Toward a More Perfect Union

How a lawyer named Mary Bonauto made — and won — the case for gay marriage in Massachusetts.

By David J. Garrow

Mary Bonauto vividly remembers her first day as a lawyer at Gay and Lesbian Advocates and Defenders (GLAD), the small public-interest law office that represents gays and lesbians in the six New England states. "When I came here on March 19, 1990," she recalled not long ago, "one of the things waiting for me on my desk was a request from a lesbian couple in western Massachusetts who wanted to get married." At that time, though, she believed a lawsuit seeking a right to gay marriage had no chance of success in any American appellate court. "It was absolutely the wrong time," she told me, "and I said no."

A generation or two from now, March 19, 1990, may appear in history books the same way that another date appears in accounts of Brown v. Board of Education: Oct. 6, 1936, the day that Thurgood Marshall accepted a full-time job at the N.A.A.C.P. Legal Defense Fund. Marshall too said no — for more than a decade — to petitioners who asked him to challenge public school segregation in the South. Only in 1950, as the legal landscape began to shift, did Marshall finally say yes.

For Bonauto, the wait was shorter but the outcome no less momentous. "I said no to many people over the years," she remembers, "until I finally said yes." In 1997, Bonauto and two other attorneys, Beth Robinson and Susan Murray, filed a lawsuit attacking the constitutionality of Vermont's exclusion of gay and lesbian couples from the institution of civil marriage. The case went all the way to the Vermont Supreme Court, which in December 1999 ruled in their favor but invited the State Legislature to devise a remedy. The Legislature responded by creating the country's first-ever "civil unions," which extended to same-sex couples all the legal benefits of marriage without granting the actual name.

As historic as the Vermont decision was, Bonauto will forever be remembered for her more important victory last November, when the Massachusetts Supreme Judicial Court, in response to a lawsuit she filed on behalf of seven same-sex couples seeking marriage licenses, handed down a landmark decision, Goodridge v. Department of Public Health, ending the exclusion of gay and lesbian couples from civil marriage in the state. The ramifications of Goodridge have been felt throughout the country: public officials in San Francisco; Portland, Ore.; New York State; and New Jersey were inspired to grant marriage licenses to same sex couples (all such licensing has since been halted), and a political backlash took form, culminating in President George W. Bush's call in late February for a federal constitutional amendment to

Photograph by Jeff Sheng

"protect marriage," as he put it, from "activist judges and local officials."

Just as with the society-wide desegregation of American life that slowly followed from Brown v. Board of Education 50 years ago this month, what will occur on May 17, when Massachusetts begins issuing full-fledged marriage licenses to same-sex couples, will mark the beginning of a new social era. Kevin Cathcart, the executive director of Lambda Legal Defense and Education Fund, America's oldest gay rights law group, observes that once fully credentialed gay marriages become a reality, "you can't put the toothpaste back in the tube." Many individuals and organizations have helped usher in the era of marriage equality, but Bonauto's contribution has been exceptional. Kate Kendell, executive director of the National Center for Lesbian Rights, says that "Massachusetts has had the success it did because of Mary Bonauto." Bonauto's patient, quietly passionate yet self-effacing advocacy may have as far-reaching an effect on America as did that of Thurgood Marshall. As Beth Robinson notes, the marriage-equality movement "doesn't stand on the shoulders of any one person," but there is no doubt that "the one individual person who's done the most for marriage is Mary."

In the early 1990's, Bonauto was a regular at the Roundtable, a twice-yearly gathering of gay rights litigators, where the issue of same-sex marriage was hotly contested.

A NATIVE OF Newburgh, N.Y., Bonauto grew up with her three brothers in what she describes as a "highly Catholic" family. Her father worked as a pharmacist and her mother as a teacher. Bonauto first came to terms with her lesbian identity as an undergraduate at Hamilton College in Clinton, N.Y., but only during her first year of law school at Northeastern University in Boston in 1984-85 did she come out to her parents. When she joined a small law firm in Portland, Me., in 1987, Bonauto was one of only three openly gay lawyers in private practice in the state. In Portland, she also met her life partner, Jennifer Wriggins, now a professor at the University of Maine School of Law.

The late 1980's were an auspicious time for a young lawyer in New England with a commitment to gay equality. In 1989, Massachusetts became the second state, after Wisconsin, to provide anti-discrimination protection to gays in employment, housing and public accommodations. When GLAD advertised for a lawyer to help enforce the new law, Bonauto jumped at the opportunity and moved back to Boston, accompanied by Wriggins. Bonauto's work at GLAD in the early 90's taught her, she says, "how to build, brick by brick, protections for gay folks," even while she continued to say "no" on marriage. But the marriage question was still very much on her mind. GLAD was inundated with requests from gays and lesbians for help with legal difficulties — child custody and adoption, health-benefits coverage, inheritance and Social Security survivor benefits — that would not have existed if same-sex couples enjoyed the legal protections and benefits of marriage. Some of those requests, Bonauto says, are "seared into my soul" because they came from "people who are calling me sobbing from a pay phone because their partner of 24 years has just died and the so-called family is in the house cleaning it out." But prudence prevailed. "I would have loved to have been married myself and would have loved to have filed a marriage case," she says, but "you have to apply your strategic sensibility to it."

In the early 90's, the strategic and political discussions among gay lawyers about marriage were intense. The most outspoken marriage advocate was Evan Wolfson, a Lambda lawyer who had written a prescient student paper at Harvard Law School in 1983 titled "Same-Sex Marriage and Morality: The Human Rights Vision of the Constitution." A similarly obscure article, by a little-known lawyer named Nathan Margold first set forth the constitutional game plan that Thurgood Marshall followed all the way to Brown v. Board of Education. Wolfson's deep commitment to pursuing the marriage issue ran into opposition from his colleagues and peers. Some of them argued that marriage was so unappealing an institution that access to it should not be a gay civil rights priority; others claimed that irrespective of its desirability, pursuing a right to marriage was an unattainable goal. These disagreements often were articulated at meetings of the Roundtable, a twice-yearly national gathering of gay rights litigators that originated in the mid-80's. When Bonauto attended her first meeting in April 1990, Wolfson gained a crucial ally. "I remember Evan coming over and introducing himself," she recalled. "He and I, at that point I think, were two of the very few people who felt like marriage was something that needed to be fought for in the courts."

The disagreements crystallized in 1991, when several same-sex couples in Hawaii persuaded an attorney named Dan Foley, a former legal director of the American Civil Liberties Union's Hawaii affiliate, to file a constitutional case there. Both the A.C.L.U. and Lambda declined to support the challenge, but Wolfson took an active role. Most gay lawyers gave the case little thought, but two years after Foley initiated it, the Hawaii Supreme Court issued a surprising ruling that the state would have to demonstrate a "compelling" reason — the same legal standard applied in race-discrimination cases — in order to continue excluding same-sex couples from civil marriage.

"Once the Hawaii court ruled, we were in a different world," Wolfson says. "There was this sense of possibility, this sense of hope, this sense of empowerment." Bonauto too saw it as a sea-change moment, especially for previously ambivalent gay lawyers: "It was really when the Hawaii Supreme Court ruled in May 1993 that people said we have to stand up and take notice of this. If the court is going to stand with us, shouldn't we be standing up for our own community?" The high court returned the case to a lower court for trial, but few expected that the state could meet the exacting standard the court had imposed. Wolfson celebrated what he calls a "seismic win" and declared that gay Americans stood "on the verge of victory."

But more than three years passed before a trial judge finally ruled that the state indeed had not met the Hawaii Supreme Court's test. In the meantime, political opposition mushroomed, both nationally and in Hawaii. In Washington, opponents of gay marriage won the support of President Bill Clinton in passing into law the federal Defense of Marriage Act, which limits federal recognition to male-female marriages and decrees that no state has to recognize same-sex marriages that are performed elsewhere. In Honolulu, the State Legislature voted in early 1997 to place a constitutional amendment on the November 1998 state ballot that would give it the exclusive power to define marriage.

Proponents of gay marriage eagerly awaited a decisive affirmation by Hawaii's top court, but months passed with no ruling. The court still had not spoken when Hawaii voters adopted the antigay-marriage constitutional amendment by a margin of 69 to 29 percent. Foley and Wolfson's much-heralded victory had turned into a sour defeat.

AS DISHEARTENING AS Hawaii was, the original constitutional victory was an encouraging indication of the persuasiveness of the equality argument. Early in the Hawaii struggle, Wolfson had urged Bonauto and others to hold off on filing another marriage case in a second state, but as the Hawaii log-jam dragged into 1997, Bonauto's patience waned. "I was really uncomfortable with leaving Hawaii out there alone," she recalls. "I just felt that this can't be about one state."

In July 1997, as the Hawaii case languished, Bonauto, Robinson and Murray filed their case in Vermont. Hawaii had demonstrated that a well-wrought lawsuit, strong constitutional arguments and a sympathetic court

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Evan Wolfson of Lambda. In the early 90's he helped lead the historic effort to legalize same-sex marriage in Hawaii.

could produce a victory but were not necessarily sufficient to protect and preserve it. Vermont, by contrast, had several decisive advantages. Three years earlier, the state Supreme Court had issued a pioneering opinion approving second-parent adoption for same-sex couples, thus evidencing sympathy for gay families. What's more, Vermont's state Constitution, unlike Hawaii's, was difficult to amend, creating a high hurdle for anyone eager to overturn a state constitutional judicial decision. In addition, Robinson and Murray had begun laying crucial political groundwork by creating the Vermont Freedom to Marry Task Force, which conducted public education work of a sort that had never occurred in tandem with the Hawaii case.

The case that Bonauto and her colleagues filed asserted that under the "common benefits" clause in the state Constitution (Vermont's more expansive version of the federal equal protection clause), the exclusion of gay couples from the rights and benefits of marriage was unconstitutional. A trial judge rejected their complaint, but on appeal the Vermont Supreme Court endorsed their challenge to the state's discriminatory conduct. That December 1999 ruling, Baker v. State, was a gay rights landmark, but it nonetheless left the lawyers "crushed," Robinson remembers, because the high court called for legislative action rather than ordering that marriage licenses be issued to gay couples. "It was a political decision and not a legal decision," Robinson says. When the Vermont Legislature took up the court's invitation, the result was "civil unions," in which the legal benefits of matrimony were extended to gay couples but the all-powerful term — marriage — was withheld. The distinction evoked a phrase that Thurgood Marshall knew all too well: "separate but equal," the pre-Brown label for the fictional fairness of segregation.

Bonauto decided to try again, this time in Massachusetts, where both the state Constitution and the high court offered advantages similar to those of Vermont. A summer 2000 meeting of the state's gay activists endorsed her resolve, and in April 2001 she filed her second right-to-marry case, Goodridge v. Department of Public Health (which oversees Massachusetts's marriage licenses), in Boston. On behalf of seven same-sex couples, Bonauto asserted that the state's refusal to grant licenses to gay and lesbian life partners violated Massachusetts's constitutional equality provisions. The trial court again said no, and Bonauto appealed to the Massachusetts Supreme Judicial Court. When she argued her case to the seven justices on March 4 of last year, she beseeched them not to dodge the question. Fearful of how Vermont's high court had rendered a decision that allowed for a remedy that stopped short of actual marriage, Bonauto insisted that "civil unions" would not satisfy the requirements of the Massachusetts Constitution. "The Vermont approach is not the best approach for this Court to take," she emphasized, for "when it comes to marriage, there really is no such thing as separating the word 'marriage' from the protections it provides. The reason for that is that one of the most important

PHOTOGRAPH BY JEFF SHENG FOR THE NEW YORK TIMES

protections of marriage is the word, because the word is what conveys the status that everyone understands as the ultimate expression of love and commitment." To follow Vermont, she continued, by "creating a separate system, just for gay people, simply perpetuates the stigma of exclusion that we now face because it would essentially be branding gay people and our relationships as unworthy of this civil institution of marriage."

While Bonauto waited for a decision, the legal climate improved. In the early summer of 2003, the Canadian provinces of Ontario and British Columbia joined Belgium and the Netherlands in authorizing same-sex marriages. Late in June, the United States Supreme Court, in Lawrence v. Texas, emphatically reversed its infamous 1986 decision Bowers v. Hardwick, which had upheld the criminalization of private, consensual gay and lesbian sex. The high court's voiding of Texas's antisodomy law surprised almost no one, but most observers expected a narrow ruling striking down only those laws, like Texas's, that expressly singled out gays. Instead, Justice Anthony M. Kennedy's majority opinion overturned all remaining American sodomy laws and explicitly repudiated Bowers. Kennedy energetically deplored government hostility toward homosexuals, and his expansive language seemed to open the door to full legal equality for gay Americans just as Brown in 1954 had opened wide the door to racial equality.

Although Kennedy stated that Lawrence "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," he also wrote that sodomy prohibitions "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose." The phrase "whether or not" was expressly suggestive, and an angry dissent by Justice Antonin Scalia declared that the majority's opinion destroyed the possibility of a constitutional distinction between heterosexual and homosexual marriages.

Five months later, the Massachusetts Supreme Judicial Court handed down the ruling for which Bonauto had been waiting: an unparalleled 4-3 decision ending the exclusion of gay couples from marriage. The moral influence of the Lawrence decision on the Massachusetts court was made explicit at the very beginning of the Goodridge majority opinion, in which Massachusetts Chief Justice Margaret H. Marshall cited Lawrence three times in her first three paragraphs. As Matt Coles, head of the American Civil Liberties Union's Lesbian and Gay Rights Project, observes, Goodridge "answered that question that Lawrence begged." And while "Goodridge is the earthquake," Coles says, "Goodridge is the earthquake because of Lawrence."

BONAUTO WAS SURPRISED when some observers interpreted the Massachusetts Supreme Judicial Court's180-day stay of the ruling, until May 17, as an unspoken invitation to Massachusetts politicians to substitute Vermont-style civil unions for actual marriage licenses. But when legislators formally asked the court for its opinion on such a maneuver, the four-member majority brusquely reiterated that Goodridge was "not a matter of social policy but of constitutional interpretation." That Feb. 4 announcement made gay marriage a legal certainty in Massachusetts come May 17, notwithstanding the efforts of Gov. Mitt Romney to block implementation of the court's mandate.

Bonauto remains warily prepared to head off any last-minute effort by the governor. She emphasizes that "my first priority is maintaining this victory here on the ground in Massachusetts." Most opponents of gay marriage are reluctantly backing a constitutional amendment in Massachusetts that would prohibit gay marriages while establishing fully equivalent civil unions, but the measure must obtain majority support in the 2005-2006 session of the Legislature and then win a popular majority on the November 2006 statewide ballot. Opponents can also put a more extreme measure, simply banning gay marriages, before Massachusetts voters, but not until November 2008. Thus gay marriages will have been hometown realities in Massachusetts for at least two years, if not four, before ballots to overturn Goodridge can be cast. Statewide polls show that 40 percent of Massachusetts residents already support gay marriages, and another 11 percent express no interest in the issue. Bonauto says those numbers will increase once voters see that "gay families have been strengthened, and nothing has been taken away from your family" in the months and years after May 17.

"Massachusetts was *the* breakthrough we had been building all these 10 or 12 years of work to achieve," Wolfson says. The impact of Goodridge on gay people, Bonauto adds, is immeasurable. "It has taken my breath away," she says, "to have so many people come up to me and say: 'I had no idea all the ways in which I had incorporated my second-class-citizen status and didn't even know it. For the first time I actually realize I am a full and equal citizen, and I didn't even realize all the accommodations I had been making.' That, I think, is what is transformative."

BUT GOODRIDGE'S IMPACT was felt not only by gays. Hostile reaction followed just as with Hawaii a decade ago, including critical words by President Bush in his State of the Union address on Jan. 20. Among those in the audience that evening was the newly elected San Francisco mayor, Gavin Newsom, and Bush's remarks started Newsom thinking.

Two weeks later, Newsom instructed his top aides to look into how San Francisco could start issuing marriage licenses to homosexual couples. Newsom's chief of staff, Steve Kawa, phoned Kate Kendell of the San Francisco-based National Center for Lesbian Rights late on the afternoon of Friday, Feb. 6. "The mayor wants to begin issuing marriage licenses to lesbian and gay couples," Kawa told an astounded Kendell. On Monday, Kendell suggested to Newsom's staff that the pioneering lesbian rights activists Phyllis Lyon and Del Martin become the city's first legally wed gay couple. Three days later, on Feb. 12, Lyon and Martin, ages 79 and 83, were married at City Hall. Literally overnight, Newsom's initiative transformed the gay marriage story from dry reports of court rulings into vivid pictures of hundreds of homosexual couples standing in line, sometimes in the rain, outside San Francisco City Hall in order to follow in Lyon's and Martin's footsteps.

President Bush upped the political ante on Feb. 24 when, warning that the the 1996 federal Defense of Marriage Law might not withstand judicial scrutiny, he endorsed a federal constitutional amendment to define marriage as only a "union of a man and a woman." Reaction to Bush's declaration was largely lukewarm, even among some Republican congressional leaders. But when the gay men and women of the Roundtable assembled on March 1 for a long-scheduled meeting, many worried that federal intervention could upset their careful state-level strategy. Evan Wolfson pushed his colleagues to respond to the dramatic acceleration of events by intensifying their own litigation initiatives. Some disagreed, worried that further events, on top of Massachusetts and San Francisco, could fuel a reactionary backlash.

> 'Massachusetts was *the* breakthrough that we had been building all this 10 or 12 years of work to achieve,' says Wolfson, one of the legal architects' of gay marriage.

No consensus emerged, but two days later another unexpected chapter in the struggle opened in Portland, Ore., when the Multnomah County Commission authorized the issuance of marriage licenses to same-sex couples. The Portland events received far less media attention than San Francisco's, but the Multnomah marriages soon looked more legally secure than the California ones. On March 11 the state Supreme Court ordered San Francisco officials to stop issuing licenses to same-sex couples, and joyous scenes at San Francisco City Hall came to an abrupt and tearful end after 4,037 same-sex marriages. The California court is now con-

Visitors to the Massachusetts State House keeping vigil during the March debate to constitutionally ban same-sex marriage in the commonwealth.

sidering whether to hold the San Francisco marriages null and void, and a ruling disallowing the licenses is possible sometime this summer. In Oregon, a trial judge has upheld the Multnomah marriages but also ordered the county to halt such licensing at least temporarily. Accelerated appellate review may put the question before the Oregon Supreme Court this fall, but conservatives hope to force a popular vote on an antigay-marriage state constitutional amendment either this November or in 2006.

The gay and lesbian Roundtable litigators envision first Massachusetts and then perhaps Oregon embracing full marriage equality within the next 12 months. Lambda also has potentially promising constitutional challenges pending in New Jersey, New York and Washington state courts that could prove successful within the next few years. Longer-shot marriage cases — some of them brought by attorneys not acting in concert with the Roundtable organizations — are also under way in Arizona, Florida, Indiana and North Carolina.

But rather than dwell on state-by-state prognoses, Bonauto and other gay and lesbian litigators privately focus upon delaying any federal court consideration of same-sex marriage issues for a good many years. "What's happened in Massachusetts has been a beacon of fairness, hope and equality across the country," Bonauto says, but "I think that what it boils down to is avoiding the federal piece" for as long as possible. "I have tried to plead with lawyers not to get overly ambitious about going into court," she says of a potential challenge to the federal Defense of Marriage Act. "I think a lot of times these cases would arise as tax cases by wealthy individuals" who pay disproportionate sums because of the unavailability of marriage. "I can't think of a less sympathetic prospect," Bonauto says. "I would like the opportunity for states to wrestle with this before we have to go into federal court."

One immediate challenge Bonauto faces is an attempt by Gov. Romney to order local officials to enforce a long-ignored 1913 statute that proscribes the issuance of marriage licenses to out-of-state couples whose marriage would be "void" in their home state. Romney wants town clerks to begin demanding proof of residency from marriage applicants, but individual clerks will face the choice of how to apply the state instructions, couple by couple.

That's exactly the context Evan Wolfson wants. After May 17, he predicts, "for a period of time there will be a patchwork in which couples have this mix of experiences, and in which nongay people, primarily, sitting on the other side of those desks at the bank, at the clerk's office, at the school registrar's, are going to have to now look at a real family and say, 'Am I going to be the one to say they're not married?' "

Wolfson believes that firm but polite insistence will prevail. "These couples are married," he says. "They're as married as any people on the planet. They are legally married." And first in Massachusetts, and then probably in Oregon and elsewhere, the evidence rapidly will mount, in a phrase both Bonauto and Wolfson spontaneously employ, that "the sky doesn't fall" once gay couples receive unquestionably valid state marriage licenses. "Moving it from a hypothetical, when it's easy to be 'against it,' to a reality of 'these are real people, and who does it hurt?' " Wolfson predicts, will fundamentally alter the debate.

Bonauto believes that the struggle that will climax on May 17 is strengthening America. "Because of gay folks wanting to get married," she says, "the rest of the country is having a teach-in about what marriage is." The most important lesson Massachusetts illustrates, she adds, is that "it's marriage itself that is so valuable as an institution, and that it's more than the sum of its legal parts."

WHEN ASKED TO TALK about herself, Bonauto insists that "it's totally not about me." Since she and her partner Jennifer Wriggins — and their twin 2-year-old daughters, to whom Bonauto gave birth during the early litigation of Goodridge — now live in Maine, rather than Boston, Bonauto and Wriggins's desire to marry may fall victim to Massachusetts's nonresident statutory restriction. Beth Robinson emphasizes Bonauto's "modesty and humility," but insiders who fully appreciate how a very small network of gay lawyers has brought America to the threshold of another civil rights milestone know whom to credit. Disclaiming any desire for an "architect" label, Bonauto says "I'm happy to be a bricklayer."

Wolfson says, "I really believe we are going to win," and Bonauto agrees. "I'm very confident what the outcome is going to be," she says. She is uncertain how many years will pass before gay marriage triumphs nationally, but, she emphasizes: "I really think that time is absolutely on our side here. That's part of why there's such a rush from our opponents to amend the federal Constitution." Enemies of gay rights, just like the Roundtable litigators, can read the public-opinion data showing how heavy majorities of younger Americans readily support same-sex marriage.

Lambda's Kevin Cathcart cites that polling data in explaining "why I can be confident and sleep soundly at night." He acknowledges that "it's very difficult right now to predict what's going happen" in the months and years immediately ahead, but like Wolfson and Bonauto he too says that without a doubt "in the long run we win."

"I'm a little less sanguine than a lot of people," Cathcart admits, about the very long odds that marriage equality opponents face in pushing for an antigay-marriage federal constitutional amendment. Bonauto acknowledges that the possibility of statewide votes in Massachusetts in 2006 or 2008 actually impedes the mustering of antigay-marriage forces at the national level, but at her weakest moments she too focuses on the long-term demographic implications of current polling data. "The times when I'm struggling," she says, "I think, Do I have to wait until those people who are now 10 years old are 55 before we have equality for all gay and lesbian families in this country? And that's a possibility, but even if that is true, that's 45 years from now."

Looking back 50 years to Brown v. Board of Education, most Americans have no difficulty in distinguishing the legacies of Thurgood Marshall, Martin Luther King Jr. and John F. Kennedy from those of the segregationist governors Orval Faubus, Ross Barnett and George Wallace. And 50 years from now, the odds are that Americans will have little difficulty in distinguishing the legacies of Evan Wolfson, Mary Bonauto and Gavin Newsom from those of Bill Clinton, Mitt Romney and George W. Bush. As Kevin Cathcart asks, "Which side of history do you want to be on?" ■

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