

LGBT Rights and the Courts

HGLC Annual Dinner Keynote Address

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I want to talk tonight about LGBT rights and the courts. I spend my days as a lawyer working on those rights mostly in the court system. And much of that lawyering work is really quite pedestrian, quite unremarkable. I do lawyer stuff like writing nasty letters, and I argue with people on the phone, and I write what we call briefs, although they're not all that brief. I also have the honor on occasion to stand up in courtrooms around the country representing LGBT people and people with HIV disease.

That sort of mundane day-to-day lawyering is aimed at judges, usually, sometimes juries, and it's aimed at getting legal rights of one kind or another. What I want to focus on is that the litigation has a larger purpose. It's not so much about just getting legal rights; it's about changing the way people in America think about LGBT rights. Because without transforming the way America thinks about all these things, the legal victories really aren't going to lead to any lasting change.

As a lawyer what I'm trying to do is use the courts to effect social change. But it's important in doing that to keep in mind several things. As I said earlier, changing the way America thinks about us is the ultimate goal, and using the courts is just a means, or one of many means, to get to that end. But we need to start the process of social dialogue, social change outside the court system, before we can have the hope of getting the legal victories through the court system that we want in the first place, because it takes a while for the courts to get there. We need to find a way to nudge them along and make them feel like they're not going so much out on a limb.

Ultimately, change in public opinion is crucial to making the legal change that the courts will codify, making it part of the culture, embedding it in the very idea of equality so that it becomes something that is part of what everybody thinks it is to be American.

The classic idea of a law reform case is you go to the courts to set norms for society. You're asking for a legal decision in very dry, technical terms. But you're also looking to use the moral authority of the court system, the principles that are embedded in the constitution -- because these are usually constitutional cases -- in order to change how the country thinks about some controversial social question like LGBT rights. Of course, the quintessential example of a law reform case is *Brown v. Board of Education*, which I think most people know the US Supreme Court decided in 1954, declaring that racial segregation in education was unconstitutional.

What came out of *Brown* was not just a legal principle of equality, but also, on a larger level, it has become a monument to equality across many different movements. It is something that is embedded in the culture. Everybody thinks of it as a prime example of what equality means, and it's something that everyone in the country at least feels obligated to say they agree with whether they actually do or not. That's what I'm talking about of taking a legal decision and turning it into what everybody thinks about when they think about equality.

The Lawrence v. Texas decision from the US Supreme Court in 2003 gave our community a piece of what Brown has given the whole country, and especially the African-American Community. In practical terms the Lawrence decision took away sodomy laws that existed in thirteen states at the time. And on a larger level, it gave us a wonderfully affirming statement from the US Supreme Court that our relationships are entitled to the same dignity and respect as everyone else's relationships. It also took away the primary justification that was used against us in political debates. Because prior to Lawrence, when we'd go into cities and towns across the country and say we want a non-discrimination ordinance or we want a domestic partnership registry, the response was often – we can't do that because it would be contrary to our sodomy law. Or, even if it was in a state that didn't have a sodomy law - we can't do that because what makes you different (the fact that you formed intimate relationships, emotional as well as physical relationships with people of the same sex) is criminalizable in this country. The overall message of Lawrence for us is that we are part of America too, and we are entitled to the same rights and the same dignity. The Goodridge decision from the Massachusetts high court in the fall of 2003, allowing a number of people in this room to get married, is another example of transformational law reform. Getting a principle from the court that then enables us to start the process of social change.

But simply doing the lawyering -- writing the briefs, making the arguments -- isn't enough to get us decisions like Brown, Lawrence or Goodridge in the first place, or to ensure that the decisions result in the enduring change that we need. First we need to enable the change to happen and prepare the stage, because the legal decisions we need may well not happen unless we start that process of education and social change even before we get to these kind of precedent-setting decisions. There's a popular perception that a significant role of the courts is to create social change, which leads the way in social movements. I think that's a very significant overstatement of the court's historical role. Brown is an example of change happening, but history shows us that courts more often follow than lead on these things. I think you have to get a point where much of the country is already on board with the ideals we're talking about before you can get a national solution, certainly to an issue like race discrimination or the sodomy laws or an issue like same-sex marriage.

Plessy v. Ferguson was the 1896 case that was overturned by Brown v. Board of Education. It was about racial segregation in railroad cars in the South. And it established the "separate but equal doctrine" that stated that racial segregation was simply fine as long as you provide what a court defined as equal facilities. Now, the lawyers for Plessy were making the right arguments. You read those briefs today and they would win. But the problem is they were asking for a degree of social change that the court, at least the majority of that Supreme Court, was not ready for at the time.

The difference between the reception that the argument received in 1896 in Plessy, versus how it was received in 1954 in Brown, is that a lot had changed in the intervening years in terms of the country's attitudes towards race discrimination. By the 1940s many of the northern states already had laws that banned race discrimination in public accommodations. In 1948, which was six years prior to the Brown v. Board of Education decision, the California Supreme Court, in a decision that was ahead of its time, struck down on constitutional grounds California's ban on interracial marriage - something the US Supreme Court didn't do until 1967. So by the time Brown comes up,

much of the country is already on board with the idea that race discrimination is a problem, which progresses from being a state-by-state patchwork system to a national response.

Lawrence also overturned an earlier decision, *Bowers v. Hardwick* from the US Supreme Court in 1986. *Bowers* upheld a law that made sexual intimacy a crime in Georgia not just for same sex couples but for straight folks as well. In 1986 when the *Bowers* case reached the court, there were twenty-four states that still had sodomy laws on the books, and it turned out that we were asking for a degree of change that the court was not prepared to give us. So, after we lost *Bowers* in 1986, the LGBT community made a concerted effort to get rid of as many of the remaining sodomy laws as possible. Some of them fell through legislative repeals. More of them went down through court challenges under state constitutions. So by the time the *Lawrence* case -- which was one of the efforts to use state constitutions to get rid of the sodomy laws -- reached the US Supreme court in 2003, there were only thirteen states left with sodomy laws. And that kind of change at a state level made it not as big a deal for the court to overrule its prior decision of only a decade and a half earlier and decide that our relationships are entitled to constitutional protection. The *Goodridge* decision is also a breakthrough for us, but also not something that just came out of the blue. There had been marriage cases in the early '70s in Minnesota and in Washington State. Marriage litigation was started in Hawaii in the early '90s, although it ended badly with a state constitutional amendment defining us out of marriage. And a marriage case in Vermont ended up giving us civil unions. While none of the precursors to *Goodridge* actually resulted in marriage, they did start a conversation about our issues across the entire country that led to the beginnings of social progress on the issue, and was an important factor that enabled the *Goodridge* court to reach its decision.

So the experiences with the journey from *Plessy* to *Brown*, and from *Bowers* to *Lawrence*, and from the earlier marriage cases to *Goodridge*, suggest to me that bringing the marriage issue to the federal court system and the Supreme Court is not a very good idea right now. It's because we're at too early a stage in the development of this kind of law, this kind of social change, for us to have any hope that we'd prevail before the Supreme Court.

At this point, public education in addition to good lawyering is key to ensuring that the change we get sticks, that it becomes enduring. It's a mistake to think that simply getting a declaration from a court that we have this right or that right will magically fix the problem. We need to convince America that change is appropriate and that it's consistent with our constitutional values.

While *Brown* announced the important principle of equality that has become part of the culture, as people observed again and again in connection with the 50th anniversary of the *Brown* decision two years ago, it hasn't actually resulted in much greater integration in the public school system. The *Roe v. Wade* decision is another case that illustrates this problem and concern. Reproductive freedom, reproductive choice won a great victory in the early '70s, but we are still fighting this fight over and over again because we have not yet managed to convince a solid majority of the country that it's the appropriate remedy.

I think the *Goodridge* case so far has been a great example of how working to convince the public that the values reflected in the decision --work that a lot of people

in this room have been doing -- lessens the chance of a repeal, lessens the chance of losing that decision. Given the proposed constitutional amendment that's up for a vote in the Massachusetts constitutional convention this summer, it's not hard to see that if we don't convince enough people that we're right about this, that they shouldn't amend the state constitution to take marriage away from the over 8,000 couples in the Commonwealth of Massachusetts that have married, we could easily lose that. Once again, the point is that old-fashioned lawyering isn't good enough ultimately to secure our rights. There has to be a dialogue with the public. There has to be an effort to make this not just about courts, but about society at large and about legislatures, and to get people to agree that the ideals that go into those court cases are things that people agree with, or at least they can tolerate reasonably well.

What we need is a movement that is broader than litigation. We need to engage in a campaign to change people's minds, to enable the change and to ensure that the change becomes a part of the culture. If we want to use cases as part of that kind of movement to change people's minds, we need to find stories and individuals whose experiences exemplify why what we are challenging is wrong in the first place.

I want to give three examples of the kinds of stories and the kinds of individuals that I'm talking about – stories that will connect with the public at large and help convince them that we're being harmed in a way that they think is wrong, even if they aren't fully comfortable with who we are.

The first one concerns the ban on adoption by lesbians and gay men in the state of Florida. I've been involved with the ACLU in long-standing litigation trying to strike that ban down on federal constitutional grounds and it is an incredibly depressing experience in one sense, certainly as a lawyer, because we lost. We lost in the trial court. We lost in the appeals court. We asked the full appeals court, all twelve judges, to take the case and reconsider it. And six of them voted to take it and six of them voted not to take it, which means they didn't take it because they needed a majority. We asked the US Supreme Court to take the case and they wouldn't take it. In the process we got some pretty nasty opinions that have been harmful to us in the area of adoption and they may well be harmful in other areas, too. That's a disaster, right?

It's not a disaster and here's why. If all we're thinking about is the litigation, it's pretty hard to say there's anything positive here. But we were doing a lot more than simply asking courts for decisions. We found a way to engage the country and talk to a very large audience about the issues raised by the law and give people a concrete example that would help them realize that they didn't agree with this kind of exclusion. And the vehicle was a wonderful family.

Steve Lofton and Roger Croteau were both pediatric nurses working in a pediatric AIDS unit with infants at a South Florida hospital in the early '90s. These were the kids who tested positive for HIV at birth, had been taken away from their parents, and the state was looking for some place to put them. So Steve and Roger took in first one, then two, then three, and ultimately four infants and young children who had tested positive for HIV. One of them did die, but three others flourished in Steve and Roger's care, so much so that the child welfare agency that oversaw the placement of these kids gave Steve and Roger an award as foster parents of the year and then named the foster-parent-of-the-year-award after them. When one of these kids turned 10 years old -- he'd been with them since he was 2 months old -- the state of Florida

terminated the parental rights of his biological parents so he'd be free for adoption. But Steve and Roger couldn't adopt him because they're gay. So the state of Florida calls Steve up and says Bert's parental rights have been terminated and we need to move him on from what we told you was permanent foster care to adoption. Can you recommend anyone who might want to adopt your son? Can you imagine getting that call as a parent? Can you imagine what Bert, the boy, must have felt? He's ten years old; he knows what's going on. This is the only family, the only parents, the only siblings he's ever had.

It's a powerful story. It connects with people and we found a way to get the story out. Rosie O'Donnell lives part time in South Florida and she heard about it from the newspaper reports, so she calls us up and says hey, is there something I can do to help. We said, actually there is. You can be a spokesperson for us on this issue. And she did us one better. She came out on national television specifically around this issue. And we found out the immense power of television. It's amazing how many people that story reached through her two-hour primetime show. I'm sitting on an airplane about a year later and I'm working on some papers and the flight attendant asked me what I'm working on. I tell her it's about an appeals brief in a case about the Florida adoption ban, and she said, "Oh, you know that's silly, what a silly law. Just look at Rosie." And the woman goes on to tell me that she's a Bush supporter and she lives in the suburbs outside of Charlotte, North Carolina. So I'm thinking, she's not in the demographic of people who should really feel good about this. Right? But she could connect with that story. She could connect with Rosie, who she thinks she knows. And seriously, that's how you make change. That's how you convince people. And the challenge here is to find ways to make those kinds of connections with people so that, even if the litigation goes badly, we started a conversation that's making the change. And the reason I'm confident it is making change is that a number of other state legislatures have proposed legislation to restrict the parenting rights of LGBT people. And the polling that HRC did in this last legislative session shows that the support is just not there. I know it's not simply because of the Lofton case and it's not simply because of Rosie O'Donnell, but it's got to be part of it. So we've got to make sure that we're talking not just to courts, but also to the public at large.

The next story I want to tell you about is one that can be helpful to the cause of transgender rights. There's a legal issue that we're trying to get at in the law, and it's the question of whether or not the federal ban on sex discrimination in employment covers transgender people. I think most of us would say, what is discrimination against transgender people other than sex discrimination. But there are a lot of cases in the '70s and '80s that says no, Congress wasn't thinking about transgender people when they passed the Civil Rights Act. So, we're looking for a way to get past that. And the following story I think gets at this issue. And so far, the case is going well and we'll hopefully do better than we did in the Lofton case.

Diane Schroer is a transgender woman who spent 25 years in the US Army as David Schroer. She was an Airborne Ranger and a qualified Special Forces officer. She headed classified national security operations, she briefed Vice President Cheney on national security issues, and she executed over 450 parachute jumps. After twenty-five years she retired as a Colonel from the Army and then started working as a consultant to

military contractors on anti-terrorism issues. At the same time she began the transition from male to female.

So she sees a job posting for a terrorism researcher at the Library of Congress, and she goes for an interview and is selected for the job. She's told she's their top pick; they're so excited to get her, someone with her security clearance, and her experience. She takes her new boss to lunch before she starts and she says, "I'm so excited about the new job, but you know what, I've started a transition. I'm living as Diane outside of my work life and now I want to start working as Diane. Here's a photograph. I look very professional." And the next day the offer is rescinded. She's rightfully shocked. This is a woman who spent twenty-five years of her life working for the US government. In her words she "went to every god-forsaken hell hole" that the Army sent her to without any complaints and now she's not fit to work for the United States government as a terrorism researcher at a time when the government thinks we need terrorism researchers.

It's a good story because it connects with people. People who don't know anything about transgender people and what it means to be transgender, yet they still think there's something wrong here. And if we're going in to ask the judge to do something that he may not be really comfortable doing, we need a story like this in order to give him that comfort. If we're talking to people around the country, trying to get them to be more comfortable with what it means to be a transgender person or what it means to discriminate or not discriminate against a transgender person, we need the same kind of stories that are going to ease them into an experience and a concept that they don't understand.

The last example I want to talk about has to do with marriage. The issue of marriage is cropping up in a lot of different contexts. It's cropping up in affirmative marriage cases in state courts that are pending in about six or seven states around the country. It's popping up in arguments about why states hopefully shouldn't amend state constitutions to exclude us from marriage, civil unions, and domestic partnerships. And especially given the Senate's debate over a federal marriage amendment this past week, it's clear that we have the country's attention on the issue of marriage. So what do we say?

I think the key to persuading the country and the courts and the public to support marriage of same-sex couples, or at least not to oppose it, is to convince them of two things. First, that same sex couples make the same commitment to each other that straight couples make. And second, that they get harmed in very tangible ways when the government does not recognize or respect their relationships. So we want to find stories that demonstrate those things to America so that the public will conclude that excluding us from marriage isn't a fair thing to do.

I'm going to tell you about the story of Sam Beaumont and Earl Meadows. Sam Beaumont was a Vietnam vet and he met Earl Meadows in Okalahoma in 1977. And it is a wonderful, sappy story. They fall in love and they move in together in Bristol, Oklahoma, with Sam's three sons from a prior marriage. For the next 23 years, Sam takes care of the cattle on the ranch that they live on, builds a house for the five of them, cooks, cleans, does the laundry, and takes care of the animals. Earl works in town at a company. The land and the bank accounts are all in Earl's name because he's in town and he's the local guy. They share everything because they're a couple, they're a

family. Sam takes care of Earl's parents when they get sick, and then he takes care of Earl for the last three years of his life after Earl has a stroke and can't care for himself anymore. Earl dies and of course that's devastating, but Sam thinks everything is okay on the ranch because Earl left a will that leaves the ranch and the house and the car and the cattle and everything to Sam. But the problem was Earl didn't know that he needed two witnesses for a will in Oklahoma, yet he only had one. So without the will, even after 23 years together, but nothing in his name, Sam is a legal stranger to Earl and gets nothing. To top it all off in the court fight that follows, Sam comes in and says that if you won't recognize the will, then treat this as a partnership -- if it's not a marital partnership it's at least a contractual partnership and I put in my sweat equity -- so I should get half the stuff. But the courts says you did that for love so you cannot sue based on a contract, and yet you're not married so you can't get it that way either.

This story shows the real harm and injustice that comes from the state's refusal to recognize the relationship. It's a powerful story, and there are stories like this in the marriage cases we're bringing around the country. Finding ways to talk to America about these situations, whether through litigation or through other means, is key to making progress on the marriage issue.

So we've got two aspects to our legal work that function in tandem: the assertion of rights in the courtroom; and the larger social message and dialogue that we're trying to spark with the public in general.

In closing, what I want to say is this -- this kind of work is not just for professional homosexuals like me - I know there are other professional homosexuals in the room - it's for everybody. Some of this is regular old lawyer work, but more of it is the job of convincing America that they agree with us and not with our opponents. That treating us badly is not consistent with their sense of fairness and their sense of what it is to be an American.

So we need to explain our issues to the country. The issues aren't limited to marriage, adoption, or discrimination against transgender people. They include every area where LGBT people are treated differently in society. And all the issues are linked. So talking about one set of issues will help with the others. Talking about parenting helps with marriage. Talking about discrimination in schools helps with talking about discrimination in employment and housing.

Now I want to talk about things that people can do that are not too hard, but are immensely important.

First of all, we need to be out in all parts of our lives. There's a new study that HRC is circulating that says people don't change their attitudes about LGBT people in any fundamental and significant way until they know three LGBT people personally. So we've got to make sure we're out as much as possible. Be out at work. Be out at school. Be out in every context that you can be out in. At this gathering we are all people of immense privilege and we can use that privileged position to open minds and take chances in different parts of our lives.

The other thing is to go back and to talk to people about why relationships are important, why restrictions on parenting by gay people are misguided, or why discrimination against transgender people isn't fair. Bring it up in conversation. Make some noise about these issues in your own world wherever that happens to be. Be an activist at least on a small scale. Most of us have jobs. Most of us who don't will

hopefully have jobs soon. So when you go back to your job, ask if there is a non-discrimination policy at your place of work. Does it include gender identity, if there's a policy that covers sexual orientation? Does your employer offer domestic partner healthcare benefits? Does your city or town have those things? How about your school? This kind of change, the change that is so crucial to ensuring that the change that we make in the court system sticks, is done at the retail level. It's done by talking to people, because if we don't do it, who will?

Most of us here tonight are not from Massachusetts. We're here for reunions, which means we're going to go back to someplace else where, given Massachusetts' somewhat exalted position in the LGBT rights firmament, there's still a lot of work to do. Go home. Get involved. Making progress in LGBT rights means we need a movement, not just a series of lawsuits. And you folks are all key to making that movement happen. Thank you.