chef nous semblent inappropriés : il insiste longue-
ment sur la constitutionnalisation des privilèges légis-
latifs des législatures provinciales (à la p. 72) en né-
gligeant d’ajouter que les législatures demeurent néan-
moins souveraines pour en modifier la teneur et pour-
raient même en abolir l’existence ; il présente aussi, à
l’appui de sa thèse, le fait que le principe de la pri-
mauté du droit (rule of law) est fondamental à la
Constitution du Canada (à la p. 71), ce qui est vrai.
Néanmoins, on se souviendra qu’en Grande-Bretagne,
jamais ce dernier principe ne peut servir à restreindre
la souveraineté parlementaire !
Il se peut que les réflexions du juge en chef sur le rôle du préambule ne soient que des opinions ne liant
pas les tribunaux (obiter dicta). En effet, n’a-t-il pas
écrit, avant sa longue dissertation :
Les présents pourvois ont tous été plaids sur le
fondement de l’al. 11d) de la Charte, disposition qui
garantit l’indépendance et l’impartialité de la magistra-
ture. Il ressort des termes mêmes de cette disposition
que le droit qu’elle garantit est un droit d’application
limité : il n’est applicable qu’aux personnes qui font l’ob-
jet d’une inculpation. Malgré la partite limite de l’al.
11d), il ne fait aucun doute que les pourvois peuvent et
doivent être tranchés sur le fondement de cette dispo-
sition. Dans une large mesure, notre Cour est prisonnière
du contexte que les parties et les intervenants lui ont
présenté. (à la p. 63).

Do guns deter crimes against property?

Although the United States is exceptional among developed countries for its high crime rates, crime rose signif-
icantly in virtually all other non-Asian developed countries in approximately the same time period [1965 on].
Violent crime rose rapidly in Canada, Finland, Ireland, the Netherlands, New Zealand, Sweden, and the United
Kingdom? With regard to crimes against property, a broader measure of disorder, the United States is no longer
exceptional: Canada, Denmark, the Netherlands, New Zealand, and Sweden have ended up with theft rates higher
than those in the United States over the past generation.


Beef drain

During the 1980s, on average, one in every ten head of live cattle produced in Canada was exported. During the
1990s, this ratio climbed to one in every three head. The bulk of these exports originated in Western Canada and
was destined for the United States. Despite rising inventories in the United States, this expansion indicates a struc-
tural change in the Canadian cattle industry.


Rainer Knopff

THE CASE FOR DOMESTIC PARTNERSHIP LAWS

A society that values child-rearing and care-giving has every reason to provide special preferences for hetero-
ssexual marriages. That some married couples do not have children does not weaken this argument. On the other hand, society may also have an interest in encouraging permanent, caring relationships between people who do not engage in procreative sex — or any sex at all. Domestic partnership laws that allowed people of either sex and any sexual per-
suasion to form socially-sanctioned partnerships should therefore be considered. Groups who prefer that homosexual marriage be legalized should not regard them as a consolation prize.

Une société qui valorise l'éducation et le soin des enfants a toutes les raisons d'accorder un traitement préférentiel aux mariages hétérosexuels; et le fait que certains couples mariés n'aient pas d'enfants n'affaiblit pas cet argument. D'autre part, la société peut aussi avoir intérêt à encourager l'établissement de relations permanentes entre des personnes qui n'ont aucune relation sexuelle ou dont la sexualité n'est pas orientée vers la procréation. Il y a donc lieu d'envisager l'adoption de lois permettant à deux personnes de contracter une union reconnue par la société, sans égard à leur sexe ou à leur orientation sexuelle. Les groupes qui favorisent la légalisation des mariages homosexuels ne devraient pas voir là un prix de consolation.

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W

orking through the courts, gay-rights
activists have pushed the issue of same-
sex marriage to the top of the Canadian
policy agenda. With respect to one law after another,
gays and lesbians have challenged opposite-sex defin-
tions of the legal term “spouse,” hoping thereby to
gain access to a variety of “spousal benefits” — such
as survivor pensions — and, ultimately, to achieve the
full status of legal marriage.

In response, Canadian legislatures have begun to
consider passing the kind of “domestic partnership”
law pioneered in Scandinavia and Hawaii. Partners
registered under such laws enjoy many of the benefits,
rights, and obligations of married couples, but their
legal status falls short of full marriage, which remains
the preserve of heterosexual couples. Reform Party
MP Ian McClelland has proposed a sexually indifferent
partnership law, under which any two people, whether
they are sexually involved or not, and regard-
less of their sexual orientation, can register a partner-
ship, with all of its attendant rights and obligations.
Recently, the Alberta government announced it would
consider the idea.

Some gay-rights activists maintain that domestic
partnership laws are the last refuge — or gasp — of
homophobic prejudice, a final attempt by a losing
force to draw its line in the sand and make a futile last
stand. I want to suggest, in contrast, that domestic
partnership laws are a plausible response to a truly
perplexing policy issue. Such laws address what is
attractive in the argument for same-sex marriage —
parts of which should attract even conservatives —
while respecting the equally legitimate case for het-
rosexual marriage. Domestic partnership laws will be
caught in a predictable crossfire from the extremes,
but they should find favour with the moderate middle.
Marriage, as traditionally conceived, makes three major sexual distinctions, only one of which is challenged by the advocates of same-sex marriage. First, it distinguishes between sexual and non-sexual relationships, with only the former qualifying for marriage. These distinctions are not enough. In the old days, this expectation was formalized in the norm that a marriage became valid only when it was sexually “consummated.” Consummation is no longer necessary, and in any case, purely “platonic” marriages were always possible if neither partner complained. Nevertheless, the general expectation was, and is, that marriage is grounded in a sexual relationship. Advocates of same-sex marriage simply seek to bring another kind of sexual relationship under the umbrella of marriage, not to extend the status and benefits of marriage to roommates.

Second, marriage distinguishes between casual and committed sex. The marriage ceremony is centered on a solemn commitment by both partners to forsake all others and to commit to a permanent union. Again, advocates of same-sex unions generally accept this aspect of marriage. Homosexuals want to get married for the same reasons that heterosexuals do: to publicly consecrate a long-term commitment.

Third, marriage has traditionally distinguished between heterosexual and homosexuality. Only heterosexual relationships qualify for marriage. This, of course, is the facet of marriage that must be overcome for publicly recognized same-sex marriages to occur.

In sum, the traditional institution of marriage exalts long-term, committed, actively heterosexual relationships over all other kinds of relationships. According to traditionalists, it does so because of society’s special stake in the generation and rearing of children. A child is necessarily the product of one man and one woman, and, on average, biological parents who live in a stable and committed relationship rear children most effectively. No better way of replacing and socializing the next generation has yet been discovered.

Marriage, in short, is society’s way of giving special status to the procreative sex that produces children and to the family stability that best nurtures them. This purpose makes sense of all three sexual distinctions at the root of marriage and it especially justifies restricting marriages to heterosexual relationships.

Marriage has purposes other than the procreation and rearing of children, of course. Jonathan Rauch, a strong advocate of same-sex marriage, identifies two: “domesticating men and providing reliable caregivers.” He says that “civilizing young males is one of any society’s biggest problems,” and for this purpose “marriage is unmatched.” Marriage is similarly unmatched as a way of ensuring that “most people have somewhere whose ‘job’ is to look after them” in times of crisis or infirmity.

If its procreative and child-rearing functions tilt marriage toward heterosexuality, its domestication and caring functions do not. Certainly, gay men need “farming” as much as heterosexual men do, and marriage can have the same beneficial effect in both cases. Similarly, homosexuals have no less need than anyone else for committed partners to see them through hard times and old age. And since devoted spouses do this job so much better than the state, society has an interest in casting the net of marriage as widely as possible. Far better, the argument goes, to encourage interdependence and mutual care through the civil-society institution of marriage than to end up with individuals dependent on the impersonal state.

These are attractive arguments in favor of same-sex marriage and spousal benefits. Arguments, that, as noted, should resonate powerfully even with social conservatives.

But while social conservatives might concede the domestication and caring-giving benefits of same-sex marriage, they worry about sending the message that society has no more stake in procreative sex than in non-procreative sex, that the two are perfectly equal in status. This is not a message sent by the drift from formal marriage to common-law relations among heterosexuals, or by the legal recognition of heterosexual common-law relationships; but it is the unavoidable message of legally recognized homosexual marriage. Is this a message society can afford to send at a time when a variety of social forces seem already to be undermining the inclination to have children or to shoulder the burdens and responsibilities of effective parenthood?

Advocates of same-sex marriage have a ready response to this concern. If non-procreative sex undermines a fundamental purpose of marriage, they ask, why do we grant marriage licenses to clearly infertile heterosexual couples? Why don’t we refuse to grant a marriage license to a post-menopausal woman, for example? And if non-procreative sex is so bad, why do we permit the sale and use of contraceptives? Moreover, we don’t require that a commitment to have children be part of the marriage ceremony even for fertile couples, who may freely choose to remain childless. Finally, we clearly recognize that sex has important non-procreative purposes even for couples who have children; it promotes intimacy and bonding, for example, things that are good in themselves, and thus equally good for homosexuals. (This last argument seems especially relevant in an era when, because of birth control and increasing longevity, reproduction and child-rearing occupy less of people’s lives.)

If homosexuality is incompatible with marriage, the argument goes, it can only be for reasons that apply with equal force to heterosexual couples who cannot or will not procreate, and the latter should thus also be denied the right to marry. By the same token, if we allow non-procreative heterosexuals to marry—presumably for domestication or caring reasons—we have no good reason to deny the same benefits to homosexuals.

Have we? Non-procreative sex and childlessness among married heterosexuals certainly challenge society’s effort to give higher status to procreative sex, but they do not completely undermine it. They take procreative sex down a peg or two, but do not totally eradicate the traditional hierarchy between procreative and non-procreative sexuality. The official recognition of same-sex marriage, by contrast, would leave absolutely no doubt that society had abandoned any public distinction between procreative and non-procreative sexuality. The official recognition of same-sex marriage would leave absolutely no doubt that society had abandoned any public distinction between procreative and non-procreative sexuality.

It might, of course, be objected that one shouldn’t put too much stock in something so insubstantial as the educational message of the law. But proponents of same-sex marriage can make this objection: Their whole project is based on the power of legal education. They want official, legally recognized marriage because it is more powerful in its effects than purely private commitments. It is even more powerful than “domestic partnership” laws that give a kind of “common law” status to homosexual unions. “There is no substitute,” says Rauch, “Marriage is the only institution that adequately serves the domestication and caring-giving functions. It shrewdly exploits ceremony (big, public weddings) and money (expensive gifts, dowries) to deter casual commitment and to make bailing out embarrassing. Stage parties and bridal showers signal that what is beginning is not just a legal arrangement but a whole new stage of life.” Domestic partner laws do none of these things.

Big public ceremonies, expensive gifts, and the like can, of course, be organized on a purely private basis, or in the context of domestic partnership laws. But this is not enough for Rauch. What gives all the ceremonial devices of marriage their oomph is official legal recognition of the marriage contract.

The educational message of the institution of marriage is obviously supremely important to advocates of gay marriage. If society’s recognition is important to them, however, they cannot logically discount the possible reciprocal effect of that recognition on society. Is it more likely, in other words, that gay marriage would strengthen marriage generally by “reaffirming society’s hope that people of all kinds settle down into stable unions,” as The Economist thinks, or that it would call even more seriously into question the role of marriage at a time when the threats to it, ranging from single-parent families to common divorces, have hit record highs, as James Q. Wilson maintains? Traditionalists believe the latter is more likely, and oppose homosexual marriage for this reason.

But to oppose gay marriage on the grounds that it might further weaken heterosexual marriage, says one advocate, Andrew Sullivan, is to sacrifice a minority to the utility of the majority. In his view, “It’s not at all clear why, if public disapproval of homosexual is indeed necessary to keep families together, homosexuals of all people should bear the primary brunt of the task.”

In response, a traditionalist might ask why the public preference of heterosexual marriage necessarily entails “public disapproval” of homosexuals. After all, society prefers heterosexual marriage to all kinds of cohabitation arrangements among singles — e.g., cohabiting siblings, adult children and parents, friends — without subjecting the latter to “public disapproval.” In fact, immediately after raising his “public disapproval” objection, Sullivan himself recommends such a nuanced approach to social ordering. “Is it inconceivable,” he asks, “that a society can be subtle in its public indications of what is and what is not socially preferable? Surely, society can offer a hier-
exclusively the pursuit of sexual relationships. Quite so. But follow the analogy through. Just as parents who would prefer a heterosexual marriage for their child now endorse the second choice of a loving, but unmarried, partner, why should we not wish to encourage people to experience sexual relationships in the same way?

Second, the incentives for civil-society partnerships exist because there are not, as yet, any better incentives for sexual arrangements. Thirty years ago, Canada had a wide range of universal programs, from health care and education to universal transfers to the elder, that provided coverage to families with children. Growing deficits and increasing demands on government resources, arising, for instance, in its failure to provide all families with at least some fiscal recognition for the costs of raising children, have led to the erosion of raising-children benefits. To this day, the entitlement to health care in the private insurance market is accompanied by the entitlement to benefits in the private insurance market. But why could not the same benefit be provided, through the universal system, in a way that encouraged these other arrangements? It is time for the Canadian public to think about how it might encourage these other arrangements, and that the universal system can be designed to accommodate these other arrangements.

This summary of the authors' forthcoming paper in the Canadian Journal of Economics argues that targeted social programs, which came to dominate Canadian social policy in the 1990s, are both unfair and inefficient. Unfair because if Canadians decide people shouldn't have to bear the entire cost of raising children, having a hip replacement or acquiring an education, their exemption from cost shouldn't vary according to their income. Inefficient because clawbacks add to the effective marginal tax rate faced by the recipients of social programs, thus increasing the distortion of their work, leisure, investment and saving choices.

The pursuit of "target efficiency" led to the replacement of universal programs with a complex set of targeted initiatives. However the erosion of universal programs has contributed to the growth of the middle class and the decline of Canada's unique institution for children. Universal programs are superior mechanisms for transferring income to children because they are automatically and non-discriminatory. Universal programs reduce administrative costs because they can be provided for all children, regardless of income. The eradication of universal programs has blunted the federal government's spending power, and the universality of health care can no longer be taken for granted.

The benefits of universality are significant. Universal programs provide a floor for the costs of raising children."