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Dale Carpenter

University of Minnesota Law School, dalecarp@umn.edu

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A TRADITIONALIST CASE FOR GAY MARRIAGE

DALE CARPENTER*

I will present here the outline of an argument for same-sex marriage within a particular school of conservatism. Let's call it traditionalism or Burkeanism, after the eighteenth century British statesman and writer Edmund Burke. It is important, I think, to note at the outset what I am not talking about. I am not talking about libertarianism. It is not economic conservatism. It is not neo-conservatism. It is not religious conservatism. And it is not compassionate conservatism.

My aim is not to argue normatively for Burkean conservatism as an approach to all social change and public policy. My own view is that while it is generally preferable, there are times when it is not appropriate. Emergency circumstances, for example, would not be a time for Burkean incrementalism. It is also not my aim to make constitutional arguments for a right to same-sex marriage. I could not improve on the presentation by Dean Choper on that score,¹ and I will not even try to do so. Instead, I am basically attempting to do five things.

First of all, I will describe briefly what I mean by Burkean conservatism. Second, I will sketch, based on that description, a case against the recognition of gay marriages. Third, I will outline an affirmative argument for same-sex marriage. Fourth, I will reconsider, in the light of those arguments, the Burkean case against same-sex marriage. Finally, I will discuss what a Burkean conservative ought to say about the pace and the process for achieving same-sex marriage.

First, what do I mean by Burkean conservatism? The basic idea of Burkean thought is that we should respect tradition and history. We should, in general, prefer stability to change, the tried to the

* Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota School of Law. This piece is substantially based on Professor Carpenter's presentation at SOUTH TEXAS LAW REVIEW's symposium, *Gay Marriage in the Conservative Movement*, 50 S. TEX. L. REV. 1 (2008).

1. See Jesse H. Choper & John C. Yoo, *Can the Government Prohibit Gay Marriage?*, 50 S. TEX. L. REV. 15 (2008).

untried, and continuity to experiment.

I think the best quotation from Burke's writing that captures this basic idea comes from his most famous work, *Reflections on the Revolution in France*. He wrote:

[I]nstead of casting away all our old prejudices, we cherish them to a very considerable degree, and, to take more shame to ourselves, we cherish them because they are prejudices; and the longer they have lasted, and the more generally they have prevailed, the more we cherish them. We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.

Russell Kirk was a modern American disciple of Edmund Burke. Reflecting on Burke's approach to the past and to change, Kirk wrote that Burke did not believe we are condemned to a perpetual retreading in the footsteps of our ancestors. Burke was obviously not opposed to all evolution in a society that honors traditions and values. That would be, as Burke once said, like trying to rock "a grown man in the cradle of an infant." Instead, Burke counseled deliberation and patience in reform. He said that we should base change on experience, not on abstraction and not on philosophical principles divorced from lived reality. Burke wanted a slow but well-sustained progress, and for that reason, he supported incremental change rather than the kind of convulsive upheaval he saw in events of his own time like the French Revolution. Notably for Burke, even what we presently regard as fundamental principles are not immune to critique and revision based on the lessons derived from experience.

With that very brief primer on Burkean conservatism, how would we sketch a case against the recognition of gay marriage? The case would have four basic elements. First, gay marriage is, of course, a change. Because of that alone, we should be resistant to it and suspicious of it. Second, marriage is a long-standing cherished and important institution that has never before in its history included the union of a man and a man or a woman and a woman. This historic practice of uniting men and women and not same-sex partners may have a reason that our current logic cannot fully understand. Third, gay marriage is being brought to us in the service of non-marital and abstract causes, such as equality, inclusion, and tolerance. Fourth, and worst of all perhaps, it is a radical change being thrust upon us suddenly by impatient activists and courts. These activists and courts have tended to be hostile, both to marriage itself and to tradition as a

basis for law. That, I think, is the strongest case that one can make against same-sex marriage using Burkean premises.

Against that Burkean critique, how might we construct a response? We must begin with an observation that much of the public policy toward homosexuals in this country was developed in a time when, quite frankly, we did not know much about homosexuals, how they lived, what they were like, how many there were, and so on. We filled in the gaps in our knowledge with myths about homosexuals: that they were dangerous, that they were predatory, especially toward children, psychopathic, and maladjusted.

In the twentieth century, a process of medicalization of the homosexual and of homosexuality occurred, in which homosexuality was viewed as a kind of disease to be cured—not a physical one, but a psychological one. This basic perspective has changed in the past century, especially in the last fifty to sixty years as homosexuals came out of the closet in large numbers and as homosexuality has become a subject of systematic study and experience. From that study, a strong consensus has developed in the scientific, medical, sociological, and psychological communities about homosexuals. They are not mentally ill or dangerous. They are much the same as heterosexuals in all measures of adjustment and in terms of need for love and companionship.

While we don't know with certainty what causes a person to have a homosexual orientation, or a heterosexual orientation for that matter, we do know that homosexuality as an orientation is not consciously chosen and cannot easily be changed, if at all. It is not contagious. As Judge Richard Posner pointed out in his book, *Sex and Reason*, homosexuals are not created by recruitment or persuasion or seduction.

There are people, of course, who dissent from one or more of these propositions. It would be surprising in a country of some three hundred million people not to find someone dissenting from these views. But in contrast to the past, they now hold a distinctly minority view that has, frankly, no good empirical or experiential support.

All of these are things that we did not know until the last fifty or so years. Also, consider the dimensions of the issue. Conservatively speaking, there are about nine million gay people in the United States using a three percent baseline to estimate the number. According to a 2005 federal government estimate, there are about 770,000 same-sex couple households in the United States. And that is almost certainly

an undercount. That is, as Charles Murray has pointed out,² a small percentage of the whole population of the United States. If sacrificing the interest of that larger group is required in order to recognize the interests of this small minority, then that sacrifice is probably not worthwhile.

The numbers of gay people and same-sex couple households in the country are things that we did not count, and that the government certainly did not count, until about two decades ago. When you think about it, that is a considerable number of people who will never have a reasonable prospect of marriage in their lives. It denies to them the most powerful social and legal institution we have for encouraging values that traditionalists hold dear such as commitment, fidelity, and monogamy. Perhaps that denial is justified and we are right to withhold these encouragements and incentives from homosexuals, but at the very least, we have to recognize that a trade-off is involved.

According to the 2000 Census, about twenty percent of all of the male couple households in the United States and thirty-three percent of all the female couple households in the United States are raising children. That might somewhat overestimate the percentages, but it is not too far off. What we do know, using the most conservative numbers available, is that there are at least one million children in this country right now being raised either by single gay people or by gay couples. None of these children have the protection and benefits that marriage would provide to their families. We were unaware of the dimensions of this phenomenon until recently, so we could easily ignore or dismiss its growth and development. We no longer have that excuse. The question now is, "Now that we know, what do we do?" How might marriage help?

There are certainly possible benefits, both to individuals and to communities, in the recognition of same-sex marriages. Let me first discuss the possible individualistic benefits, some of which have already been alluded to. Certainly for the couples who would participate in same-sex marriages, there is little doubt, I think, that marriage would improve their prospects as couples in the long-term and enhance their lives in a number of ways. The only question really on the table is what the magnitude of that benefit would be and whether it would be as great as it is for heterosexual couples.

Certainly legal benefits are involved—more than a thousand of them at the federal level and more importantly, even more at the state

2. See Charles Murray, *Love Has Nothing to Do with It*, 50 S. TEX. L. REV. 77 (2008).

level. Same-sex marriage advocates usually treat these legal benefits as the most important benefits provided by the right to marry. I doubt that is the case.

More important than the legal benefits are the caregiving benefits. Marriage makes one other person responsible for your well-being. Someone watches you when you are ill, helps you when you lose your job or suffer an injury, and promises to be there for the long term.

After legal and caregiving benefits, the third class of benefits may be the most important of all. These are the social benefits of marriage. As Jonathan Rauch has pointed out, marriage is the way a couple signals the depth of its commitment to each other and signals that commitment to families, to friends, to workers, and to communities. That commitment is then reinforced by social expectations.

Professor Nagel³ made an excellent point in noting that at least some of that social expectation may not apply initially to same-sex couples because of resistance to the idea of gay marriage. However, the most important socially-reinforced expectations come from families and friends, people who are likely to be most supportive, even initially, of the relationship that has just been entered. Perhaps the whole social benefit will not be immediately captured, but it is reasonable to expect that a large amount of it will.

In addition, there are the benefits to children. The children being raised by gay couples would surely be better off if their parents could be married, both for legal reasons and because of the enhanced stability that their families would enjoy.

Any time you talk about gay marriage and children, you always hear something like the following objection: A married mother and father is the best environment for raising children. This is what Professor Bradley calls the optimality view.⁴ It's essentially a reasonable view—and it might be the correct view—but I think Professor Bradley was correct to dismiss it, though perhaps not for the reason that he gives.

The reason I would give for dismissing the optimality argument is that it is largely irrelevant to the debate over same-sex marriage. Here's why: No serious opponent of same-sex marriage advocates removing children from their gay parents. No opponent in this

3. See Robert F. Nagel, *Marriage and Practical Knowledge*, 50 S. TEX. L. REV. 37 (2008).

4. See Gerard V. Bradley, *Three Liberal—but Mistaken—Arguments for Same-Sex Marriage*, 50 S. TEX. L. REV. 45 (2008).

symposium proposes that.

Whether or not gay marriage is allowed, children will continue to be raised by gay parents in this country, and it will happen in increasing numbers, as it has over the past several decades. The real question on the table when it comes to the welfare of children is this: Will these children be raised in homes that enjoy the protections and benefits of marriage or will they not?

There are also communitarian benefits, that is, benefits for the entire community, in the recognition of gay marriage. I go back to Professor Bradley again because he asked exactly the right questions: What would be the state's interest in recognizing same-sex marriage? What would be the public purpose or interest in recognizing these marriages? I can think of four.

First a possible communitarian benefit, or State interest, would be that marriage by some measure, would better the lot of millions of our fellow citizens who are living in gay families today. That is a material and moral interest that we all have, and it cannot be easily dismissed.

Second, there might be an advantage to limited government, or the concept of limited government. Consider this: Married people make relatively fewer demands on state welfare services and on the healthcare system. The Congressional Budget Office in 2004 estimated that nationwide same-sex marriage would save the federal government almost a billion dollars a year in healthcare and other costs. More savings will occur at the state level. I am not proposing same-sex marriage as a way to balance the federal budget, but a billion here and a billion there adds up to real money. This savings should serve the goal of limited government, something that conservatives believe in, or used to believe in.

Third, gay life and culture in general could benefit from the recognition of same-sex marriages. One concern often heard from traditionalist conservatives is that gay culture is characterized by a series of cultural pathologies: too much promiscuity, too much drug use, too much alcohol abuse, too little personal responsibility, and too little connection. One fear is that this culture will infect marriage and somehow change it. I believe that particular fear is overblown as it assumes a large effect from what will, after all, be a very small cause because gay marriages will be a tiny proportion of all marriages. We have been reminded repeatedly that gay people comprise such a small portion of the population that they are irrelevant to the discussion about marriage in the country. One has to turn around and ask: If homosexuals are such a tiny minority, how is it that they will bring

about the destruction of marriage?

However, if the concern is with gay culture itself, the question then is this: What should the policy on marriage be? Should we allow it or prohibit it for these couples? Could marriage have the sort of traditionalizing effect on gay culture and individuals that conservatives, and especially traditionalist conservatives, would cheer?

Law has only a limited role in changing culture. Up to now the law's role and the law's message to gay people has been entirely perverse from a traditionalist perspective. Here's one way to think about it: American law embodies a kind of asymmetry. On the one hand, the law says to gay people, "Go out and have as much sex as you like. You have a constitutional right to it." On the other hand, the law says to these same people, "There will be nothing available to you to channel all of that sexual activity into a productive, healthy, and stable family life." I cannot think of another demographic group in our society to which that double message is being sent. Because we are not returning to the criminalization of sodomy—the question really is: What do we do about the second half of that message? When same-sex marriage is permitted, gay couples—to borrow the words of Martin Luther King—will not be free at last. In a sense, they will be bound at last—bound to traditions, to other people, to communities, and to a culture.

These possible traditionalizing effects of same-sex marriage on gay culture and life have led to a great deal of concern and anxiety on the part of some activists on the left. Paula Ettelbrick, a well-known lesbian writer and early critic of same-sex marriage, worries about this effect:

Ironically, gay marriage, instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context. Just as sexually active non-married women face stigma and double standards around sex and sexual activity, so too would non-married gay people. The only legitimate gay sex would be that which is cloaked and regulated by marriage. . . . Lesbians and gay men who did not seek the state's stamp of approval would clearly face increased sexual oppression.⁵

I believe that reaction is exaggerated, but there's enough truth in

5. Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK: NATIONAL GAY AND LESBIAN QUARTERLY, Fall 1989, at 9, reprinted in LESBIANS, GAY MEN, AND THE LAW 401, 403 (William B. Rubenstein ed., 1993).

it that I believe it should warm a traditionalist's heart.

Fourth, there might be a possible communitarian benefit to marriage as an institution. Conservatives, I think, rightly worry that there are a lot of problems with marriage today: high divorce rates, lots of births out of wedlock, and very little respect for marriage. But none of these threats to marriage were created by gay people.

Conservatives nevertheless say that this is a time of instability and that it is risky to add to the pressures and strains on marriage by making such an important change now. I have some sympathy with that concern. There are possible unintended consequences of any change, and we have to pay attention to them. But instead of being a threat to marriage, consider that gay marriage might be a very small part of its revival. Gay couples are now living together and are raising more than a million children in this country, entirely outside of marriage. As Jonathan Rauch has argued, their very existence is a message to the culture that it is okay not to be married, that you can raise your children, you can have a happy life, you can live a long time, and you can do very well entirely outside of this institution.

Now, there are a lot of people who think that the message being sent by all of these unmarried gay couples raising children outside of marriage is a wonderful message. We need a multiplicity of family structures and forms. These are terrific developments, they believe. But I would not think that is the kind of message a traditionalist would like very much. Gay marriage could reinforce the idea that marriage is the normative status for people who are willing to make the legal and social commitment that it entails.

This is exactly what sexual liberationists fear so much about same-sex marriage. Consider, for example, what Michael Warner, a professor at Rutgers, had to say about the possible effects of gay marriage in a book he wrote a few years ago. The effect of gay marriage "would be to reinforce the material privileges and cultural normativity of marriage. . . . Buying commodities sustains the culture of commodities whether the buyers like it or not. That is the power of a system. Just so, marrying consolidates and sustains the normativity of marriage."⁶ My reaction to that is, "Well, just so." What Warner fears, traditionalists should, at least in principle, cheer.

With all of that in mind, let us revisit the Burkean case against the recognition of same-sex marriages, and look at the four points that

6. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 109 (1999).

I raised earlier.

First, of course, gay marriage is a change; however, it is obvious that not all change should be resisted. Burke himself recognized that change is a means of society's preservation. I believe what the Burkean approach would counsel is that gay marriage advocates, in this debate, have the burden of proof. But it cannot be and should not be an impossible burden.

Second, it is also true that the man-woman traditional definition and understanding of marriage may embody a logic of its own that we cannot fully appreciate or that we have somehow lost over time. That urges a special caution on the part of reformers, but it does not entirely defeat the argument in favor of same-sex marriage. The same type of argument could be made any time a traditional practice has been changed, from ending slavery to granting women the right to vote. Also, it could be argued that while there have been a lot of changes in marriage, nothing but man-woman marriages have existed because we have never had man-man or woman-woman marriages.

Yet the same sort of thing could be said about any change in marriage. Prior to the change we never practiced the thing that changed. Every time we confront this question of whether we should change, we could always confront the objection that we have never done that before. Burke's insight about tradition is a warning to base change on actual lived experience and not simply on reason. It is not a command to resist all change.

Third, while some same-sex marriage advocates do in fact speak in very abstract terms about their cause, gay couples and families are not an abstraction. Their existence is not theoretical. They are not people who happen to live under the same roof, who are joined together only by a shared commitment to the philosophy of Michel Foucault. Gay families are part of the lived experience of this country.

Fourth, is gay marriage really such a radical change that is suddenly being forced upon us? As for whether it is really radical, other marriage reforms in the past hundred years certainly seem to have affected marriage much more comprehensively. Consider no-fault divorce for example, which affects every marriage in a jurisdiction that accepts that idea, or women's equality, which has grown up over the past one hundred and fifty years. Both affect every marriage involving a man and a woman. In comparison to that, gay marriages will represent an incremental addition of perhaps three percent in the number of married couples. If David Frum is correct in

asserting that the take-up rate by same-sex couples has been very small,⁷ then the numbers should be even smaller than that.

As for the suddenness of this change, gay families have in fact been growing up around us organically for a century. They are not the top-down creations of government bureaucrats or radical visionaries. They are bottom-up facts of life.

Let me say a few things about pace and process. As I mentioned earlier, Burke believed in a slow but well-sustained progress. Is that what we have been witnessing? The truth is for some time in this country that we have already been on an incremental path to the full recognition of same-sex relationships.

First, I would include as part of this path the decriminalization of sexual relations between people of the same sex which has occurred since the drafting of the Model Penal Code and has occurred legislatively and judicially over a period of about fifty years. I mentioned earlier medicalization. A de-medicalization of homosexuality has occurred in our society, particularly when the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973.

An incremental path towards the recognition of same-sex relationships started with private domestic partnership policies and moved to some limited public recognition of same-sex relationships by cities, counties, and states. As a result, we now have full same-sex marriage in Belgium, the Netherlands, Spain, Canada, and South Africa. In some of those places, it was achieved legislatively. In others, it was brought about judicially. And, of course, we now have it in Massachusetts. More than that, we have civil unions, or the equivalent of civil unions, in several more countries, including Britain, France, Germany, and the Scandinavian countries. In the United States, we now have it in Vermont, New Hampshire, Connecticut, New Jersey, Oregon, California, and more limited recognition in the state of Washington. Almost all of those developments in the states have been legislative rather than judicial developments. So, we have now reached a point in this country where one-fifth of the population of the United States lives in a jurisdiction where same-sex couples are fully recognized under the law as equivalent to opposite-sex married couples in all but name.

Now for the Burkean, what would be the steps ahead? First, there

7. See David Frum, *Same-Sex Marriage: Unconservative in Purpose, in Application, and in Result*, 50 S. TEX. L. REV. 85 (2008).

should not be an immediate nationwide resolution of this issue either in favor of gay marriage or against it. There should be no Supreme Court decision telling the states they must recognize same-sex marriages. There should also, however, be no federal marriage amendment foreclosing state experimentation in this area.

Second, the reform toward gay marriage should continue to move incrementally and with a strong preference that it move legislatively. One of the advantages of this approach is that it is having a profound effect on the debate over gay marriage. The debate about gay marriage is moving from the realm of the theoretical and the abstract into the realm of the experiential and the empirical. Increasingly, the debate about gay marriage is not going to be about highfalutin principles, but about issues such as divorce rates, marriage rates, and illegitimacy. I think that is a Burkean development.

Consider one minor point in this regard. Eighteen years after recognizing same-sex relationships in Scandinavia, there are higher marriage rates for heterosexuals, lower divorce rates, lower rates for out-of-wedlock births, lower STD rates, more stable and durable gay relationships, more monogamy, and more respect for monogamy. So far there is no slippery slope to polygamy, incestuous marriages, or as Senator Rick Santorum once said, to man-on-dog unions.

Did same-sex marriage contribute to these retraditionalizing trends? The answer is that we do not know. We have only a correlation. But the evidence so far, I think, at least makes any claim about doomsday scenarios very hard to credit.

Finally, given that gay people exist and are not going to be eliminated or converted by any means acceptable to the American people, the question for conservatives is now, "What is to be done with them?" Is it better for our society and for traditional values that they be pushed aside, marginalized and ostracized, and made to feel alien to traditional values and institutions? Or is it better for society and for traditionalists that they be included in the fabric of American life, including in the most important social institution we have for encouraging, recognizing, and reinforcing loving relationships?

I can understand why a feminist critic of marriage like Paula Ettelbrick, or a libertarian, might want government out of all of this and might therefore oppose same-sex marriage. Same-sex marriage might be a threat to their values. I have a harder time now understanding why a traditionalist would.

Sometimes it seems that gay people are practically the last people in the country who still believe in marriage, who are reaffirming its importance in their lives with their very existence and their families,

and who actually believe it can make their lives better. They are saying “yes” to a traditionalizing institution. So the question for conservatives at the end of the day is, why can’t they take “yes” for an answer?