

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2008

Marriage and Practical Knowledge

Robert F. Nagel

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Family Law Commons](#), [Law and Philosophy Commons](#), [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

Citation Information

Robert F. Nagel, *Marriage and Practical Knowledge*, 50 S. TEX. L. REV. 37 (2008), available at <https://scholar.law.colorado.edu/faculty-articles/306>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

HEINONLINE

Citation: 50 S. Tex. L. Rev. 37 2008-2009

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Tue Mar 21 13:34:30 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

MARRIAGE AND PRACTICAL KNOWLEDGE

ROBERT F. NAGEL*

One strain of conservative thought, traceable to Michael Oakeshott and (before him) Edmund Burke,¹ tends to be positive about the past and present while being pessimistic about change in the future. Enlightenment liberals, on the other hand, tend to be deeply dissatisfied with the past and present while being optimistic about change in the future. These tendencies are often taken to reflect either differences in moral sensibility or, at least, differences in psychological disposition.

Traditionalist and liberal tendencies can more usefully be traced to distinct ways of understanding the world. Oakeshott, for instance, distinguished between rationalism and practical knowledge.² Rationalism, as he described it, is committed to the proposition that knowledge arises principally from individual intellectual effort.³ Practical knowledge, in contrast, is knowledge that arises from participation in an activity.⁴ Rationalists, then, will tend to be inattentive to the particulars of human practices and relatively sanguine about the possibility of improvement.⁵ Traditionalists like Oakeshott will tend to be appreciative of the complexity of human activities and distrustful of the capacity of individual human minds to make helpful changes.⁶ What we often take to be differences between liberals and conservatives, in short, arises from opposite views on the relationship between activity and knowledge.

* Mr. Robert F. Nagel is the Rothgerber Professor of Constitutional Law at the University of Colorado Law School. Mr. Nagel is a widely published and acclaimed author, focusing on the interplay between American culture and the judiciary.

1. Amy L. Wax provides an interesting discussion of the relationship between the thinking of both Burke and Oakeshott and the institution of marriage in *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005).

2. See MICHAEL OAKESHOTT, *Rationalism in Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 1, 7–8 (1962).

3. See MICHAEL OAKESHOTT, *Rational Conduct*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 2, at 80, 85–86.

4. See OAKESHOTT, *supra* note 2, at 8.

5. See OAKESHOTT, *supra* note 3, at 84–85.

6. See OAKESHOTT, *supra* note 2, at 10.

I will begin by explaining more fully what Oakeshott meant by rationalism and practical knowledge. I will then apply the distinction to the issue of homosexual marriage. Traditionalist understandings do not inevitably lead to the conclusion that such an alteration in the institution of marriage would be unwise, but they do help identify the kinds of concerns that proponents should be willing to address.

A rationalist, according to Oakeshott, values individual intellectual effort.⁷ Under this view, the ideal is for a human mind, situated outside of an activity, to define the purpose of the activity and then propose changes that will better achieve that purpose. Oakeshott gave as an example the design of bloomers as a way to enable women to ride bicycles.⁸ A rationalist designer would start by thinking that the object of riding is mobility, and such a designer would conceive of bloomers as simply a way to enable women to move more freely on a bicycle. Oakeshott's objection to this kind of thinking was not that it is wrong or useless; indeed, as the example of bloomers suggests, he thought that some degree of rationalism is inevitable and can be useful.⁹ (Reading cookbooks is useful too, but it is not the same thing as knowing how to cook.) Oakeshott's objection to rationalism was that it is an incomplete form of knowledge.¹⁰ A person committed to rationalism as an ideal, therefore, is committed to misunderstanding the nature of the activity in which he is engaged.

The designer of bloomers was not in fact working from outside the practice of bicycle riding nor merely attempting to improve female mobility. Bicycle riding, of course, is an activity with a history and it is situated within other activities that have histories. Bloomers represented an effort to improve mobility while not departing too far from the aesthetic and moral standards of the times. A garment aimed more narrowly at mobility might have looked like the Lycra outfits worn by so many riders in my town of Boulder, but even these are reflections of developments in fashion, modern expectations about sex roles, changes in technology, and other cultural developments. The design of athletic clothing, which must ultimately find favor with those who actually participate in athletics, is not an isolated and abstract intellectual activity (though it is that to a degree), but an aspect of a collective activity where understanding and judgment are based on a history of engagement with sport. A designer who appreciated this

7. See OAKESHOTT, *supra* note 3, at 81.

8. See *id.* at 81.

9. See *id.* at 95–96.

10. OAKESHOTT, *supra* note 2, at 12.

would use rationalism but would not be confined by it. Such a designer would be using practical knowledge in that his thinking, while a “reflection upon conduct,” would not be separate from conduct.¹¹

The rationalist, who is searching for the vindication of individual intellect, is represented in our time by the image of Justice Harry Blackmun sitting in an office somewhere, writing out a draft of *Roe v. Wade*.¹² Blackmun had to reduce the number of objectives to be served by abortion regulation to two, medical safety and protecting potential life, because any recognition of the possible range and inter-relatedness of the state’s interests would have made a simple solution, such as his trimester scheme, impossible.¹³ He had to convert a moral interest in protecting the value of human life into an interest in protecting the lives of persons in the full sense of the word;¹⁴ in this way, the state’s purpose would be independent of the means chosen to achieve that purpose, making the mental effort of testing the law’s rationality possible. He had to find the legal history of abortion regulation, as well as the whole history of human thought on abortion, inconclusive because he needed to clear the decks for the imposition of a resolution that his own mind had generated.¹⁵ He had to demand empirical evidence of the relationship between means and ends because the rationalist resists uncertainty and indefiniteness. His resolution to admittedly difficult moral issues had to be reducible to a simple set of propositions (or, in Oakeshott’s terminology, doctrines or maxims)¹⁶ so that progress could go forward unhindered by complexity or subtlety.

Appreciation for practical knowledge does not necessarily mean, of course, that Blackmun was entirely wrong about abortion. Nor does it mean that the institution of marriage ought never to be changed to include homosexual relationships. It does mean, however, that such a change should not be imposed by courts because, as I have argued elsewhere, modern judges in general are thoroughly committed to the intellectual framework of rationalism.¹⁷ It also means that the change ought not to be imposed by Congress because ideological thinking, which is rationalism on a grand scale, so dominates there.

11. OAKESHOTT, *supra* note 3, at 90.

12. *Roe v. Wade*, 410 U.S. 113 (1973).

13. *See id.* at 162–64.

14. *See id.* at 162–63.

15. *See id.* at 156–62.

16. *See* OAKESHOTT, *supra* note 2, at 10.

17. *See* ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 120 (1989).

Additionally, the libertarian solution of leaving the decision up to individuals is inconsistent with the activity of marriage as we have known it because marriage has public purposes and, therefore, necessarily involves some regulation by the states. If, however, substantial numbers of homosexuals were to live as couples, raise children, and otherwise approximate the state of marriage, other members of the community might gradually find the arguments for gay marriage to be backed by relevant experience and therefore compelling. In this way, marriage understood as an activity sanctioned by law might evolve to include homosexuals.

At present, however, the practical argument against gay marriage begins with two weighty facts. First, at least as far as I know, except for a few modern departures, marriage has been thought of and conducted as a heterosexual practice across human history and in most, if not all, human cultures;¹⁸ and, second, marriage is undoubtedly a foundational institution that serves such absolutely basic purposes as socializing children, domesticating young men, and protecting women during childbearing years.¹⁹ The ubiquity of heterosexual marriage means that virtually all of those who have been in married relationships and those who have been close to married relationships—in widely different times and circumstances—have understood heterosexuality to be an important, perhaps a necessary, component of marriage. They do not understand this in an abstract way. They understand it as an inherent aspect of a way of living. The foundational nature of marriage means that the risks to society involved in disregarding this understanding would be far-reaching.

Deeply embedded, foundational social institutions have been successfully reformed before, and the human mind has certainly been willing to attempt it with the institution of marriage. And it is true that the arguments for legal authorization of gay marriage seem reasonable and even humane. It is said that one main purpose of marriage is to allow love to flourish and that homosexuals are as capable of loving relationships as are heterosexuals.²⁰ It is said that another purpose of marriage is to raise children and (again) that homosexuals are capable of raising children.²¹ It is said that marriage entails certain legal benefits and that homosexuals deserve such

18. Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313, 321 (2008).

19. *See id.* at 321–22.

20. *See id.* at 329.

21. *See* William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUT. CHILD. 97, 97 (2005).

benefits in the same way as heterosexuals do.²² It is said that marriage promotes stability and monogamy, and homosexuals can benefit from both.²³ And, finally, it is said that authorizing homosexual marriage will not reduce the status of the institution or discourage its use.²⁴

I am not sure, however, that these arguments come to grips with the doubts held by many and that arise, I think, from long experience with marriage as a personal and social activity. Consider, for example, the demand by reformers for empirical verification of the claims of traditionalists.²⁵ Reformers say that to justify separate treatment of homosexual marriage there must be evidence that child-rearing by homosexuals is less effective than child-rearing by heterosexuals.²⁶ They say that to justify heterosexual marriage there must be evidence from experimental systems in Europe that authorizing homosexual marriage encourages divorce or child-rearing outside of marriage.²⁷ And so on. Of course, such evidence would be relevant and useful. But focusing too intensely on systematic studies can create a false sense of certainty. The results of studies can and do change. Moreover, many important social and psychological phenomena are not susceptible to accurate measurement because they are too subtle or too diffuse. To demand that long-established institutions be justified on the basis of empirical studies is to confuse the capabilities of social science with wisdom.

Consider, more fundamentally, the demand that the purposes of traditional marriage be analyzed in isolation from one another, that is, as separate from or outside the activity of marriage as a whole. When, for instance, reformers say that homosexual couples are as capable of love as are heterosexuals, they are not speaking of exactly the kind of love that traditional marriage encourages and honors.²⁸ That kind of

22. See Stewart, *supra* note 18, at 329.

23. See Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1179 (2005).

24. See Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981, 997-98 (1991).

25. See Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 298 (2001).

26. See generally David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345 (1994) (discussing common misconceptions about homosexuals and arguing that gay parents are as competent as heterosexual parents).

27. See generally M.V. LEE BADGETT, *WILL PROVIDING MARRIAGE RIGHTS TO SAME-SEX COUPLES UNDERMINE HETEROSEXUAL MARRIAGE? EVIDENCE FROM SCANDINAVIA AND THE NETHERLANDS* (2004), available at <http://www.iglss.org/media/files/briefing.pdf>.

28. See Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the*

love, obviously, is the kind that is based on the physical and emotional complementarity that the two sexes can provide one another. Similarly, when it is said that homosexuals can raise children, the understanding of child-rearing implicit in the activity of traditional marriage is changed.²⁹ That understanding, again, is based on the observation that men and women have somewhat different instincts on matters like discipline, risk-taking, and nurturing.

Even stating two of the purposes of traditional marriage in this way, as simple instrumental objectives, distorts them. Traditional marriage laws do not embody a judgment that gender differences are necessary for either love or child-rearing. Rather, they embody the judgment that the relationships such differences make possible are morally and psychologically preferable and, thus, should be officially acknowledged, rewarded to a degree, honored, and encouraged. The tangible benefits associated with marriage have to be understood in this light. Homosexual couples may need these financial and legal benefits, but what proponents of homosexual marriage must establish in addition is that homosexual couples are as entitled as heterosexuals to the public recognition and respect that is an aspect of these legal entitlements.

The issue, then, is not simply whether homosexuals can raise children well, can have loving relationships with one another, or would benefit from various legal entitlements. To a large extent they can do all that now. The issue is whether the state should hold out homosexual relationships for honor and encouragement in the same way that it holds out the relationships of heterosexuals. Whether gender differences are relevant to morality, aesthetics, psychology, or family dynamics are questions that may be exasperating for some, but recent changes in attitudes towards homosexuality do not alter the fact that in many times and in many places people have strongly believed that the differences between men and women are profoundly and especially valuable. This is why, needless to say, the activity of marriage affords special status to heterosexual relationships in a rich context of cultural activities—including courtship patterns, music, literature, clothing, religious beliefs, and innumerable other facets of life—that idealize heterosexual romance leading to marriage.

Without a similar level of cultural support, it is at least questionable whether legal authorization of homosexual marriage

Impossible?, 47 CATH. U. L. REV. 1245, 1249–50 (1998).

29. See George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 595 (1999).

would succeed in extending public recognition and respect to homosexual relationships. It is for this reason, of course, that some traditionalists fear that gay marriage would eventually devalue marriage as an institution, especially as an institution primarily for raising children. But another possibility is that while all marriages, both gay and straight, would outwardly involve the same rights and obligations, many people would privately view homosexual marriage as in fact being different and less significant. In this event, despite identical legal forms, two types of marriage would exist in fact. Even more insidiously, homosexuals might suspect that their marriages were not actually respected no matter what private attitudes were. In either event, society would bear the risks involved in altering a foundational institution while the psychic gains sought would not materialize.

Understanding marriage as an activity long conducted within many other social practices, then, raises a quintessentially conservative question. Rather than seeking a radical alteration in a pivotal institution like marriage, might it not be wiser, and in the longer run more effective, to attempt gradually to change more peripheral aspects of the culture so that any reformulation of marriage that eventually occurs will seem, to the bulk of Americans, to be a natural extension of what is already known and accepted?

