

Privatizing Marriage Will Expand the Role of the State

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Libertarians are being taken in by rhetoric that sounds libertarian but, in fact, will lead to a dramatic shift in the balance of power between the state and civil society, indeed between the state and the natural order itself.

In my [previous article](#), I showed why it is impossible to get the state out of the marriage business. Marriage attaches mothers and fathers to their children and to one another. This is an irreducibly public function. Yet attempting to do the impossible is not harmless. Assigning the state an impossible task amounts to giving it a blank check.

That is because the attempt to privatize marriage will hinder the ability of marriage to perform its essential public function. Nonetheless, children still need to be attached to mothers and fathers somehow. The state will pretend to get out of the marriage business all right, but then the state inevitably will be caught up in the business of defining who counts as a parent. Up until now, that job has been largely left to Mother Nature, with the state simply recording the natural reality of parenthood.

You can see this process at work by looking at disputes between same-sex partners over child custody. These kinds of disputes are already redefining parenthood. Some of the cases involve various kinds of civil unions. Some of these cases involve agreements between the would-be parents. The difficulties these cases present illustrate how problematic it really is to attempt to “privatize marriage.”

The typical case involves a woman who has a baby through artificial reproductive technology. Usually the father is an anonymous sperm donor, and so he has been safely escorted out of the child’s life, before the child was even born. The disputes arise because the mother no longer wants her former sex partner to have anything

to do with her child. Whatever agreements they may have made prior to the child's birth have broken down. Enter the state.

The traditional way of determining parenthood is through biology. The woman who gives birth to the child is the legally recognized mother. Her husband, if any, is presumed to be the father of any children she gives birth to. This rule, called the "presumption of paternity," coupled with a social practice of sexual exclusivity within marriage, attaches children to their biological parents.

In exceptional cases where the natural parents could not care for their children, the child may be placed for adoption. But adoption does not undermine the biological basis of parenthood. In fact, everything about adoption screams that biology matters. Natural parents do not give up their children lightly, and mothers have the opportunity to change their minds after their babies are born. The state does not remove children from their natural parents without good cause, and with procedural safeguards. In most jurisdictions, adopted children have some opportunity to discover their biological origins.

But when the family courts get involved in resolving disputes between contracting parents, they are being asked to give parental rights to someone who is not related to the child, either by blood or adoption. Let us call this person a "non-parent." In response to these cases, the courts are defining a new category of parenthood. The "*de facto* parent" category usually involves multi-part tests to determine whether the non-parent should be counted as a parent. The court then inquires into issues such as how much care the non-parent provided and whether the child called her "Mommy." The state decides that a person not related to a child, by either birth or adoption, can count as a parent. A perfectly fit mother can be compelled to allow her former lover access to her child, against her own wishes.

Think about it. The concepts of "mother" and "father" are natural, pre-political concepts, immediately intelligible to the human race. Up until now, the state has seen its role as simply recording this natural reality. But now parenthood is becoming the creation of the state. This is what "contract parenting" will come to mean: the state taking over parenthood and recreating it for its own purposes. Do you seriously think this can possibly be a "libertarian" or minimum-government move? I do not think that it can.

The call to “privatize marriage” is an attempt to transfer an important structure of the market—contract law—into the family, where it does not properly belong.

The belief that we can solve the conflict over the definition of marriage by “letting the market decide” is a confusion between the private and the public, a confusion between how marriage functions for an individual family and how marriage functions as a public institution. Perhaps an analogy to property law will help clarify the issue.

Most libertarians have no trouble seeing that the system of property and contract law is something different from an individual’s personal property or a particular contract he might have made. Under an economic system of private property, people get to do pretty much what they want with their own property. But backing up all those personal decisions is a public system, administered by the government and sustained by the consciences and habits of the populace. The minimal but robust legal structure of private property makes possible a dizzying array of individual activity and a wide swath of personal liberty.

The institution of marriage is comparable to the market system in this sense. We get to do most of what we want, most of the time, inside our marriages. No one comes to check up on us, unless we do something really egregious.

The freedom of particular couples is supported by and made possible by the institutional structure of marriage and family law. Marriage provides boundaries on people’s behavior: you have sex with your spouse and no one else; you take care of the children born to you and your spouse; you respect the parenting decisions of other families. And until the advent of no-fault divorce, you stayed married, unless someone did something really awful.

With this analogy in mind, imagine an Economic Leftist makes this proposal: “you advocate private property, I advocate communism. Why should the government discriminate against me and other economic minorities? Why should the taxpayers support the system of private property and contract law, which offends me, and benefits you? You capitalists can pay for your own property rights system. Privatize property law.”

This is not an offer of compromise, but a demand for complete capitulation. If the state ceases to support the property rights system, one of the key institutions of capitalism will be out of commission, and the whole system closer to collapse.

“Privatizing marriage” is comparable to “privatizing property.” The uncertainty about your own expected behavior, the weak incentives for proper behavior by your spouse, the cost of getting justice done if someone violates the terms of the agreements: all of these things add up to an extremely weak “marriage” institution. In fact, this amounts to the complete de-institutionalization of marriage, smuggled in, under the guise of “privatization.”

And that weak marriage institution means that marriage will lose its ability to provide structure for people’s lives. Getting married and having kids are life-changing experiences that you don’t do yourself very many times. People won’t have the guidance of either law or social practice in figuring out what to do. If you try to do marriage and parenthood by trial and error, you can accumulate a lot of errors and wreak a lot of damage.

This pretty much has been the story of the past fifty years. Every “increase of freedom” turned out to be another episode of lawlessness. No-fault divorce, out-of-wedlock childbearing, and the early sexualization of children, all seemed like good ideas at the time, ideas that would free us by relaxing oppressive social and legal constraints.

But lawlessness turned out to impose constraints of its own. Children suffered from loss of connection with their parents. Parents suffered from loss of connection with their children. And adults found themselves ever more lonely and unable to sustain meaningful long-term relationships.

And who generously and kindly steps in to clean up the mess? Why, the state, of course. The government now involves itself in people’s private lives far more than it ever did in the dreaded fifties. When people got married and stayed married, they had a greater capacity to take care of themselves, their children, and the elderly in their families. And who has led the charge in the deconstruction of the family? Why, the “Lifestyle Leftists,” of course.

They removed the presumption that marriage should be permanent, by creating and sustaining no-fault divorce. In practice, this usually turns out to mean unilateral divorce of one party against the will of the other, a grotesque violation of the most basic idea of contract. The Lifestyle Left removed the presumption that children should be born to married parents, by offering child support to unmarried mothers, instead of to widows and orphans as previously had been the case.

And these folks, not surprisingly, are precisely the people who want to remove the last remaining structural feature of marriage, by declaring it to be genderless, or failing that, to insist that the “government get out of the marriage business.” They are not giving the slightest thought to the new incentives these policies would put in place, or the whole sequence of changes they would set into motion. The Lifestyle Left has never taken the slightest responsibility for the harms they have already inflicted on others with these policies. They aren’t about to start now.

This is why I am so disappointed that libertarians are talking about privatizing marriage as if it were like privatizing the post office. I think libertarians are being seduced by rhetoric that sounds libertarian, but in fact, will lead to a dramatic shift in the balance of power favoring the state over civil society. The state will in effect go to war against the natural order itself.

The state has a duty to provide the basic legal scaffolding that supports the natural family. At the very least, the state must stop attacking the family. The state has no right to take over marriage and redefine it out of existence, or redefine it to suit its own purposes.

In short, the state has a duty to be in the marriage business. In my final article, I will explain what that duty is, and where it comes from

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