

**Judicial Narratives & Same-Sex Marriage:
Analysis of the Arguments in *Goodridge v. Department of Public Health***

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Abstract

Storytelling has long been central to the LGBT rights movement. By sharing their personal stories, gays and lesbians help combat preconceptions and misinformation about their community. Through storytelling, gays and lesbians have been able to successfully shape public policy to advance equality for their community. This is true across all branches of government, from grassroots activists through to the justices on the highest courts. This paper examines the storytelling used in Massachusetts in litigating *Goodridge v. Dept. of Public Health*, the case that first legalized same-sex marriage in the United States. Storytelling is often seen more as a tool for the political branches, but by examining the litigation in *Goodridge*, it is clear that storytelling has a place in legal argument as well. In this paper, I examine the briefs filed in the *Goodridge* case to explore the ways that the litigators utilized story structure and narrative to make the case for same-sex marriage.

Introduction

Storytelling has long been central to the LGBT rights movement. Early activists, like Harry Hay in the 1950s and later Harvey Milk in the 1970s, urged gays and lesbians to tell their personal stories as an important step toward achieving social and political equality. Coming out, the process of disclosing one's sexual orientation, is a form of storytelling. By sharing their personal stories, gays and lesbians help combat preconceptions and misinformation about their community. These stories make gays and lesbians full, rounded human beings rather than simply flat or stock characters that the public cannot empathize with. More than simply humanizing members of the LGBT community, though, storytelling has public policy dimensions. Through storytelling, gays and lesbians have been able to successfully shape public policy to advance equality for their community. Stories persuade. Stories mobilize. This is true across all branches of government, from grassroots activists through to the justices on the highest courts. Stories are everywhere.

This paper examines the storytelling used in Massachusetts in litigating *Goodridge v. Dept. of Public Health*, the case that first legalized same-sex marriage in the United States. Drawing on the work of applied legal storytelling scholars, I look at the briefs filed by the plaintiffs as well as the amicus briefs in support of marriage equality. I also look at the Supreme Judicial Court's opinion in the case in order to examine its use of storytelling. Storytelling has distinct features that make it useful for persuasion and advocacy. With this fact in mind, this examination seeks to understand the specific ways that storytelling was used in the legal proceedings around the *Goodridge* decision.

Even though the Massachusetts Supreme Judicial Court decided *Goodridge* over a decade ago, and other courts have delivered more recent cases on same-sex marriage, *Goodridge*

remains an important case for study and analysis. The *Goodridge* case was first and for that reason alone warrants examination. This study will also lay the foundation for further comparative analysis across different cases, states, and times. By understanding how storytelling was used within the *Goodridge* litigation, we can begin to understand how storytelling was used in the same-sex marriage litigation more broadly. *Goodridge* also provides an important opportunity to study the role of storytelling at the appellate level, in addition to the trial level. Trials are more clearly tied to storytelling as they are, quite literally, creating the story for the jury as the process unfolds. Appellate argument has been separated from its storytelling aspects; it is often seen as focused on applying law to facts. While that it is true, as I believe this paper shows, storytelling technique is still a useful aspect of appellate argument.

First, I review the emerging scholarship on storytelling, persuasion, and politics. Then I provide a brief history of the fight for same-sex marriage in the United States to provide context for the *Goodridge* litigation. Then I turn to the *Goodridge* case specifically and examine the ways that storytelling shaped the case at both the trial and appellate levels. I conclude by briefly discussing developments since *Goodridge* and the ways that storytelling continues to be useful in the judicial arena as the final push for same-sex marriages across the country continues.

Storytelling and Public Policy

Scholars have recently started taking storytelling seriously. One of the challenges in this area, however, remains one of definition. There is not a single, uniform definition for “story” or “storytelling.” Haven (2007), Mayer (2014), and Paskey (2014) outline some of this debate. The scholars generally agree on the core of the definition. Stories are sequences of events, either real or imagined. Posner (2009), Dalkir and Wiseman (2004), and Pennington and Hastie (1991) all use a form of this definition. For some scholars this core definition is not enough. Different

scholars emphasize and add different elements. Paskey adds that plot must be broadly conceived and that some awareness of the audience should factor into the definition. He also emphasizes the distinction between the story and the telling. Scalise Sugiyama (2005) focuses on character in addition to the plot elements in her definition. For her, stories are about someone, not something. Paskey's concept of character is broader; he allows that the main character could be "an inanimate object or an idea" (Paskey 2014, 63). This is not a true contradiction if the inanimate object is fully personified, but it's unclear that Paskey would require that.

Amsterdam and Bruner (2000) have one of the more fully developed definitions for storytelling, which they see as distinct from narrative. Stories, they argue, have specific elements that separate them from other narratives. For Amsterdam and Bruner, the central element of story is conflict, what they call "Trouble." A story requires a preexisting steady state that is upset by some type of trouble. Characters then work to overcome that trouble, providing the essence of story. The characters then either fail or succeed and a new or returned steady state is achieved. Stories, under this definition, are transformative. This is distinct from a "script," the generic, every day type of narrative. Scripts are not stories because they lack the tension and the transformation that a story requires. For example, the usual trip to the supermarket is a script. It only becomes a story if something unexpected, something unscripted, happens. This definition has its roots in Aristotle's *Poetics*, where he explored the nature of the dramatic arts. Amsterdam and Bruner's definition was used by Chestek (2010; 2011) in his studies on storytelling in appellate advocacy and shares many of the same elements as Haven's definition from his study on the power of storytelling.

This definition is not universally accepted. Paskey (2014), notably, rejects it as too narrow. He posits examples of legal stories that would not fit the definitions offered by

Amsterdam and Bruner or Haven. The examples he uses, however, can fit this definition if those stories are properly conceived. Paskey gives the example of cases where the government is trying to deport Nazi supporters. He says that these cases don't fit the plot outline used by Haven, which is substantially similar to the one used by Amsterdam and Bruner. He says that since the victims' stories were not necessary, then the case doesn't fit the definition. What Paskey fails to grasp, however, is that the story being told in the examples he uses isn't about the defendants or the victims; neither is the hero or central character. The story is, instead, about the government's efforts to rid the country of war criminals. The government is the hero of that story and the legal story being told regards its efforts to show why the Nazi supporters should be deported. That story, conceptualized in this way, does meet the supposedly "narrow" definition Haven suggests.

Mayer's (2014) work, though not helping define "stories," does recognize the utility of storytelling for public policy. For Mayer, stories are central to collective action. Narrative motivates people to join social movements seeking policy change. It helps overcome the free-rider problem that economics suggests should make significant collective action difficult (See Olson 1965). Storytelling derives its persuasive and motivating power from the fact that humans are heavily predisposed to think in narrative terms. Boyd (2009) argues that this predisposition has genetic elements. He outlines a possible evolutionary basis for both the desire to tell stories and the desire to hear them. Bruner (2002), looking at storytelling through the lens of developmental psychology, argues that humans are creatures of story and narrative. Our brains process the world through storytelling and narrative. He goes so far as to argue that civilization itself would not be possible "were it not for our human capacity to organize and communicate experience in a narrative form" (Bruner 2002, 16). Storytelling is so central to how humans see

the world that our brains create it even when narrative is entirely absent (Paulos 1998). Because our minds crave narrative structure, stories are also powerful tools for persuasion and argument. Giving the brain what it wants makes persuasion that much easier.

In addition, stories are useful because of their emotional nature. We are moved by our emotions in ways that we are not moved by abstract or statistical data. Acknowledging emotion's role in persuasion is not new. Aristotle saw emotional appeals as one of the main rhetorical tools. Many people however, argue against using emotion when making decisions rather than welcoming it; instead, decisions should be based on logical thought and analysis. Recent research suggests that approach may be wrong. As Haven (2007, 18) observes, "No one ever marched on Washington because of the facts on a flow chart." Data in a graph cannot captivate or motivate an audience the same way that a character's struggle, whether real or fiction, can. Damasio (1994), looking at the role of emotion in decision making, has shown that even apparently rational decisions require some amount of emotional processing. Haidt (2012), building on this, has shown that emotion is necessary to changing opinions on deeply held political viewpoints. He argues that the mind can always rationalize facts that do not fit preconceived beliefs but that an emotionally compelling story may, slowly, be able to overcome that initial resistance. People connect with stories at an emotional level, persuading them to accept new ideas and new explanations that their rational brains would reject.

Because of its persuasive force, storytelling has a clear use in public policy disputes. President Obama, in a 2012 interview, said that one of his first term mistakes was not paying enough attention to storytelling (Boerma 2012). Policy is only part of the job; presidents must also tell a story that unifies and inspires the public. This will build support for the substantive policy goals. Without that, the policy is significantly less likely to be implemented. Storytelling,

and the emotional appeals that come with it, is widely accepted in the more political branches of government. Its use in the judiciary, however, has been more controversial.

Lawyers, of course, have long been storytellers. This is particularly true at the trial level, but storytelling plays a role in all aspects of the practice and study of law (Batt 1990; Bennett and Feldman 1981; Chestek 2011; Massaro 1989; McKenzie 1992-1993; Meyer 2014; Robbins 2006). Part of lawyering is listening to the client's story and retelling that in legal forms that will help the client prevail. This is true for both trials, where the story is told to the jury, and appeals, where the story is told to a panel of judges. The Applied Legal Storytelling movement has recently started examining the role of legal storytelling in greater detail. In law, storytelling becomes centered on "controlling and presenting" the case facts for maximum persuasive effect (Foley 2008, 35).

Facts, however, are not the only thing that matter in a legal dispute. The legal rules applicable to a situation are as important as the facts that give rise to the case. Burns (1999) and later Chestek (2010) explore the relationship between fact and law in the context of legal persuasion. They argue that law and fact are two strands, both of which are necessary, to make a compelling case. A legally sufficient case may still lose because the story was not persuasive or compelling. Similarly, a compelling story may be barred by the legal rules governing the situation. Paskey (2014) goes further. He says storytelling in the law is about more than just persuasion. He argues, instead, that the controlling law itself is a stock story and that separating law from story is impossible. Story and law are linked.

Chestek (2010) conducted a small study on the role of storytelling in legal persuasion. He sent briefs, some with storytelling elements, some without, to a variety of legal decision makers. This included judges, law clerks, appellate attorneys, and law professors. All groups, other than

law clerks, clearly favored the storytelling briefs. The law clerks were divided. Interestingly, Chestek found a correlation between career length and persuasiveness of the storytelling brief. The longer the respondent had been working, the more they favored the storytelling brief. While the sample size limits the generalizability, the results suggest that storytelling can be persuasive among most categories of experts. Further research in this area is needed to confirm and expand on these findings.

Yet the importance of storytelling in legal argument is controversial. Even scholars who study legal storytelling often frame story as distinct from law (see Paskey 2014). Law is believed to be rational. Trials, and to an extent appeals, are designed to produce Truth. What happened? Who deserves to win? That this is influenced by a carefully crafted story to the same extent as the legal rules is seen by some as unfortunate: It undermines faith in the justice system. Research in other fields, however, affirms the importance of storytelling for decision making more broadly: Lawyers should embrace storytelling and learn to use the aspects of it that work for their case.

Some scholars are calling for this directly. In *Storytelling for Lawyers*, Meyer (2014) argues that lawyers should take lessons from films in crafting and presenting their cases. Pacing, tone, setting, and character are all as essential to advocacy as they are to filmmaking. Meyer compares, for example, closing arguments with film narratives. He explores both plot and character development, two of the essential features of storytelling. Beyond the structural elements, Meyer also argues for storytelling style in legal argument. Point of view, voice, rhythm, and setting can all enhance legal storytelling, and thus legal argument, in ways beyond simple recitation of the facts of a case. Lawyers need to pay careful attention to these elements of their case; traditional, pure legal argument is often insufficient. This advice is, perhaps, more

directly applicable to trials than it is to appeals. Trial attorneys have somewhat more control over these elements than appellate lawyers facing an active bench of judges do. But certain aspects, particularly character development and tone, do carry over from trial to appeal.

Robbins (2006) argues, in particular, for careful characterization. She uses the concept of the Hero's Quest as a template for legal storytelling. Robbins argues that lawyers must be careful to cast their clients as heroes on a quest. Heroes do not, necessarily, have to be the traditional warrior hero. Robbins outlines several different heroic archetypes that can be useful for legal storytelling. In addition to warrior, other archetypes include everyman, lover, outlaw, jester, and more. Each has certain traditional elements associated with it, including goals and flaws. By properly casting the client as the right type of hero, a lawyer helps build a story that is persuasive and engaging. This concept of heroic archetypes comes, originally, from Campbell (2008) and has also been used by Mark and Pearson (2001) in marketing and by Chestek (2011) in his examination of the litigation over the Affordable Care Act.

The scholarship that is currently emerging demonstrates that, at some level, law and storytelling are inseparable. Storytelling is important for persuasion, even in the supposedly logical, rational world of legal argument. Before turning to how storytelling was used in *Goodridge v. Department of Public Health*, I provide a brief history of same-sex marriage litigation in the United States. This will provide necessary context to understanding the *Goodridge* case.

Same-Sex Marriage Litigation in the United States—A Brief History

The movement for marriage equality in the United States goes back longer than many realize. The United States Supreme Court first ruled on the issue in the 1972 case *Baker v. Nelson*, an appeal from a denial of a same-sex marriage license in Minnesota. The Court

dismissed the case with a single sentence denying the existence of any federal question. In 1972, the Supreme Court was unwilling to even consider the application of the 14th Amendment's protections to same-sex couples. It would be over 40 years before the Supreme Court reexamined this issue and, in *Obergefell v. Hodges*, found a right for same-sex couples to marry.

The time between *Baker v. Nelson* and *Obergefell v. Hodges* was one of varied interest in the issue of same-sex marriage (See Chauncey 2004). After an initial flurry of activity in the 1970s, the issue faded for a time. Some of this can be attributed to the focus of the organized gay rights groups operating at the time (Hirshman 2012). Even though many organized groups were not interested in marriage, others were (Chauncey 2004). In the post-Stonewall years, the Gay Liberation Front formed to capitalize on the radical spirit of the time. This group did not seek to assimilate into mainstream culture and was not interested in marriage as a goal. Their focus sought, instead, to revolutionize society and its major institutions (Frank 2014). Later groups, like the Gay Activists Alliance, took a more moderate approach but still did not include marriage as a goal. GAA focused on the decriminalization of sodomy, media portrayals of gays and lesbians, and employment discrimination (Frank 2014). Lambda Legal, the first LGBT legal rights advocacy group, was focused on employment discrimination and custody disputes. The 1970s saw the enactment (and the repeal) of city and state laws banning discrimination against gays and lesbian in a host of areas (Stone 2012). None included marriage. And, with the onset of the AIDS epidemic in the early 1980s, the organized gay rights movement had issues more pressing than marriage to address (Chauncey 2004).

The next wave of marriage organizing came about in the early 1990s. Private attorneys, not connected with the organized gay rights movement, brought suit challenging state bans on same-sex marriage in Hawaii. Initially, none of the leading LGBT organizations wanted to get

involved in the case (Klarman 2013). Conventional wisdom held that pushing for marriage at that time would create substantial negative precedent that would make future efforts to secure marriage more difficult. In light of the then recent Supreme Court decision in *Bowers v. Hardwick* upholding the criminalization of same-sex sodomy, this fear was quite reasonable. Surprisingly, though, the Hawaii litigation proved more successful than anticipated. This eventually prompted the organized gay rights movement to get involved.

The Hawaiian Supreme Court eventually held that excluding same-sex couples from access to marriage was presumptively a violation of the state constitution. The case was remanded to permit the state to attempt to justify the discrimination. After a long delay, the plaintiffs prevailed at the trial level. This did not, however, result in the first same-sex marriages in the country. The state appealed and, during another long delay, the voters in Hawaii amended the state constitution to overturn the decision before the final ruling was reached (Chauncey 2004; Klarman 2013). Coming as close to marriage as Hawaii did, however, created an impetus for continued efforts to create same-sex marriage somewhere in the United States (Klarman 2013). Those efforts next led to Vermont.

Lawyers from the Gay and Lesbian Advocates and Defenders (GLAD) brought suit in Vermont seeking access to marriage for same-sex couples. Like the Hawaii case, the suit was brought under the state constitution to avoid reaching the potentially hostile United States Supreme Court. Vermont was specifically chosen because it had a history of progressive judicial decisions. This decision provided mixed results. The plaintiffs won the case, but the Vermont Supreme Court left the issue of remedy to the legislature. The court only required that whatever remedy the legislature chose to create provide all the same rights and benefits of marriage;

marriage was an option for the legislature, but not a requirement. The legislature chose to create civil unions instead of marriage (Klarman 2013).

Civil unions provided all of the state benefits that come from marriage, but none of the federal benefits. They clearly created a separate and, many argued, inferior system of relationship recognition. Inferior though they were, civil unions were still official. The state recognized same-sex relationships as legitimate and worthy of (some) protections. Politically, civil unions created a new moderate position between the extremes of full marriage recognition and zero relationship recognizing. This shifted the conversation significantly. Official relationship recognition also helped show that marriage was a worthy and attainable goal. But it still fell short of the full inclusion that advocates sought and that only marriage could provide. Shortly after Vermont's actions, GLAD again filed suit for marriage, this time in Massachusetts.

Marriage in Massachusetts—*Goodridge v. Dept. of Public Health*

In April of 2001, GLAD filed a complaint in the Superior Court for Suffolk County on behalf of seven gay and lesbian couples seeking access to civil marriage. The plaintiffs sought “declaratory judgment that the exclusion of the Plaintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law” (Complaint, 31). The complaint placed specific emphasis on the remedy sought. Granting the plaintiffs full access to marriage, in both its tangible and intangible aspects, was the only acceptable remedy. No mention was made of civil union or other types of relationship recognition. GLAD was clearly seeking to avoid an outcome like the one achieved in Vermont.

The storytelling elements become obvious from the very beginning of the case. The plaintiffs, in filing the complaint, carefully make the case about couples, not individuals. Each

couple is treated as a unit in the caption of the complaint and in the description of the parties. This makes the case clearly about each of the plaintiff couples' right to get married, not an individual's right. The lead plaintiffs, Hillary and Julie Goodridge, are described in several paragraphs. The complaint outlines the length of their relationship, their joint ownership of a home, their employment, the combined nature of their finances, and their struggle to have a child. We even learn that their daughter, now five years old, studies both piano and ballet (Complaint, 3-5). The court is also told that the Goodridge family has done everything possible to ensure they receive as much of the protection that comes from marriage as is possible without actually being legally married. These protections, however, proved insufficient. To provide context for this, the complaint outlines the problems the family had to endure in the hospital during the birth of their child and their uncertainty over whether similar conduct could occur again in the future. They attribute the denial of these protections to the lack of formal, legal recognition of their relationship. The complaint, in language replicated for each couple, also alleges the denial of emotional benefits and obligations that married couples enjoy. It places these emotional benefits on par with the financial and legal ones inherent in marriage. This proved important later when the Supreme Judicial Court considered the sufficiency of civil unions.

The couples are, the complaint argues, just like every other family in the Commonwealth. Using Robbins's (2008) heroic archetype structure, this emphasis on ordinariness casts the plaintiffs as everyman heroes. Everyman heroes are seeking to "connect with society" (Robbins 2006, 803). In the plaintiff's complaint, the emphasis is on societal recognition. Nearly every couple talks about making a "public expression" of their love or seeking recognition of their relationship from "the wider world" (Complaint, 9, 11). This sentiment is perhaps most

eloquently stated by Gloria Bailey and Linda Davies who “want the world to see them as they see themselves—a deeply loyal and devoted couple who are each other’s spouses in all ways” (Complaint, 24). Throughout the description of the plaintiffs’ reasons for seeking to marry, the recurring theme of societal recognition is present. They want society to recognize their relationship as equal to any other loving relationship. Marriage is a central and vital social institution from which the plaintiff couples are excluded. Their quest is simply to be able to share in that institution. Beyond describing the plaintiff couples and their goals, this framing is also important in the due process and equal protection claims made throughout the litigation.

After describing each couple, the complaint then goes on to describe their attempts to obtain marriage licenses. Here we begin to see the trouble that turns this situation into a story. What should be a simple, everyday occurrence becomes an impossible task. The couples, who meet all the other requirements for marriage, are denied because of the gender of their intended spouse. The clerks who deny the couples access to marriage licenses are, however, not portrayed as villains. The complaint is careful to cast the law itself, and not the clerks charged with administering it, as the ultimate villain to be vanquished. The clerks are consistently described as polite even offering suggestions for the couples on how to proceed (Complaint, 24-28). With the steady state now disrupted by the inability to marry in the same way any other couple in Massachusetts would be able to, the story shifts to the efforts to overcome that obstacle and permit these couples to fully join in marriage and in society. These efforts take the form of a law suit against the Commonwealth and the appeals that follow.

The legal argument in the *Goodridge* case was grounded in two main theories: due process and equal protection. The plaintiffs also advanced freedom of speech and association claims, but these were less fully developed. These arguments were used at both the summary

judgment stage in the trial court as well as in the appeal to the Supreme Judicial Court. At the trial court level, the story elements are more clearly utilized. The argument at the Supreme Judicial Court was more reliant on traditional legal reasoning. But the story, though present to different degrees, is the same at both levels: The plaintiffs are everyman heroes simply seeking to join in society's most important institution.

Turning first to the due process claims, we see two related stories being told. The plaintiffs argue that access to marriage is a fundamental right and that they should be allowed to marry. This story is linked with the story of marriage itself as an institution. To support the argument that marriage is fundamental, and more precisely that freedom to choose one's spouse is central to marriage, the plaintiffs tell the story of marriage's evolution. This links their personal story with the story of law's evolution. By telling these stories together, the plaintiffs further emphasize their role as everyman heroes seeking to join society, not destroy it. Since the institution they are seeking to join is one that is constantly evolving, their quest to reach it is in keeping with society's norms. It is constructive, not destructive.

The plaintiffs begin by showing the long history of marriage's importance in the Commonwealth. Marriage's fundamental nature is also affirmed by the plaintiffs' description of the rights and obligations that come from marriage. Marriage changes the status of the couple with respect to each other and, perhaps more importantly, to society. Some of these changes are in the form of legal protections afforded by the legislature. These include economic protections, like inheritance, taxation, and requirements of mutual support. But they go further. Laws also provide for special recognition of the intimacy of marriage, giving spouses primacy in medical decision making for incompetent spouses, hospital visitation, and protection for marital communications. Marriage also has cultural significance. The plaintiffs claim that marriage has

special significance based on its universally understood privilege and status. This reflects the importance of marriage beyond its legal status. There are legal and social benefits that come from marriage and only from marriage. The core of the everyman heroic quest again comes through. The plaintiffs are just seeking to fully integrate into this fundamental institution, not simply receive some limited portion of government benefits that would come with civil unions or a similar status. Marriage, and only marriage, is the goal.

The plaintiffs also demonstrate a trend toward expanding access to marriage. While some limitations were in initially place, the plaintiffs show a trend toward elimination of status-based restrictions on marriage. Interracial marriage, once prohibited, is now permitted. The same is true for marriage restrictions based on limitations on remarriage after divorce. This fits in with the story the plaintiffs are telling of the historic expansion of marriage rights and fundamental freedom in choice of partner. This story was further developed at the Supreme Judicial Court by an *amicus curiae* brief from historians of marriage. That brief told a very detailed story about the changing understanding of marriage, particularly the shift toward companionate marriage. Marriage became about love and partnership rather than a more economic focused arrangement. Being able to marry the person of your choice, therefore, became even more central to the right to marry. In seeking that right, the plaintiffs are again casting themselves as everyman heroes trying to join society on the same terms available to everyone else.

For the equal protection analysis, the plaintiffs make two claims. In the first, they argue that denying same-sex couples access to marriage is discrimination based on sex. Denying plaintiffs the right to marry the person of the choice based on the sex of that person is sex discrimination. That it applies equally to men and women doesn't negate the discrimination inherent in the classification. This parallels the racial discrimination argument from *Loving v.*

Virginia. The second claim is that the restriction discriminates on the basis of sexual orientation. This claim is related to, but distinct from, the sex discrimination claim.

Like with the fundamental rights analysis, the plaintiffs use a story framework. The attorneys start by arguing that the protection provided for equality in the Massachusetts Constitution is greater than the corresponding portions of the federal constitution. The attorneys again reach back to the Revolutionary period to explain the evolution of the equality principles enshrined in the Massachusetts Constitution. Like notions of due process and liberty, the equality provisions have been expanded beyond their initial scope as a reflection of society's commitment toward greater equality. Massachusetts' long standing commitment to equality serves as the background for the plaintiffs' quest. The steady state, like the due process argument, is framed as one of expanding notions of equality that encompass all of Massachusetts's citizens. This expansion, the plaintiffs argue, must include gays and lesbians and their desire to marry.

In making their specific claims for sex and sexual orientation discrimination, the plaintiffs' argument appears to take two forms. With the sex discrimination claim, grounded on more clear constitutional text and with clearer case law as precedent, the argument takes a more traditional legal form. Little effort was made to frame this argument as a story. Sexual orientation discrimination, on the other hand, lacks the solid legal foundation of prohibitions against sex discrimination. It is here that the story elements are more present. The references to expanding notions of equality and the current stigma facing gays and lesbians in society need to be clearly articulated here because there isn't specific legal language on point supporting the argument. This calls to mind Posner's (2008) argument that storytelling, and with it emotion, are more useful when judges are called to act in a legal grey area.

Storytelling in the plaintiffs' briefs is used with legal argument to provide context and history. Story frames the general trend in equal protection, as it did in due process section, rather than the specific legal arguments of sex and sexual orientation discrimination. But that contextualization is important and cannot be overlooked. It is this context that links the legal argument to the everyman heroic archetype that the plaintiffs' case is using as its central theme. The story, really, is the national story of a move away from prejudice in general, and against gays and lesbians in particular.

The Amicus Briefs

Amicus briefs play a significant role in appellate litigation. These are designed to provide helpful information to the court to aid in determining the outcome of a case (Simard 2008). As non-parties, amici have greater freedom to advance novel arguments and to make arguments that go beyond the record in a case. The Supreme Judicial Court received more *amicus curiae* briefs in the *Goodridge* case than in any other case in its history (Bonauto 2005). The number of groups participating is even higher as individual briefs were often joined by several groups. The brief submitted by the Urban League of Eastern Massachusetts, for example, was joined by over twenty other organizations. Other briefs were submitted by professors, medical and psychological professional associations, religious groups, international human rights groups, various other civil rights groups, bar associations, advocacy organizations, and other state governments. Many of the briefs filed in support of the plaintiffs took up the story that the plaintiffs were telling. I examine a few of these briefs now.

The brief from the Professors of the History of Marriage, Families, and the Law relied most on storytelling. Like the trial court submission from the plaintiffs, this brief focused on the evolution of marriage and how it has expanded to permit more types of marriages. This evolution

changed who was eligible for marriage and the relationship of spouses within a marriage. Recognition of same-sex marriage is shown as the next logical step in this progression. The brief uses the denial of marriage licenses as the Trouble that Amsterdam and Bruner (2000) see as central for a story. The steady state is the gradual expansion of marriage as our understanding of society changes. Denying same-sex couples access to marriage “flouts this robust tradition” (Brief of the Professors of History of Marriage, Families, and the Law, 2). By not following the robust tradition, the Department of Public Health has created a tension between the way things are and the way they ought to be, a tension that must be resolved by the story’s heroes.

The brief from the scholars of the history of marriage also supplements the plaintiffs’ story in an important way. As noted above, the plaintiffs’ briefs cast them as Everyman heroes on a quest to join society completely. This brief uses the same archetype to frame the story. The plaintiffs are striving to join with society in its most fundamental institution. That their membership may change marriage doesn’t mean that marriage will be destroyed. Instead, marriage’s constant evolution will continue and this group, previously excluded, will now strengthen marriage as an institution. Marriage will remain central to society.

The brief submitted by the Professors of Remedies, Constitutional Law and Litigation also used storytelling in its structure, but with a different focus. This brief does not, directly, attempt to address the underlying legal claim. It does assert that the plaintiffs have a constitutional right to marry their same-sex partners, but does not spend time arguing that point. The focus of the brief is, instead, on the remedy available to the plaintiffs should the court agree that a violation exists. The brief focuses on convincing the Court to that it can and should rule on this issue and, in particular, for the plaintiffs. In this they attempt to rebut the defendant’s

arguments in favor of deference to the legislature on the issue of marriage for gay and lesbian couples.

Because of the shift in focus, the Professors of Remedies, Constitutional Law and Litigation necessarily must tell a different story. The plaintiffs are no longer central to the argument. A new hero, with a new story, must be chosen. Looking back at the structure of the Hero's Quest, it appears that this brief has chosen to frame the Court as the hero, one on the verge of accepting the quest. Campbell (2008) starts the hero's quest with a choice; the hero can choose to accept or to reject the quest. The focus of this brief is on urging the Court to accept the quest before it and decide the pressing legal issue. The defendants have offered the Court an alternative, encouraging the court to defer to the legislature on this issue and avoid starting this particular quest. In doing so, the brief asserts that the defendants have "question[ed] the very legitimacy of judicial review" (Professors of Remedies, Constitutional Law and Litigation at 4). To encourage the Court to accept the quest, to rule on the issue of same-sex marriage, the brief outlines the history the Court has of deciding controversial and contentious issues. Deferring to the legislature, as the defendants urge, is not part of the Court's history. Rejecting the quest is equated to abdicating the proper role the Court plays in our system of government.

This brief also addresses the different remedial options. The Court could strike down the marriage laws entirely. This is disfavored. Instead, the brief urges the Court to extend the marriage laws in a gender neutral way to include the plaintiff couples. Here, again, the focus is on the authority of the Court to act rather than on the substance of the plaintiffs' claims. This fits with the first part of the brief casting the Court as a hero about to begin a quest. The brief is merely providing the tools necessary for the hero to succeed. The tools, as can be expected in a legal argument, include precedent cases, legislation, and constitutional provisions that

demonstrate that the Court has the authority and ability to successfully complete the quest before it.

Not all of the amicus briefs utilized storytelling. The Boston Bar Association and the Massachusetts Lesbian and Gay Bar Association filed a joint brief that discusses the specific legal harms faced by gay and lesbian couples because of the denial of marriage. The brief does attempt to show how much harm gays and lesbians suffer by being excluded from marriage, but the presentation is not done in a way that invokes a strong emotional response. Nothing in that brief particularizes the harm to these plaintiffs; the harms are instead kept at an abstract level.

In both sections—one addressing the same-sex couples specifically and the other their children—the language remains abstract and legal. Only in discussing the remedy available does the brief truly attempt to go beyond the purely legal. The only proper remedy is to extend the civil marriage to include same-sex couples. Civil unions, the brief argues, “fall short in symbolic and practical ways” (Boston Bar Association Brief, 47). Civil unions lack the “cultural status” of marriage. The separate system would only send the message that gay and lesbian couples are not “full, equal, or valued members of the community” (Boston Bar Association Brief, 48). The brief emphasizes the separate nature of civil unions to invoke the legacy of *Brown v. Board of Education* and its insistence that separate is seldom, if ever, truly equal. But rather than end on this potentially powerful note, the brief returns to economic and legal arguments. Citing the problem of federal recognition, the brief gives the example of pension benefits under ERISA as support for marriage instead of civil unions. This, of course, ignores the Defense of Marriage Act and its prohibition against federal recognition of same-sex marriage. But more importantly, it returns to marriage as money, not love. The idea of humanity so evident that it did not need citation that closed the plaintiffs’ brief is gone. Now marriage is about ERISA and federal

pensions. On the whole, this brief lacks heart, character, and emotion. It lacks story. The laundry list style presentation of harms faced by gay and lesbian couples is important to highlight. But it is not done in a particularly compelling way. There is no emotional chord struck.

The amicus briefs submitted all present strong legal arguments. Those that join that legal argument with compelling stories read as more effective and persuasive. This is most true of the briefs that adopt the story told by the plaintiffs: Marriage is ever evolving, but always central to society. The Court's job is to continue that story and allow these couples to complete their quest by fully joining society in its most treasured institution. That is what the Supreme Judicial Court did.

The Supreme Judicial Court Decisions

The Massachusetts Supreme Judicial Court addressed same-sex marriage twice. After the initial ruling in the *Goodridge* case, the Massachusetts Senate sought an advisory opinion, as permitted under Massachusetts law, on whether civil unions would meet the requirements outlined in *Goodridge*. In *Opinion of the Justices* the SJC reaffirmed the *Goodridge* holding that marriage, and only marriage, was sufficient remedy for the harms suffered by the plaintiffs and, by extension, all same-sex couples in Massachusetts. I turn to both of these decisions now.

The Court begins the *Goodridge* opinion with a description of marriage. "Marriage is a vital social institution" that "nurtures love and mutual support" between spouses (*Goodridge*, 312). Marriage is "one of our community's most rewarding and cherished institutions" (*Goodridge*, 313). The Court also notes the legal and financial benefits of marriage but at the same time it clearly invokes the social benefits. They are equally important. The Court links the benefits for the spouses and their children to the burdens imposed, including "social obligations" (*Goodridge*, 312). These are explored in greater detail later in the opinion. But even this limited

reference in the introductory section makes clear that marriage is both multifaceted and central to society. The links to the plaintiffs' everyman story are clear. While the decision "marks a significant change in the definition of marriage" it does not "disturb the fundamental value of marriage in our society." The "plaintiffs seek only to be married, not to undermine the institution of civil marriage" (Goodridge, 337). This clearly demonstrates the everyman hero's quest that the plaintiffs make central to their argument.

The Court frequently refers to "civil marriage" and not just marriage generally. In the introductory section, the Court uses this phrase every time it specifically mentions same-sex marriage. Examples are numerous: "The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by *civil marriage* to two individuals of the same sex who wish to marry....But [the Commonwealth] has failed to identify any constitutionally adequate reason for denying *civil marriage* to same-sex couples....Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from *civil marriage* is a question not previously addressed by a Massachusetts appellate court" (Goodridge, 312-313, emphasis added).

This characterization is deliberate. The Court is striving to keep the state in the marriage. In describing the law in question, the Court makes the government's role in marriage clear: "for all the joy and solemnity that normally attend a marriage, G.L. c. 207, governing entrance to marriage, is a licensing law" (Goodridge, 318). And later, "Simply put, the government creates civil marriage." Most clearly, the Court says, "In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State" (Goodridge, 321). This is an interesting choice as it seems to limit the emotional aspects of marriage. Marriage almost

becomes just another government function. The state regulates entry to and exit from marriage and sets the various obligations and benefits that attend a marriage. The state's presence and control over marriage, however, is crucial to one particular story that the majority is seeking to tell: the story of marriage and its evolution. Marriage becomes the hero of the story that the court tells.

The Court analyzes the history of marriage and the state's regulation of it. Civil marriage is, and always has been, secular in Massachusetts. But, the Court says, it has changed dramatically in other ways. Here the Court focuses most clearly on racial equality in marriage. The United States Supreme Court decision in *Loving v. Virginia* and the California Supreme Court decision in *Perez v. Sharp* that preceded it clearly illustrate the changing nature of marital equality. The Supreme Judicial Court draws a direct comparison between the racial exclusion cases and same-sex marriage. "As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination" (Goodridge, 328). The Court returns to history a few pages later to address gender equality in marriages. Married women's rights have grown dramatically as society has recognized greater equality among the sexes. The Court ends its review of history by noting that many of the same fears that are raised in opposition to same-sex marriage have been raised in the past in regards to other changes to marriage law. "Alarms about the imminent erosion of the 'natural' order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of 'no-fault' divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution" after same-sex couples are allowed entry to civil marriage (Goodridge, 340).

Marriage is affirmed as a central part of society and the couples' desire is just to more fully join that institution. The Court spends a significant time discussing marriage, more so, in fact, than it spends on the plaintiffs directly. In total, the plaintiffs receive two paragraphs of description. Marriage receives significantly more. In addition to the history of marriage, we learn about the various benefits and obligations that come with entry into marriage. The description of the benefits incident to marriage spans six paragraphs. The historical evolution receives several more.

Marriage, and not the plaintiffs, becomes the central character in the Court's decision. The Court's description of marriage and its evolution adheres to the definition of story advanced by Amsterdam and Bruner. The constant evolution of marriage is the initial steady state that begins a story. Marriage, while flawed, has consistently expanded as society has come to understand these flaws. Couples that were once excluded are ultimately granted full inclusion into marriage and, through that, into society. Stopping the continued evolution of marriage disrupts the steady state and creates a conflict that must be rectified. It creates the Trouble necessary for a story. These foundational elements create the basic story that the Supreme Judicial Court is telling in its opinion. In the coda, the period after the story's resolution, we are returned to the steady state where rights are continually expanding and individuals continue to be afforded greater access to marriage. Not everyone was happy with this particular ending. The Massachusetts Senate began considering legislation that would overturn the *Goodridge* decision.

Under the Massachusetts Constitution, the Senate can request an advisory opinion from the justices of the Supreme Judicial Court. Advisory opinions come from the justices of the Supreme Judicial Court acting as scholars learned in constitutional law and not from the Court itself. The process is clearly advisory and not adjudicatory. While not binding in the same way

an opinion in an actual case is binding, advisory opinions carry great weight. In this case, the Senate asked the justices if a civil union style system would remedy the constitutional harms the Court found in the *Goodridge* case. Like the underlying *Goodridge* case, the advisory opinion proceedings received many *amici* briefs on both sides. The request for an advisory opinion gave the justices of the Court a second opportunity to comment on marriage and equality.

The majority here takes the view that the question asked by the Senate was already answered in *Goodridge*. The Senate's attempt to offer a new, more clearly articulated purpose for excluding gays and lesbians from marriage does not change the analysis. That purpose, preserving "traditional marriage," attempted to provide legal justification for creating a separate system for recognizing gay and lesbian unions. The Court rejected that purpose. In fact, the purpose provided by the Senate does nothing but preserve the "constitutional infirmity" already addressed (*Opinion of the Justices*, 10). The same flaws the Court found in *Goodridge* are present and in fact are "exaggerated by" the senate's proposed change (*Opinion of the Justices*, 10).

This becomes even more evident when the effects of the separate but equal regime is explored. Separating opposite-sex couples and same-sex couples into different relationship recognition regimes is more than "semantic" (*Opinion of the Justices*, 13). It is a clear "considered choice" to limit marriage to the preferred class, heterosexuals, while relegating the disfavored group, homosexuals, to a secondary, lesser status. This would perpetuate a "stigma" that the constitution cannot tolerate (*Opinion of the Justices*, 14-15). The dissenting justices see this as a "squabble" over language (*Opinion of the Justices*, 13). The majority believes that view "so clearly misses the point that further discussion appears to be useless" (*Opinion of the Justices*, 14). The majority's story affirms the importance of marriage itself and not the benefits

that attend to it. This makes the decision to require marriage, and not the benefits of marriage, central to the dispute and not just a semantic choice.

In storytelling terms, the Senate's request for an advisory opinion and the creation of a separate status for same-sex unions was an attempt to change the ending to the *Goodridge* case and thus the story of same-sex marriage in Massachusetts. The Supreme Judicial Court, however, rejected that request. It insisted on the story that was told in the initial decision: Marriage is central to society and it is ever changing. But it is always changing to be more inclusive. The Court emphasized that its decision was the only one that was in keeping with the greater story of liberty that is central to the history of Massachusetts.

Discussion

The emerging scholarship from applied legal storytelling scholars argues that legal storytelling and simply telling a good story are different things. It's not just telling a story, but telling the right story, in the right way, that matters. Mary Bonauto, the lead attorney for the plaintiffs during the *Goodridge* case, reflected on the decision and its place in the larger fight for gay and lesbian equality. She believes that part of the success of the litigation came from the way it told a story. The plaintiffs sought, simply, to be treated equally and told a story that placed their desire to marry in the same context as any other couple. The plaintiffs were everyday people, "partners, parents, Little League coaches, and literacy volunteers." They sought marriage for the same reasons as other couples: "to express their deep and abiding love for one another" and "to secure protections for their families" (Bonauto 2005, 1). Telling that story, a story of love and equality, in a legal dispute helped the courts ultimately find for the plaintiffs and extend marriage to them and all same-sex couples.

Robbins (2006) argues that proper casting is essential to legal argument. Knowing who the hero is, and properly portraying that hero's quest, makes persuasion more powerful. In a purely legal dispute, like the one in the *Goodridge* case, that casting matters more. The facts are not contested, so the only disagreement between the parties is on the legal application of those facts. It is here that the specifics of frame selection become most clear. As shown above, the plaintiffs are portrayed in their own filings as everyman heroes on a quest to join one of society's most important, most vital institutions. This framing furthers the story that Bonauto credits as part of the success of the case. The plaintiffs, and same-sex couples everywhere, are more similar to traditional families than they are different from those families. By linking same-sex marriage to the common, everyday ideas about relationships and society, the storytelling served to make those similarities clear for the judges and the public.

This is most clearly seen in the way the plaintiffs frame the due process analysis. The plaintiffs frame the question as one about access to "marriage" and, since "marriage" is a fundamental right, whether or not the states' restrictions on it are appropriate rather than arguing for a right to same-sex marriage. This is more than semantics. It changes the legal analysis entirely. Only fundamental rights require the highest level of scrutiny. If the right in question is marriage, strict scrutiny applies and the state must justify its restrictions with compelling reasons. If, on the other hand, the right is to "same-sex marriage," it is less likely to be seen as fundamental, and the state need only demonstrate a rational basis for the restriction.

The plaintiffs kept the focus on marriage and their status as everyman heroes throughout the case. This theme is found in all their filings with the court, from the initial complaint in the trial court through both cases at the Supreme Judicial Court. By keeping the focus on this theme, all aspects of the litigation fit neatly together and work toward the logical conclusion: Marriage

must be made available to same-sex couples. While the theme is present throughout, each filing relies on it to a different extent. This variability is expected because different filings have different purposes. In traditional legal argument, as a case moves from a trial court to an appellate court, factual information becomes somewhat less important than legal analysis. Trial courts deal with facts; appellate courts deal with law. Many scholars, as noted above, dispute this and argue that even “law” can be argued using story techniques (Amsterdam and Bruner 2000; Chestek 2008, 2010). In *Goodridge* there was some evidence of this, but the amount of storytelling was clearly reduced as the case proceeded.

The complaint is the filing that most clearly uses storytelling techniques. Here is the basic characterization and the clear adoption of the everyman theme. As the factual basis for the legal claims, complaints call for storytelling. It is here that the legal wrong, in this case the discrimination, must be explained. The fact-centric nature of the complaint makes a storytelling presentation easier. Keeping that focus as the purpose of the particular court process changes presents challenges for litigants.

In this case, we see this in the plaintiffs’ motion for summary judgment. Since the parties agree on the facts of the case, there is no need to re-tell them. The only dispute is a legal dispute. What does the law mean when applied to these facts? By definition, this calls for legal argument not more storytelling. But that legal argument should still further the story that the plaintiffs’ are trying to tell. And here it does. The same holds true at the appellate level. More law is required, but that law needs to be argued persuasively. Keeping the story present, as Chestek (2008) and Burns (1999) argue, helps. That does not mean, however, that the plaintiffs in *Goodridge* always kept the story as present as they could or, arguably, should have. The plaintiffs’ lawyers missed many opportunities to reaffirm the story they were trying to tell and their filings may have leaned

too far toward the purely legal side. Similarly, many of the amicus curiae briefs would have benefited from more storytelling elements.

In explaining its decision, the Supreme Judicial Court utilized clear storytelling elements. It emphasized the changing nature of marriage in a way that fit with the plaintiffs' story. For both the plaintiff couples and the court, marriage is the defining institution of society. It is ever changing, yet always retains its central importance and prestige. By allowing the plaintiff couples to complete their quest and marry, the court continues the story of marriage's evolution. This new chapter in the history of marriage welcomes more couples into society and the story continues.

Storytelling was clearly present in the litigation around same-sex marriage in Massachusetts. Understanding the ways advocates have used storytelling can help other advocates better prepare for arguing cases with broad policy implications. There remains much research to do in this area, and this initial descriptive study will hopefully inform further research on judicial storytelling.

Epilogue—After Goodridge

After the litigation in *Goodridge*, Massachusetts faced several years of efforts to overturn the decision by those opposed to same-sex marriage. Marc Solomon (2014), one of the activists seeking to preserve same-sex marriage, details this in his book *Winning Marriage*. These efforts failed and *Goodridge* remained the law of Massachusetts. The Massachusetts governor at the time, Mitt Romney, did successfully limit the number of same-sex couples able to take advantage of this change in the law by invoking an almost forgotten law from 1913. Under the 1913 law, any marriage performed in Massachusetts would be void if it would have been illegal in the couple's home state. At the time, Massachusetts was the only state to recognize same-sex

marriage. This meant that potentially all out of state couples would be barred from marrying in Massachusetts. Eventually this law was repealed and Massachusetts welcomed all couples to get married in the state. Other states eventually followed Massachusetts.

The next states to get marriage equality, in 2008, were also as a result of judicial decisions. Connecticut's case, *Kerrigan v. Commissioner of Public Health*, was brought by GLAD, the same organization that brought the cases in Vermont and Massachusetts. California's victory was short-lived. A few months after the judicial victory, a referendum, Proposition 8, amended the state constitution and overturned the decision. This remained in effect until a subsequent federal court ruling ultimately settled the issue in 2013.

The Iowa decision, *Varnum v. Brien* from 2009, tells a story much like the one in *Goodridge*. The Iowa court spends significant time outlining Iowa's leadership role in change. It emphasizes how Iowa is always at the forefront of progress. This places the recognition of same-sex marriage as the next chapter in an on-going story of social change and expanding rights. That story is the same that runs through both the litigation and legislative efforts to expand marriage equality in the years leading up to the Supreme Court's decision in *Obergefell v. Hodges*. The story remains the same: gays and lesbians seek to join fully in American society as equal members in its most fundamental institution. Their story is the story of American progress.

For now, the story appears to be coming to its new steady state of equality. The United States Supreme Court, in the 2015 decision of *Obergefell v. Hodges*, held that the 14th Amendment to the United States Constitution requires states to recognize same-sex marriages. To do otherwise would be an affront to the dignity of gay and lesbian citizens.

The story is not yet over. Many still oppose same-sex marriage for personal or religious reasons. In the wake of *Obergefell* officials in Kentucky and Alabama refused to comply with the

Supreme Court's decision, prompting further legal challenge (Dyer 2017; Robertson 2016).

Legal equality has been secured. Now the efforts must focus on changing the hearts and minds of those most opposed. As Haidt (2012) argues, this will require emotional appeals and clearly structured stories. But, if recent polling trends continue, this is already significantly under way.

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