Foreword to Legalizing Gay Marriage

David L. Chambers  
*University of Michigan - Ann Arbor, dcham@umich.edu*

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The significance and timeliness of Michael Mello’s book was brought home to me recently when I participated in a conference on same-sex marriage at Brigham Young University Law School in Provo, Utah. Nearly everyone in the audience opposed permitting two men or two women to marry each other. Many favored an amendment to the United States Constitution to prevent any state from permitting same-sex couples to marry. Most regretted the decision of the United States Supreme Court in June 2004 holding sodomy laws unconstitutional. To them, the institution of marriage was under siege. The welfare of unborn children was at risk. Same-sex unions, one speaker believed, would offend “the dignity of children.” Another speaker referred to the union of two men as “mere friendship, with the option of sodomy.”

My task at the conference was to discuss the developments in Vermont. I drew on Professor Mello’s manuscript and described the decision of the Vermont Supreme Court in the Baker case, the response of the Vermont legislature, and the responses of Vermont voters in the two elections that have followed. After I spoke, another member of the panel, a member of the Brigham Young faculty, delivered a short version of a 60-page law review article he had written appraising the Baker decision. He criticized the reasoning of the court and accused the justices of misusing their own precedents. He then went on at some length to point out that few appellate courts in other states had cited Baker in the nearly four years since it was decided. He never acknowledged that the absence of citations in other courts should be no surprise. After all, in the four years since Baker, no other appellate court in the United States has decided a case involving a claim for same-sex marriage. Moreover, the Vermont decision rests entirely on an unusual provision of the Vermont Constitution, the so-called Common Benefits Clause, that is found in only a few other state constitutions. What this speaker was trying to do was to make the Baker case go away.
But it won’t.

The fact that a conference in Utah devoted an entire panel to *Baker* nearly four years after it was decided is a sure sign of its continuing importance. *Baker* was the first decision of a state supreme court requiring that the benefits and responsibilities of marriage be extended to gay male and lesbian couples. And Vermont’s legislature was the first legislature to affirm those benefits for its gay and lesbian citizens. The decision and the action of the legislature in adopting the civil union legislation produced temporary political upheaval in Vermont. In the rest of the country, the decision was praised by liberal activists and used by many to push for expanded recognition of same-sex relationships in their own states. At the same time, the decision was condemned by conservative Catholics, Christian fundamentalists, and right-wing politicians.

Professor Mello’s book preserves this historic set of events in Vermont, drawing on newspaper accounts, on letters to the editor, on the sometimes angry, sometimes joyous testimony of private citizens before the Vermont legislature, and on interviews with some of the principal actors in the drama. I believe you will find this a gripping story.

I am not an entirely impartial witness to these events. I am a Vermont resident now, after teaching law at the University of Michigan for 34 years. My partner, John Crane, and I are among the thousands of American couples who have joined in civil union. John and I both worked in support of the legislation while it was pending. On one occasion, John attended a public hearing in the chamber of the Vermont House. Over a thousand people were in the building. While he was waiting to learn whether his name would be pulled at random to be one of the witnesses in support of same-sex unions, he heard a different Crane called as a witness. It was his brother Les. Part of what Les said that night is quoted in Chapter 3 of this book as reported in the next day’s *Rutland Herald*:¹

Leslie Crane of Williston read a letter from his 18-year old son, who was unable to attend the hearing.

“I am shocked that we as a state and a nation are entertaining the idea of homosexual union.” Crane said, reading from the letter. “I believe that if Vermont legalizes this unnatural behavior, I believe there will be a migration like none ever seen. Such an influx of homosexuals will be detrimental to the moral and family values that surround us in Vermont.”

The eighteen-year-old was John’s nephew, a young man who liked John a lot. John heard what Les said and was stunned. It was not Les’s beliefs that caught him by surprise. John knew that Les is a fundamentalist Christian. His surprise was that, given his closeness to Les and his wife Suzanne and their four children, Les would say what he did in public.

John approached Les outside the House chamber after his testimony. Les seemed taken aback that John was there. He told John that he didn’t mean to be referring to the two of us when he spoke. He had dissociated us, whom he loved, from an impersonal menace that he feared. John said little that evening, but wrote Les a long letter telling him how offended and hurt he was. Les, who cares as much about family as we do, wrote back saying he understood and offered to absent himself from a family gathering that he knew John would be attending soon. He closed by asking John if the two of us would join Suzanne and him for dinner sometime at a neutral restaurant to try to repair the damage. Many months later, when John felt less angry, he accepted their invitation. The four of us met at a restaurant and talked. Les and Suzanne discussed the place of religion in their lives. John and I talked about our own lives. None of us changed the others’ beliefs, but the brothers did come away reaffirming the love they felt for each other. Six months later, when John and I celebrated our civil union, Les and Suzanne were there. So were John’s parents and three other brothers.

Our story is not unique. John and I know many others whose civil unions have proved an opportunity to bring family members to a better understanding of loving gay and lesbian relationships.

I hope that thirty years from now the tale that Professor Mello tells here of the resistance to same-sex marriage will seem as peculiar to young people as the story of men’s resistance to women’s suffrage seems to me today. If it does, Professor Mello’s book will probably have played a small but valuable role in making that shift of mind possible.