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GUEST COLUMN

Round 2 for same-sex marriage

By Ilya Shapiro

Same-sex marriage is back at the U.S. Supreme Court in a set of cases to be argued Tuesday. But this time the justices can't avoid the main issue as they did in the challenge to California's Proposition 8 in *Hollingsworth v. Perry* (2013) (which they dismissed for lack of appellate standing). And in light of the court's ruling in the Defense of Marriage Act case, *United States v. Windsor* (2013), the outcome in the cases now before it — consolidated under the name *Obergefell v. Hodges* — is in about as little doubt as a high-profile controversy could be.

After all, could swing-Justice Anthony Kennedy, the author of not just *Windsor* but the gay-rights cases of *Lawrence v. Texas* (2003) and Romer v. Evans (1996), really vote against gay marriage?

But *how* the court reaches its result is just as important as the result itself. Will Kennedy spin a tale about the "sweet mystery of marriage"? Will he explain how to balance state powers and individual rights? Will Chief Justice John Roberts instead just call marriage a "tax" and therefore universally applicable?

See Page 7 — JUSTICES

DAILY APPELLATE REPORT

CIVIL LAW

Constitutional Law: Arizona's voter registration law imposes at most, a de minimus burden and is rationally related to the state's legitimate interest. *Arizona Libertarian Party v. Bennett,* U.S.C.A. 9th, DAR p. 4516

Juveniles: Juvenile court may reinstate juvenile ward's restitutionary obligation even though his wardship had terminated. *In re Keith C.,* C.A. 1st/4, DAR p. 4523

Probate and Trusts: Son excluded from grandfather's estate by father vindicated on appeal, as common law demands parties in son's position must receive 'substantial share' of appointive property. *Sefton v. Sefton,* C.A. 4th/1, DAR p. 4525

Probate and Trusts: Child born out of wedlock cannot establish that she is intestate decedent's natural child despite DNA evidence because decedent never held her out as his own. *Estate of Britel,* C.A. 4th/3, DAR p. 4503

Torts: Patient's injury from falling on mopped floor in hospital was caused by ordinary negligence and not professional negligence; two year statute of limitation applies. *Pouzbaris v. Prime Healthcare Services,* C.A. 4th/3, DAR p. 4512

Daily Journal photo

U.S. Magistrate Judge Paul S. Grewal is one of a number of judges called upon to approve warrants for the use of secretive surveillance technology.

Warrants for mobile surveillance questioned

By Laura Hautala
Daily Journal Staff Writer

SAN FRANCISCO — Technology that allows law enforcement to track suspected criminals through their mobile phones has drawn increasing scrutiny from civil libertarians who say innocent people are caught in the dragnet. Now some federal judges in the Northern District, who are called upon to approve warrants for the use of the technology, are taking care to better educate themselves about the technology and the way it can be used.

The controversial technology — known as a cell-site simulator and employed by law enforcement to track the location of suspected criminals — was a topic of discussion among judges and lawyers at the Northern District's annual conference, held in March in Napa. Magistrate Judge Jacqueline S. Corley moderated the panel and Brian Owsley, a former magistrate judge in the Southern District of Texas, was a panelist along with Nathan Judish from the Department of Justice Computer Crime and Intellectual Property Section.

And at least one federal magistrate, Judge Paul S. Grewal of San Jose, had the technology demonstrated for him. Grewal confirmed the demonstration took place but declined to comment on any details for this story, as did other federal judges.

Civil libertarians have been raising red flags about the technology because it tells the police the phone number of every person in the area, not just the suspect's. What's more troubling, they say, is that judges often don't know rarely know what they're signing when they approve warrants to let the police use this tool.

Finally, even if a judge knows they've signed a warrant for a search using the device, a criminal defendant and his attorney rarely know it has been conducted.

But that is changing, at least in the Northern District of California.

Aside from prosecutors and defense attorneys openly discussing the concerns over the warrants at March conference, defense attorneys are finding more ways to make public the government's use of cell-site simulators, shedding more light on specific uses of the technology.

The simulator is often called a Stingray, which is the brand name used by a major manufacturer of the devices, Harris Corp. The device acts like a cell phone tower, attracting signals from all nearby phones and revealing the phone number and identification number connected to each phone.

"I think a lot of policymakers and judges have started to realize what's really at stake with these devices," said Nicole A. Ozer, an attorney at ACLU of Northern California, speaking of the issue nationally. "Up until a few months ago, the public was in the dark, policy makers were in the dark, judges were largely in the dark."

"These devices were created and designed for surveillance for entities like the CIA abroad, because they couldn't rely on cooperation from local providers," former judge Owsley said in an interview. Owsely is now a law professor at Indiana Tech Law School.

See Page 3 — JUDGES

Clarity vital in silence protection

Appellate court found man's silence at the scene of fatal accident should not have been used against him

By L.J. Williamson
Daily Journal Staff Writer

The California Supreme Court held in a 4-3 decision last August that a criminal defendant must speak in order to remain silent — that is, a defendant has to unambiguously invoke his Fifth Amendment right against self-incrimination to prevent prosecutors at trial from pointing to silence as evidence of guilt consciousness.

That doesn't appear to be the last word on the subject.

On Thursday, upon remand from the high court, the 1st District Court of Appeal reversed the conviction for vehicular manslaughter of a San Mateo man who did not speak at the scene of a fatal accident, finding the jury likely interpreted the man's silence as evidence of his negligence.

Experts say the decision is just one in a line of cases in which defense lawyers will challenge what constitutes an unambiguous invocation.

In February 2007, Richard Tom while speeding collided with another car carrying a mother and her two children. The accident injured one child and killed the other. At the scene of the accident, officers reported that Tom only said, "I didn't even see it." After his arrest, Tom told police that he would not give a statement without counsel present.

During his subsequent trial, police officers testified on more than one occasion that Tom failed to inquire about the welfare of the occupants of the other car. In addition to expert testimony which attempted to determine his rate of speed, the prosecutor urged the jury to consider Tom's silence as substantive evidence of an "I don't care attitude," to establish that he had acted with gross negligence. Tom was found guilty of gross vehicular manslaughter.

In a long unpublished opinion overturning the verdict Thursday, Justice Martin J. Jenkins held that, "The prosecutor's entreaty to the jury to consider defendant's silence as evidence of his guilt took on added significance," reiterating that Tom had in fact clearly invoked his right to silence. Yet in the absence of any eyewitnesses or physical evidence, the appellate court described the jury's assessment of Tom's silence — especially his failure to ask about the occupants of the other vehicle — as "very likely an important and even determinative factor" in its finding that Tom had acted with gross negligence.

Justices Peter J. Siggins and Stuart R. Pollak joined the opinion.

This case is likely to be one in a series of cases examining invocation of the right to silence.

"I do think that this will continue to be an area that the California Supreme Court will have to address," said Laurie Levenson, professor at Loyola Law School, who wrote an amicus letter to the California Supreme Court asking it to rehear the case.

"I think it's unlikely that this case will be reviewed by the state Supreme Court, but there's certainly another one coming down the pike. I think that defense lawyers are going to challenge what constitutes an unambiguous invocation. Because we have an ambiguous standard for what constitutes an unambiguous invocation."

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Rising plaintiffs' lawyer eyes science company in latest trial

By Matthew Blake
Daily Journal Staff Writer

LOS ANGELES — Lawrance Bohm is a rising star in the plaintiffs-side labor and employment bar.

In November in San Diego, he won $185 million for a single plaintiff in a pregnancy and gender discrimination case against Autozone Stores Inc.

In 2012 in Sacramento, he won $167 million for another single plaintiff in a retaliation and sexual harassment matter.

Now Bohm, who started his plaintiffs firm in 2005 after a stint on the defense side at Jackson Lewis LLP, is trying to work that magic before a Los Angeles jury.

He has a lot to prove; he says he's on a five-trial winning streak and a lot of people are watching to see if he can persuade another jury to render an eye-popping verdict in a whistleblower case. But this case presents more challenges.

During closing arguments last week, Bohm sought to convince a jury that his client suffered enough emotional trauma to warrant damages.

The Bohm Law Group attorney showed slide after slide of visually gripping allegorical frames meant to illustrate a point about the dispute. With Van Gogh's "The Starry Night" in the background, Bohm said scientist Janus Bogdanski suffered insomnia since losing his job at NanoPrecision Products Inc.

"Sleep deprivation is a recognized form of torture," Bohm said. "Dr. Bogdanski has challenges every day sleeping."

Later, flashing a football scoreboard that read "Visitors 46, Home 8" in the fourth quarter, Bohm said there was a high probability Bogdanski warranted damages, just as there was a high probability the visiting team would win that game.

The Bogdanski trial marked the first time, though, the Sacramento lawyer displayed his courtroom style to a Los Angeles jury. It is also a more complex dispute over the safety of high-powered lasers, instead of more readily understandable pregnancy or sexual harassment discrimination claims.

Bogdanski sued after being fired in August 2013 by NanoPrecision, a 13-year-old El Segundo company specializing in fiber optic technology development. *Bogdanski v. NanoPrecision Products Inc., et al.*, BC528228 (L.A. Super. Ct., filed Nov. 19, 2013).

Bogdanski was let go the same day he lodged a complaint with the U.S. Occupational Safety and Health Administration about NanoPrecision allegedly not having safety protocols governing its lasers.

Bohm told the jury his client was fired with little warning and in retaliation for going to OSHA, presenting numerous slides, some recapping key moments of the trial and others more evocative.

See Page 3 — BOHM

Who caused the death of Kayla Mueller?

By Mitchell Keiter

The recent passing of al-Qaida hostages Warren Weinstein and Giovanni Lo Porto during a drone strike recalls the similar death of Kayla Mueller. Kept isolated in an abandoned building by the Islamic State group, she died when a Jordanian missile exploded. In each case, headlines reported the hostages were killed, not just *during* the strikes, but *by* them.

But did Jordan really *cause* Mueller's death? Did the U.S. cause the deaths of Weinstein and Lo Porto? There is room for re-evaluation of drone strike policy, but true responsibility belongs with the terrorists who kidnaped and confined their victims.

The criminal law distinguishes between the "direct" and the "legal" cause of death. The former is the event that inflicted the fatal wound. But the latter concerns fault, and who thus deserves blame. This distinction should inform how journalists report events, and how policymakers respond.

A 1918 case clarified the causation rule for California. *People v. Fowler*, 178 Cal. 657. Just as the Islamic State left Mueller vulnerable, defendant Fowler beat his victim and left him lying alone on a dark road. An unsuspecting motorist then ran him over. The state Supreme Court held it did not matter whether Fowler or the driver was the direct cause of death. Either way, death was the "natural and probable result of the defendant's ... leaving [the victim] helpless and unconscious ... exposed to that danger."

MITCHELL KEITER
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Our state Supreme Court has since cited cases from around the country showing how legal causation derives not from the actual killing, but from the creation of conditions that make death a natural and probable result. *People v. Roberts*, 2 Cal. 4th 271 (1992). Where "A" threw a grenade at "B," who impulsively kicked it toward "C," who died as a result, Indiana's high court held the evidence supported A's conviction. Madison v. State, 130 N.E.2d 35 (Ind. 1955). A Florida court likewise held that where a defendant shot at a driver, who "ducking bullets," accidentally ran over a pedestrian, it was the shooter, not the driver, who committed the homicide. *Wright v. State*, 363 So. 2d 617 (Fla. Dist. Ct. App. 1978). And these cases show that so long as such death is a foreseeable consequence of the defendant's conduct, it is no excuse that the grenade-kicker or driver acted unreasonably.

The concept applies with special force to hostage and "human shield" cases. When police inadvertently killed a human shield, the robbers were guilty of his death. The robber who "chose to put [the victim] in a dangerous place ... [is] as culpable as if he had done the deed with his own hands." *Pizano v. Superior Court*, 21 Cal. 3d 128 (1978).

Obviously, it is legal, not direct, causation that matters. If a hostage is killed during a rescue attempt of a Paris kosher market or Sydney chocolate shop, then regardless of who fired the fatal bullet, the terrorist who created the life-endangering condition should be said to have "killed" the victim.

But the failure to place blame with those who create such life-endangering conditions makes shield-taking a profitable tactic. Last summer, for example, Hamas repeatedly fired rockets from Gaza hospitals and schools, and even forced children to remain in the line of fire. According to Amnesty International, Hamas "repeatedly launched unlawful attacks ... and displayed a flagrant disregard for international humanitarian law and for the consequences of their violations on civilians in both Israel and the Gaza Strip." Whereas the shield-using robbers moved the victim to a dangerous place, Hamas moved danger to the victims.

The New York Times

In an undated handout photo, Kayla Mueller, the American aid worker abducted by the Islamic State group, with her dog.

But instead of deterring life-threatening risks to children, reporters unwittingly rewarded them, and incentivized them for the future. With a statistical precision usually reserved for Olympic medal counts, journalists kept a running tally of civilians killed by responsive Israeli fire. (Amnesty and others have since concluded that some of these deaths were directly caused by Hamas' own fire, not Israel's.) But although Hamas is culpable for such deaths whether or not it "had done the deed with their own hands," the exclusive focus on direct rather than legal causation exempts the terror organization from blame it deserves.

Shield-taking is an especially sinister tactic, because it works against only forces that respect innocent human life. It would be pointless to use children as human shields against the Islamic State or Hamas, because they would not hesitate to make them "martyrs." Ominously, pro-Russian separatists in Ukraine have adopted the tactic.

It is no surprise the Islamic State told the world that Jordan had killed Kayla Mueller. The wonder is why Western media played along. More and more human shields will face that fate until the West stops rewarding terrorists' efforts to escape blame for the deaths they cause.

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Justices can't avoid main issue in marriage cases

Continued from page 1

As someone who believes that governments shouldn't be regulating marriage in the first place, I hope that the answers to the two questions that the Supreme Court posed — regarding licensing and recognizing same-sex marriages — focus on the ancient meaning of "equality under the law."

Indeed, the 14th Amendment's equal protection clause establishes a broad assurance of equality for all. It guarantees the same rights under the law for all men and women of any race, whether rich or poor, citizen or alien, gay or straight, and, as the court held in *The Civil Rights Cases* (1883) "prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."

As the provision's proponents said in their congressional debates in 1866, the clause "establishes equality before the law" and "abolishes all class legislation in the States," thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction."

Under the 14th Amendment, the court ruled in *Romer*, a state can't relegate anybody to the status of a pariah, "a stranger to its laws" — or deny to gay men or lesbians rights basic to "ordinary civic life in a free society" so as to "make them unequal to everyone else." The equal protection clause, the court said in *Windsor*, clearly protects against state-sponsored discrimination and "withdraws from Government the power to degrade or demean."

Nevertheless, the 6th U.S. Circuit Court of Appeals — when it heard the cases now at issue — held that the equal protection clause doesn't apply to state marriage laws because there's no evidence that "the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage."

The lower court erred by focusing on a certain kind of original *understanding* — the immediate effect supporters "understood" the 14th Amendment to have. The Supreme Court has rejected that approach, focusing instead on original *meaning*. Look no further than the remarkable Second Amendment case of *District of Columbia v. Heller*, where both the majority and dissenting opinions reasoned on originalist grounds.

In the 14th Amendment context, the court has asked how the well-established meaning of terms added to the Constitution in 1868 applies to modern exclusions of new social groups. It has described the equal protection clause as securing to all "the protection of equal laws" and prohibiting caste legislation that discriminates against a social class.

Indeed, many equal-protection precedents are hard to explain as a matter of "original understanding" but are amply justified as an application of the equality-under-law concept. The rule against class legislation applies with special force to the central institutions of state law, as the court has repeatedly held in striking down laws that restricted marriage licenses based on incarceration, owing child support, or race.

So while it's undoubtedly true that nobody in 1868 expected that the 14th Amendment would force a state to license same-sex marriages, evidence of the ratifying generation's prophetic anticipation isn't necessary for courts to apply the provision to novel facts. As originalist scholar Ilya Somin recently put it, original-meaning originalism "is entirely consistent with updating the application of its fixed principles in light of new factual information. Indeed, such updating is often not only permitted, but actually required by the theory. Otherwise, it will often be impossible to enforce the original meaning under conditions different from those envisioned by the generation that framed and ratified the relevant provision."

Just as a "19th-century statute criminalizing the theft of goods is not ambiguous in its application to the theft of microwave ovens," as Justice Antonin Scalia wrote in the otherwise forgettable case of *K Mart Corp. v. Cartier Inc.* (1988), a 19th-century constitutional command that no state may "deny to any person within its jurisdiction the equal protection of the laws" isn't ambiguous in its application to sweeping exclusions in state family law. The civil recognition of marriage is a legal matter and the plaintiffs here have clearly been denied myriad legal benefits and protections solely on account of their sexual orientation. This is the very kind of class-based discrimination that the equal protection clause prohibits.

In short, does the 14th Amendment *require* states to issue marriage licenses to same-sex couples? Of course not. It doesn't say a word about marriage licenses. Or driver's licenses. Or liquor licenses, business permits, corporate status, public schools, libraries, buses or universities.

The 14th Amendment *requires* almost nothing affirmative. The only benefits states must grant are the privileges or immunities of citizenship, the due process of law (before depriving someone of life, liberty, or property), and the equal protection of the laws. In other words, the 14th Amendment requires states to issue marriage licenses to same-sex couples only if they give them to everyone else.

The New York Times

Associate Justices Anthony Kennedy, right, considered the primary audience for briefs about the legalization of same-sex marriage, and Stephen Breyer in Washington, March 23.

Ilya Shapiro *is a senior fellow in constitutional studies at the Cato Institute, which filed a brief supporting the plaintiffs in the same-sex marriage cases now before the Supreme Court.*

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