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THE *BAKER* CASE, CIVIL UNIONS, AND THE RECOGNITION OF OUR COMMON HUMANITY: AN INTRODUCTION AND A SPECULATION

David L. Chambers*

Every Vermonter seems to know about two recent decisions of the Vermont Supreme Court. In the first, the court struck down the system of local financing of public schools.[1] Like similar decisions in many other states, the school financing case led to a struggle in the legislature and difficulties for legislators at election time. In the second and even more controversial decision, the court reached an outcome that no other state supreme court had ever reached: it held unconstitutional the state's marriage law on the ground that it inappropriately denied the legal benefits of marriage to same-sex couples.[2] This decision, *Baker v. State*, also led to a legislative resolution that infuriated many voters.

In his concurrence, Justice John Dooley of the Vermont Supreme Court described *Baker* as "the most closely watched opinion in this Court's history."[3] The five articles and essays in this symposium concern *Baker* and the civil union legislation that the Vermont Legislature adopted in response to it. My goal, in this short introduction, is to whet your appetite for the reading that awaits you. I also speculate on the answer to a question that is more difficult than it appears: Why did the legislators and the governor who displayed such positive attitudes toward gay people and gay relationships refuse to call the new legal relationship that they created "marriage"?

I. THE *BAKER* DECISION AND THE LEGISLATURE'S RESPONSE

Baker v. State was filed in 1997 by a gay couple, Peter Harrigan and Stan Baker, and two lesbian couples, Holly Puterbaugh and Lois Farnham, and Stacy Jolles and Nina Beck, after they had been denied marriage licenses by their town clerks. Beth Robinson and Susan Murray, partners in a Middlebury, Vermont firm, and Mary Bonauto, of Gay and Lesbian Advocates and Defenders in Boston, represented their clients without fee. The couples claimed that their rights had been denied under the Vermont Constitution. They relied primarily on a section of the Vermont Constitution, commonly called the Common Benefits Clause, which provides: "That government is, or ought to be, instituted for the common benefit, protection and security of the

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1. Brigham v. State, 166 Vt. 246, 268, 692 A.2d 384, 397 (1997).
2. Baker v. State, 10 Vt. L. Wk. 363, 363-64, 744 A.2d 864, 867 (1999).
3. *Id.* at 376, 744 A.2d at 889.

people, nation, or community, and not for the particular emolument or advantage of any single person, family or set of persons, who are a part only of that community."[4]

The lawyers for the three couples argued that the laws of marriage must operate for the "common benefit" and "protection" of all couples—not just for a selected subset. They drew on earlier cases in which the Vermont Supreme Court had interpreted the Common Benefits Clause as a general protection against unjust discrimination similar to the Equal Protection Clause of the Fourteenth Amendment. At trial, the state offered seven justifications for treating same-sex couples differently from opposite-sex couples. The judge, ruling in December 1997, rejected six of these seven justifications. The court nonetheless upheld Vermont's marriage statute on the ground that permitting same-sex marriage would impair the public's perception of the link between marriage and procreation and thus diminish men's and women's sense of responsibility for child-rearing.[5]

The plaintiffs appealed to the Vermont Supreme Court, which heard oral arguments in November 1998 and announced its decision in December 1999. The five justices unanimously held unconstitutional the state's exclusion of same-sex couples from the legal benefits of marriage. The majority opinion, written by Chief Justice Jeffrey Amestoy, applied the Common Benefits Clause and rejected all of the justifications for differing treatment offered by the state. Amestoy found no empirical support or intuitive plausibility for the claim that the state needed to restrict marriage to one man and one woman in order to sustain the link between procreation and parental responsibility in the public mind. He concluded his opinion with a passage that has been quoted often since:

> The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nothing less, than the legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.[6]

Despite this stirring language, the court did not enter an order directing the state to begin issuing marriage licenses to gay and lesbian couples. Instead, in an unusual disposition, the court held that while the state must extend to same-sex couples all the legal benefits and responsibilities that marriage offers to opposite-sex couples, it was free to do so either by

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4. VT. CONST. ch. I, art. 7.
5. Baker v. State, No. 51009-97 CnC (Vt. Super. Ct. Dec. 19, 1997).
6. *Baker*, 10 Vt. L.Wk. at 376, 744 A.2d at 889.

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permitting gay people to "marry" or by creating a parallel institution with a different label such as "domestic partnership." It then offered the legislature a "reasonable time" to choose between the permitted solutions, telling the plaintiffs that they could return to the court for specific relief if the legislature failed to act. Two justices concurred separately in the court's judgment. Justice John Dooley agreed with the outcome but disagreed over the appropriate standard for determining justifiable differing treatment under the Common Benefits Clause, and Justice Denise Johnson argued that the court should order the relief that the plaintiffs had demanded.

Within a few weeks of the court's decision, the legislature began its work. Briefly stated, each chamber held committee hearings, with invited witnesses. They also sponsored joint public hearings at which hundreds of Vermonters spoke. Virtually every witness at the hearings advocated one of two polar positions. Those who disliked the supreme court's decision opposed giving any legal recognition to same-sex relationships. Most opponents also advocated that the legislature begin the process for adding an amendment to the Vermont Constitution that would explicitly limit marriage to opposite-sex couples. By contrast, gay people and their supporters urged that the legislature should simply include gay couples within the existing marriage legislation. Virtually no one favored the adoption of the sort of "domestic partnership" legislation invited in the supreme court's decision.

Ultimately, in a compromise that neither group preferred, the legislators created a new institution called "civil unions," and poured into it all the rights, benefits, and responsibilities of "marriage." The "civil union" bill extended to same-sex couples the tax, inheritance, and other laws relating to married persons. It also required couples entering into civil unions to formalize their relationship before a justice of the peace or a minister and to secure a divorce before becoming legally free to enter a new union. After emotional debates and close votes in the two chambers of the legislature, the bill was adopted on April 26, 2000, and signed into law by Governor Howard Dean the next day.[7]

At the time of its adoption, the "civil union " law came closer to treating same-sex couples identically to opposite sex couples than the law in any other state or any other country.[8] The Act took effect on July 1, 2000, and, in its first months, several hundred couples, many more from out of state than from within, entered into civil unions. In the fall 2000 elections, civil unions dominated the political discourse. Five Republicans in the House who had

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7. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2000)).

8. A comprehensive review of the legal status of same-sex relationships in other states and nations is related in Professor Johnson's article in this symposium. *See* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

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voted for civil unions were defeated in the primaries by conservatives in their own party. Many disgruntled Vermonters planted "Take Back Vermont" signs in their front yards. They blamed recently arriving "flatlanders" for civil unions, the new school financing law, and onerous environmental legislation. Supporters of civil unions responded with their own signs urging voters to "Keep Vermont Civil" and "Take Vermont Forward." On election day, Howard Dean was re-elected as governor and the Democrats retained control of the Senate, but Republican candidates for the House unseated many Democrats who had voted for civil unions and the Republicans seized control of the House by a wide majority.

II. THE SYMPOSIUM ARTICLES

This symposium contains five articles and essays that offer a rich mix of history, law, and social policy and reveal some starkly different points of view.

A. Historical Context

Greg Johnson relates some of the history of efforts in other states to secure same-sex marriage prior to *Baker*. He tells of the early same-sex marriage cases brought in the 1970s in Minnesota and Washington and of a quite recent case in Alaska in which he participated. All of these cases ultimately resulted in defeats for persons in same-sex relationships. Johnson also describes the extension of marriage benefits to same-sex couples in Canada, Scandinavia, and Western Europe. He then turns to Vermont and reports the substantial grassroots political and legislative work conducted by gay activists in Vermont during the fifteen years prior to the filing of *Baker* that helped create the relatively positive political climate within which *Baker* was filed.

Johnson, Michael Mello, and co-authors David Coolidge and William Duncan also report on the repercussions of the *Baker* decision. Johnson describes the responses of state agencies to questions from the legislature about the probable fiscal impact of a civil union bill. Mello reports on the public reactions to the *Baker* decision as reflected in letters to the editors in Vermont newspapers. Coolidge and Duncan describe their efforts and the efforts of others to persuade the House and Senate to initiate the process for amending the state constitution to limit marriage to the union of one man and one woman and to provide that neither the legislature nor the courts are obliged to provide any of the rights and benefits of marriage to any other sort of couple.

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B. Legal Commentary

David Coolidge and William Duncan, in critiquing the Court's decision and disposition, argue that the justices impermissibly redefine "marriage" and misconstrue the Common Benefits Clause. Michael Mello disagrees and regards the Court's decision as a "straightforward application of the plain language" of the Clause's terms. He also believes that the hostility to gay people revealed in the post-decision behavior exhibited by many conservative Vermonters provides after-the-fact support for the Court's decision to protect gay men and lesbians as a "despised minority." Gil Kujovich also accepts the Court's construction of the Common Benefits clause and believes that through its remedy, the Court prudently avoided the question of whether same-sex relationships should be labeled marriage. Quite unlike Coolidge and Duncan, he believes that in referring the choice of remedies to the legislature the Court engaged in an appropriate form of judicial restraint.

Barbara Cox disagrees with Coolidge, Duncan, and Kujovich. She contends that the Court failed to go far enough and that granting the right to "marry" was the only justifiable outcome. She believes that, given the social status attached to the term "marriage," an institution with a different name will necessarily be unequal and thus same-sex relationships will continue to be regarded as socially inferior.

C. Social Policy

Finally, the authors also differ among themselves on the ultimate policy question of whether Vermont (or any other state) ought to permit couples of the same sex to marry. Coolidge and Duncan believe that marriage by its inherent nature is limited to units of one man and one woman and that the Vermont Constitution should be amended as soon as possible to reflect that natural principle. Cox and Mello each believe that states ought to permit same-sex couples to marry and that anything less is unsatisfactory. Johnson, who has worked for gay marriage for many years, seems content to give "civil union" a try, hoping that the gay community can come to accept the term and shape civil unions into their own distinctive institution.

In this brief preview, I have not done justice to the range and diversity of the offerings in this symposium. Read them and discover for yourself.

III. A SPECULATION: WHY NOT "MARRIAGE"?

Despite the diversity of the articles here, one important point of view is missing. None of the authors endorses the view of the civil union legislation

that was implicitly or explicitly held by most of the legislators who authored the bill, by the governor who signed the bill into law, and probably by most of the justices who participated in the *Baker* decision. That view is this: that gay people are morally worthy and their relationships deserve great respect, but that the relationships between two men or between two women differ from the relationship between a man and a woman to a sufficient extent that it is acceptable for the law to call the joining of same-sex couples something other than "marriage." "Civil union" is equal enough.

Consider Governor Howard Dean. On the day after the supreme court's decision, he pledged that he would work hard to carry out the court's mandate, but also acknowledged that same-sex marriage "makes me uncomfortable, the same as anybody else."[9] Just as he promised, he pressed reluctant Democratic legislators to vote for the civil union bill and signed the bill into law. After the signing, he was asked whether "civil union" wasn't simply a form of "separate but equal" treatment for gay people that, like segregated schools for African-American children, was doomed to be "unequal" in fact. Dean responded that he preferred to think of civil unions as "different but equal."[10] Unfortunately, he did not explain how same and opposite-sex relationships were relevantly different. Compare an analogous moment in legal history frequently invoked in the Vermont debates, the ending of legal barriers to cross-racial marriage in the United States. No state that repealed its miscegenation law went only part way and named black-white marriages something other than marriage. And, if they had, one can well imagine the hostile reaction from black Americans and liberal whites.

Thus, the question I want to explore for a few paragraphs is: Why not "marriage"? What were the governor and legislators thinking? One possible explanation is that they really did accept same-sex unions as identical to opposite-sex unions in every relevant respect, but concluded that, if they called same-sex unions "marriage," they would be unable to muster enough votes within the House or Senate or would incite even more anger in their traditional constituents. That pragmatic stance was certainly the position of Representative Bill Lippert, a gay legislator and Vice-Chair of the House Judiciary Committee, who favored "marriage" but was one of the civil union bill's most effective advocates.

Many of Lippert's colleagues who supported the civil union bill no doubt feared being perceived by voters as endorsing homosexual behavior, which is, of course, precisely what they were accused of anyway by Vermont's

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9. Carey Goldberg, *Vermont High Court Backs Rights of Same-Sex Couples*, N.Y. TIMES, Dec. 21, 1999, at A1.

10. Editorial, *Gay Rights Ping Pong?*, RUTLAND HERALD, Dec. 26, 1999, at C2 (quoting Vermont Governor Howard Dean).

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Catholic bishop and many other conservatives. Every time civil-rights legislation is proposed in the United States to deal with discrimination on the basis of sexual orientation, the opponents maintain that it will place an official stamp of approval on homosexuality.[11] The proponents respond that no endorsement is implied in simply assuring equal treatment. In the Vermont context, the legislators surely hoped that by withholding the blessing of the label "marriage" they could avoid appearing to endorse homosexuality[12]

This explanation may be accurate, but it assumes that, if they had voted their consciences, the legislators would simply have included same-sex couples within the marriage statute. My own hunch is that the actual explanation is more complex, that Governor Dean was honest when he said that, like anyone else, he was troubled by "gay marriage," and that many of the legislators shared his sentiments.

One place to look for a more complex explanation is within the language of the civil union law itself. In one of the legislative "findings" in the first section, the Act seems to be trying to explain the use of a different name:

> (10) . . . Changes in the way significant legal relationships are established under the constitution should be approached carefully, combining respect for the community and cultural institutions most affected with a commitment to the constitutional rights involved. Approaching the granting of benefits and privileges to same sex couples through a system of civil unions will provide due respect for tradition and long-standing social institutions, and will permit adjustment as unanticipated consequences or unmet needs arise.[13]

This explanation is more than a little opaque. It suggests that calling same-sex relationships "civil unions" is needed in order to pay due respect for the institution of marriage. Conversely and more harshly, it suggests that to call same-sex unions "marriage" would be disrespectful to the institution of marriage. Unfortunately, however, it doesn't explain why. Still, it does provide a clue that I'd like to pursue. Here is my own brief attempt to provide the missing explanation.

"Marriage" really is, as the legislature found, "a long-standing social institution." Along with burial rituals, it may well be the world's oldest and most geographically universal social institution. Every society has a term

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11. *See* Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149, 155, 185-187 (John R. D'Emilio et al. eds., 2000).

12. In a similar move, the legislature went out of its way to make clear that churches could withhold their endorsement of gay relationships by refusing to perform "civil unions."

13. 2000 Vt. Acts & Resolves 91 §1(10) (legislative findings).

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equivalent to "marriage" that is reserved for its most prized form of sexual union. Thus, it is hardly surprising that, without knowing quite why, heterosexuals feel an urge to keep the term to themselves (and hardly surprising that gay men and lesbians want so badly to have the term apply to them).

My guess is that many of them (and Howard Dean) really do think that gay relationships are different from theirs and, though worthy, not quite equal. First, as was said frequently by conservatives in the hearings, marriage is in part about children and two people of the same sex simply cannot produce a child biologically. I suspect that this obstacle of biology, invoked often by conservatives, also affects the unconscious attitudes of many liberal legislators, even though they are aware that large numbers of gay couples are raising children and despite the fact that the legislators had recently enacted a statute that facilitates the adoption of children by gay partners.[14] Second, marriage is in part about sexual pleasure, and gay men and lesbians have sex in ways that most heterosexuals find quite uncomfortable to think about. And, third, marriage is about gender roles that most liberals consciously reject but unconsciously embrace. Even in this era of working wives and companionate marriages, most American men, including most liberal men, seek out as spouses women who are not only younger, and shorter, but also earn no more than they, and who possess equal or less education. Most liberal women seek as partners older, taller, higher earning men. Good wives still raise the children. Good husbands still bring home most of the bacon. When two gay men or two lesbians are seen living outside of these roles, many decent heterosexuals are "uncomfortable" for reasons they have difficulty expressing.

Still, I cannot attribute the choice of a term other than marriage solely to the discomfort of liberal heterosexual legislators. They were not the only ones who accepted relegating gay people to a "different but equal" institution. Liberal homosexual Vermonters in large numbers, including me, comfortably accepted the relegation. Of course, we would have preferred "marriage," but when it became clear that we weren't going to get it, only a few of us experienced "civil union" as an affront. Many of us, as pragmatists, were delighted to take what we could get for now, especially from a legislature that had demonstrated such good will. Nonetheless, I believe that some part of our comfort with "civil union" has a deeper explanation. It is that just as heterosexuals see themselves as different from us, we too see ourselves as different from them. Even the most self-assured among us grew up feeling different in some essential way from our parents and from most of our peers.

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14. *See* 1996 Acts & Resolves 161 § 1-102 (codified at VT. STAT. ANN. tit. 15A, § 1-102 (Supp. 2000)).

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I think that it is this acceptance of difference that has made so many of us comfortable for over a decade with the entire domestic partnership movement, which has brought health benefits to thousands of us and our partners under a different rubric than marriage. The irony in the end is that our comfort provided comfort to the liberal legislators of Vermont when they named our marriages something else.

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