

PEOPLE — NOT THE GOVERNMENT — SHOULD DECIDE WHAT MARRIAGE MEANS

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GAY MARRIAGES AND NO-FAULT DIVORCES

As I start to write this pamphlet, on the evening of March 4th 1996, a group of people are arguing on the television (BBC1's "Heart of the Matter") about the rights and wrongs of gay marriages. Another marital discussion a few days earlier (on BBC2's "The Midnight Hour", February 29th) was about the vexed question of "no-fault" divorce.

I agree with those who say that gays ought to be allowed to get married. I oppose those who say that gay marriages, being an "insult to ordinary people", ought to be illegal. I say that gays should be allowed to exchange whatever promises and vows they want to exchange, and that these promises should be the basis of legally recognised complaints from one party to the marriage if such promises are broken by the other party.

In the matter of "no-fault" divorce, I sympathise equally strongly with those who say that no-fault divorce strikes at the heart of what marriage ought to be about. "No-fault" divorce means that either party can abandon a "marriage" whenever he or she wants. Yet the whole idea of marriage — it seems to me — is that both of you promise *not* to behave like that. Marriage means that you stick with it. You stay together. You either solve your problems or else you suffer in silence, maybe for the sake of the children, maybe because, if you leave, the other one will be destitute or defenceless, or maybe just because — damnit — that's what you promised.

WHAT DID THE PEOPLE THEMSELVES PROMISE?

Some might say that my attitude to marriage is inconsistent, in that I support the "progressive" side in the argument about gay marriages, but side with the reactionary fogeys about "no-fault" divorce. But I say that *both* the gay victims of our current marriage laws *and* the traditionalist victims of the marriage laws we are now threatened with are victims of the *same bad idea*, against which they might usefully make common cause.

This bad idea is: *that the government ought to decide what marriage means*. Against that idea, I say that the meaning of any particular "marriage" should be decided by those who are taking part in the arrangement. I want to see the principle of *consent* applied not just to some marriages, but to *all* marriages.

Two gay people want to get married and there's a church of some sort which is happy to lay on the ceremony, and perhaps also to offer guidance about the pitfalls of the relationship they are entering into. In another part of town, two timid young or

not-so-young fogeys like me, anxious not to be abandoned and perfectly willing to promise not to do any abandoning, want *that* principle to be proclaimed to each other and to all their friends and relatives, and for *that* proclamation to have legal force. I say, let both ceremonies proceed, for both satisfy the needs of those taking part in them.

The legal system should not forbid gays, or traditionalists, or the organisations that marry them, from proclaiming and exchanging whatever proclamations and vows and promises they want to. If people, as most surely do, require specialist advice about which sorts of marriage vows make the most sense, prove most durable, and are most conducive to marital bliss, then they can seek if from churches, and from rival secular organisations, in much the same way that they seek advice about other complicated decisions from other experts. The job of the legal system, in the event of having to pronounce judgment upon this or that piece of marital strife, should be to side with whoever is sticking to their promises and to side against whoever is trying to get out of doing what they promised. In the event of marital strife, the law should ask such questions as: What was the contract that *these people themselves* decided upon? Which of them is breaking it? What sort of compensation should be paid by the breaker of this contract to the party who wishes that the contract hadn't been broken? The law shouldn't be deciding whether a marriage contract is sensible, or wise, or tasteful, or respectable, or the sort of contract which the presiding judges or jurors would have made for themselves or would recommend to their sons and daughters. It should confine itself to upholding whatever contracts the people themselves chose to make.¹

OPENING THE FLOODGATES OF CONSENT!

One of the arguments used by one of the traditionalist opponents of gay marriage, in the TV discussion I referred to above, was that once you allow gay marriages, then the "floodgates" would open, and the law would then allow absolutely anything. Polygamy, for example, might be legalised. At that point in the argument, nobody defended polygamy, because nobody in the argument was basing their beliefs about marriage on the principle of consent.²

But what is so wrong with polygamy? If one gentleman and more than one lady (or for that matter one lady and more than one gentleman — "polyandry") want to come together in a marital relationship, and they all agree to that arrangement, or if a pair or group of people already married want to add another person to the team, and the new person agrees to that, why should the rest of us forbid this, or say that such promises should have no legal force, merely because most of us would never contemplate becoming involved in such relationships ourselves?³

Also mentioned in the TV debate about gay marriage (as one of the things that it would open the floodgates to) was incestuous marriages, perhaps the ultimate consenting horror.⁴ What if a brother and a sister, a father and a grown-up daughter or whatever, wanted to solidify *their* relationship — their *sexual* relationship — with some sort of marriage ceremony? Well, don't expect me to officiate. But again, provided that those directly involved are all truly consenting to the arrangement, why should the law forbid this, or deny any legal significance to the promises that get made?⁵



Political Notes No. 129

ISSN 0267-7059 ISBN 1 85637 334 7

An occasional publication of the Libertarian Alliance,
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The views expressed in this publication are those of its author, and not necessarily those of the Libertarian Alliance, its Committee, Advisory Council or subscribers.

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FOR LIFE, LIBERTY AND PROPERTY

As with all such libertarian suggestions, it is necessary to repeat (for it cannot be repeated too often) that to *allow* something is not the same as recommending it. The government now *allows* sex between consenting adult gays in the privacy of their own homes, and quite right too, but this does not mean that the government is recommending such behaviour, nor should it.

Allowing everything that people consent to, but nothing that they don't consent to, will "open the floodgates" only to a civilisation more civilised than the world has ever seen before.

As a libertarian I uphold your right to criticise the marital arrangements that other people make — the ones that are now legal and the ones I am here arguing should be legalised — to boycott them, to explain why they are disgusting, sacreligious, genetically disastrous, and so on and so forth and so on. Maybe you'll convince them to change their ways. You certainly shouldn't have to attend any marriage ceremony you don't want to attend, and you should be allowed to subject anybody who does participate in or attend a marriage ceremony you disapprove of to whatever verbal abuse you like. You should be allowed to *discriminate* against gay, polygamous or incestuous persons, or against any who assist them in solemnising their relationships, by withholding employment, goods, services, respect, politeness or anything else that is and should be yours to give or withhold. But you should not be allowed — via the legal system you support — to bust up such arrangements or ignore the legal significance of any promises made during them.

OPPOSING NO-FAULT DIVORCE IS NOT THE SAME AS OPPOSING DIVORCE

I am not saying that a person who marries in haste and repents at leisure should not be allowed to get divorced. I don't think that divorce as such should be illegal.

Personal liberty, freedom of contract, and the idea that contracts should count for something — these are principles that have been taken seriously, here and there, for centuries. Consequently it has been known for centuries that these principles often conflict with each other. As libertarians often ask each other: if a man owns himself, may he sell himself into slavery? What if he does, and then wants out, but his "master" still wants to go on owning him? This is a question rather like: what if one married person (but not the other) wants a divorce?

The answers to all such questions, it seems to me, are bound to be a bodge, the bodge I favour being: yes, you *can* end your self-contracted obligations, but only at a price. A married person wanting out should have to show that the other partner has already broken some key marriage vow, such as the one about not committing adultery, or about loving and cherishing, whatever. (It all depends on what was said.) If he or she can't show that, then a penalty is in order. In other words, it is not divorce as such that I oppose, merely divorce without penalty to the breaker — or to the first and more culpable breaker — of the marriage vows.

NO-FAULT GAY DIVORCE?

A further proof that there is nothing inconsistent about supporting gay marriages but opposing no-fault divorce is that if you are gay and contemplating a gay marriage, you probably wouldn't want *that* to be endable with a no-fault divorce. Sadly, however, gay marriages *now* suffer under the shadow of no-fault divorce. Gays are, if televised coverage of gay "marriages" are anything to go by, *already* allowed to exchange whatever promises they like. In that sense gay marriages are already legal. But the courts won't recognise the legal validity of the promises that gays exchange at their marriages. In other words, gay marriages are already undermined by the same legal defect that heterosexual marriages are now threatened with!

A BLACK MARKET IN MARRIAGE LAW

If there really is about to be a no-fault divorce regime in Britain, for *all* marriages, then I would say that there is a fundamental sense in which *all marriage is about to be made illegal*.⁶ In

other words, if you want your marriage vows to be made to stick, then you'll have to call in the criminals. Yet another "victimless crime" is being created — and with it yet another black market. According to the TV and film dramas, criminals spend much time making people honour whatever debts they have voluntarily incurred. If, as criminals will, they often do this in a sloppy or unscrupulous way, the answer is to legalise the deals in question and thus remove criminals from them, just as with things like drugs, prostitution and gambling.

I assume that — the gay scene being the explosion of rampant macho masculinity that much of it is — there are presumably often some friends of friends, trusted by both parties, who are willing forcefully to punish whichever gay marriage partner broke his marital promises, in other words that there is already a black market in the enforcement of gay marriage vows, given that the government refuses to supply this service.

Nobody should have to resort to such extremities, just to get married. I say: let people — not the government — decide for themselves what their marriages each mean.⁷

NOTES

1. See also Leon Louw, *Libertarianism and the Lessons of the Common Law*, Legal Notes No. 10, Libertarian Alliance, London, 1990, p. 4: "... our first question should be not what has some libertarian theorist we follow or respect a lot said happens in contracts? We should not set about establishing *a priori* or in advance what we think the principles are that should govern a contract. The first and most libertarian thing to do is to leave it to the contracting parties. If the contracting parties want to say that the rising of the full moon will be the factor that determines the passing of rights, well, that's fine. That is their agreement. Who are we to say otherwise?" Amen.
2. Alas, the argument was about what was "natural", a notoriously slippery and elusive concept, calculated to lead to the exchange of insults about all customs one does not personally feel happy about. Are helium atoms "unnatural", merely because they are rarer than other sorts of atom?
3. See Norman Barry, *An Individualist's View of Marriage and the Family*, Economic Notes No. 43, Libertarian Alliance, London, 1992. Barry favours the "privatisation of marriage [which] means that the bulk of existing marriage and divorce law should be repealed and that people themselves should determine, by voluntary agreement, what form of relationship they want, and the terms under which it should be conducted. The form of marriage contract that people can make should be limited only by statutory provisions to protect children and laws to outlaw such things as bigamous marriage contracts." Bigamy, the fraudulent promise of exclusive marital fidelity to more than one 'wife' or 'husband' should indeed be outlawed. But Barry says nothing about polygamy (or polyandry), that is, the taking of more than one wife (or husband) *with the consent of those concerned*. Is that included in "such things as bigamy"? I hope not, and I say that it shouldn't be.
4. I say the "ultimate" consenting horror. Even more outrageous to respectable opinion would be any sort of "marriage" between an adult and a child. This is the one consensual "outrage" that I will here avoid discussion of, because the question of exactly what it means for a child to "consent" to such an arrangement seems to me too fraught to discuss other than in a pamphlet devoted centrally to the rights — including the sexual rights — of children. For some thoughts on children's rights (but not on this particular one) see Brian Micklethwait and Sean Gabb, *Freedom For Children: An Exchange*, Educational Notes No. 2, Libertarian Alliance, London, 1986.
5. See Sean Gabb, "Reflection on the Case of *R v Ball & Anr*", *Free Life*, Number 16, May 1992.
6. A similar black market will emerge in medicine — it probably already has — to the extent that the law now punishes the unsuccessful taking of medical risks. Medical risks being inherent in the practice of medicine, and risks being things that can go wrong, this amounts to making the practice of medicine itself illegal. This is a particular problem in the USA right now. The black market presumably takes the form of desperate patients who want hazardous treatments promising the local Godfather that if things go wrong they won't sue the doctor. See my Political Notes No. 56, *How And How Not To Demonopolise Medicine*, 1991.
7. In some states of America it is possible to sign a "pre-nuptial" agreement which state law takes seriously in the event of future disputes. Insofar as existing marriage law has lost touch with what the people marrying actually want and instead has become hopelessly burdened with the opinions of lawmakers about what they think marriage ought to mean, this may be the only way to rescue marriage law.

See also: Innes Fleming, *Marriage Contracts Should Be Enforceable: The Libertarian Case Against No Fault Divorce*, Legal Notes No 25, which was written at the same time as the above. Neither of us knew of the other piece until both pieces were nearly finished, but we state virtually identical positions.