Introduction

Do Same-Sex Couples Have a Right to Marry? The State of the Conversation Today

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On March 4 and 5, 2005, nearly three hundred people gathered at the Yale Law School for a symposium on the emerging law and theory of same-sex marriage. Entitled "Breaking with Tradition: New Frontiers for Same-Sex Marriage," the symposium gathered scholars, litigators, activists, and theorists for what proved to be two exceptionally stimulating days of conversation.[1] It was, we believe, a fully realized intersection of theory and practice.

It was also timely. A week before the symposium, the Judiciary Committee of the Connecticut General Assembly easily passed a bill that would create same-sex civil unions in the home state of the Yale Law School.[2] If passed, Connecticut will be the first state in the union to recognize same-sex couples through original legislation rather than court order. The symposium was held less than a year after Massachusetts started issuing marriage licenses to same-sex couples pursuant to an opinion by the Justices of its Supreme Judicial Court,[3] and nearly six years after Vermont became the first state to

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[†] The authors are both J.D. candidates in the Yale Law School Class of 2006 and were co-chairs of the symposium. We wish to express our thanks to those organizations and individuals who helped make the Symposium possible. The symposium benefited enormously from the support of the Larry Kramer Initiative for Lesbian and Gay Studies at Yale ("LKI"), and the advice of its executive director, Jonathan D. Katz. Henry Harding, a Yale College student full of energy and ideas, did much of the labor needed to realize the event, and LKI graciously funded his work. Most importantly, thanks are due to Harold Hongju Koh, the Dean of Yale Law School, for supporting and funding the very idea of a legal symposium on this subject. The advice and support of Natalia Martin, the Associate Dean for Student Affairs, her assistant Maura Sichol-Sprague, as well as Associate Dean Mike Thompson, were all essential to making the event possible.

1. An edited transcript of the symposium and a digital video disc of the proceedings have been given to the Lillian Goldman Library at Yale Law School. Streaming video of the symposium is available at *http://www.law.yale.edu/samesexmarriage*.

2. Bill No. SB-963, February 7, 2005. Action/Date: JFS February 23, 2005. At the time of this writing, two versions of the bill had passed in each side of the legislature, and pending conference and resolution the bill is likely to be signed to by Governor Jodi Rell

3. Opinion of the Justices to the Senate, 440 Mass. 1201 (2004).

extend to same-sex partners civil union status pursuant to a decision by the Supreme Court of Vermont.[4]

The Massachusetts high court's decision in *Goodridge v. Dept. of Public Health*[5] was the chief reason that same-sex marriage became a major political issue in the 2004 presidential election. President George W. Bush has proposed and reaffirmed his support for an amendment to the U.S. Constitution defining marriage as the union of a man and a woman. On November 2, 2004, the electorates of twelve states approved ballot measures defining marriage as the union of a man and a woman, in some cases going further to prohibit civil unions or other forms of state recognition for same-sex couples.

It was against this dynamic and contentious backdrop that we sketched our first ideas for the symposium.[6] From our earliest planning meetings in a New Haven coffeehouse, we knew that we did not want merely to reflect the national political debate on whether same-sex couples should be able to marry. Rather, we hoped to frame legal questions about the issue that could advance scholarship and articulate ideas that might prove useful to courts struggling with these questions in the future. To those ends, we framed five main questions to ask at the symposium.

First, what were the stakes of this debate, and in what context should a right for same-sex couples to marry be viewed? We asked a panel of thinkers and activist litigators to consider this: William Eskridge, Jr. and Kenji Yoshino of the Yale Law School, Matt Coles of the ACLU Lesbian and Gay Rights Project, Ariela Dubler and Katherine Franke of Columbia Law School, and Leslie Moran of Birkbeck College, London. Moderated by Edward Stein of the Benjamin Cardozo School of Law, these panelists opened the symposium by asking both how to view the question, and what evidence and arguments would support various arguments surrounding the dispute.

Second, what were the politics of the debate: In whose name was this issue being discussed, by whom, and for what ends? Again, a distinguished panel struggled with these ideas: Michael Bronski of Dartmouth College, historian Nancy Cott of Harvard, scholar and activist Nan Hunter of Brooklyn Law School, Morris Kaplan of SUNY Purchase, and Robert Post and Reva Siegel of the Yale Law School. Moderated by William Eskridge, Jr., the panelists concurred that the same-sex marriage need not come at the expense of other important political goals for gay and lesbian Americans.

Third, what were the existing and developing international forms of same-sex marriage, and how could they be useful to U.S. courts, particularly as the U.S. Supreme Court is increasingly recognizing transnational law as

4. Baker v. State, 170 Vt. 194 (1999).

5. Goodridge v. Department of Public Health, 440 Mass. 309 (2003).

6. We were fortunate to have had the support and advice of several members of the Yale Law faculty in planning the program, especially Professor William Eskridge, Jr. and Professor Reva Siegel.

persuasive? Economist Lee Badgett of the University of Massachusetts, Amherst, legal scholar Daniel Borillo of the University of Paris X–Nanterre, litigator Joanna Radbord of Epstein Cole LLP in Toronto, and Darren Spedale of the New York office of White & Case, LLP, led a discussion moderated by Leslie Moran.

Fourth, how should we understand racial and sexual discrimination jurisprudence to apply to the question of who can marry? Kate Kendell of the National Center for Lesbian Rights, Chai Rachel Feldblum and Mari Matsuda of Georgetown University Law Center, and Serena Mayeri, a fellow at New York University School of Law examined this question, moderated by Reva Siegel.

Fifth, what about the federalism question? Is this an issue for states to decide, or does the nation need to enact a national definition of marriage? What about the national Defense of Marriage Act, and the tension between it and the full faith and credit clause of the U.S. Constitution? Praveen Fernandes of the Human Rights Campaign, Andrew Koppelman of Northwestern University School of Law, Lynn Wardle of the J. Reuben Clark Law School at Brigham Young University, and Ed Stein of the Benjamin Cardozo School of Law participated in a discussion moderated by Robert Post.

The symposium opened with a magisterial review of the jurisprudence and legislation relevant to the symposium by Harold Hongju Koh, Dean of the Yale Law School. Dean Koh, an international law scholar, devoted a significant portion of his opening remarks to developments in same-sex marriage law abroad. Koh illustrated how recent Supreme Court jurisprudence indicates a greater willingness by the Court to look to foreign constitutional systems, especially when considering cases involving rights necessary to a system of ordered liberty. These systems, according to Koh, can supply needed empirical data, and inform our understanding of evolving standards of human decency and dignity. Koh expressed hope that the experiences of the Netherlands, Belgium, Spain, and Canada as they adjust to same-sex marriage in their societies may ultimately inform our understanding of the issue, both in the courtroom and the legislature.

Koh made a pointed and potentially troubling analogy between this symposium and an earlier one, held fifty years prior, in the same room. That gathering was to discuss birth control laws, and it marked an important step on the road to *Griswold v. Connecticut*.[7] Yet despite the potential importance of the symposium suggested by Koh's analogy, most at this symposium would probably not want to the future course of the same-sex marriage question to emulate the *Griswold* history: That is, few would want to put the question of a right to marriage for same-sex couples before the United States Supreme Court in the foreseeable future. Few would deny that without the broad social

7. 381 U.S. 479 (1965).

acceptance of a right connoted by the lawmaking of elected legislators, a judicial finding of an unpopular right can bring limited benefits. Could same-sex marriage be headed down the same rocky path as racially integrated schools or abortion rights if courts get too far ahead of society?

Nonetheless, Koh's broader point was clear: This event was critical if scholars and practitioners are to work for the establishment of a right for same-sex couples to marry. "We stand for the principle of Love," said Koh. "Punishing people for whom they love is unjust and it offends national and international concepts of ordered liberty."

Suffusing the dialogue among panelists and audience members was a sense of energy and enthusiasm for same-sex marriage to become a reality. Despite the objections some of the panelists voiced regarding the desirability of marriage as an institution, and the studied dissent of some scholars against same-sex marriage in particular, most agreed that if full equality for gays and lesbians is to be achieved, same-sex partners must have equal access to marriage. In answering the questions posed for the symposium, the panelists illuminated the issues in three dimensions: theoretical, practical, and political.

The symposium as a whole showed how panelists from different backgrounds and philosophies can cause us to rethink prior notions of how to achieve gay equality in the context of same-sex marriage. Particularly rich examples of this can be drawn from the Discrimination and Marriage panel. Kate Kendell, of the National Center for Lesbian Rights, called for the gay rights movement to "combat the rich, white stereotype" by putting working class people and people of color in the movement's leadership. Such a move would not only confront hierarchies and racism within the lesbian and gay community, but would counter the elitism critique implicit in the anti-gay rhetoric of "gay rights equals special rights." Serena Mayeri, of the NYU School of Law, compared the sexual equality movement to the racial equality movement, and noted that anti-subordination strategies used by such jurists as Ruth Bader Ginsberg illustrate how we can "expand rather than contract our conception of what is a harm, and how that harm might be remedied." In essence, the gay equality movement should avoid the trap of "compulsory comparisons," where "if [a] new harm isn't parallel to the old, there's no remedy." By taking an expansive view of the project of equal protection, a victory "on the gay rights front may have salutary consequences for feminism" and people of color, as well.

Chai Feldblum and Mari Matsuda of the Georgetown University Law Center each advocated a change in the rhetorical strategies used by the gay equality movement, essentially by confronting the issues of moral values and aestheticism head on. "Gay sex is good," said Feldblum, echoing the radical cry of 1970s-era homosexual liberation. Only by addressing society's judgments about gay sex itself can the gay equality movement avoid the

argument that same-sex marriage is equivalent to "injecting a moral wrong into a moral good." Matsuda, on the other hand, connected gay equality to the peace movement, claiming "homophobia is a building block of war. . . . Our side will win because we have love. The other side is the market, globalization, capitalism, patriarchy, racism, and homophobia. It is not the club of lovers." Invoking concepts of love and family is the key to gay equality, at least in the context of same-sex marriage, according to Matsuda. "We are not seeking a right to homosexual sodomy. We are not seeking a right to same-sex marriage. We are talking about having access to the right to family, to protect our relationships and our families, a civil right that everyone else can choose and that we want to be able to choose for ourselves."

The symposium closed with a keynote address by Jon W. Davidson, the Legal Director of Lambda Legal and a 1979 graduate of the Yale Law School. In his remarks, Davidson provided a useful synthesis of the panels. Yet he also offered an important perspective on the movement and its future, admonishing us all that to remember that "if we have setbacks, they should be used to convince others of the unfairness of our vulnerability and second-class status and the need for change. When we have advances, they should be used to demonstrate to America the positive outcomes, rather than harms, that result from supporting all our nation's families." May our advances outnumber our setbacks.