mehlman, a closeted gay man who was inspired to come out as a result of Ted Olson's agreement to take on the Prop 8 case and who then played a leading role in getting Republican libertarians to sign on to the marriage equality cause in New York with their influence and money. Her account leaves out the important work of the NY gay rights lobbying groups, the key role of Alphonso David in the governor's office, Brian Ellner's leadership of the media campaign, etc. Similarly, although she mentions Evan Wolfson with some frequency, her treatment of his key leadership role is colored by the first presentation — accurately in light of the particular perspective of her story — as somebody who pushed back against the attempt by Griffin and Dustin Lance Black to instigate direct federal litigation prematurely.

Becker's account is spellbinding. Will it mislead people about the overall trajectory and accomplishments of the marriage equality struggle? Perhaps, if read in isolation. But it will be only one of many books on this subject. Olson and Boies have their own book coming out this summer, and the extraordinary events of the year since Windsor was decided will certainly prompt more writing, as will the drive to the final Supreme Court decision, most likely to come in 2015 at the earliest. Meantime, I hope that people are not put off from reading Becker's book, because it is a book that deserves to be read, and debated, and argued over. It will certainly help people to understand Chad Griffin, now the head of HRC and thus a leading spokesperson for the national LGBT community. This book, at its heart, is his story told from his perspective by a talented journalist. That should be enough to whet peoples' appetites.

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