THE ROAD TO INCLUSION FOR SAME-SEX COUPLES: LESSONS FROM VERMONT*

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Given that I'm addressing law students, my remarks should probably be thick with legal analysis, academic theory, and case citations. But they won't be. For one, I know that the more I concentrate on legal analysis or academic theory, the more vulnerable I am to a tough question from a student or professor that leaves me looking like a deer in the headlights. I'd prefer to minimize my exposure to such embarrassment.

More important, I think some of the most valuable lessons we, as lawyers, can draw from the Vermont experience aren't strictly legal, or academic, and can't be gleaned by simply reading the *Baker v. State*[1] decision or reviewing the civil union law.[2] I'll hit the law, too, but I hope you'll indulge me in sharing some of these other important lessons.

LESSON #1: THE LAW IS ABOUT REAL PEOPLE

Law can be a fascinating intellectual exercise. Developing a theory, researching the history and case law, and articulating the argument with just the right turns of phrase can be exciting and satisfying. Sometimes it's easy to forget that law is not only a lively forum for interesting debate— it's a living force that pro-

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[1] 10 Vt. L. Wk. 363 (Vt. December 20, 1999).

[2] *See, e.g.*, Vt. Pub. Act 91, 2000 session.

foundly affects peoples' lives. Through the course of our work in Vermont I've encountered so many couples, both clients and friends, who have experienced, firsthand, the injustice of laws that treat them as legal strangers to one another, denying them the important legal protections available to their heterosexual counterparts.

I think about Nina and Stacy, one of the plaintiff couples in this case, as they describe the birth of their first son, Noah. Nina was giving birth to Noah at home, by design, when things went badly awry. They rushed to the hospital, and when they got there medical personnel rushed Nina into a room and immediately began working with her. While Nina, and their soon-to-be-son, were struggling for their lives, hospital agents stopped Stacy at the door and asked for papers showing that she had a right to be there. Now Nina and Stacy are pretty sophisticated people. They knew they needed durable powers of attorney for health care, and had the wherewithal to pay attorneys to draft them. In fact, Stacy even had the presence of mind in the middle of that medical emergency to go to the file cabinet and retrieve the papers before heading to the hospital. So Stacy got into the room with her partner and child. But I have to tell you, even though she got into the room, Stacy will never forget the sting of the assault on the integrity of her family, especially at a time when they were most vulnerable.

These hospital scenarios aren't unusual. My friend Jay talks about the time his partner, a disabled veteran, had to go to the emergency room at a nearby veteran's hospital. While Jay was sitting in the waiting area, and his partner was back being examined, somebody "coded." When I think about this story I always picture the dramatic moments on the television show "ER" when doctors and nurses start running around urgently, and "crash carts" start flying down the hall. Jay could tell as he sat in the waiting room that something pretty major was happening down the hall, and he grew concerned. His partner hadn't come in for a life-threatening illness, but, again, anyone who has ever watched ER knows that it happens all the time: people come in to the emergency room with a bad hangnail, and the next thing you know, they "code" or go into a coma. So Jay got nervous, and he asked at the desk for reassurance that his partner was okay. The attendant asked him his relation to the patient, and he explained that they were partners. Citing a policy prohibiting the sharing of medical information with anyone other than "family," the attendant declined to provide Jay any information or assurance.

Some of the injustices I've encountered are financial. Deb talks about the time she and Carol refinanced the house and added Carol to the deed. (Originally Deb owned the house on her own). They were charged a property transfer tax, which is $500 on the first $100,000 of a home's value. This tax on transfers of property would never have applied if Deb and Carol had been legally-recognized family.

Or I think about Janice and Suzie. Janice has worked for a major manufacturing plant for over 20 years now. She and Suzie have been together for 18 of those years. Janice has built up quite a pension, but if she died tomor-

those years. Janice has built up quite a pension, but if she died tomorrow, Suzie wouldn't get a penny. Nor would she see one cent of Social Security survivor benefits. If Suzie were a man, she would be well provided-for if anything should ever happen to Janice. Because she's a woman, she'll be on her own if Janice predeceases her.

Ironically, some of the most important protections of the marriage laws arise in the context of divorce. Frequently in my law practice I've seen same-sex couples trying to untangle their finances and property in the midst of the turmoil of breaking up without any guidance from the divorce laws or assistance from the family court. Sometimes they end up going to the Superior Court— the court in Vermont that deals with civil, non-family cases— and invoking ill-fitting legal doctrines developed to deal with business partnerships dissolving, or implied contracts. More often, they muddle through the best they can, and the economically-vulnerable party is left holding the stick. I remember a client, Susan, who put her whole life savings into a farm titled to her partner. A number of years later, they broke up— and it was an ugly break-up. If Susan had been able to access the Family Court, and the divorce laws, the court could have ordered the farm sold, and the proceeds divided, or it could have awarded the farm to her. Instead we ended up in the Superior Court, where we spent years trying to get and then to enforce a judgment. In the end, Susan lost her life savings.

Some of the deprivations I've seen are more trivial. A few years ago Suzie— as in Janice and Suzie—lost her brother. Janice and Suzie took his death hard. Although Janice's company allowed employees a day of paid bereavement leave to attend the funeral of a family member, including an in-law, Janice wasn't allowed a bereavement leave to attend Suzie's brother's funeral. Even though he had been effectively Janice's brother-in-law for fifteen years, in the eyes of the law, and the eyes of Janice's employer, he was a stranger to her, with no more connection than a person on the street. Again, it's a relatively trivial example. Janice was able to take a vacation day to attend the funeral. It wasn't the end of the world. But it wasn't really the money, or the vacation day, that mattered— it was the slap in the face to Janice and her family during their time of grief, the suggestion that her family didn't count as a real family, that stung.

Some of the incidents I've learned about are anything but trivial. This is the one story that didn't involve a friend or a client. I read about it in the newsletter of a legal advocacy organization. But it had a profound effect on me. Two men had been partners for a number of years. One of them died. The survivor, grief-stricken, buried his partner. He put up a tombstone and planted flowers by the grave. As you can imagine, he spent a great deal of time by the graveside. And then one day he came to visit and there where his partner was supposed to lie for eternity— next to where he himself had planned to lie for eternity when his time came— was a hole in the ground. . . . . The tombstone was broken into pieces and lying by the dumpster . . . . The deceased partner's biological family, his *legal* family, had removed the body to bury it in the family plot. And the kicker is,

under existing law, they may have had every legal right to do that.

As a lawyer who represented many gay and lesbian people long before the marriage issue arose, it was incredibly frustrating encountering situations like these, and dozens and dozens of others like them. Hard as I tried, and as clever as I liked to think I was, there was precious little that could be done to avoid situations like I've just described. By drafting a will and a durable power of attorney for health care, I was able to provide some modicum of security for client-couples, but the vast majority of the legal protections, supports and responsibilities of civil marriage were simply out of reach for same-sex couples.

Not all of the problems same-sex couples encounter on account of our discriminatory laws are strictly legal, but they flow from the laws. Sandi and Bobbi have been together for 34 years. About nine years ago Sandi was diagnosed with cancer. She immediately asked her doctor to schedule another appointment so that Bobbi could be present and they could review the treatment options together. The physician bristled, and told Sandi this was an issue for Sandi and him to discuss— Bobbi had no place being there. Sandi was shocked. She reminded the doctor that he had on file a durable power of attorney for health care designating Bobbi as her medical decisionmaker in the event she was incompetent or otherwise unable to make her own decisions. Her doctor responded that the document only kicked in if Sandi was unable to make her own decisions. Until then, he would deal with Sandi— alone. Now the solution to Sandi's situation was obvious; she immediately got a new doctor. But the fact of the matter is that her doctor wasn't just denying Sandi's family out of the blue. He was taking his cues from the laws which said that Bobbi was a legal stranger to Sandi, and that their relationship of then-25 years was nothing like a marriage.

That story really points to a more fundamental issue underlying the freedom to marry debate—one I personally didn't fully appreciate when we started this journey. I've talked a lot about specific benefits and legal disadvantages that same-sex couples have faced. As a lawyer, that's where my mind tends to go. But the law does more than simply delineate rights and obligations, or distribute benefits and burdens. The law also tells a story. It's a story about who we are as a community, how we view ourselves, and how we view one another. And it's a dynamic process; on the one hand, the law reflects our values and assumptions, and at the same time the law helps shape our values and assumptions. Before July 1, 2000, the story told by the laws of every state in this country was that committed, loving same-sex couples don't exist, or if we do, our relationships have no value, and aren't worthy of equal treatment under the law. And that story, which is so completely out of synch with what I know to be true, doesn't just undermine the committed same-sex couples who seek legal recognition and protection of our relationships; it touches every member of our community, whether gay or straight.

I think of my friend Scott, a gay man in his early twenties. He describes the struggle he went through in high school as he wrestled with his budding sexual-

ity. During that difficult period, Scott kept bottles of Nyquil beside his bed and tried to do himself in by drinking them. Scott wasn't trying to kill himself because he was gay; he was doing it because he couldn't bear the thought of coming of age in a world that told him he was a second class citizen, that said that any relationship he might form wasn't worthy of equal recognition and protection of the laws, and that didn't hold out for him the same promise— or at least hope— of a committed lifetime partnership recognized by the community through our laws, that his heterosexual counterparts took for granted. This story told by the laws— that our relationships don't exist, or have no value— speaks directly to the Scotts of the world. It touches every gay, lesbian or bisexual person, regardless of whether we are partnered, and regardless of whether we have any desire to ever avail ourselves of the legal protections and obligations of marriage.

It speaks to our families, giving them permission to shun and reject us, and telling them that any relationship we may form, no matter how healthy, loving, or committed, is less worthy than any relationship our heterosexual siblings may form. Fortunately, most families move past that; they come to understand the disconnect between the story told by the law and the reality of our lives. But some do not.

This story speaks to the homophobes among us, giving schoolchildren permission to taunt the sixth grader with two lesbian moms, and bolstering the resolve of the anonymous bigot who sends hate mail to his openly gay neighbors.

It also speaks to the well-intentioned but ill-informed— the doctor who didn't understand why Sandi wanted Bobbi involved in the treatment plan, or the employer who's uncomfortable hiring a gay employee.

It's this story, and the way it touches every single one of us, that lies at the heart of the freedom to marry debate. What story best reflects existing reality and best shapes the most just and inclusive community?

LESSON #2: LITIGATION DOESN'T HAPPEN IN A VACUUM

I've spent a lot of time on the human issues, and I apologize if I've bored you. I continue to believe that it's the most important conversation generated by our work in Vermont. Lesson #2 is far more practical. All the great case citations in the world won't get you to your goal if the political and educational context is wrong. Judges don't live in a vacuum, and every judicial decision is subject to some sort of political response, whether it be statutory, executive, or constitutional. It's not enough to win the battle of the case if you go on to lose the war.

That's why in 1995 we actually passed up the opportunity to take on a freedom to marry case. Instead, along with a number of other committed volunteers, we formed the Vermont Freedom to Marry Task Force. For a year and a half before the *Baker* litigation came along, Task Force volunteers took every opportu-

nity to speak to churches, civic associations, gay and lesbian organizations, community leaders, and anyone else willing to offer us an open mind and a chance to engage.

In speaking with these groups we addressed the myth that marriage has always existed in its present form, unchanging and uniform across cultures and throughout time. To the contrary, the institution of marriage has evolved dramatically through time. Just over 100 years ago in Vermont a woman who married lost her ability to own property or form contracts in her own name. The law treated a married man and woman as one— and the one was him. The transformation from that conception of marriage to our modern egalitarian concept, in which women and men theoretically stand on equal legal footing within marriage, was a dramatic one. It was also a positive one that most of us can agree enhanced rather than undermined the institution.

We talked about the shameful history of interracial marriage in this country. Just 53 years ago, 36 states in this country banned interracial marriage. Six found it so odious that they put the prohibition in their constitutions. Public opposition to interracial marriage was far greater than public opposition today to same-sex marriage, and the concept of a black person and a white person married to one another was as antithetical to many peoples' conceptions of what a marriage is as the concept of a man marrying a man or a woman marrying a woman is to many people today. In fact, in studying the interracial marriage debates, I was struck by how strongly every single argument we hear in the contemporary debate about same-sex marriage resonates with the arguments previously offered in opposition to interracial marriage:

> "God didn't intend it this way." "If we allow interracial couples to marry, we'll be forced to allow polygamous and incestuous marriages." "These people are the dregs of society." "Their children will be messed up." "The law doesn't discriminate. People of all races *can* marry (as long as they marry someone of the proper race)."

Our laws concerning race and marriage changed, but that change didn't undermine marriage; it maintained much of what is good in marriage, while eliminating a destructive aspect of the institution.

We talked to these groups about the distinction between civil and religious marriage— a distinction that is no doubt obvious to lawyers, but which is lost on many people. They're two separate things. Long before Hawaii or Vermont, some communities of faith were blessing unions between same-sex couples. Long after every state in this country allows same-sex couples to marry just like our heterosexual counterparts, free from any legal discrimination, there will no doubt be churches that decline to recognize our unions— just as there are churches that won't recognize interracial marriages or remarriage following divorce. We're not here to tell the Catholic Church they have to do gay weddings;

in fact, I'd represent the Church myself if someone tried to compel them to.

We raised these policyish issues during our public education work but, frankly, they were not the most important messages we shared. Far more important were our stories— real stories about real people and the reality of our lives. Janice and Suzie, Deb and Carol, and Scott, the suicidal teenager. Those stories, and our willingness to be honest and open about our lives and our families, cut through the myths that bind gay and lesbian progress far more than any policy paper or research project ever could.

And we worked hard to take our message not just to the likely suspects, already in our camp, but to the folks who might not necessarily, at first blush, support our goals: the well-intentioned but underinformed middle, folks who haven't had the opportunity to get to know openly gay or lesbian people, or to think about these issues. And we're still doing it. Just about a year ago I pulled a six hour shift at the ice hockey rink in Lyndonville, Vermont, staffing the Vermont Freedom to Marry Task Force booth at the Northeast Kingdom Home, Garden and Lawn Show. I have to confess that even after all these years, it still feels a little odd at the local fairs and events like that. There I was with the obligatory fudge booth down the aisle, the chimney sweep booth across the way, and next to me my favorite, "Blazing Needles: Custom Embroidered Baseball Caps While You Wait." We can craft the best arguments in the world in court, but if we're not also standing in booths at the local county fair, or speaking to a nearby church congregation on a Wednesday night, we risk losing in the court of public opinion our well-deserved gains in the court of law.

LESSON #3: MARRIAGE LITIGATION 101:

And that brings me to the lawsuit: *Baker v. State.* In July, 1997, Mary Bonauto from Gay & Lesbian Advocates & Defenders, my law partner Susan Murray and I had the privilege of filing suit on behalf of three amazing same-sex couples who were denied marriage licenses from their town clerks.

Holly and Lois had been together for twenty-five years at that point— through the seventies, eighties and most of the nineties. They raised an adopted daughter together, and were active in their community— participating on town boards, serving as deacons in their church, volunteering for various worthy causes, and serving as foster parents for over a dozen children. But they were not out. At some level, coming to their first Vermont Freedom to Marry Task Force meeting in late 1995 was an act of coming out— after twenty-three years. Then a year and a half later they finished the job on the front page of the New York Times.

Stan and Peter are wonderful men— thoughtful and articulate. They were willing to stand up and publicly declare their love, affection and commitment for one another. That's not easy for anyone, but in doing so Stan and Peter made themselves vulnerable to the particularly nasty strain of homophobia that targets

gay men in particular. Stan and Peter saw the legal and public commitment of marriage as an important way of weaving couples and families into the fabric of the broader community, and they wanted to share in that. They entered this case not with any desire to undermine marriage, as some have suggested, but with a profound respect for what the institution of marriage can be.

Nina and Stacy came to this case, first and foremost, as parents. When we asked them why they wanted to do this, they explained that it was for Noah— the son born in the home birth gone awry that I described earlier. If marriage is good for children, if it provides a more stable and secure environment in which to raise them, then Noah deserved that added measure of security as much as any other child. He deserved to grow up knowing that his family was recognized and respected by the laws as any other family. An effervescent child of two, always smiling and making friends, Noah was a charming representative of the children who are disadvantaged because their same-sex parents cannot marry.

That's where our story took a tragic twist. Noah had been born with a congenital heart defect, although he had not had very serious difficulties before. About a week before we filed the *Baker* case, his heart failed. He spent six weeks waiting for a donor heart that never came, and then he died.

At that point, it would have been perfectly understandable if Nina and Stacy had pulled out of the case. They were dealing with the most unimaginable grief, and we fully expected that they might not be able to deal with the stresses of the case on top of their anguish over Noah's loss. But that's not what happened. Instead, they took some time to grieve, and then they came back. They explained that they had started this case for Noah, and they couldn't imagine a better testament to his life than to continue on in the name of all of the children of gay and lesbian parents. From that moment forward, Nina and Stacy took every opportunity to talk publicly about Noah, and about the importance to children— all children— of laws that respect our families. For their courage in the midst of their own private heartache, Nina and Stacy, along with Stan and Peter and Holly and Lois, are true heroes.

Procedurally, the case moved quickly and efficiently. We filed our complaint in July, 1997. The State of Vermont filed a motion to dismiss and we responded. By December, 1997, we had a decision from the trial court rejecting our statutory and constitutional arguments and dismissing our case. We appealed to the Vermont Supreme Court, and within a year of our filing the case in the trial court it was fully briefed before the Vermont Supreme Court.

I won't rehash our arguments in too much detail. Our opening appeal brief and reply brief have already been published.[3] In fact, you can find most of the

[3] *See* Bonauto, Murray and Robinson, *The Freedom to Marry for Same-Sex Couples: Opening Appellate Brief of Plaintiffs Stan Baker et al in* Baker et al v. State of Vermont, 5 MICH. J. OF GENDER & LAW 409 (1999); Bonauto, Murray and Robinson, *The Freedom to Marry for Same-Sex Couples: Reply Brief of Plaintiffs Stan Baker et al in* Baker et al v. State

19 briefs filed in the case, including amicus briefs on both sides, on the Vermont Freedom to Marry Task Force web site at www.vtfreetomarry.org, in the section relating to the lawsuit.

In any event, our constitutional argument rested on the Common Benefits Clause of the Vermont Constitution which provides:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the 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]

This provision is Vermont's equal-protection analog, reflecting a commitment to inclusion of all Vermonters, and an opposition to laws that set up a part only of the community as privileged and preferenced.

Historically, in applying the Common Benefits Clause the Vermont Supreme Court has articulated the same test applied in federal equal protection cases: In cases involving a fundamental right or a protected classification, strict scrutiny applies; in cases not triggering heightened scrutiny, a rational basis test applies.

My rudimentary understanding of this process before this case was that if, in challenging a law, if you get yourself to heightened scrutiny, you win; if you don't, you lose. I think that may be the rule of thumb that many of us carry away from law school when we forget the subtleties. But as we evaluated the Common Benefits Clause cases decided by the Vermont Supreme Court, we realized this overly simplified summary failed to explain a lot of important decisions. Even within the framework of "rational basis" review, the Vermont Supreme Court has looked more closely at some statutory classifications than others, upholding a broad range of economic regulations, while striking down laws discriminating against adopted children even when supported by a rationale that arguably passes the laugh test. Something more was going on— the Court was looking more closely at classifications that involved particularly important rights or benefits (such as public education), or which targeted groups historically subjected to animus (adopted children); and the Court was doing this even within the framework of so-called rational basis review. In fact, we found that the United States Supreme Court has done the same thing.

So, with respect to the applicable standard, we argued that heightened scrutiny should apply for all the reasons you would expect: the marriage law discriminates on the basis of the protected classification of sex; the law discriminates on the basis of the prohibited classification of sexual orientation; and the

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of Vermont, 6 MICH. J. OF GENDER & LAW 1 (1999).

[4] VT. CONST. ch. I, art. VII.

law discriminates with respect to a fundamental right. But we also argued that even if heightened scrutiny did not apply for any of the above reasons, the Court's analysis should take into account the importance of the rights in question and the animus to which gay and lesbian citizens have been historically subjected.

Now, so far the "action" in these marriage cases has focused on the applicable level of the scrutiny. One of the revelations of the *Baker* decision is that the level of scrutiny doesn't necessarily matter as much as we might have thought. The fact is that under *any* level of scrutiny, the State's discrimination still needs to be supported by *some* reason that makes sense. When it gets right down to it, there isn't one. Under Vermont's marriage laws, a random man and woman could meet in a bar, go to the town clerk's office the next day, and attain the legal status, protections and responsibilities of civil marriage. In the meantime, Holly and Lois, together through life's ups and downs for 25 years, could not. The State simply had no justification for such a distinction. Forget the level of scrutiny— there isn't even a reasonable connection between the State's discrimination and a legitimate public purpose, let alone a narrowly-tailored connection with a compelling purpose.

The only rationale proffered by the State that invited more than the back of a hand involved procreation: the biological begetting of children. Because only a man and a woman together can biologically beget a child, the argument goes, the State can legitimately limit marriage to a man and a woman. Assuming that it's true that only a man and a woman can biologically beget a child together— and Justice Morse called into question the long-term viability of this presumption in the face of rapid advances in cloning technology— the procreation-based argument fails for two reasons.

First, we all know there are plenty of married, heterosexual couples who don't have children, either because they have chosen not to, or because they cannot. We know many couples who bring kids into their families using the same reproductive technologies as same-sex couples, and many others who adopt children, as do many gay and lesbian couples. Yet nobody would suggest that we could deny such couples the right to marry.

My grandfather died when I was quite young, and a number of years later my widowed grandmother, Babbo, married a handsome widower, Dudley. They were in their 70s at the time. When Babbo and Dudley walked down the aisle in that church, and as we soaped "Just Married" onto their car windows and put rocks in their hubcaps, there wasn't a person present who thought for one second that Babbo and Dudley might biologically beget a child together. But nobody would have suggested that their union was less valued or worthy of equal treatment and respect for that reason.

The second problem with the procreation argument is sort of the flip-side of this. It can't really be that the State is all that interested in how a child is conceived. What the State may care about is creating a stable environment in which

to raise children. That's not the only purpose of our marriage laws, as we know from the Babbo-Dudley example, but it may be a legitimate state goal. The problem for the State is that this rationale doesn't support denying Nina and Stacy, Stan and Peter, and Holly and Lois the right to marry. In fact, two of these three couples have children. If the State really cared about providing a stable environment for children, it would seek to extend the same protections and stability to the Noahs of the world, rather than denying their parents the right to marry.

LESSON #4: EXPECT THE UNEXPECTED:

Decision day brought us two big surprises— one substantive, and one trivial but amusing. The Vermont Supreme Court hands down its decisions on Fridays. That's just what it does. The Court calls counsel sometime between 9:00 a.m. and 11:00 a.m., and then decisions are posted online and are released to the public at 11:00 a.m. We argued this case in November, 1998. So beginning in the spring of 1999 we had to be on call every Friday. We staggered our vacations, depositions, and out-of-office commitments to ensure that either Susan or I was in the office on any given Friday. We had an elaborate decision-day protocol in place involving notifying all the right people, pulling together a press conference, and responding to the decision. And I wore the same outfit every Friday because I thought it was the best-suited for a press conference. (Actually, there were two different suits because our waiting spanned several seasons, from the spring through the summer and fall and back into the winter.) Anyway, we went through this ritual week after week, month after month, every Friday. Sure enough, on *Monday*, December 20, while our guard was down, the decision came down. . . . I had to race home to get my press conference suit.

The more significant surprise was the substantive one. We had prepared ourselves mentally to win. We had tried to prepare ourselves for the possibility of losing. But I have to confess, we truly weren't prepared, emotionally, politically, or otherwise for what we got.

In terms of the legal analysis, the Vermont Supreme Court agreed with our arguments to a large extent. After reviewing the history of the Common Benefits Clause, and its own caselaw applying the provision, the Court articulated a three part test to describe its Common Benefits Clause analysis. In particular, the Court concluded that in analyzing whether a classification violates the Common Benefits Clause the Court should weigh three factors: the significance of the benefits and protections of the challenged law; whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and whether the classification is significantly overinclusive or underinclusive.[5]

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[5] *Baker*, 10 Vt. L. Wk. at 368.

Applying this test to the various rationales offered by the State to support its discrimination, the Court concluded that "none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law.[6]

Summarizing the thrust of its decision, the Court wrote in its concluding paragraph:

> The past provide many instances where the law refused to see a human being when it should have. . . . The future may provide instances where the law will be asked to see a human when it should not. . . . The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than 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.[7]

These words, self-evident as they may sound, are truly historic. Having read what courts have had to say about gay and lesbian people for years, I can assure you that this simple recognition of our common humanity is monumental. With that recognition, and its aspiration to inclusion, the Vermont Supreme Court has distinguished itself. We expected no less.

But then the Justices, with the exception of Justice Denise Johnson, did something we didn't expect— something profoundly disappointing. Having articulated a lofty vision of inclusion for all Vermonters, the majority of the Court backed away from that promise and opened the door to further exclusion. The Court broke new ground in recognizing our claim to equal treatment under the laws, but then stopped short of ensuring that equal treatment. The Court acknowledged that the Vermont Constitution was there to protect gay and lesbian Vermonters as much as any other Vermonters, but then turned us over to the political process as if *our* constitutional rights were subject to popular vote.[8]

In particular, the Court said that even though our clients sought marriage li-

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[6] *Id.* at 371.

[7] *Id.* at 372-73.

[8] Justice Johnson strongly criticized the majority's decision to send the Plaintiffs to "an uncertain fate in the political cauldron," declaring that she "would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license based solely on the sex of the applicants." *Id.* at 380.

censes, our arguments focused primarily on the *benefits* that flow from marriage, not on the legal status of being married (as if the legal status of being married is not itself a benefit of marriage). The Court created an artificial distinction between the *status* of marriage and the *benefits* of marriage— a dichotomy never suggested or evaluated in the 19 briefs filed with the Court— and then redefined our case solely in terms of the latter.[9]

The Court concluded that our clients were clearly entitled to the legal benefits of marriage— not just a few, but the *same* benefits available to heterosexual married couples.[10] In an extraordinary act of deference to the legislature, however, the Court did not actually grant our clients any relief at all, but deferred further action for some undefined period of time in order to give the legislature an opportunity to respond.[11] The Court noted that the legislature could comply with the requirements of the Vermont Constitution by revising Vermont's marriage laws to include same-sex couples in marriage.[12] The Court also suggested that the legislature might consider creating for same-sex couples some sort of parallel structure— perhaps modeled on European registered partnership laws.[13]

The Court declined to resolve, and reserved for some future time the question of whether such a parallel structure, providing marital benefits to same-sex couples but denying us marriage licenses, would be constitutional[14]. (We obviously think not; the Vermont Constitution's requirement that same-sex couples be afforded the *same* benefits of civil marriage, a requirement recognized by the Court, has to require inclusion of same-sex couples in the legal status of marriage, even if they have already have access to marital benefits. After *Baker*, though, that's another question for another day.) Although the Court declined to resolve this issue either way, the fact of the matter is that the Vermont Supreme Court opened the door to consideration of a "separate-but-equal" regime for gay and lesbian couples in marriage by suggesting that after all these years of walking we were entitled to ride on the bus— but it might be okay to require us to sit in the back.

I don't mean to sound overly harsh. The Court's decision is truly courageous in some ways. But it's also, frankly, cowardly in others. It's a strange combina-

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[9] *Id.* at 371.

[10] *Id.*

[11] *Id.* at 371-73.

[12] *Id.* at 364.

[13] *Id.* at 371.

[14] *Id.*

tion of *Plessy v. Ferguson*[15] and *Brown v. Board of Education*[16] in the same decision, if you can imagine. The decision has unquestionably raised the bar, and broken important ground for the next court to consider the issue; I only hope it hasn't also set a ceiling, and that the next court that addresses these issues finishes the job, embracing the principles of *Baker* and seeing them through to their just and logical conclusion.

LESSON #5: THERE ARE HEROES AMONG US

I couldn't figure out how to caption this section. I also considered "Democracy's Messy," "Lawmaking in the Sausage Factory," "Every Vote Counts," "Compromise Happens," "Compromise Hurts," and "Compromise Helps." There were so many different lessons from the legislative process. What struck me most, when all was said and done, was how many ordinary folks who never picked this battle rose to the occasion and demonstrated genuine strength and integrity when push came to shove.

The Court's decision was December 20, 1999. The legislative session began in the first week of 2000. As you can imagine, the decision unleashed scrambling among advocates on all sides of the issue, and within the leadership of the legislature. Although the legislative agenda had already been set, and this issue was not on the list, many leaders felt compelled to act for a variety of reasons. Some were genuinely committed to removing a constitutional deprivation as soon as possible. Some were panicked that if the legislature did not quickly create some separate structure to recognize and protect same-sex relationships the Court would, at some point, order the State to issue our clients marriage licenses. That was substantively unacceptable to some legislators, and politically frightening to others. Some were moved by a combination of the above factors.

So beginning the first week of the legislative session, the question of whether and how to recognize committed same-sex relationships was at the top of the House Judiciary Committee agenda. Led by soft-spoken, moderate Republican Chair Tom Little, along with vice-chair, openly-gay Democratic Vice-Chair Bill Lippert, the eleven-member, tripartisan (5 Republicans, 5 Democrats, 1 Progressive) House Judiciary Committee spent the better part of six weeks taking a crash course in family law, constitutional law, and gay and lesbian rights. The committee consciously chose to fully inform itself before setting out on a particular path, or drafting a particular bill, so it heard from witness after witness, including legal scholars across the spectrum, family law experts, gay and lesbian people, historians, and clergy.

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[15] 163 U.S. 537 (1896).

[16] 347 U.S. 483 (1954).

The committee faced three major options: revise the marriage statutes to include same-sex couples, create a parallel structure, or do nothing. Nobody advocated for the second option. Instead, the Vermont community was deeply divided. Of those who cared about the issue, roughly half advocated for full marriage rights; anything less, we contended, would continue to stigmatize our relationships, and would resonate with the Jim Crow laws of the mid-20th century South, which purported (wrongly) to provide equal accommodations to African Americans while maintaining a legal separation between whites and people of color. (I should note that we have never contended that the dynamics of discrimination against people of color were and are identical to the dynamics of discrimination against gay and lesbian people; there are obvious differences on various levels in the character and degree of different forms of discrimination. But the *analogy* is undeniable.) In any event, that was our position— that we would not and could not accept anything short of full equality.

On the other side the opponents of equal rights for same-sex couples were advocating that the legislature should do nothing— except perhaps impeach the Justices of the Vermont Supreme Court. Although their rhetoric focused on protecting marriage, it became clear that they did not merely object to changes in the institution of marriage; they objected to the underlying concept of legal parity for same-sex couples and the implicit acceptance of homosexuality that would reflect. Just as we couldn't embrace the "separate" in "separate-but-equal," they couldn't accept the "equal" part of the analysis.

So in the face of this intense polarization— which hadn't yet shattered the general ethic of civility within Vermont politics and community— the committee found itself not just in a statewide spotlight, but a national and even international spotlight. Legislators who had viewed five constituent letters on a given topic as evidence of a groundswell of public opinion suddenly found themselves bombarded by hundreds and even thousands of letters, e-mails, and phone calls at home and at the statehouse. Instead of working in the quiet, relative privacy of their small committee room, the committee found itself working in front of cameras, reporters, and dozens and dozens of citizens day in and day out. And bear in mind that these are not professional legislators; it's a part time legislature that meets around 5 months per year. The House Judiciary Committee consisted of three lawyers, two retired state troopers, a retired teacher, a housing consultant, a non-profit director, a retired social worker, a fundraiser, and a saleswoman. The pressure these folks came to bear— relating to an issue that none of them had chosen or probably would have chosen on their own— was unimaginable.

In the face of this stress, thanks in no small part to the measured leadership of Chair Tom Little, the committee kept its focus, heard witness after witness, and held together as a group. Eventually, about six weeks into the process, it was time to pick a path. The good news is that not a single committee member ended up in the "do nothing" camp. After hearing all the evidence, everyone agreed that maintaining a world in which same-sex relationships were not protected or

acknowledged was not an acceptable option.

The bad news, from our perspective, is that the committee opted to craft a compromise measure— a parallel system— along the lines that advocates on both sides of the issue had opposed. That put us in a real bind: without our support, the measure would die. We had to decide whether or not to support the proposal. We withheld judgment until we saw the actual product, and then we went through days and days of intense, emotional, and challenging meetings and phone conferences with our fellow freedom-to-marry advocates. People quit the organization, and then rejoined. Tears happened. Stress ran high. Fortunately, even in the face of real differences of opinion, our advocacy community held together and avoided the bad feelings and ill will that could have interfered with our deliberations. Ultimately, we collectively decided to support what was coming to be known as the civil union bill, despite our reservations, for four reasons.

First, the benefits and protections of the bill were comprehensive. This was not a glorified domestic partnership plan with a limited laundry list of benefits. The bill provided that *every* Vermont law applicable to married couples would apply in the same way to same-sex couples joined in civil union. It didn't attempt to list the laws— it would have been impossible to do so. Instead, it incorporated by reference all of our laws relating to marriage.[17] That was significant.

Second, the bill provided for the formation and dissolution of civil unions in the same manner as marriage. This was important to us— it goes to this issue of the "story" told by our laws. Although the story told by the law reflected a continuing sense of separation between same-sex couples and heterosexual couples, the parallelism between marriage and civil unions was significant. You don't just mail in a form to join in civil union; you have to get a license, and the union must be certified by a clergy person, justice of the peace, or judge, just as in the case of a marriage.[18] This process isn't just window dressing; it's one of the characteristics— the benefits and protections— of marriage.

Third, the bill altered the story told by our laws more expressly in the "findings" or preamble section. The final version of the bill acknowledges:

> Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together,

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[17] *See* 15 V.S.A. § 1204 (2000) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a marriage").

[18] *See* 18 V.S.A. § 5160 (2000).

> participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law. . . . The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.[19]

Again, this may seem obvious, but having seen what legislatures have been saying about us for years, this was pretty mind-boggling.

Finally, we believed that civil unions would not be the end of the line. Once we got on the bus, and people got the chance to chat with one another as the bus rolled down the road to justice, everyone would realize the absurdity of the artificial line down the middle of the bus and we'd all choose our own seats after awhile. That's essentially what's happened in the Netherlands; after several years of a law similar to the civil union law, that nation has eliminated the artificial distinctions among committed couples and has simply included same-sex couples in its marriage laws. That doesn't mean we thought we'd turn around in Vermont in a year and get marriage; it'll take some time; but we felt confident that civil unions would be, for the most part, a step forward rather than backward.

So we opted to support the law. I don't have time to tell a lot of the great "war stories" of the legislative process. It's certainly different from litigation. As a lawyer, I'm used to crossing the street to avoid the judge if I'm in the middle of a trial lest I inadvertently walk into an ex parte contact. In the legislative process, on the other hand, I found myself prowling around the coatroom just hoping to catch a legislator for a quick, private conversation. The rules of the game are quite different, and sometimes a little messy.

It was a close vote in the House both times around. (We spent some time in the Senate, which made some changes, then we came back to the House for final approval.) In fact, I remember on the day of the final House vote the Speaker opened the day with an obscure bill relating to septic regulation of trailer parks. The hundreds of spectators who had packed into the house were patient but somewhat perplexed as the bill's reporter read through the bill, line by line. It was only when a supportive representative who had apparently had car trouble came flying through the doors and into her seat that the reporter stopped talking, a vote was conducted, and the House moved on to our business. The septic bill reporter later told us she was prepared to read the entire bill if she had to give her pro-civil union colleague time to get to the Statehouse.

So the bill passed, and the governor signed it. The final version wasn't that different from the original. You can find it online or in Vermont's statute books.[20]

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[19] Vt. Pub. Act 91, § 1 (2000 session).

[20] *See* www.vtfreetomarry.org (last visited June 2, 2001) or

So that's the legislative story in a very small nutshell. I captioned this section "There Are Heroes Among Us," and I'd like to come back to that for a second. The compromise was hard, and learning about the legislative process was fascinating. The closeness of the vote in the House was unnerving. (The Senate vote was not close; the civil union bill passed the Senate 19-11.) But the most noteworthy aspect of the story for me involved the heroism of ordinary Vermonters.

There were the gay and lesbian citizens, many of whom had lived a contentedly closeted life in small town, rural Vermont for years, who felt compelled to come out, often at great personal risk and sacrifice, throughout the heart of this debate. I think about a woman I met, Lori, who showed up at the first public hearing. She dutifully put her name in the hat, realizing that the more of us who did so, the more our names would be drawn and our collective voices heard. Lori had lived with her partner for a number of years. She was essentially closeted in her public and professional life. Wouldn't you know it? Hers was the first of the one hundred or so names drawn. She sat down at the microphone and spoke movingly about her love for her partner, her family, their life together, and their simple desire to share fully in the legal and civic life of their community. Now you all probably realize how the media works; they don't sit through three hours of testimony and then choose their photos and footage at the end. They take the first shots they can get, and they're out of there. Sure enough, Lori came out of the closet that night onto the front page of all the major newspapers in the state. In fact, a snippet of her testimony was the teaser for the eleven o'clock television news shows that night. To me, Lori represents hundreds of ordinary gay, lesbian and bisexual Vermonters who heard the call and stepped up to the plate.

And there were our family members. Helena Blair, who later became a spokesperson for the Vermont Freedom to Marry Task Force and Vermonters for Civil Unions, first came to light in a letter she wrote to her Senator, which he read on the floor:

> I am a 78 year old Catholic mother of 8. This is not about statistics or Biblical interpretation. It is about a farm family and a son who announced 26 years ago that he is gay. What could we do? Cast him out or accept him instantly? Patronize him or love him? We brought up our 8 children with the same value system. Did we do something wrong? Our son would not choose emotional and cultural persecution. He was just plain born gay. I can only say that God blessed us with eight children. And God made no mistake when he gave us our gay son.

Most of all, there were the legislators. Too many heroes to name. Most leg-

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http://www.sec.state.vt.us/civilunionlaw.html (last visited June 2, 2001).

islators on both sides of the issue, frankly, found themselves in a position in which the command of their own conscience matched the collective preference of their constituents. But some were not so fortunate.

Representative John Edwards, the Republican retired state trooper on the House Judiciary Committee, was not someone we counted as an obvious supportive vote when the process started. His own background hadn't exposed him to many gay or lesbian families, and he represented a very conservative, heavily Catholic district near the Canadian border. Representative Edwards used his training as a law enforcement officer, and worked hard to maintain an open mind and take in all the evidence before reaching a conclusion. He struggled as he challenged and worked through his own instinctive discomfort with homosexuality. In the end, not only did Representative Edwards support the civil union bill, but he spoke out publicly in favor of the bill— despite tremendous pressure from his constituents to oppose it. He did so knowing that it might cost him reelection, because it was the right thing to do. And he was right— it did cost him his reelection. He lost by a substantial margin in the Republican primary. That in itself wasn't so bad, he has explained; it's the former friends and neighbors who still won 't speak to him that have sometimes gotten him down. But despite the tremendous price he paid, John Edwards doesn't express an ounce of regret. He says that being part of the passage of the civil union law was the most worthwhile thing he had the opportunity to do as a legislator; he's made his mark on history, and helped make Vermont a better place for all of its citizens. For that, he has no regrets.

Marion Milne was a Republican three-term representative from Williamstown, Vermont— the heart of the anti-gay organizing in the state. Representative Milne, who was in her mid-60s, kept photos of her grandchildren on her desk in the House chamber to remind her of her obligation to the younger generation. During the floor debate, Representative Milne acknowledged that she would probably lose her seat over her vote, but as she looked at the pictures of her grandchildren, she explained that she had no real choice. She had to do what was right for all Vermonters, and future generations, and could not vote against including an oppressed minority within the law's protections. Like Representative Edwards, Representative Milne lost the Republican primary by a substantial margin; she actually got the Democratic nomination on write-in votes, but declined it and ran in the general election as an independent. She lost that election as well, by a substantial margin. She, too, doesn't mind the political loss nearly as much as the loss of friends and neighbors, the folks who said mean things to her teenage grandson as he campaigned door-to-door for her, and the longtime customers who have stopped patronizing her business. Again, Representative Milne has no regrets about her actions, and is exceedingly proud of her role in Vermont's historic leadership.

I've heard tell of another pro-civil union representative, a devout Catholic mother of seven who has always been quite active in her local parish, who was

asked by her priest to stop attending Sunday services. Apparently he found her presence too divisive. And I'm told that when another pro-civil union representative and his family go to their central Vermont church his fellow parishioners steer clear of, and even vacate, his pew, leaving him and his family isolated within their own faith community.

Don't get me wrong— the vast majority of the folks who supported this law were reelected, and most have not endured the level of animosity I'm describing here. But many have. These folks, who would not have chosen this issue for their own political martyrdom, who may not have even thought about the issue before it was thrust upon them, but who rose to the occasion because it was the right thing to do— these people are true heroes.

LESSON #6: THE SKY DIDN'T FALL

I've alluded to the nasty election season we faced in Vermont in the fall of 2000. It really was awful. The civility that had characterized the debate throughout the court process and even, to a large extent, through the legislative process, evaporated in the heat of campaign season. There were those who believed they could benefit politically from whipping up resentment and anti-gay sentiment, and they did so with a vengeance. The only saving grace was the tremendous support for gay and lesbian Vermonters that materialized in response. The polarization in September and October in our state eclipsed anything we saw even at the height of the debate in the legislature.

When the dust cleared, the story was generally positive. All of the pro-civil union statewide candidates were reelected. Governor Dean, who had been the main target of the "Take Back Vermont" movement, won over 50% of the vote, with pro-marriage-rights-for-same-sex-couples Progressive candidate Anthony Pollina fielding over 10%. Republican gubernatorial candidate Ruth Dwyer, the standard-bearer for the anti-civil union crowd, fielded under 40%— about the same as she had two years earlier before the issue had even surfaced. In the Senate, only one candidate lost reelection largely because of his civil union vote, and it was a close election. Pro-civil union forces maintain a 17-13 majority in the Senate. In the House, we definitely suffered some losses. We saw a decided swing in the balance of the House, with around a dozen incumbents losing their seats over their civil union vote. Now we have an 89-61 anti-civil union majority in the House, and the newly-composed House Judiciary Committee has spent a great deal of time this year trying to find ways to gut the law.

But the political stuff is far less interesting than the human stuff. Since July 1, 2000, over two thousand couples have joined in civil union, around 25% of them from Vermont. I went to a lot of weddings last summer. . . . . They ranged in tone and character from Joseph and Michael's simple service in the town meeting hall, with a justice of peace presiding, to Stan and Peter's "high church"

ceremony at St. Paul's Episcopal Cathedral, complete with officiants in colorful robes, powerful choral music, and abundant quantities of incense, to Mary and Cheryl's completely private ceremony followed by a small gathering with friends. One thing all of these weddings have had in common— something I hadn't thought about and didn't really expect— is the electricity in the room when the officiant says, in some form or another, "By the authority vested in me by the State of Vermont, I now join you in civil union." That acknowledgment, on behalf of the Vermont body politic, means so much to couples who have not grown up taking the recognition for granted, and have not until recently dared to hope for such inclusion in the broader community.

Far more than the November, 2000 elections, and far more than the continuing assault on gay relationships in the 2001 legislature, these people and their families are the real story of Vermont after the passage of the civil union law. The sky hasn't fallen. The institution of marriage hasn't dissolved. Some Vermont families are a little more secure, and nothing's been taken away from anyone else. Gay and lesbian Vermonters, still both bruised from the abuse we've endured through the past year and buoyed by the support we've found, feel nonetheless a little more included, a little more a part of the community. Nobody's been hurt, and some people have been helped tremendously. This is, perhaps, the most important lesson of the Vermont experience.