

Should We Abolish Legal Marriage?

-by Nicholas C. Lund-Molfese

Integritas Institute for Business and Professional Ethics

This article considers the arguments made in *Baker v. Vermont*, wherein the Vermont Supreme Court held that same-sex couples must be granted all the legal rights and privileges that are granted to married couples. The article concludes by questioning if abolishing the legal institution of marriage would be the best way to protect the natural institution of marriage.

On December 20, 1999, in *Baker v. Vermont*,¹ the Vermont Supreme Court held that under the "common benefits" clause of the Vermont Constitution, the state of Vermont is "required to extend to same-sex couples the benefits and protections that flow from marriage under Vermont law."² The court left it to the legislature's discretion to either allow same-sex couples to marry or to grant same-sex couples the same legal rights as married couples through a domestic partnership statute. The court's reasoning is most instructive.

The heart of the court's decision is a three part analysis that focuses on the denial of various legal benefits to same-sex couples that are available to married opposite-sex couples.³ The court first examines what part of the community is disadvantaged by reserving marriage exclusively to opposite-sex couples. Then it considers the legislature's justification for including some couples and excluding others from the benefits of marriage. Finally, it determines "whether the omission of a part of the community from the benefit . . . of the challenged law bears a reasonable and just relation to the government's purpose."⁴

According to the court's analysis, same-sex couples make up the class of persons who are excluded from the legal benefits of marriage.⁵ While this is a convenient judgment for the court to make, is it not equally true that single and divorced persons are also excluded from these same benefits? Are not persons in polygamous unions also being excluded? What about hard working single parents? If the state is irrationally granting benefits to married couples then every non-married person in the state is being unjustly discriminated against. The court does not provide any justification for its decision to limit the "excluded" class to same-sex couples and, in the future, other groups will certainly be demanding inclusion.

Married couples receive a host of tax, insurance and other legal privileges.

The State of Vermont argued before the court that these benefits are justified in recognition of "the government's interest in furthering the link between procreation and child rearing." In addition, the state has a vital interest in "promoting a permanent commitment between couples [sic] who have children to ensure that their offspring are considered legitimate and receive ongoing parental support." The government claims that legally sanctioning same-sex unions will "advance the notion that fathers or mothers are mere surplusage to the functions of procreation and child rearing." Finally, the state argues that, as a matter of public policy, children are better off raised by a man and a woman rather than by a same-sex couple.⁶

In the third part of its analysis the court decides that the state's justification for excluding same-sex couples from the benefits of marriage is irrational. According to the court, the exclusion of same-sex persons from governmental benefits granted to opposite-sex couples does not promote the governmental purposes stated above. While conceding that the state does have a legitimate interest in promoting a permanent commitment between parents for the benefit of their children, and that traditional marriage has been a rational way of promoting that interest, the court is ultimately swayed by the facts of contemporary sociology.⁷

The court correctly points out that "many opposite-sex couples marry for reasons unrelated to procreation" and "some of these couples never intend to have children." Thus marriage law extends government benefits to many persons who have no "logical connection to the government goal." Also, many lesbians and gay men are begetting children through various means and over a million children are being raised by gay parents.⁸ The court justifiably concludes that "the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples."⁹

Married couples, just like their same-sex counterparts, are increasingly turning to heterogeneous fertilization techniques and other reproductive technologies which utilize biological material from someone outside their marriage. The court notes that the state has done nothing to ban such techniques by married couples even though such practices destroy the link between procreation and marriage. Therefore, the court ruled, "there is no reasonable basis to conclude that a same-sex couple's use of the same technologies would undermine the bonds of parenthood."¹⁰

Finally, the court finds implausible the state's argument that, as a matter of public policy, a heterosexual marriage is a better environment for the raising of children. In fact, in 1996 the Vermont legislature removed all legal barriers to the adoption of children by same-sex couples and provided for court mandated child support and visitation agreements in case the same-sex parents terminated their cohabitation. The court ultimately holds that, "in light of these express policy choices, the state's arguments that Vermont public policy favors

opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies, are patently without substance."¹¹

In essence, the Vermont Supreme Court decided against the state and for the same-sex plaintiffs because the state's description of marriage bore little legal or sociological resemblance to marriage as it actually exists. Two ironies should not be missed. First, the arguments of the State of Vermont as to the nature of marriage coincide (in part) remarkably well with Catholic teaching. Second, the court is rather mild in describing the current status of heterosexual marriage.

The Catholic Church teaches that:

By its very nature the institution of marriage and married love is ordered to the procreation and education of the offspring. . . .¹² Techniques that entail the dissociation of the husband and wife, by the intrusion of a person other than the couple . . . are gravely immoral. These techniques . . . infringe the child's right to be born of a father and mother known to him. . . .¹³

Today, the Catholic Church is virtually alone in upholding the inseparability of procreation, sexual intercourse and marriage, and in prohibiting any technique of reproduction that "dissociates the sexual act from the procreative act."¹⁴ These principles are part of the natural law and belong to the essence of marriage. When they are violated, harm is done to the persons involved and to the institution of marriage. That the State of Vermont was forced to resort to similar arguments in defending traditional marriage is convincing secular evidence in favor of the Church's teaching. Pope Paul VI was a true prophet in proclaiming in *Humanae Vitae* that the general acceptance of a contraceptive mentality--once it institutionalized in culture and law a separation of procreation, intercourse and marriage--would lead to the cultural and legal destruction of traditional marriage.¹⁵

As for the second irony, the Court is rather merciful on the institution of marriage as it exists today. In law and culture the institution of marriage, traditionally understood as essentially consisting of unity, indissolubility, and openness to life, no longer exists and has not existed for some time.¹⁶ Vermont law allows for no-fault divorce after as little as six months separation for couples willing to claim that the "resumption of marital relations is not reasonably probable."¹⁷ So much for any legal support for "indissolubility," but Vermont is no worse than most states in this regard. Similarly, while the court does an effective job of pointing out the law's acceptance of artificial means of conception and sodomy, it might also have mentioned the decriminalization of fornication and adultery as further examples of the legal recognition of the separation of sex, marriage and procreation.

Less than a month before the Vermont court's decision, the University of Chicago's National Opinion Research Center released a comprehensive

sociological study which demonstrates the culture's separation of sex, marriage and procreation.¹⁸ The most common type of household in America consists of two unmarried persons who live together without any children. In almost one-third of households with children the adults are not married. Married-with-children (26%) is the *third* most common type of household, after not-married-no-children (32%) and married-no-children (30%). Overall, 62% of households have no minor children living in them and just slightly over half (51.7%) of all children are being raised by a married couple.¹⁹ Cohabitation has become the norm with the majority of women and men "starting off cohabitating rather than marrying."²⁰

In light of the non-traditional choices and experiences of the majority of Americans, it is surprising that marriage law has retained any traditional elements at all. As our nation is a representative democracy, governments are increasingly solicitous of the concerns of the 44% of households that consist of persons who are living together unmarried. Thus, we can expect that family law will increasingly diverge from the natural law.²¹

Given that the legal institution of marriage no longer respects any of the essential elements of the natural institution of marriage, we may have reached a point where government "support" for marriage is more of a detriment than an asset. Marriage as a natural institution and as a sacrament might be better off if the state ignored it rather than perverting it beyond all recognition. As only a fraction of married couples likely intend the essential ends of marriage, it might be fairer for everyone if legal marriage benefits were abolished. Certainly this would be preferable to extending them to anything the state decides to call a marriage.

In the new legal regime I am sketching, persons who wish to participate in the religious institution of marriage would simply get married in church and then enter into a civil contract that would gain for them many of the rights previously granted by the legal institution of marriage. (The law would still need to provide for the rights and responsibilities of parents and might grant a variety of tax and other benefits to persons raising children.) The sacrament of marriage, and even the natural institution of marriage, once freed from guilt-by-association with legal marriage, might actually gain cultural stature. The primary meaning of "marriage" would become religious, rather than legal, and therefore, control over the definition of marriage would rest in the hands of the churches rather than the state. Perhaps most importantly, the abolition of legal marriage would also abolish the lie of divorce and the incongruity of remarriage.

There is much to argue against the idea of abolishing or privatizing marriage. Such a position goes against years of efforts by prominent Catholic intellectuals to preserve and strengthen legal marriage. Abolishing legal marriage may be a bad idea. However, when the Church speaks of the state's

duty to strengthen marriages and support the family, it envisions the state playing a positive role. We may have reached the point, or are quickly reaching the point, where marriage law constitutes not support for, but an attack on, marriage as traditionally understood. In that case, protecting the natural and sacramental reality of marriage may require the abolition of legal marriage.

Notes

1. *Stan Baker v. State of Vermont*, Docket No. 98-032. Available at http://dol.state.vt.us/gopher_root3/supct/current/98-032.op

2. *Ibid.*, p. 3, 39.

3. *Ibid.*, p. 43. The court expressly states that "it is plaintiffs' claim to the secular benefits and protections of a singular human relationship that, in our view, characterizes this case."

4. *Ibid.*, p. 2 -24.

5. *Ibid.*, 27.

6. *Ibid.* 28. The state does offers numerous other token justifications (p. 36) such as "bridging differences between the sexes," and "minimizing the legal complications of surrogate contracts."

7. *Ibid.*, 29.

8. *Ibid.*, 29-30. [Section editor's note: There is probably no hard evidence to back up this statistic cited by the court. One should be very skeptical about its accuracy.]

9. *Ibid.*, 31.

10. *Ibid.*, 32.

11. *Ibid.*, 36.

12. *The Catechism of the Catholic Church*, 1652, quoting from Vatican II's *Gaudium et Spes*.

13. *Ibid.*, 2375.

14. *Ibid.*, 2377.

15. Pope Paul VI, *Humanae Vitae*, see in particular paragraph 17.

16. See, *Catechism*, 1664.

17. *Vermont Statutes Annotated*, 15: 551.

18. Tom W. Smith, "The Emerging 21st Century American Family," National Opinion Research Center, University of Chicago, November 24, 1999. Available at <http://www.norc.uchicago.edu/online/emerge.pdf>.

19. *Ibid.*, p. 25, 28, 29.

20. *Ibid.*, p. 2.

21. In response to these political realities, approximately forty municipalities, four states (California, Hawaii, Massachusetts and New York) and the District of Columbia have domestic partnership registration systems that allow unmarried, cohabiting couples to gain some level of public recognition for their relationship. At least eighty-seven municipal governments (including New York, Los Angeles and Chicago), and the states of New York, Hawaii, Vermont and Massachusetts, have extended domestic partnership benefits to their employees. See, ACLU, "Domestic Partnerships: List of cities, states and counties," 10/29/99, <http://www.aclu.org/issues/gay/dpstate.html>.

