

Term paper on legalizing gay marriage

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Abstract

This paper presents a review of *Legalizing Gay Marriage*, by Michael Mello. Key ideas of this book include the background behind the *Baker v. Vermont* case that challenged the constitutionality of refusing to allow same-sex marriages under the Vermont constitution, the legislative response to that decision, and an examination of civil unions as a compromise position. The applicability of this book is discussed as a historical snapshot of a momentous time in the gay rights movement, as a writing supporting the fundamentality of the marriage right, and as a possible lesson in the interaction of the judiciary and the legislature that would be useful in predicting patterns of future social change.

In his 2004 book, *Legalizing Gay Marriage*, author Michael Mello is memorializing a very specific point in time for the gay rights movement in America. The book discusses the background and holding of the case *Baker v. Vermont* that touched off a legislative response to the issue in Vermont, the formation a new form of marriage termed the “civil union.” Mello goes on to chronicle the heated political and cultural environment toward gays and lesbians that resulted from that legislation. The book finishes with an evaluation of civil unions and a discussion of whether civil unions should be considered a sufficient victory, despite the fact that it is not gay marriage. The book serves as an example of the interaction of the judicial, legislative, and political processes that surround controversial social change in America. In this way, the story told in *Legalizing Gay Marriage* not only echoes social change that had gone before, such as the ban on segregation and the ban on interracial marriage, but can also provide lessons for future social

movements attempting to bring about change within this system.

In describing the Baker decision Mello very wisely tells not only the judicial side of the story, but also delves down into the personal lives of the three homosexual couples who brought suit in the case. Judicial cases that deal with civil liberties are interesting for the details behind the case facts. For example, he relates that Nina Beck and Stacy Jolles, two of the Baker plaintiffs, had a 2-year-old son who was born with a heart defect and was dying and Stacy had been denied entry into the emergency room because of her lack of legal relation (Mello, 2004, p. 33). Mello also had a student research assistant interview Beth Robinson, one of the attorneys that worked for the organization that sponsored the suit, the Vermont Coalition for Lesbian and Gay Rights. The interview report told the story of her and Susan Murray, the other attorney involved (Mello, 2004, pp. 31-33). The use of personal stories and interviews greatly increased the interest in this section of the book and helped balance the author's personal approach to the book's subject matter.

The balance of Mello's viewpoint is necessary because his opinions on the topic are obviously strongly held. His disapproval of the civil union system, but begrudging acceptance of it as a valid compromise on the issue of gay marriage, perhaps for the sake of the gay rights movement, begins from page one and carries through the entire length of the book. However, the necessity of using many outside sources, such as legislative history, many, many newspaper articles, and personal interviews help temper his position and provides a means for other viewpoints to be told. The use of so many sources, a potential weakness of the book, actually saves it from being

merely one person's view of the situation and instead a valid recordation of that point in time, in Vermont, as the first state to successfully provide a method of gays and lesbians to marry, in a fashion. Although it does remain a question: is a non-gay, non-Vermont native the right person to record what happened?

Perhaps the best place within the book to answer this question is where Mello discusses the anti-gay and lesbian backlash that resulted with the passage of the civil union legislation (Mello, 2004, 48-63). His meticulous recording of the innumerable letters to the editor were frankly difficult to read, given the page after page of nasty, hateful, vitriolic comments.

However, not being gay may have allowed Mello the ability to gather the information and present it in a less emotional way than a gay author may have been able to do. In this way, it allowed the human side of the letter writers shine through despite the hate flowing from their pens. The letter writers were people, too, with their obviously highly emotional opinions about the topic. Beyond merely recording the emotional and culture environment, these letters serve another important function.

Recording these comments was central to a showing of gays and lesbians being a despised minority and deserving of a civil liberties treatment to their judicial case, something the Baker court did not take to the full extent of providing actual marriage rights. Arguably, if it had afforded civil liberty ramifications to the case, the only valid remedy would have been full marriage rights. Instead the court stated that a solution was needed and pushed the issue to the legislation, and the civil union process was the result. Mello soundly criticizes this approach in the later parts of the book,

and the reactions of the public described in the middle section strongly support his position. In one of the most compelling sections of the book, Mello states:

The avalanche of homophobia that swept Vermont following Baker demonstrated that prejudice based on sexual orientation was real in Vermont. The Baker court was an eminently legitimate act of the judiciary: to protect the civil rights of despised minorities. As I've suggested, this is what courts are for – and it's why the civil rights of minority ought not to be decided by majority vote (p. 144).

With this statement Mello provides the greatest lesson of the book, an illustration of the function of the judiciary in civil rights movements and what happens when a court diverts parts of its function to the legislation.

Mello was not the only person conflicted by the actions of the Vermont judiciary and legislature. Another very interesting situation described in the book is the difficult position of Democratic Rep. William Mackinnon (Mello, 2004, p. 161). Legislation in Vermont requires the passage of two separate voting rounds. In the first voting round, Mackinnon voted against the civil union law because it did not provide marriage rights equal to heterosexuals. It was only after a highly vocal anti-gay group that opposed the bill publicly thanked him for voted against the bill did he change his vote to “ yes.” This conflict can show proponents of future social change what the danger of a middle position can be. They can lose the support of even politicians that are “ on their side” by presenting legislative solutions that do not take the issue to its farthest conclusion. Although ultimately this did not cost the gay and lesbians of Vermont, as the civil union legislation did pass, a scenario can be

imagined where no progress is made because the solution proposed was too timid.

A further lesson of the book is the position of these events within the general context of civil rights litigation. In the later section of the book, Mello compares the results of this judicial action with those of segregation and interracial marriage. He makes a compelling argument that the civil union law is a reiteration of the “separate but equal” solution in the education context that was soundly criticized and rejected by Justice Warren in *Brown v. Board of Education*. This is particularly convincing when taken into context that separate is not only inherently unequal but also unmistakably inferior (Mello, 2004, p. 161). Mello goes on to discuss that although the Baker court was correct in recognizing “our common humanity” with those that are gay, it did not go far enough in recognizing the marriage right as something fundamental. This contrasts sharply with equally mundane act and arguably less fundamental acts that have been found so, such as “eating a cheeseburger and drinking a Coke at a Woolworth lunch counter in North Carolina, or riding a crosstown bus in Montgomery, Alabama or staying at a motel in Atlanta” (Mello, 2004, 161). When stated in this manner, comparing factual patterns of fundamental rights from the segregation civil rights cases to the marriage right, it is difficult to see the civil union solution as anything but a contrived middle ground.

This whole scenario is particularly interesting in the context of the current state of legalization of gay marriage in both Vermont and the nation. In 2009, Vermont did make gay marriage legal, but it took an over-ride of the governor’s veto to do it (Carlson, 2009). Currently, at the national level there

is a constitutional challenge in the Supreme Court to California's ban to single sex marriage, but it is widely believed it will not result in a national right and thus will not be the last word (Biskupic, 2013). Twelve of 50 states and the District of Columbia permit gay men and lesbians to marry, with a projected ten more states having either equality or partial-level equality for gay couples by 2014 (Flaherty, 2013). Obviously, the political climate is very different now than it was when Mello wrote his book, but this does not render the experiences and its lessons, as seen through Mello's strong personal opinions, any less valid, particularly for those advocating for social change in the future. Such advocates are precisely those who should read this book.

References

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