
THE INEVITABILITY OF GAY MARRIAGE

Gretchen Van Ness*

Thank you. It is such a great pleasure to be here; to be able to meet so many people I have read about throughout my legal career. It is also very interesting to be here as a practicing attorney on a panel about constitutional issues because I thought long and hard about what I can contribute to this. I think that if my path had gone in a separate direction I might be a constitutional law professor myself, but I have been too busy practicing law. So I thought, “What can I add to the panel today?” I thought really what I can add is what it has been like to be part of this fight about gay marriage in Massachusetts and nationally, as a practicing attorney who represents gay and lesbian persons, who has worked in leadership of the Women’s Bar Association, which supports efforts to end discriminatory laws against gay marriage, and who has been able to also be a part of seeing GLAD’s¹ work—historic work and courageous work—both in Vermont and here in Massachusetts where the *Goodridge*² case is now pending.

So, as we are here at this historic conference, we are also in the shadow of history, waiting for the Supreme Judicial Court to act. And as I was putting together my thoughts for talking with you today, the first title that I came up with for my remarks was just a very simple one, and it was, “Well, we’re right and they’re wrong.” I realized that I had this sort of childish

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1. Gay & Lesbian Advocates & Defenders.
2. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that denial of marriage rights to same-sex couples was a violation of the Massachusetts State Constitution).

reaction and I wanted to sort of make all of my remarks that way because I have sat through so many hearings over the past several years about the Super DOMA laws, the attempt to amend our Constitution to prevent gay marriage, and all of the bills that have been introduced to try to stop gay and lesbian people from being full citizens in our country and in this state. I have sat through these hearings hour after hour, day after day. I have read everything that I could read and I think that I try as an attorney to keep an open mind—to try to understand all of the arguments that are for or against every side of every issue. And, particularly because I practice law and I help gay and lesbian people who are entering partnerships or forming families, I want to advise them the best way I can with the right to marry just over the horizon in our country. What does it mean? When will the law change? What does it mean to help them make plans to protect themselves, each other, their children and their families? And what I have come away with from all of this long, long study of the opposition is that I wanted to say starkly that we are right and they are wrong, because all of the arguments in opposition to the recognition of gay marriage simply do not stand up to scrutiny.

If marriage is a good thing for society and it is a good thing for families and for civilization as we know it, it seems to me that pro-marriage folks should be spending their millions of dollars encouraging more people to marry, not spending all this money to permanently stop a small minority from ever being able to marry the people they love. So, I have been trying to deal with and understand this opposition and I wanted to share with you some of my thoughts because I think we need to understand what the arguments are against gay marriage in order to understand why we are going to win this fight, because I think we *are* going to win this fight. I am not sure when, but we will win it. But it seems that from all of the things that I have done, there are basically four different categories of arguments against gay marriage. So, I wanted to review a little bit of them and why I think that they are going to fail.

First, the most overarching argument we heard the state of Massachusetts present in the *Goodridge* case, and also that I have heard presented in support of amending our Constitution to prevent same-sex couples from marrying, is this overarching argument that same-sex marriage is wrong and is unconstitutional simply because it has never been done before. In essence, this argument is that marriage is a fixed and immutable institution that human beings and, more specifically, the human beings who make up the courts of last resort, simply cannot tamper with. In this view marriage is what it has always been and therefore, cannot be anything else. And then there is another argument that is often repeated and it is that marriage is based on the time-honored principles derived from our shared Judeo-Christian heritage and, because the definition of marriage

predates our Constitution and laws, we cannot through constitutional review or legislative action “change” the definition of marriage.

Those are the two arguments I hear most of all. Then there is a whole panoply of arguments in opposition to same-sex marriage that I have grouped together under the heading I call the “Parade of Horrors.” In the “Parade of Horrors,” allowing same-sex marriage somehow opens the door to adultery, bigamy, polygamy, child abuse, drug abuse, capitalism, global warming. I start to lose track after a while but you have all heard Senator Santorum’s³ remarks as just the latest example of this. And in this unapologetic appeal to fear and loathing perhaps the saddest arguments come from the so-called ex-gay movements, representatives of which came to Massachusetts recently to testify for the proposed Super DOMA constitutional amendment, and these folks essentially asked lawmakers, “please save us from ourselves.”

And, finally, the last category for the arguments in opposition to gay marriage falls into what I call the “father knows best” arguments. In this category of arguments, somehow someone’s image of what marriage is will be destroyed if gays and lesbians are allowed to marry. These are arguments based on an idealized and largely fictional view of heterosexual love and commitment, which claim that special status is rightfully afforded if couples can make some sort of special promise to each other and continue to assert, despite all of the evidence to the contrary, that heterosexual marriage serves and protects the best interests of the children. So, let us look at these arguments.

First, it is true that recognizing same-sex marriage has not been done before in our Commonwealth or in the United States. But our republic survives and our constitution and the rule of law continues to have force and effect in our society because we have not let “the way things have always been” stop us from finding a better way. We no longer live in a country where white males are the only citizens allowed to vote, the only persons allowed to attend universities or law schools, the only persons legally cleared to enter into contracts or own property, to hold certain jobs or to hold public office. It was once simply inconceivable to mention that a society and relation between people could be organized in a different way, but it has happened and we are all living proof of it today.

Second, the argument about the Judeo-Christian tradition suffers from two fatal flaws. First, as we all know, our government cannot adopt one religious view to the exclusion of all others. Defining civil marriage based on any religious tradition violates the principles of separation of church and state and, actually, is a threat to all religious beliefs in our country. More importantly, it seems that this interpretation as a Judeo-Christian tradition

3. Rick Santorum (Republican-Pennsylvania).

is flawed. If there is a traditional view of marriage that appears in the Bible, I think it would be polygamy. It seems like the people in the Bible are always marrying more than one person. In any event, I think it was Elizabeth Birch, who was the chairwoman of the Human Rights Campaign, who often reminded us that homosexuality did not even make it to the Ten Commandments.

Third, as our newest Supreme Court made clear in *Romer v. Evans*,⁴ the case that struck down the Colorado statute that would have prevented anti-discrimination laws protecting the gay and lesbian community, and again more recently in *Lawrence v. Texas*,⁵ hatred and bigotry are not to, and cannot be used to, justify discrimination. Whatever society's problems may be today and whatever the state of heterosexual marriage, preventing same-sex marriage is not the solution. It will not end poverty or hunger, it will not win the war on terrorism, and, most importantly, it will not make gay and lesbian people and their families disappear.

Regarding the fourth argument, and I want to thank Karen for making this statement as well, the idealized and fictional marriage that the opposition is fighting so hard to protect simply does not exist. Make no mistake about it, civil marriage is available to anyone over the age of eighteen who passes a syphilis test and is marrying someone of the opposite sex—that's it! The marriage that the opposition is protecting and all of this discussion about children, love, devotion, procreation, an exalted relationship in every way; it is not required by any state statute. To get a marriage license you must only be eighteen years old—that's all! You do not have to prove that you are fertile; you do not have to prove that you are able to have children; you do not have to prove that you are not getting married just for the health insurance or the tax benefits; and, you do not automatically lose your license if you fail to produce children or stop loving each other. Just as importantly, the state does not step in to remove your children if you are a single parent or divorced or force you to be sterilized if you are disabled or impaired. Under the law, two people can marry for any reason at all, so long as they are of the opposite sex, or for no reason at all, or for any reason that many people would believe are bad reasons. But the important point here is that the state does not ask. Your church may ask, your family may ask, your friends may ask, but not the government. And this is all that gay and lesbian people are asking for; the right to marry without hearing those kinds of questions asked of them.

So, the reason that gay marriage is inevitable is not just because there are no good reasons opposing it; same-sex marriage is also inevitable because of the conflicts in which this issue has arisen. For those of you who heard

4. 517 U.S. 620 (1996).

5. 123 S. Ct. 2472 (2003).

Gary Buseck's speech this morning you know that we are probably in the second wave of litigation concerning gay marriage. Back in the 1970s several suits were filed in different states by gay couples seeking marriage licenses. Those cases failed, but the important point about them is that they were pursued by regular people before there were organizations like GLAD and LAMBDA that do impact litigation on behalf of the gay and lesbian community now, before there was a gay agenda as was recently noted by Justice Scalia. From the very beginning of the gay and lesbian civil rights movement, therefore, marriage has been a concern of real men and real women in real relationships having families together. Here, the rank and file was far ahead of the lawyers; the gay agenda eventually developed and the lawyers have been trying to catch up ever since. And lawyers now know what so many of our gay and lesbian persons in our community know and have known for so long, and that is that gay and lesbian people need to marry and want to marry for all of the same reasons that non-gay and lesbian people want and need to marry. I have never in all my work and all my study, as being interested in history, seen such a powerful and persistent grassroots movement. That is one of the reasons that gay marriage is inevitable. These needs and wants will not change, they will only increase.

Another central reason why gay marriage is inevitable is because history shows us that when a fundamental right has been recognized in the courts, any discriminatory regulation of that right eventually falls. Once marriage was determined to be a fundamental right, it could not be denied because of economic status, race or color, criminal record or history of incarceration. It is only a matter of time, then, until the law catches up with the reality all around us so it also makes no sense to deny an individual his fundamental rights simply because of his sex and the sex of his prospective spouse. Finally, gay marriage will inevitably be recognized because as Mary Bonauto⁶ said in her argument to the Supreme Judicial Court in the *Goodridge* case, it is the right thing to do.

The more gay and lesbian people come out and share their stories with their families and friends and coworkers, the more the majority learns how simply unfair it is that the minority is prohibited from marrying. When most folks learn about the sorts of inequities and injustices that you have heard about today, they begin to see why freedom to marry is so crucial to full citizenship for members of the gay and lesbian community. This community is defined by love, which I think is actually a crucial reason that this movement will be successful and, in the words of Susan B. Anthony, "failure is impossible." Thank you.

6. Mary Bonauto was counsel for Plaintiff Hillary Goodridge in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

