

IT'S NOT OVER YET



JON W. DAVIDSON

MAKING EQUAL TREATMENT A REALITY FOR ALL IN THE LGBT COMMUNITY REQUIRES CONSIDERATION OF THE EFFECTS OF RACE, NATIONAL ORIGIN AND OTHER FACTORS.

I'VE BEEN SAYING FOR A LONG TIME that indeed there is an LGBT “agenda,” and it can be summed up in one word: equality.

On February 23, 2011, our quest for equality was made significantly easier. On that day, Attorney General Holder announced that he and President Obama have concluded that the so-called “Defense of Marriage Act” is unconstitutional. Their conclusion flowed from their analysis that courts must give what is called “heightened scrutiny” to government action that treats people differently based on their sexual orientation, and that DOMA cannot survive such close judicial review.

It's hard to overstate the importance of this analysis. When “heightened scrutiny” is applied, courts presume that government acts that treat one group of people unequally to others are unconstitutional and they put the burden on the government to prove that the inequality was necessary to substantially further an important government objective. Up to now, most federal courts have used lower levels of judicial review which presumed that government actions were constitutional and it was up to us and other legal

groups to argue otherwise. But Lambda Legal has argued for decades that, because discrimination based on sexual orientation is likely the result of bias or stereotypical thinking, courts should be suspicious of laws and other government action that treat gay people unequally. Until now, we fought what seemed to be an Orwellian-named Department of “Justice” that had argued that the burden should be on those challenging antigay laws or conduct to disprove every possible reason that might be imagined to justify the government's action, and that courts should give deference to other branches of government even when they were blatantly discriminating.

Heightened scrutiny is a very hard standard to meet and, if adopted by the courts, should result in the elimination of all antigay laws. But we're not there yet. The leadership of the House of Representatives has hired private lawyers to defend DOMA who likely will urge courts not to demand much of a rationale for sexual orientation discrimination. And, of course, judges have to do the right thing and strike DOMA and other antigay laws down. But having the Obama administration on our side makes that *much* more likely.

If the courts agree that heightened scrutiny is required, the battle for LGBT equality will still not have been won, however. Heightened scrutiny of race and sex discrimination has not ended all unequal treatment of racial minorities and women. Instead, a right to equality under the law must still be translated into equality in practice. As some have said, we need not just “formal equality,” but also “lived equality.” That means not only enforcing the victories that we are now trying to win, but also taking into account social and economic forces that prevent people from accessing and, if necessary, enforcing their rights.

Making equal treatment a reality for all in our community also requires consideration of the interactive effects of race, national origin, sex, sexual orientation, gender identity and expression, HIV status and other disabilities, immigrant status, age, poverty and other factors. As lesbian activist and leader Urvashi Vaid has argued, to ignore the intersections between multiple and overlapping forms of discrimination and disadvantage that continue to exist in our society is to leave some of us behind.

President Obama and the Attorney General have made our quest for equality much easier. But we still have very far to go to achieve true equality. Fortunately, Lambda Legal is determined to be there for the long haul.

A handwritten signature in blue ink that reads "Jon W. Davidson".