ARTICLE

The Language of *Love v. Beshear*

Telling a Client's Story While Creating a Civil Rights Case Narrative

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I. Introduction

We tend to think of a good lawyer as being a vigorous, focused advocate, one who thinks first and foremost of the interests, needs, and desires of their clients. But what if the client's case will affect an entire group of people; a group who may also seek to have its collective rights vindicated? This is the dilemma of the civil rights attorney—how does an effective advocate balance the specific needs of the client with the broader, long-term needs of the group the client represents? And who should have a say in what story is told on behalf of the client? In civil rights cases, it is not just the client, but activists, organizations, academics, and the media who have a stake in the outcome. How much of a say should they have in the creation of a litigation story that will most directly impact a single client? How are those stories crafted? With careless, blunt-force litigation, or with purposefulness? And does it matter who gets to tell the story?

This article addresses those questions by examining the recent marriage equality litigation that culminated in the Supreme Court decision *Obergefell v. Hodges*. Focusing on the Kentucky case, *Love v. Beshear*, this article shows how civil rights attorneys may be constrained by their dual roles—advisors to their clients and advocates for civil rights—and how they decide what story to tell to remain true to their clients' needs

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while keeping engaged with the larger civil rights issues inherent in these impact litigation cases. Moreover, once the litigation has begun, the other players—organizations, media, even the judges themselves—can change the story, highlighting what they see fit. The ultimate story of who a lawyer's clients are ultimately may not be up to the lawyer or the client. If that is the case, what is the lawyer's role in crafting a narrative? Part II of this article discusses the importance of narrative, creating a client's story, in litigation. Part III discusses additional difficulties and interests that must be considered when creating a narrative in civil rights litigation and shows how that story can change over time as other players become involved. Part IV delves into the cases *Love v. Beshear* and *Obergefell v. Hodges* as examples of how different actors can shape a client's narrative.

II. Importance of Narrative in Litigation

A lawyer's primary job is to persuade, and legal narrative is an effective way to do so.[1] Lawyers often use storytelling or a legal narrative to persuade judges and juries that their client should win their dispute because legal narratives present "a series of facts or events in an interesting and compelling fashion."[2] Legal narrative or storytelling has become a burgeoning area of legal scholarship. According to scholar Helena Whalen-Bridge, "A legal narrative is a story that focuses on the effect of a particular law on the lives of its characters,"[3] and a "story" is "an account of a character running into conflict, and the conflict's being resolved."[4] Storytelling is powerful because it is such a large part of how we understand the world.[5] In fact, a story can "ring true" and be persuasive even if it presents a version of events that differs with other people's perceptions of the same events.[6]

Part of a story or narrative's power is its ability to evoke an emotional response in its audience.[7] Narratives "evoke the reader's sympathy by depicting how events bear on the life of a character," and so narratives necessarily focus on individuals.[8] According to one scholar, "The most

1 Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ALWD 229, 233 (2010).

2 *Id.* at 231.

3 Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 Or. L. Rev. 943, 943 (1994).

4 Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers On How To Use Fiction Writing Techniques To Write Persuasive Facts Sections*, 32 Rutgers L.J. 459, 466 (2001).

5 *Id.* at 958.

6 Whalen-Bridge, *supra* note 1, at 234.

7 Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. Legal Writing 127, 144 (2008).

8 Apt, *supra* note 3, at 961.

potent legal narratives are often personal testimonies."[9] To that end, one way a story can be persuasive is if it is recognizable to its audience so they can envision those events happening to them.[10] These stories invoke empathy by emphasizing the similarities between the narrative's characters and its audience.[11] For that reason, legal narratives are often used to advance social justice causes on behalf of marginalized groups.[12] The stories of the victims of discrimination can be told in academic writing, in writing to and by the courts, and in statements to media outlets in order to help the audience see the world from the victim's point of view.

In litigation, one way to tell a legal story is through the theory of the case, which "includes four elements: the facts presented, the legal framework, the client's perspective, and coherence with the audience's moral intuitions or lived experiences."[13] To that end, a case theory should "explain the party's version of the facts," be supported by the law, and respond well to the opponent's likely theory.[14] Part of the theory of the case is the "theme" of the case, which is "where the client's voice and point of view are present. The theme causes the visceral reaction that allows the reader to be immersed in the story, not just the law at issue."[15] A theme is therefore an important part of the theory of the case because it helps the theory of the case connect "to the client's experience of the world . . . in the way that can best achieve the client's goals."[16] By doing so, the theory of the case "combines the perspectives of the lawyer and the client with an eye toward the ultimate audience—the trier of fact."[17] A theory of the case that focuses too much on legal framework or strategy may lose the ability to connect with its subject—the client—and may therefore lose its ability to tell a meaningful story. By doing so, lawyers lose the ability to influence judges when the judges engage in "narrative reasoning," which is reasoning that "evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode."[18]

9 *Id.* at 957.

10 *Id.* at 970–71 (citing Kathryn Abrams, *Hearing the Call of Stories*, 79 Calif. L. Rev. 971, 1051 (1991).

11 Foley & Robbins, *supra* note 4, at 468 ("The more the reader understands and likes a character, the more the reader will root for him.").

12 Apt, *supra* note 3, at 943.

13 Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 Clinical L. Rev. 188, 189 (2008–2009).

14 Foley & Robbins, *supra* note 4, at 492–93.

15 Mary Ann Becker, *What is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 Gonz. L. Rev. 575, 576 (2011).

16 Binny Miller, *Give them Back their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 487 (1994).

17 *Id.*

18 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. F. 7, 11 (1996).

Some scholars have criticized the gap between the story the lawyer tells and the story the client would have told.[19] They have argued that the stories that lawyers tell to fit a legal framework often remove their client's perspectives from the story, effectively silencing the client.[20] "The phrase 'lost narrative' refers to such a situation, where events have occurred that some would like to discuss but which cannot, for some reason, be addressed."[21] However, other scholars have argued that a purely client-centered story would also not be as effective because it would not fit into a legal framework that could help the client get what she wants.[22]

This conflict between a client's personal story and their "legal" story gets even more complicated in civil rights litigation. In civil rights litigation, it is not only the client's story that needs to be told because larger issues are at play. More specifically, civil rights lawyers must balance the needs of their individual clients and the larger issues their clients embody when deciding what story should be told because the effects of one case could set a precedent that will affect larger communities. In addition, lawyers who represent individual plaintiffs in civil rights litigation are often pressured by several groups to tell a particular story, including activists, the media, academics, civil rights organizations and, indeed, the clients themselves.

In such cases, the trier of fact may *not* be the ultimate audience, as one activist scholar wrote:

> A group engaged in challenging entrenched power . . . has to contend with far more powerful opponents in incredibly lopsided political contests. Such a group, therefore, has not only to foster a strong internal identity; it also has to win allies beyond the bounds of that identity, if it is to build the collective power it needs to move any serious political goals forward.[23]

In other words, when advancing the rights of a marginalized group or seeking the creation of a new right, public opinion matters. Often these

19 Miller, *supra* note 16, at 515.

20 *Id.* at 486. This criticism of "lawyer-led" civil rights advocacy has come to the fore in recent scholarship. Arkles et al., describe

> troubling dynamics [in representing marginalized clients] where lawyers take center stage, where the voices of people with the most privilege in our communities are centralized, where knowledge stays within the legal profession rather than being shared outside of it, where an intersectional analysis is lacking, and where decisions about priorities are made in isolation from many key movement leaders and the people who are most impacted by the issues.

Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 Seattle J. Soc. Just. 579, 584 (2010).

21 Whalen-Bridge, *supra* note 1, at 229.

22 Miller, *supra* note 16, at 516–17. Also, sometimes, the client's unvarnished story is "neither noble nor empowering." *Id.* at 526.

23 Jonathan Smucker, Hegemony How-To: A Roadmap for Radicals (2017).

cases are part of a larger movement with multiple points of attack that need to be, if not fully coordinated, at least cognizant of the larger forces in play. That being the case, the stories told in civil rights litigation are meant for public consumption and therefore are often tailored to what will play best in the public eye. Consequently, although ostensibly wanting the same thing, the creation of a favorable judicial rule (or even an entirely new civil right), each group has their own larger interests to advance and will therefore want the client's story to be told a certain way.

Accordingly, detachment from the client may be intentional to serve a larger goal. For example, Dale Carpenter's book, *Flagrant Conduct*, discusses how the plaintiff's story was essentially ignored during the proceedings in *Lawrence v. Texas*,[24] including the likelihood that the sodomy for which he was arrested never occurred.[25] Instead, lawyers and activists wanted to focus on the constitutionality of the law itself and not get stuck on factual matters.[26] This was not necessarily a bad thing; Lawrence agreed to this strategy and was interested in advancing the larger civil rights issue.[27] In contrast, the plaintiff "Jane Roe" in *Roe v. Wade* felt ignored by her attorneys in their pursuit of larger constitutional issues and, perhaps due in small part to her perceived mistreatment, ultimately became an advocate against abortion.[28]

A different strategy has been used in other civil rights cases, where the plaintiffs challenging the law on constitutional grounds were made a large part of the story of the case, bringing the facts of the clients' lives and relationships into the forefront. The plaintiffs in *Loving v. Virginia*, although they shied away from media attention, were still a large part of the case theory, which focused on their affection for each other and the fact that they appeared to be the same as any other couple.[29]

Another example, and the focus of this article, are the plaintiffs in the case *Love v. Beshear*, one of the cases that was combined into the Supreme Court case *Obergefell v. Hodges*,[30] the case that granted marriage equality.

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24 539 U.S. 558 (2003).

25 Dale Carpenter, Flagrant Conduct 105 (2012).

26 *Id.* at 127.

27 *Id.* at 134.

28 *See* Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 Hastings L.J. 779 (1996) (presenting an in-depth analysis of the conflicts between Roe and her lawyer, who was extremely focused on litigating the larger constitutional issue, arguably to the detriment of her client, who simply wanted an abortion).

29 *See, e.g.,* Brief of Plaintiffs-Appellants at 61, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (internal citations omitted) ("The ability to identify a racial classification when the statute 'treats the interracial couple made up of a white person and a Negro differently than it does any other couple,' is no different from the ability to identify a sex-based classification when a statute is applied to treat a couple made up of a man and a man differently from a couple made up of a woman and a man.").

30 135 S. Ct. 2584 (2015).

Although largely lauded for its results, some scholars have criticized *Obergefell* for focusing too much on marriage as opposed to other kinds of relationships.[31] Such criticisms appear to argue that the attorneys in the *Obergefell* cases focused too much on their clients without considering the larger civil rights issues.[32]

Cynthia Godsoe has also criticized the case for "normalizing" the issue of gay rights by choosing only "perfect" plaintiffs who most resemble heterosexual couples at the expense of the wider gay experience.[33] As she sees it, "[H]eteronormative and traditional characteristics [are] present in the carefully curated set of *Obergefell* plaintiffs" because "respecting individual choice in those we love[] will require challenging mainstream norms themselves rather than simply imitating existing models."[34] Godsoe's critique offers another potential conflict between the needs of the client and the larger civil rights issue: anticipating the individual needs of those in the larger marginalized group who are not the client.[35]

These criticisms show the difficult balancing act civil rights lawyers must accomplish in order to stay true to their clients' needs and address the larger civil rights issues their clients represent. As shown below, the lawyers in *Love v. Beshear* were faced with the monumental task of deciding what story to tell not only about their clients, but about same-sex relationships overall, to very different kinds of audiences. However, and perhaps more importantly, choosing clients was only the beginning of the crafting of the clients' stories in *Love v. Beshear*. Ultimately, it was not the lawyers that chose the stories told; it was the media, national organizations, and the judiciary that cherry-picked the stories they liked best.

III. Putting it into Practice: Creating a Marriage Equality Story

The *Obergefell* decision shows the importance of activists and civil rights groups to change society's opinions about a marginalized group even before the case is brought to court. Changing society's opinions is

31 Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 Fordham L. Rev. 23 (2015); Leonore Carpenter & David S. Cohen, *A Union Unlike any Other: Obergefell and the Doctrine of Marital Superiority*, 104 Geo. L.J. Online 124 (2015).

32 *Id.*

33 Cynthia Godsoe, *Perfect Plaintiffs*, 125 Yale L.J. Forum 136 (2015).

34 *Id.*

35 Part of the tension inherent in *Obergefell* stemmed from the fact that it was seen as representative of the entirety of the LGBTQ+ rights movement. But by 2013, that movement had already expanded far beyond the space allowed by its ever-growing acronym. The "movement for LGBTQ+ rights" was, and is, several movements that were shoved under one umbrella in common parlance, but which had very different needs and aspirations.

essential to make room for a narrative about individual clients that a trier of fact can empathize with. Social understanding of new rights, including newfound empathy for disenfranchised minorities, takes time to develop. Civil rights lawyers must play into that understanding by placing their clients in a context that judges, juries, and the greater population can empathize with, and even champion.

A. Putting the Clients in Context: When to Tell the Story

To create a successful narrative for their same-sex couple clients, civil rights attorneys needed to understand what would make their clients most sympathetic to judges, juries and even the public at large. To do so, they had to understand the history of the fight for legal recognition of gay marriage and how social forces had changed over time. The history of the legal fight for same sex marriage began in the 1970s but did not seriously gain steam until the early 2000s.[36] During that time, Americans' views of homosexuality also began to change, due in large part to the efforts of activists and organizations who sought to tell stories of gay people in the news media and popular culture.[37] In addition to capitalizing on national events such as the AIDS crisis and "Don't Ask, Don't Tell," the media brought gay characters in popular television shows such as *Ellen* and *Will and Grace*.[38]

The impact of the change in narrative—the change in the nation's understanding of gays and lesbians—was essential for the increased legal recognition of their civil rights. Beginning in the 1990s, courts began to entertain the idea of same-sex marriage as a fundamental right.[39] In 2004, in *Lawrence v. Texas*, the Supreme Court overruled *Bowers v. Hardwick* and held that adults, even in same-sex couples, have the right to sexual intimacy.[40] That decision sparked more activism,[41] more court cases,[42] more ballot initiatives,[43] and, ultimately, *United States v. Windsor*, in which Justice Kennedy called the right to same-sex marriage, as conferred

36 For a more in-depth history of the fight for same-sex marriage rights, see Daniel J. Canon, *Marriage Equality and a Lawyer's Role in the Emergence of "New" Rights*, 7 Ind. J.L. Soc. Equal. 212, 217–18 (2019).

37 *Id.* at 228–37.

38 *Id.* at 229.

39 *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

40 Lawrence v. Texas, 539 U.S. 558 (2003) (right of consenting adults to sexual intimacy); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraception).

41 Emily Althafer, *Leading Gay Rights Advocate to Speak at UF*, Univ. of Fla. News (Jan. 23, 2006), http://news.ufl.edu/archive/2006/01/leading-gay-rights-advocate-to-speak-at-uf-1.html.

42 David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law 64–65 (2016).

43 *Id.*

by certain states, a "dignity and status of immense import."[44] Kennedy's language suggested the country and its courts might finally be ready to take same-sex marriage head-on.

During this time, activists and organizations became sophisticated storytellers who used the media and the courts together in order to change the law. Moreover, even the losses were used to gain momentum; the issue continued to be reported in the media and motivated LGBTQ+ supporters and allies to continue to tell their stories to change the narrative about same-sex couples.[45] The foregoing shows that the efforts of these activists, and their narratives, made a big difference in legal landscapes. The attorneys involved in the marriage equality cases made use of the new, humanizing stories being told about same-sex couples in their own litigation. *Love v. Beshear* would provide another opportunity for these groups to engage in persuasive storytelling.

B. Choosing Clients, Choosing Stories

Although there were legislative and judicial gains for same-sex couples, the work of creating a successful narrative across the United States was far from finished. Public opinion regarding gays and lesbians in Kentucky (and most of the Midwest/South) was much more negative than on the coasts, as evidenced by the over 75% approval of Kentucky's 2004 "traditional" marriage amendment.[46] To win over the middle of the country in 2013, Kentucky civil rights lawyers had a more religiously conservative populace and a constitutional amendment to overcome.

Moreover, LGBTQ+ rights organizations purposefully were not bringing impact litigation in the South and Midwest because they did not believe they could win in the courts there.[47] These organizations had a national focus, not a local one. Individual activists, on the other hand, were more tied to their local communities and interested in fighting for same-sex marriage where they lived. And they were willing to be the face of that movement, meaning that their stories would be the ones heard by the courts and the national and international media. Consequently, after *Windsor*, there was no shortage, even in Kentucky, of both 1) same-sex couples who wanted to get married in their home state, and 2) same-sex

44 United States v. Windsor, 570 U.S. 744, 768 (2013).

45 Cole, *supra* note 42, at 37.

46 *Kentucky*, Initiative & Referendum Inst., Univ. S. Cal., http://www.iandrinstitute.org/ states/state.cfm?id=36 (last visited Aug. 30, 2019).

47 In one sense, the organizations were right—plaintiffs lost at the Sixth Circuit Court of Appeals. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd*, Obergefell v. Hodges, 135 S. Ct. 2594 (2015).

couples who were already married, and who would like their out-of-state marriages to be recognized by their home state.

The attorneys in the marriage equality cases had a myriad of concerns to address when choosing clients and a case theory. First, they needed people who wanted to get married simply because that was the right they were pursuing. Finding same-sex couples who wanted to get married (or who were already married in another state) necessarily limited who the lawyers could choose; the available pool of potential plaintiffs was self-selecting.

The couples' reasons for getting married were also salient. Attorneys needed to find couples who had articulable reasons for wanting their marriages recognized, partially to underscore the importance of the right. It is not enough to explain the benefits of marriage in the abstract—the attorneys needed to find people who were suffering without those benefits. For that reason, the attorneys focused on couples who had practical reasons for getting married, such as looming medical emergencies, adopted children with only one recognized parent, or the additional burden of drafting legal documents to commemorate their relationship in the event one of them should die.

The attorneys also needed to find people the audience would connect with. The audience in this case, as in many civil rights cases, was not just the judges who would hear the case; it was the public as a whole, and particularly the segment of the public that had still not thought much about the issue.[48] Thus, people who had what could be called "typical" relationships that resembled heterosexual marriages were the most natural vehicle for relating to both judges and the wider audience. Recognizing this, attorneys in every state tended to select couples who had been together for a long time and had children. This strategy allowed attorneys to create a story that their audience could relate to that involved people they could empathize with.

In the pleadings, Kentucky's lawyers gave equal weight to each couple's story, to present as many narrative angles as possible within the framework they were given.[49] As far as client selection was concerned, the marriage cases were more like *Loving* than *Lawrence*. The marriage bans affected thousands of people in every state, unlike the selective and infrequently used criminal penalty in *Lawrence*. This state of affairs gave a degree of leeway to attorneys in selecting plaintiff couples, and by extension in selecting the stories that could be told. But unlike many legal teams nationwide, the Kentucky attorneys, acting without the narrative

48 As shown below, portions of the judicial opinions in *Love v. Beshear* were pointedly aimed at a skeptical general audience.

49 This was a decidedly different approach from the litigation in Michigan (*DeBoer v. Snyder*), which had only one plaintiff couple: two professionals with children. *See infra* part IV.C.

impulses of the national organizations, made an effort to be more inclusive. As such, they selected couples that represented a "traditional," heteronormative marriage—suburban, church-going professionals with children—as well as couples that were outside that norm: rural-based, childless, blue-collar, and otherwise refusing to conform. The twelve plaintiffs represented by Kentucky's lawyers were among the largest groups in any marriage case in the country (excluding class-action cases)[50] and by far the largest to go to the Supreme Court in *Obergefell*.

Still, reaching to the farthest fringes of the marginalized to ensure a population is well-represented, even if desirable, is not always possible. Self-selecting clients are likely to have more education and more resources than the average member of their group, and the Kentucky plaintiffs were no exception. Furthermore, the available stories were limited to those who thought marriage was a good idea in the first place.[51] This basic fact excluded a large number of nontraditional couples falling under the expansive LGBTQ+ umbrella, though many of those couples undoubtedly had a stake in the outcome of the litigation. Telling only the stories of the plaintiffs that found their way to lawyers necessarily meant that the stories of others would be silenced, at least in the short term.

The first case, styled *Bourke v. Beshear*, involved Greg Bourke and Michael DeLeon, an upper-middle-class couple who had been together for more than thirty years, and who had officially married in Canada in 2004.[52] Bourke and DeLeon had two adopted children, and a suburban lifestyle right out of a magazine spread.[53] Similarly, plaintiffs Paul Campion and Randy Johnson, a youthful-looking middle-aged couple with four adopted children, lived the married life of a 1960s sitcom couple (with a notable exception).[54] Paul is a nurse and Randy is a schoolteacher.[55]

Two other couples, Kim and Tammy Boyd, and Jimmy and Luther Meade-Barlowe, were from small towns in Kentucky.[56] Each couple

50 *See, e.g.,* Strawser v. Strange, 307 F.R.D. 604 (S.D. Ala. 2015) (granting class certification to Alabama marriage plaintiffs).

51 Tom Geoghegan, *The gay people against gay marriage*, BBC News Mag., June 11, 2013, https://www.bbc.com/news/magazine-22758434 ("Some lesbians are opposed to marriage on feminist grounds, says Claudia Card, a professor of philosophy at the University of Wisconsin-Madison, because they see it as an institution that serves the interests of men more than women. It is also, in her view 'heteronormative', embodying the view that heterosexuality is the preferred and normal sexuality."). For a very different take on (arguably) LGBTQ+ opposition to marriage, see Brief of Amici Curiae Same-Sex Attracted Men and their Wives in Support of Respondents and Affirmance, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_Same-Sex_Attracted_Men_and_Their_ Wives.pdf.

52 Brief for Petitioners at 9, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-574_Brief_Of_Bourke.pdf.

53 *Id.*

54 *Stories*, Freedom to Marry, http://www.freedomtomarry.org/stories/P10 (last accessed June 1, 2020).

55 *Id.*

56 *Id.*

had been together for decades—Luke and Jimmy since 1968.[57] Their hometowns would not likely have approved of same-sex attractions, and certainly would not have voted in favor of same-sex marriage.[58] But these couples had been road-tested; they were well-known—and widely accepted—by their communities.[59] While they were emblematic of small-town same-sex couples everywhere, they were not the nuclear family analog that conventional wisdom suggested middle-America would relate best to.[60]

Luke and Jimmy were particularly relatable because they had been through the worst of anti-gay rhetoric and understood how far the country had already come. When they met in 1968, the thought of same-sex marriage was "who in their wildest dreams could ever dream that? And to adopt children? I mean, how weird is that?"[61] They were "so in the closet" that they exchanged rings under the table at their wedding ceremony in Iowa.[62] Luke and Jimmy's story also had the added element of the medical treatment issues first brought to light during the AIDS epidemic.[63] Jimmy had been diagnosed with non-hodgkins lymphoma a decade before the case began.[64] His prognosis showed no immediate danger, but the couple was well aware of the impact the legal status would have on Jimmy's healthcare in the future.[65]

The "licensure" plaintiffs were similarly diverse. The fortuitously-named Tim Love had been with his partner, Larry Ysunza, for thirty-three years.[66] They were (and are) a typical story of monogamous romance, with the attendant typical problems that defined same-sex marriages in 2014.[67] Tim had heart problems that had put him in the hospital some months before.[68] The couple decided to delay emergency surgery so that

57 *Id.*

58 *Id.*

59 Clare Galofaro, *After four decades in secret, Kentucky couple fights for the next generation*, LGBTQ Nation (Apr. 25, 2015), https://www.lgbtqnation.com/2015/04/after-four-decades-in-secret-kentucky-couple-fights-for-the-next-generation/.

60 Noted legal journalist Dahlia Lithwick has discussed the "Will & Grace" theory of cultural change: "A mainstream television comedy featuring openly gay characters demonstrated what social scientists have long known: the single most important indicator of one's support for gay rights is whether one knows someone who is gay. In a pinch, it seems, a fellow on TV will do." Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, New Yorker, Mar. 12, 2012, https://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick.

61 Love v. Kentucky (Informavore Media 2017).

62 *Id.*

63 *Stories*, supra note 54.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

they could execute documents to prevent anyone from interfering, and to ensure access to one another, should the unthinkable happen.[69]

Also involved were Maurice Blanchard and Dominique James, young activists living in Louisville.[70] In 2013, Blanchard and James went to the county clerk's office and demanded a marriage license.[71] When the clerk informed them that she could not legally issue a license to two men, they refused to leave.[72] They were arrested, prosecuted, and fined one penny by a Louisville jury.[73] Their prosecution was six months before the Supreme Court's opinion in *United States v. Windsor*,[74] and about seven months before *Bourke v. Beshear* was filed.

Compared to Tim and Larry's relative conservativism, Maurice and Dominique represented what people now think of as gay rights activists. Tim and Larry were demure, studious, and decidedly working-class in their affect and dress; Maurice and Dominique dressed colorfully, wore dark glasses, and were more oratory. Maurice (also known as "Bojangles") in particular was unafraid of media; he was the first openly gay Baptist minister in Kentucky.

There was, at first, some concern by the legal team (and by some of the original plaintiffs) that Maurice and Dominique might have been more alienating to the general public in Kentucky, and perhaps to the judiciary, than Tim and Larry. On the other hand, Maurice and Dominique, perhaps more than any of the other Kentucky plaintiffs, represented the face of the young LGBTQ+ movement in the 2010s—out, proud, unashamed, and willing to fight.

Despite the variety of plaintiffs' stories, the popular media's treatment of the wave of marriage litigation reflected the narrative angle that most national advocacy groups thought would be most successful: one making a direct comparison between "normal" married couples and same-sex couples, with as few differences highlighted as possible. One of the first cases to be filed after *Windsor*, the unexpectedly successful *Kitchen v. Herbert*,[75] featured two plaintiffs who met later in life and apparently

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *See* Andrew Wolfson, *KY Gay Couple Fined 1 Cent In Fight For Marriage,* USA Today, Nov. 27, 2013, https://www.usatoday.com/story/news/nation/2013/11/27/kentucky-gay-couple-marriage-protest/3765599/. Maurice and Dominique's decision to take that criminal trespass case to trial was in itself a tried-and-true example of the use of a civil disobedience narrative to raise awareness about a larger cause. *See* United States v. Anthony, 24 F. Cas. 829 (N.D.N.Y. 1873). As evidenced by Susan B. Anthony's famous speech to the court for illegal voting, victory at trial was not the goal. *See* Andrew Glass, *Susan B. Anthony found guilty of voting, June 19, 1873*, Politico, June 19, 2018, https://www.politico.com/story/2018/06/19/susan-b-anthony-found-guilty-of-voting-june-19-1873-649110.

74 570 U.S. at 768.

75 755 F.3d 1193 (10th Cir. 2014).

did not plan to have children. Nonetheless, the *Salt Lake Tribune* emphasized the normalizing aspects of their relationship: "Call, a native Utahn, and Archer, who is originally from Colorado, said they married for the same reason most couples do: as a public declaration of their love, commitment and fidelity to one another."[76] Similarly, *USA Today*'s story on the Kentucky litigation focused solely on one couple (Bourke-DeLeon), and did not even mention the other plaintiffs.[77] The article mentioned the couple's son's activity in scouting, and quoted DeLeon as saying "'There's no reason why we should be second-class citizens. . . . We should be at the table with everybody else.'"[78]

Despite the effort to provide a broad base of narratives to the public, the story told to the media by Kentucky's legal team also became one of drawing similarities with straight couples almost immediately after suit was filed. One of the plaintiffs' attorneys (and one of the authors of this article) described the clients in an editorial dated December 18, 2013:

> Our clients are four ordinary, lawfully wedded couples. They go to work, attend school, raise their children, go to church, pay taxes, and in most respects live as any other married couple in Kentucky. Like many married couples in the commonwealth, the plaintiffs were wed outside of their home state. Their marriages were valid under the laws of the jurisdictions in which they were registered. The federal government recognizes plaintiffs' marriages and extends certain benefits to them as a result. And yet, Kentucky refuses to accept that these couples are married simply because they are same-sex couples.[79]

This story, as told by lawyers and the press, was not one of individual liberty, or of government intrusion, or of religious discrimination. It was fundamentally a story of sameness, of uniformity, of analogy—one designed to invoke sympathy, not outrage, in the average, undecided, middle-American media consumer. And it was the story that persisted all the way through *Obergefell*, seemingly without regard to the details of any particular plaintiff's case.

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76 Brooke Adams, *Couples Determined to Topple Utah's Same-sex Marriage Ban*, Salt Lake Trib., June 28, 2013, https://archive.sltrib.com/article.php?id=27277024&itype=storyID.

77 Jessie Halladay, *Couple Challenges Kentucky Law Against Gay Marriage*, USA Today, July 26, 2013, https://www.usatoday.com/story/news/nation/2013/07/26/same-sex-marriage-kentucky/2589379/. This exclusive focus is all the more shocking because Kim and Tammy were actually the first couple to file, a filing which was later withdrawn and consolidated with Bourke in a different court.

78 *Id.*

79 Dan Canon, *Dan Canon: The Case for Marriage Equality in Kentucky*, Insider Louisville (Louisville Future, Louisville, Ky.), Dec. 18, 2013, https://insiderlouisville.com/uncategorized/marriage-equality/.

IV. How the Story in *Love v. Beshear* Evolved

Kentucky's litigation happened in two phases, one for recognition of out-of-state marriages, and the second for the right to be married in Kentucky. The strategy of bringing "recognition" cases (as opposed to "licensure" cases) was employed by Kentucky attorneys, as well as attorneys in other states, because it seemed the obvious next step from *Windsor*[80] and made a better story for the general public. As discussed below, mostly by the irresistible tide of judicial opinions and popular media coverage, the case necessarily evolved into one that made close comparisons between opposite-sex and same-sex married couples, serving to minimize the differences between the two. Despite the myriad of different stories the clients represented, both the judiciary and the media repeatedly focused on traits that same-sex and heterosexual couples have in common, effectively ignoring the stories that did not fit that narrative. The result was beneficial for all couples but, as discussed below, losing so many stories that did not fit with the judiciary and media's preferred narrative did have some far-reaching implications that future litigants and activists will have to grapple with.

A. The Kentucky Plaintiffs: Recognition Cases

The point, as was argued in the plaintiffs' briefing at the district court level, was that even if someone disagreed with allowing marriage licenses to be issued to lesbian and gay couples within the Commonwealth of Kentucky, it was unfair to withhold the rights and responsibilities of marriage from couples who had been lawfully married in other jurisdictions, simply because they were same-sex couples. As such, Plaintiffs began their Memorandum in Support of Summary Judgment by emphasizing this unfairness:

> Plaintiffs are ordinary married couples. They go to work, attend school, raise their children, go to church, pay taxes, and in most respects live as any other married couple in Kentucky. Like many married couples in the Commonwealth, Plaintiffs were wed in other jurisdictions. Their marriages were in all respects valid under the laws of the jurisdictions in which they were solemnized and registered. The federal government recognizes Plaintiffs' marriages, and extends certain benefits to them as a result. And yet, the Commonwealth of Kentucky refuses to acknowledge the commitments made by these couples because their spouses are of the same sex.[81]

80 *See, e.g.*, Laura Landenwich & Dan Canon, *The Lessons of* Love: *Kentucky Litigators Recount the Fight for Marriage Equality*, Bench & B. 16–17, May/June 2016, https://cdn.ymaws.com/www.kybar.org/resource/resmgr/Benchbar/BB_0516.pdf.

This is, by any measure, a "normalizing" story, one that says "lesbian and gay couples who are already married are no different from straight married couples as a matter of fact, and therefore should be no different in the eyes of the law." The setup then, naturally, was to compare gay couples to straight couples in every discernible aspect, legal and otherwise. What those couples requested in this round was not so much a change in the law as it was a bare recognition of the law of another state, and for couples who were not much different from "John and Jane Q. Public." This, the thinking went in 2013, was an easier sell than asking a Kentucky federal court to require marriage licenses to be issued to same-sex couples.

Plaintiffs jumped from this normalizing story to one that was not focused on the plaintiffs themselves at all, but rather Kentucky lawmakers. The central narrative here is one of religious discrimination.

> Sen. Ed Worley described marriage as a "cherished" institution. He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school." Soon, he concluded, we will all be prohibited from saying "the Pledge to the Legiance [sic] in public places because it has the words 'in God we trust.'" In support of the amendment, he cited to the Bible's "constant" reference to men and women being married. By way of example, he quoted a passage from Proverbs 21:19, "Better to live in the desert than with a quarrelsome, ill-tempered wife."[82]

At that time, there was an Establishment Clause claim still at play in the litigation, along with other constitutional grounds. The above passage is meant to demonstrate a legislature that is willing to impose its particular brand of religion on people who take a very different view of Christianity; it is not at all meant to draw similarities between the plaintiffs and average Kentucky families.

But the primary narrative in the *Bourke* trial court briefing was still one of comparison between straight couples and gay couples, one which required the reader (judicial or otherwise) to answer the question: why should these couples be treated differently? As such, the Memorandum returned to the practical consequences of the marriage bans of the plaintiffs. It discussed tax implications, employment complications, medical decisionmaking, and a host of other day-to-day consequences that attend marriage—consequences that straight married couples do not have to worry about, but the *Bourke* plaintiffs did.[83]

81 Plaintiff's Memorandum in Support of Their Motion for Summary Judgment, Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014), 2013 WL 6762140, at *1–2 (internal citations omitted).

82 *Id.*

83 *Id.*

Yet a third narrative running through this initial memorandum, and throughout most all of the marriage litigation nationwide, was that of broader social consequences. This argument is where academics are often featured most prominently, in true Brandeis-brief style. For example, plaintiffs quoted the American Academy of Pediatrics for the proposition that "[i]f a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interests of their child(ren) that legal and social institutions allow and support them to do so, irrespective of their sexual orientation."[84] As shown below, these arguments became indistinguishable from the "sameness" narrative by the time the case reached the Supreme Court.

The Kentucky Attorney General's response to the complaint was only a few pages, and was not what one might call a labor of love. It basically stated that it was their duty to uphold the laws of the Commonwealth of Kentucky.[85] As such, the trial court took the unusual step of requesting additional briefing from the plaintiffs in response to the amicus brief of the Kentucky Family Trust Foundation, an adamantly anti-gay group.[86] While the court did not explicitly state the reasons for soliciting a response, the ruling made it clear that it was to address, and hopefully allay, any potential concerns of the general public—not of jurists, or even lawyers.

After all the briefs were filed, Judge John G. Heyburn, appointed to the federal bench by George H.W. Bush, issued a thoughtful 23-page opinion vindicating the plaintiffs' rights—rights that were scarcely worthy of judicial discussion just a few decades prior.[87] The opinion began by acknowledging that "[f]or those not trained in legal discourse, the questions may be less logical and more emotional. They concern issues of faith, beliefs, and traditions. . . . The Court will address all of these issues."[88] In other words, his opinion was meant for public consumption, or for "those not trained in legal discourse." In the next section, he wrote explicitly about the importance of narrative to an apparently legal decision: "No case of such magnitude arrives absent important history and narrative. That narrative necessarily discusses (1) society's evolution

84 *Id.* at *6 (quoting Am. Acad. Of Pediatrics, *Committee of Psychosocial Aspects of Child and Family Health, Policy Statement: Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, Pediatrics, Apr. 2013, https://pediatrics.aappublications.org/content/pediatrics/ 131/4/827.full.pdf).

85 Respondent's Brief, Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014), 2014 WL 221586.

86 *See* L. Joe Dunman, *Bourke v. Beshear—Think Of The Children*, Professor at Law Blog (Feb. 5, 2014), https://www.joedunmanlaw.com/?offset=1391885844694&category=Constitutional+Law.

87 *See Bourke*, 996 F. Supp. 2d 542, *rev'd*, *Obergefell*, 135 S. Ct. 2594.

88 *Id.*

89 *Id.* at 544.

on these issues, (2) a look at those who now demand their constitutional rights, and (3) an explication of their claims."[89]

After a short recitation of the history of marriage equality cases, Heyburn began his description of the plaintiffs by referring to them as "average, stable American families."[90] The opinion then included basic biographical information about the couples and their children.[91] Here, it became apparent why Heyburn solicited input on the Family Foundation's brief: it, unlike the Attorney General's memorandum, made arguments rooted in tradition. As noted by the court, such arguments had already been all but universally discarded as a matter of law following *Lawrence v. Texas*.[92] But the arguments gave the court a counternarrative that it could then explain away—something that was not necessary for legal audiences, but, as the court explicitly recognized, was needed for a general audience. Heyburn essentially presented that counternarrative in the third person:

> Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused—even angry—when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.[93]

While faith and tradition were addressed broadly, the court did not mention the discriminatory animus arguments made by plaintiffs, and conducted no analysis of the Establishment Clause claim. Heyburn's "answer" was that personal religious beliefs should not play into Fourteenth Amendment analysis.[94]

Ultimately, the court concluded that "Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review."[95] But two sentences in the opinion changed the course and scope of Kentucky plaintiffs' narrative entirely: "[T]he Court was not presented with the particular question whether Kentucky's ban on same-sex marriage is constitutional. However, there is no doubt that *Windsor* and this Court's analysis suggest a possible result to that question."[96]

90 *Id.*

91 *Id.* at 546.

92 *Id.*

93 *Id.* at 554.

94 *Id.*

95 *Id.* at 544.

96 *Id.* at 555.

The day before Valentine's Day, 2014, *Time* magazine pronounced, "Kentucky Judge Turns Gay Marriage Tide in the South."[97] *Time* focused on the legal aspects of Heyburn's ruling, but selected the Bourkes as the human face of the case:

> For Greg Bourke and Michael DeLeon, the ruling cements what after 32 years together and two children, they already knew: They are a family. But Bourke said the message sent by the decision is powerful for them and for their children Isaiah and Bella, who are teenagers in the local Catholic schools.
>
> "That is a big deal for us," Bourke said. "Our kids already recognize us as a married couple, but it's important that they know the law does too. . . . We've already got texts from both them today congratulating us. They love and wanted this for us."[98]

Again, the media used a normalizing story—one that suggests the plaintiffs are just like any other married couple. This was not anything particularly new; most media throughout the litigation had focused on Greg and Michael or, in a few cases, Randy and Paul—the metropolitan couples with children.[99] Few media outlets chose to focus on the stories of the childless couples from rural areas, i.e. Jimmy and Luke, or Kim and Tammy. In this way, the earlier, post-*Windsor* media coverage became a self-fulfilling prophecy: the press expected a "sameness" narrative, the courts told that narrative regardless of what was in the pleadings, and the press retold their original narrative, this time through the filter of the court's opinion.

If, as suggested by Whalen-Bridge and others, the purpose of legal narrative is to provoke an emotional response, the *Bourke* case was highly successful. The stories of Kentucky's plaintiffs were so sympathetic, in fact, that Kentucky Attorney General Jack Conway, in a tearful press conference, announced that he would no longer litigate the marriage ban on behalf of the state.[100]

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97 Michael A. Lindenberger, *Kentucky Judge Turns Gay Marriage Tide in the South*, Time, Feb. 13, 2014, http://nation.time.com/2014/02/13/kentucky-judge-turns-gay-marriage-tide-in-the-south/.

98 *Id.*

99 Halladay, *supra* note 77. *USA Today* focused exclusively on Greg and Michael.

100 *Raw video: Attorney General Jack Conway Announces He Won't Appeal Gay Marriage Ruling*, WLKY (Mar. 4, 2014), https://www.wlky.com/article/raw-video-attorney-general-jack-conway-announces-he-wont-appeal-gay-marriage-ruling/3461265.

B. The Kentucky Plaintiffs: Licensure Cases

After the initial decision in *Bourke*, many Kentucky couples who wanted to get married contacted attorneys representing the couples who "turned the tide in the South." One of the calls came from Timothy Love. Tim and Larry, like many of the plaintiff couples who had been together since the 1970s and 1980s, had spent a lifetime in the closet out of necessity; they were less willing to loudly upset the status quo. This can be a boon to a narrative in litigation, where an advocate is almost always trying to convince a judge that the rule she is asking for is not one that is a radical departure from jurisprudential norms, destined to be overturned on appeal.

After the victory in the recognition case, Tim and Larry, along with Maurice and Dominique, filed an intervening complaint asserting a federal constitutional right to marriage equality, thus allowing "the rest of the story"—licensure—to be decided by the same district court.[101] The *Bourke* order was made final, and was briefed concurrently with three other cases in the Sixth Circuit Court of Appeals, involving plaintiffs from Michigan, Tennessee, and Ohio.

The plaintiffs' narrative strategy in *Love* was much the same as in *Bourke*—play up similarities between straight and gay couples so as to underscore the unfairness of their disparate treatment, but also underscore their differences and the importance of keeping individual liberty interests safe from an oppressive, discriminatory state. The trial court, after the ruling in *Bourke*, left the defendant state (now represented by private counsel) holding a big bag—one that contained no compelling narrative. In the end, the centerpiece of Kentucky's argument was that "traditional marriages contribute to a stable birth rate which, in turn, ensures the state's long-term economic stability."[102] This time, there was no lengthy exegesis of defendant's arguments in the court's opinion, which held curtly, "These arguments are not those of serious people."[103] Narratives of tradition and faith having been stripped away from consideration in the *Bourke* case, the court held that it could "think of no other conceivable legitimate reason for Kentucky's laws excluding same-sex couples from marriage."[104] On July 1, 2014, the trial court again ruled in plaintiffs' favor. The parties' stories again featured prominently in the judge's decision. Judge Heyburn devoted two long paragraphs at the beginning of the opinion to the plaintiffs' personal travails, including the stories of Tim's heart surgery and Maurice and Dominique's inability

101 Love v. Beshear, 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014).

102 *Id.*

103 *Id.*

104 *Id.*

to adopt.[105] Judge Heyburn went a step further than the *Bourke* opinion, holding that Sixth Circuit precedent declining to characterize gay and lesbian people as a suspect class for equal protection analysis should be overruled, and that heightened scrutiny should apply to the plaintiffs. While the court did not explain much about why lesbians and gay men have been subjected to historical discrimination (facts which, as discussed above, undoubtedly had a significant impact on the court cases leading up to *Bourke* and *Love*), Heyburn explicitly singled out the marriage narrative as distinct and important in its own right: "The ability to marry in one's state is arguably much more meaningful, to those on both sides of the debate, than the recognition of a marriage performed in another jurisdiction. But it is for that very reason that the Court is all the more confident in its ruling today."[106]

Heyburn's opinions had a dramatic effect on not only the legal claims, but the dominant narratives, going forward. Not only was the idea of religious animus essentially jettisoned, along with its colorful stories from the floor of the Kentucky General Assembly, but Heyburn called for a whole new set of stories about people who *wanted* to get married in their home state. As a result, the judiciary, like the media, reduced the *Bourke/Love* cases to a narrative about what married couples have in common, rather than what ideologies separated them. Stories of faith and tradition, as with those of discrimination based on religion, no longer loomed over the proceedings. This was simply about whether it was fair to treat same-sex couples differently from opposite-sex couples. In retrospect, though there may have been some considerable merit to other legal arguments, this made for a cleaner narrative; one that was a plain and simple narrowing of the gap between straight and gay. Arguments based upon the history of marriage as an institution, or religious beliefs, or really just about anything else, would only serve to highlight a gulf of differences between marriage as envisioned by plaintiffs, and the version clung to by the Family Foundation and other opponents.

Similarly, despite the more momentous implications of the *Love* opinion, most popular media continued to focus on Bourke-DeLeon or, secondarily, Johnson-Campion, rather than Love-Ysunza or one of the other childless couples. Even now, the ACLU's main page regarding the case features a photo of Bourke, DeLeon, and their two children.[107] *Time* did a follow-up story on the litigants from all four states, nearly a year

105 *Id.* at 540.

106 *Id.* at 550.

107 *Bourke v. Beshear & Love v. Beshear—Freedom to Marry in Kentucky*, ACLU (June 26, 2015), https:// www.aclu.org/cases/bourke-v-beshear-love-v-beshear-freedom-marry-kentucky.

after the initial *Bourke* decision. Again, the Bourke-DeLeon story was the only one selected from Kentucky.[108] And as per usual, the article focused on their parental status—i.e., their inability to co-parent their adoptive children.[109] This is a traditionally heteronormative reason for marriage, and, ironically, the supposed lack of ability to procreate was one of the most common reasons put forth by opponents to *deny* same-sex marriage. But it is the piece that consistently kept the Bourke-DeLeons and the Johnson-Campions in the spotlight.[110]

Perhaps as a result of the focus on more traditional marriages, particularly those involving children, backlash to the Kentucky opinion was practically non-existent, especially compared to the reaction of many state legislatures following a similar victory in the *Goodridge* case in Massachusetts just ten years earlier.[111] In that intervening ten years, along with the media's continuing trend toward humanizing lesbians and gay men, a popular narrative of the essential "sameness" of the couples involved in litigation had been disseminated. From the very beginning, even though legislatures were doing their best to delineate the differences between gay and straight, the (surprisingly scant) mainstream media coverage of *Goodridge* underscored the ways in which same-sex couples were the same as "the rest of us."

Just months after *Goodridge* was decided, Mayor Gavin Newsom took the unprecedented step of offering licenses to same-sex couples in San Francisco. The San Francisco Chronicle covered the story in depth, focusing on the Mayor's Chief of Staff, Steve Cawa. Cawa "said he has had three life wishes: to have a family, to be an out gay man in public service and to get married."[112] The story does not, however, breach in any meaningful way the story of the first couple to get married in San Francisco; Del Martin and Phyllis Lyon were radical feminists who founded a lesbian social club in the 1950s, and who evidently never wanted to raise children (or grandchildren) together. They were, in short, decidedly unlike a stereotypical heterosexual couple.[113] Newsom's administration, which came up

108 Charlotte Alter, *Meet the Plaintiffs in the Supreme Court's Gay Marriage Case*, Time, Jan. 17, 2015, https://time.com/3672404/supreme-court-gay-marriage-plaintiffs/.

109 *Id.*

110 Lindenberger, *supra* note 97.

111 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

112 Rachael Gordon, *The Battle Over Same Sex Marriage*, SFGate, Feb. 15, 2004, https:// www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php.

113 Jeffry J. Iovannoe, *Del Martin and Phyllis Lyon: The Lesbian Daughters*, Medium (June 7, 2018), https://medium.com/queer-history-for-the-people/del-martin-and-phyllis-lyon-the-lesbian-daughters-6b5a6db6cef9 ("Though some perceived Martin and Lyon as having a classic 'butch/femme' relationship, they did not see their partnership as defined by conventional gender roles. 'It didn't work for us no matter how we tried,' explained Lyon.").

with the idea to ask Martin and Lyon to be the first license recipients, could not turn the tide of "sameness" in the media, even in their own city.

In the end, the focus on heteronormative expectations of marriage arrangements did not occur simply because of counsel's selection of plaintiffs, nor because of the stories they chose to highlight—*all* the plaintiffs' stories were told in the briefing. However, both the media and the trial judge—who was clearly writing to a general audience—seized on the heteronormative aspects of the marriage relationships plaintiffs sought to validate, so as to draw as close an analogy to "real" marriage as possible.

C. Moving Past Kentucky: Combining Stories

The emphasis on "normal" marriages continued as the litigation advanced to the Sixth Circuit. By the time the trial court decided *Love*, the *Bourke* briefing in the Sixth Circuit was nearly complete, and the country had seen more and more federal courts striking down marriage bans. The summer of 2014 saw appeals from Ohio, Tennessee, and Michigan district courts striking down their states' respective marriage bans.[114] The Sixth Circuit Court of Appeals scheduled arguments for these cases, and for Kentucky's, on August 6, 2014. The Sixth Circuit quickly agreed to consolidate the *Bourke* and *Love* appeals and entered a new briefing schedule. The last *Love* brief was due just seven days before oral argument. While the legal bases for highlighting the differences between opposite-sex and same-sex couples had been excised, the plaintiff stories remained—each one told in equal measure, with no particular weight given to any plaintiff couple.[115]

The Sixth Circuit reversed, upholding the marriage bans under the case name *DeBoer v. Snyder*.[116] But Judge Sutton could not focus on narrative in his opinion without exposing the marriage bans for what they were, i.e., bare discrimination against lesbians and gay men.[117] This was so because of the myriad similarities between straight and gay couples—similarities that had been drawn so as to make the two categories virtually indistinguishable. Instead, the court began its opinion by stating, "This is

114 Bill Chappell, *Gay-Marriage Bans are Upheld in 4 States by Circuit Court*, NPR (Nov. 4, 2014), https://www.npr.org/sections/thetwo-way/2014/11/06/362105290/gay-marriage-bans-are-upheld-in-4-states-by-circuit-court.

115 *See* Brief for Appellees, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), 2014 WL 2631913.

116 772 F.3d 388 (2014).

117 *Id.* Similarly, the few lower courts to uphold the marriage bans after *Bourke* did so with deliberate apathy to the human element presented by plaintiffs. The Eastern District of Louisiana engaged in no storytelling at all, and scarcely mentioned the plaintiffs by name, opting instead for a garden-variety slippery slope narrative: "[I]nconvenient questions persist. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female?" Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 926 (E.D. La. 2014), *rev'd*, 791 F.3d 616 (5th Cir. 2015), *abrogated by Obergefell*, 135 S. Ct. 2584.

a case about change—and how best to handle it under the United States Constitution."[118] The court made obligatory reference to plaintiffs' personal stories, but not at great length, and with clinical detachment. For example, James Obergefell's undeniably moving story of flying his ailing spouse, John Arthur, to Maryland so that their ceremony could be performed on the Tarmac before John died,[119] was hastily coupled with another story of Ohio plaintiffs and condensed: "When Arthur and Ives died, the State would not list Obergefell and Michener as spouses on their death certificates. Obergefell and Michener sought an injunction to require the State to list them as spouses on the certificates."[120] And the story of Michigan's plaintiff couple April DeBoer and Jayne Rowse, nurses who adopted three special-needs children (though only one of them could be a legal parent to each child under Michigan law), was reduced: "Marriage was not their first objective. DeBoer and Rowse each had adopted children as single parents, and both wanted to serve as adoptive parents for the other partner's children."[121] Ultimately, the panel concluded it was powerless to help the plaintiffs, primarily citing a 1972 one-sentence Supreme Court decision that dismissed a claim for same-sex marriage as not raising a substantial federal question.[122]

The Sixth Circuit dissent, by Judge Martha Craig Daughtrey, immediately chided the majority for ignoring the narrative aspect of the cases, quipping that Judge Sutton's opinion would "make an engrossing TED Talk":

> [T]he majority sets up a false premise—that the question before us is "who should decide?"—and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it.[123]

Judge Daughtrey continued, not by emphasizing the right to be married as an abstract legal proposition, but by emphasizing the similarity between plaintiffs and everyone else:

> [The plaintiffs] are committed same-sex couples, many of them heading up de facto families, who want to achieve equal status . . . with

118 *Deboer*, 772 F.3d at 395.

119 Steve Rothaus, *Couple's Tragic Love Story Led to Same-sex Marriage Throughout U.S.*, Miami Herald, Aug. 15, 2016, https://www.miamiherald.com/news/local/community/gay-south-florida/article84122297.html.

120 *Deboer*, 772 F.3d at 398.

121 *Id.* at 397.

122 *Id.* at 400 (citing Baker v. Nelson, 409 U.S. 810 (1972)).

123 *DeBoer*, 772 F.3d at 421.

> their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools.[124]

Daughtrey also spent several paragraphs of her dissent on the story of the Michigan plaintiffs, discussing at length the specific challenges faced by each of their adopted children—a discussion which humanized the plaintiffs perhaps even beyond the narrative contained in their briefs.[125]

Daughtrey's dissent underscores the important role of narrative in the marriage cases, and in all civil rights litigation. The constitutional right to marry presumably existed in some form for plaintiffs, regardless of the apparent similarity between their marriages and opposite-sex marriages, and certainly regardless of the institutional connections of the plaintiffs (to school, church, etc.). Yet it is those similarities that allow a judge to tell the right story, a story of a palatable, cautious step from a right enjoyed by one group being extended to another group that looks much the same as the group that already has it.

D. Fighting the Alternative Story

Another advantage plaintiffs had in the battle for marriage equality overall was that there was no "other side"; at least, there was no compelling, countervailing narrative. In fact, there was no story with any human element at all on the defendants' side. In part, this was the doing of the lower courts, who, pursuant to the mandate in *Lawrence* and related precedent, eliminated virtually all discussion of tradition or religion from *Obergefell* by the time it was argued. The marriage bans, whether one was for or against them, were reduced to bare unfair treatment of an outgroup that looked more and more like the ingroup every day. The only aspect of the states' case that one could feel passionately about is the idea that states should have control over marriage, and by 2015, very few people were passionate about that.

As part of Michigan's marriage litigation, the plaintiffs submitted the testimony of six expert witnesses, including professors at Yale, Stanford, and Harvard.[126] In contrast, the closest thing Michigan could get to a star witness—Mark Regnerus—had been so totally discredited by mainstream sociologists that his testimony actually tipped the scales in the plaintiffs' favor.[127] As one amicus put it, the "scientific and medical consensus"

124 *Id.*

125 *Id.* at 423–24.

126 *Civil Rights Litigation Clearinghouse*, Univ. of Mich. Law Sch., https://www.clearinghouse.net/detail.php?id=12811 (last visited June 1, 2020).

debunking same-sex attraction as a social or mental illness had "become widely accepted over the past decades, to the point where there is so 'great an analytical gap between the data and the opinion proffered'" that its scholarly opponents often "would not qualify to testify as expert witnesses."[128] Because the academic consensus was so broad, it became difficult for even the most curmudgeonly of jurists to ignore it.

What this academic consensus was (perhaps necessarily) reduced to was a bare gainsaying of Regnerus's point, which was "they're not like the rest of us." The Michigan plaintiffs discussed this in their principal brief to the Supreme Court:

> The expert testimony credited by the district court showed that children raised by same-sex couple parents fare no differently than children raised by heterosexual couples. It is the quality of parenting, not the gender or orientation of the parent, that matters. This is a matter of scientific consensus recognized by every major professional organization in the country focused on the health and well-being of children, including the American Academy of Pediatrics, the American Psychological Association, and the Child Welfare League of America.[129]

The experts, in other words, were mostly there to discuss one particular aspect of the lives of same-sex couples: parenting. And the major debate was whether they were like, or unlike, opposite-sex couples in that aspect. There was little deeper discussion about sexuality as a spectrum, healthy gender expression, the psychological effect of marriage on the individual (outside of the child-rearing context), or the like.

In contrast, one can find nearly every sort of argument, and accompanying narrative, in favor of the plaintiff couples in the almost eighty amicus briefs filed in their support in *Obergefell*. A great number of these

127 See *Statement from the Chair Regarding Professor Regnerus*, Dep't of Sociology, Univ. Tex. Austin (Mar. 3, 2014), https://sites.la.utexas.edu/utaustinsoc/2014/03/03/statement-from-the-chair-regarding-professor-regnerus/, in which Regnerus's own institution notes that his research does not

> reflect the views of the American Sociological Association, which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that findings from Dr. Regnerus' work have been cited inappropriately in efforts to diminish the civil rights and legitimacy of LBGTQ partners and their families.

Indeed, as *United States v. Windsor* litigator Roberta Kaplan notes, Regnerus had been thoroughly discredited even before *Windsor* was argued. "[T]he American Sociological Association, in its amicus brief submitted to the Supreme Court, condemned his work in no uncertain terms, stating that it 'provides no support for the conclusions that same-sex parents are inferior parents.'" Roberta A. Kaplan, *"It's All About Edie, Stupid": Lessons from Litigating* United States v. Windsor, 29 Colum. J. Gender & L. 85, 95 (2015).

128 Brief of Amici Curiae Survivors of Sexual Orientation Change Therapies in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), at *5, http://www.nclrights.org/wp-content/uploads/2015/03/2015.03.04.-Survivors-of-Sexual-Orientation-Change-Therapies-Amicus.pdf.

129 Plaintiffs' Brief, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), 2014 WL 2631744, at *39 (internal citations and footnote omitted).

briefs were penned by academics: legal scholars, historians, and universities themselves.[130] But there are also sociological organizations, labor organizations, religious (and non-religious) groups, survivors of sexual orientation "therapies," and a men's choir, all of which provide different, sometimes deeply personal angles as to why same-sex marriage should be made the law of the land.[131] In these briefs, the vibrant diversity of the LGBTQ+ community is brought forward perhaps better than anywhere else in any marriage case.

The nearly seventy amicus briefs in opposition, however, aside from the few devoted solely to some aspect of history or judicial restraint, largely tell the same story over and over: same-sex marriage denigrates the family because same-sex couples are fundamentally different.[132] The response demanded by this refrain was not the rainbow of experience presented by the petitioners' amici. It was the same story that the courts and the media had been telling all along: our families are fine, because we are *not* different.

E. *Obergefell*: The Final Story

When the Supreme Court agreed to hear *Obergefell* in January 2015, more than sixty courts, including the Kentucky district court, had declared marriage bans unconstitutional, resulting in a cumulative avalanche of media coverage.[133] The narrative aspect of the marriage cases, while lost in the Sixth Circuit's majority opinion, was alive and well outside the courthouse. It was largely a narrative which reflected favorably on the plaintiffs and one that persisted throughout the Supreme Court proceedings.

By the time the Kentucky clients made it to the Supreme Court, their cases were combined with those from Michigan, Ohio and Tennessee, giving the Supreme Court justices several stories to choose from. In the end, it was Justice Kennedy who decided which plaintiffs' stories would be told in his majority opinion. He chose to leave the stories of the Kentucky plaintiffs (and the majority of the plaintiffs overall) out of the *Obergefell* opinion entirely.

After a sweeping recitation of the importance of marriage to humanity itself, which included cites to Confucius and Cicero, Justice Kennedy first recounted in full the story of James Obergefell and John

130 Ruthann Robson, *Guide to the Amicus Briefs in Obergefell v. Hodges: The Same-Sex Marriage Cases*, Constitutional Law Prof. Blog (Apr. 16, 2015), https://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html.

131 *Id.*

132 *Id.*

133 Cole, *supra* note 42, at 87.

Arthur.[134] It is indeed difficult to imagine a more sympathetic, heart-rending story than theirs, and Kennedy's telling presents a sharp contrast from the brusque, detached briefing Judge Sutton had given it nearly a year before. Together for more than twenty years, John developed Lou Gehrig's disease and deteriorated quickly.[135] The couple flew from their home in Ohio to Maryland, where marriage was legal, in 2011.[136] John was too sick to exit the plane, and the ceremony was performed on the tarmac.[137] John died three months later. The focus of Obergefell's suit was not the right to be married at all; at issue was James's right to be listed on the death certificate.[138] The fact that Kennedy led with this story, and with this level of detail, is indicative of just how powerful narrative can be in this context.[139]

In the first few pages of his opinion, Kennedy went on to tell a thorough version of Michigan's DeBoer/Rowse story, one which included the plaintiffs' challenges in parenting special-needs children.[140] He then turned to Tennessee's Ijpe DeKoe and Thomas Kostura, who married in New York shortly before DeKoe deployed to Afghanistan. When DeKoe returned, the Army Reserve moved the couple to Tennessee. Kennedy wrote, "Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden."[141]

These stories—one of a debilitating medical condition ending in death, one of struggling parents of special needs children, and one of a military family—were apparently the ones that resonated the most with the Court. Indeed, only five plaintiffs out of a total of 32 were discussed. Although the Ohio plaintiffs, led by Obergefell, were the first to file a petition for certiorari, which gave them top billing in the Supreme Court case name, there was no requirement that their story (or the stories of the other Ohio plaintiffs) be featured in Kennedy's opinion. However, the stories of the Kentucky plaintiffs, perhaps ordinary by comparison, along with other plaintiff couples in Ohio and Tennessee, did not make the cut. It is instructive to look at which stories were *not* told by Justice Kennedy.

For example, the lead plaintiffs in the Tennessee case, *Tanco v. Haslam*, Dr. Valeria Tanco and Dr. Sophy Jesty, are mentioned nowhere in the Court's opinion. Tanco and Jesty are photogenic, relatable veterinarians in a committed relationship who did not wish to leave their

134 *Obergefell*, 135 S. Ct. at 2594.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at 2595.
140 *Id.*
141 *Id.*

teaching positions in Tennessee. Matthew Mansell and Johno Espejo, the other unmentioned Tennessee couple, moved from California to Tennessee at the behest of Mansell's employer, a law firm.[142] Greg Bourke and Michael DeLeon, the nearly exclusive benefactors of media coverage in Kentucky, suffered many of the same disadvantages as the other families mentioned by Kennedy—they could not fully adopt, their names would not be listed as "spouse" on death certificates, they had to file separate tax returns, etc. Tim Love and Larry Ysunza had a medical scare. Why were they not even mentioned?

To the extent there is a formula to Kennedy's selections, it may be that couples were highlighted who faced practical burdens, imposed by the state, beyond the indignity of the marriage bans and the general demands of family life. In other words, it was not enough for couples to have adopted children; a more sympathetic story is a couple who has adopted children with severe special needs who require "around-the-clock care."[143] Nor was it enough to have had to move for a corporate lawyer job; a better story is one of a couple who was compelled to move because of military service. Nor was it enough to have a medical scare; the horrific loss of a beloved spouse is far more evocative. The "old guard" couples simply did not make the cut; there was no immediacy to their situations, the stories were less resonant with those who had been watching, and the story of an elderly, committed couple had already been told—in *Windsor*. In a sense, the stories chosen by Kennedy were "sameness *plus*": they built on earlier popular narratives of how the plaintiffs were just like opposite-sex couples, and then highlighted painfully cruel ways in which these couples—who are "just like us"—were disadvantaged by the marriage ban.

This formula tracks Whalen-Bridge's explanation of a legal narrative's purpose, i.e., to invoke an emotional response in the reader. By this time, the theme at work in same-sex marriage narratives was widely known: two people, a couple like any other couple (or close enough, anyway), want to get married; why should the state stand in their way? Perhaps this dish had become bland by 2015, and the stories Kennedy selected added more emotional spice in order to bring those who may still have been unconvinced to the table (and, one may speculate, to discredit the dissenters).[144] For all the plaintiffs, the result was what mattered: the creation of a new

142 Petitioners' Brief, Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), stay granted, No. 14-5297 (6th Cir. Apr. 25, 2014), http://www.nclrights.org/wp-content/uploads/2015/02/Tennessee-Tanco-Merits-Brief.pdf at 3–4.

143 *Obergefell*, 135 S. Ct. at 2595.

144 For example, Chief Justice Roberts's dissent asserts, "The real question in these cases is what constitutes 'marriage,' or—more precisely—who decides what constitutes 'marriage'?" *Id.* at 2612 (Roberts, C.J., dissenting). Kennedy's human stories say, in effect, that that is not the "real question" at all.

right. Even if their stories were omitted from Kennedy's opinion, they were still, in a real sense, heard.

V. Conclusion

Civil rights attorneys must walk a difficult line—fighting for their clients while also fighting for the rights of similarly situated others who may not have the exact same needs. In addition, when trying to create a new right, the easiest way to get judges, legislators and the public on board is to present that right in a way those decisionmakers will easily understand and empathize with, which means telling a story that shows the common ground between the majority and the oppressed minority.

All told, the difficult truth is that an advocate may have little control over the shape her client's narratives take. The stories told in *Love v. Beshear* and the other *Obergefell* cases show us how to tell these stories in a compelling way, but they also reveal the limitations of impact litigation. The narratives presented by plaintiffs—even messy, imperfect ones—take on lives of their own when clients are thrust into the public eye, and this tends to cause plaintiffs' stories to morph into something the general public might more readily relate to, whether the lawyers like it or not. While a lot of ground was gained in *Obergefell*, the litigation overall presented stories of cis-gendered couples that furthered heteronormative values. These stories undeniably overshadowed other stories that could have been told.

However, despite what Godsoe and others may argue, the stories chosen were ultimately due to the influence of the media and the judiciary, not by the hand-picking of plaintiffs by civil rights lawyers or advocacy groups. Still, there is value in Godsoe's criticism: the outcomes in cases like *Obergefell* and *Lawrence* counsel less caution in selecting the "perfect" plaintiffs, but perhaps more caution in the packaging of information about those clients to be shared with courts and the media. In other words, the square peg of sympathetic information that an advocate disseminates will likely be crammed into the round hole of a familiar narrative. The volume of this sympathetic information probably matters a great deal more than how a client presents, what their background is, or how "normal" they truly are.

Moreover, although the emphasis on more traditional-looking couples may be a legitimate limitation of *Obergefell*, as Godsoe notes, it does not have to be the end. *Obergefell* built a bridge to same-sex marriage, creating solid ground for the next group of civil rights lawyers to again expand our understanding of what relationships and "equal

dignity" really mean. As the country's understanding of same-sex couples has evolved, so has the array of stories that lawyers can tell about groups that may be insular or unfamiliar to the broader public. For example, now that transgender, bisexual, nonbinary, and polyamorous people's stories are becoming more mainstream, their stories can be used to champion a broader understanding (and legal recognition) of fundamental rights. This continuous opening of new chapters to familiar stories is the essence of civil rights advocacy.