

MARRIAGE AND THE STATE

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Libertarians often, and rightly, point to the number of intrusions made by government into our personal lives. The U.S. Supreme Court's Antisodomy decision, for instance, criminalised every form of private consensual conduct except coitus in a monogamous heterosexual marriage. What seems to have been missed is the fact that similar regulations have also been imposed on marital relations. Government has long practised interference in voluntarily entered contracts which involve none but the consenting parties, and marriages are no exception. Bigamy, for instance, at least if no deceit is involved, is a "victimless crime". In the event, the state has outlawed all but monogamous heterosexual marriage and even this requires that partners be of a certain age and that the bride assume the surname of the groom. The state has, furthermore, arrogated to itself a monopoly on the authorisation both of marriage and divorce; some governments, such as the Irish one, even go as far as making divorce illegal. Marriage is probably the most important contract people ever enter, involving the most private and sensitive decisions. Could there, then, be a greater affront to our individual freedoms than that governments seek to regulate us here?

LAISSEZ-FAIRE AND MARRIAGE

There is no reason government should be responsible even for granting let alone controlling matrimonial union. For thousands of years the Church performed the former task, and to some extent it still does. The Civil Marriage is a new institution by comparison. And the idea that marriages should be state-controlled is part of the "Right-wing" mindset which Randy Barnett attacks in "Pursuing Justice in a Free Society":

... it is argued that, to avoid such social degeneration, a central authority must outlaw certain kinds of conduct ... included should be sexual conduct (for example, prostitution, pornography, homosexual conduct, and extramarital sexual relations), conduct that encourages "anti-social" beliefs ... and behaviour that is "destructive of values" (such as drug and alcohol consumption, gambling, pool rooms, video arcades, and rock and roll).

The image that best describes the world the Right sees as ultimately resulting from the absence of a coercive monopoly of power in one in which people are fornicating in public places with heroin needles hanging from their arms. To prevent this there must be a boss: a

President, a Congress, a Supreme Court, or a Moral Majority.¹

Would society, then, degenerate into promiscuous and homosexual debauchery in the absence of marriage laws? I think not. In different circumstances different forms of marriage could develop, and have developed, without any "upheaval" of society. But in fact the traditional marriage has been and will always be an enormously popular institution. Note that most divorcees remarry. Surely most people choose to marry and single partner of the opposite gender not because the law forbids otherwise, but because that is what most people want.

SPONTANEOUS ORDER

What should be clear above all is that marriage is seldom the result of any master plan or policy; the joining of man and woman is perhaps the most basic element in spontaneous order, or, in the words of the great libertarian Wilhelm Von Humboldt, the only union which "springs from true, natural, harmonious love". He wrote further:

... such a relation cannot mould itself according to external arrangements but depends wholly on inclination; and wherever coercion or guidance come into collision with inclination, they divert it still further from the proper path.²

Perhaps the most interesting example for a libertarian of the unhindered development of matrimonial institutions is in the frontier conditions of Nineteenth Century Utah. The polygamous marriage developed there as the only way of dealing with the large number of widows among the Mormon settlers. But even at the height of the infamous Mormon polygamy it was practised by a mere 5% of the married population; 95% in other words, seemed perfectly content with monogamy. The late Robert Heinlein, in *The Moon is a Harsh Mistress*, describes a future world in which the lunar frontier conditions have a similar effect in the invention of "line marriages":

They arise, as marriage customs always do, from economic necessities of the circumstances ... Line marriage is the strongest possible device for conserving capital and insuring the welfare of children - the two basic societal functions for marriage everywhere - in an environment in which there is *no* security, neither for capital nor for children, other than that devised by individuals. Somehow human beings always cope with their envi-

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ronments. Line marriage is a remarkably successful invention to that end.³

The mormon experience converges with Heinlein's reflections. Regulation of marriage by the state is not a necessary social cement; it is a positively harmful intrusion into decisions people can manage quite adequately for themselves.

LAW, EFFICIENCY, AND THE RIGHT OF SECESSION

It was Martin Summers who first suggested to me that the whole legal process of marriage and divorce, like everything else run by the state, would be better off in the free market. David Friedman in his *Machinery of Freedom* wrote:

There exists a government monopoly bigger and more inefficient than the Post Office. It is a service industry run so inefficiently that customers frequently wait in line for years before receiving any attention and spend years more waiting for the government to finish a job that should require a week or two.⁴

He was referring of course to the state court system in general but he could just as well have been speaking of its particular service of divorce. The governmental service of dissolving marriages, like those other services such as resolving disputes, delivering mail and building roads, is characterised by monopoly, inefficiency and bad service. Divorce suits (in those countries where it is even legal) involve much time, money and grief. And many conservatives actually oppose the "liberalisation" of divorce laws. Indeed there is a powerful coalition against such liberalisation. Whilst conservatives tend to line up with Classical Liberals against socialism on many matters, in relation to divorce and other personal matters it is the other way round. Another libertarian science fiction writer, L. Neil Smith, has written in his "New Covenant" on the subject of Association and Secession:

... that we shall hold inviolable those relationships among Individuals which are totally voluntary, but conversely, any relationship not thus mutually agreeable shall be considered empty and invalid ...⁵

We must uphold this rule if marriages are to remain "voluntarily entered contracts". If marriages were dealt with as contracts then conditions for divorce and settlement could be worked out contractually, in advance, and the process of separation made far less tedious. Of course there should be nothing to stop conservatives entering into marriages which are considerably harder to break. It is often too easy, perhaps, to misconstrue that libertarian position. Someone once said "Arguing that allowing people to be wicked is better than forcibly preventing them is not the same as being in favour of wickedness."⁶ And arguing that heroin or divorce should be legal and unrestricted is not the same as advocating drug use or separation. What I like most about the argument for a non-monopolistic marriage licensing system is that it does advocate respect for freedom of private contract.

CHILDREN'S RIGHTS

The contractual system, incidentally, might go a long way to solving some of the problems of children's rights. Libertarians often ask themselves questions such as "should a

person have a legal obligation to support his or her offspring?". Presumably, in the non-monopolistic system, most religious marriages would involve some legal obligation to support offspring; for instance, the Vatican could refuse to recognise my marriage if there were no contractual provisions for my children. Even non-denominational marriages would have need of some legal arrangements for the support of offspring in order to cater for the possibility of divorce, if nothing else. And if it is that true that "children keep marriages together" then lawyers might well devise marriages with the aim of maximising the welfare of children. People entering into such "marital contracts" would then incur legal obligations to support their offspring. Of course, this would do nothing for the rights of illegitimate children, nor would it stop people from deliberately entering into marriages containing no legal obligations.

AN END TO THE MARRIAGE MONOPOLY

If we truly desire each individual's liberty to pursue his or her chosen lifestyle, it is time we called for an end to the state's marriage monopoly, and an end to its institutionalised intolerance and inefficiency. It was Rousseau who realised that the family was the state's strongest opponent; Orwell went further in 1984 in predicting that the state would try to reduce marriage and the family to nothing more than devices for fulfilment of "duty to the party". I do not believe that state marriage laws are what keep the family together. The Mormons, historically the greatest defiers of such laws, are the most family-minded people I have ever met. It is time, then, that the state were completely removed from the process of marriage-making and family planning. Wilhelm Von Humboldt came to the same conclusions almost 200 years ago. His arguments, I think, sum up my case quite well:

It is clear from these considerations that the results of marriage are as various as the characters of the persons concerned, and that, as it is a union so closely related to the very nature of the respective individuals, it must have the most harmful consequences when the State attempts to regulate it by law, or through the force of its institutions to make it rest on anything but simple inclination. When we remember, moreover, that the State can only contemplate the final results in such regulations - as, for instance, population, education of children, etc. - we shall be still more ready to admit the justice of this conclusion.⁷

I believe that marriage should endure, and as a Catholic I find the idea of homosexual and polygamous marriages distasteful. I do not, however, see this as a good reason for outlawing them. I do see good reason in trying to reduce the discretion of the state.

NOTES

1. "Pursuing Justice in a Free Society, Pt. I, Power vs. Liberty", *Criminal Justice Ethics*, Summer/Fall, 1985, p. 2.
2. *The Limits of State Action*, Cambridge University Press, 1969, p. 31.
3. Robert A. Heinlein, *The Moon is a Harsh Mistress*, New English Library, London, 1982, p. 200.
4. *The Machinery of Freedom: Guide to a Radical Capitalism*, Harper Colophon Books/Harper & Row, New York, 1973, p. 109.
5. *The Galatian Divergence*, Del Rey Books/Ballantine, New York, 1985, p. 151.
6. Brian Micklethwait, "The Case Against Politics", Arthur Seldon, ed., *The New Right Enlightenment*, Economic & Literary Books, Sevenoaks, Kent, 1985, p. 186.
7. Humboldt, op. cit., p. 131.