

Privatizing Marriage Is Impossible

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We cannot escape the fact that marriage is an intrinsically public institution. We can't avoid making collective decisions about its meaning and purpose. If we don't do it explicitly, we will end up doing it implicitly.

As a libertarian myself, I have been quite disappointed that the “default” libertarian position on marriage has become little more than a sound-bite: “Let's get the state out of the marriage business.” With all due respect, this position is unsound.

I will not be able to respond to this sound-bite with another sound-bite. The issues surrounding marriage are too deep. But I am not deterred from trying to persuade thoughtful readers who are up to the task of following a complex and unconventional argument wherever the search for truth may lead.

I make three points in this series of articles. First, in today's article, I show that it is not possible to privatize marriage. Second, in tomorrow's article, I show that the attempt to privatize marriage will not result in an increase in freedom, but will actually increase the role of the state. Finally, in the third article, I show that attempting to privatize marriage will perpetrate great injustices to children. Any of these reasons is sufficient to put an end to the “get the government out of the marriage business” mantra. All three of these reasons taken together form a compelling case for absolutely opposing the redefinition of marriage and for working tirelessly to create a robust cultural norm of one man, one woman, for life.

“Get the government out of the marriage business,” or its close cousin, “Leave it to the churches,” is a superficially appealing slogan. When I hear this, I often get the feeling that it is a way of avoiding the unpleasant dispute currently raging over the proper definition of marriage. I sense that its proponents are hoping we can remove this whole contentious topic from the public square and put it into the private sector. Each person or group can have its own version of marriage. The state, with

its powerful coercive instruments, need never get involved in resolving this seemingly impossible stalemate.

While I understand this impulse, I believe it is fundamentally misguided. Taking a stand on the purpose and meaning of marriage is unavoidable. Here is why.

Marriage is society's primary institutional arrangement that defines parenthood. Marriage attaches mothers and fathers to their children and to one another. A woman's husband is presumed to be the father of any children she bears during the life of their union. These two people are the legally recognized parents of this child, and *no one else is*. The grandparents are not; the former boyfriend is not; the nanny who spends all day with the kids is not. These two hold their parental rights against all other competing claimants. This is an intrinsically social, public function of marriage that cannot be privatized.

You might reply, "Dr. Morse, your understanding of marriage is all about parenthood, and not about marriage itself. Not every marriage has children, after all." And it is perfectly true: not every marriage has children. But every child has parents. This objection stands marriage on its head by looking at it purely from the adult's perspective, instead of the child's. The fact that this objection is so common shows how far we have strayed from understanding the *public* purpose of marriage, as opposed to the many *private* reasons that people have for getting married.

If no children were *ever* involved, adult sexual relationships simply wouldn't be any of the state's business. What we now call marriage would be nothing more than a government registry of friendships. If that's all there were to marriage, privatizing it wouldn't be a big deal. But if there were literally nothing more to marriage than a government registry of friendships, we would not observe an institution like marriage in every known society.

Perhaps libertarians might concede that marriage attaches children to their natural biological parents. They might even agree that this is a fine and necessary thing—and then try to imagine that the institution now known as marriage could be replaced by private agreements among prospective parents. I will argue later that this policy will inflict serious injustices on children. For now, I want to show that it

is an illusion to think that these contracts can dispense with any and all state involvement.

Disputes that arise between the contracting parties must be resolved by an overarching legal authority. Let's face it: that overarching legal authority always will be some agency of the government. "Getting the government out of the marriage business" amounts to refusing to define marriage on the front end. But the state will end up being involved in defining what counts as a valid marriage or parenting contract, on the back end, as it resolves disputes. We cannot escape this kind of state involvement.

No-fault divorce provides an analogy. No-fault divorce allows one party to end the marriage bond for any reason or no reason. In effect, the state redefined marriage by removing the presumption of permanence. Marriage became a temporary arrangement rather than a permanent union of a man and a woman. No-fault divorce was supposed to increase personal freedom.

But the result of this legal change has been state involvement in the minutiae of family life, as it resolves disputes over custody, visitation, and child support. Family courts decide where children go to school, or to church. I've even heard of a family court judge choosing a teenaged-girl's prom dress because the divorced parents couldn't resolve the issue.

Married spouses disagree with each other over all sorts of issues, of course. But it is literally unthinkable that the state would be involved in resolving these kinds of disputes in an intact marriage. One might have thought that no-fault divorce would "get the government out of the divorce business." In fact, it did no such thing. The government got out of the front end of deciding what counted as a valid reason for divorce. But the government reappeared on the back end, in a far more intrusive form, as it decides how to divide family assets and resolve post-divorce conflicts.

Furthermore, "leaving marriage to the churches" is a fantasy. At this point in history, churches are not the ultimate legal authority for anything. There is exactly zero chance that the state will permit religious law to be the legal authority for its members on issues such as custody, visitation, and child support. In fact, the "Lifestyle Left" has spent considerable energy marginalizing the churches,

reducing even further their ability to shape the behavior of their members and influence the wider society. They've done this, I might add, with scarcely a peep of protest from libertarians.

Even if the state did grant churches binding legal authority over their own members, the state would still be drawn into disputes between people in mixed religious marriages, as well as people of no religion at all. Thus, what appears to be "leaving it to the churches" will be in fact no such thing. The state will end up shaping people's behavior by how it chooses to resolve the disputes that will inevitably arise.

Finally, getting the government out of the business of giving out marriage licenses does not mean that the government will be completely neutral with respect to kinds of relationships. The government is already deeply involved in many aspects of human life that affect people's decisions of what kind of relationship to be in. For instance, government's policies regarding welfare, health care, and housing have contributed to the near-disappearance of marriage from the lower classes, not only in America, but throughout the industrialized world.

Miss Octo-Mom, to take a specific example, thought it was in her interest to give birth to fourteen children without ever even having a relationship with a man, much less being married to one. Surely government policies had something to do with her decision-making. Agencies of the state provided her with income support, free medical care, the use of a stranger's sperm, as well as legal assurance that said sperm donor would never show up and bother her. Every one of these policies has implied views about marriage. If libertarians ever succeed in getting the government out of all of these areas of life, maybe we can talk about making the government "neutral" with respect to marriage. Until then, forget it.

In short, the idea that we can get the government out of the marriage business in the early twenty-first century is an illusion. Marriage performs an irreducibly public function, of attaching mothers and fathers to their children and to one another. Given the current scope and size of the government's activities, the state cannot be completely neutral with respect to different types of relationships.

We simply cannot escape the fact that marriage is an intrinsically public institution. We can't avoid making collective decisions about its meaning and purpose. If we don't do it explicitly, we will end up doing it implicitly. "Privatizing marriage" is impossible. Adopting this position on the marriage issue as an attempt to avoid conflict is unworthy of thoughtful adults.

But the attempt to do the impossible is not harmless. In my next article, I will show that "getting the government out of the marriage business" will actually amount to an increase in the size and scope of the government.

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