practices are rapidly moving people's lives in directions that increase freedom of choice, maintain and in
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religious organizations, private institutions, individual decisions, and ordinary law
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that their government should grant official "marriage licenses" to couples willing to apply and meeting the
rates, the state does not bother with the term 'marriage'
and whether
cohabiting
and when there is doubt, those rules favor
the weaker party (usually women)
state's default rules are optional, not mandatory, and for the
most part, people can change them as they like.
In this nation, as in others, the tax law is a topic of many jokes and much controversy. But in setting tax
rates, the state does not bother with the term 'marriage'. The tax code does pay attention to whether people
are cohabiting. If you live with someone else, your expenses are lower, and you will therefore be taxed at a
somewhat higher rate. But there is an active discussion of whether the "cohabitation penalty" is too severe
and whether it should be eliminated.
Now suppose that some radical reformers seek to disrupt this peaceful little nation. The radicals propose
that their government should grant official "marriage licenses" to couples willing to apply and meeting the
relevant requirements (about which sharp disputes are predictable). Perhaps the proposal should and will be
accepted. But we could easily imagine a vigorous debate and even a fair bit of outrage. Skeptics would contend that the state ought not to decide who can "marry" whom -- this is a decision for religious
institutions, individuals, and private organizations, not for public officials. Skeptics would ask: Why should
the state insist on adopting an official licensing system here, when the situation can be handled through
religious organizations, private institutions, individual decisions, and ordinary law?
2. BEYOND SCIENCE FICTION
In our view, this is a legitimate question. In so saying, we are aware that we are marching against a social
consensus. For all the debates about the nature and future of marriage, few people are arguing on behalf of
privatization. Same-sex couples want access to the institution of marriage; they are hardly seeking to
abolish it. But the formal debates obscure a social reality. In a sense, a form of privatization is already well
Underway -- as a matter of actual practice, constitutional doctrine, and enforcement policy, if not as a
matter of large-scale transformations in state law. In many countries, including the United States, voluntary
practices are rapidly moving people's lives in directions that increase freedom of choice, maintain and in
some ways increase the authority of religious institutions, and reduce the state's official role. Whatever the state says, same-sex couples make commitments to one another, sometimes with formal ceremonies, sometimes with the approval of their religions. And if religious institutions do not want to authorize same-sex marriage, no nation, and no American state, requires them to do so.

The privatization of marriage could take many forms. The most extreme version is signaled by the science-fiction story, in which official marriage does not exist, and government acts solely via ordinary contract law and default rules. A less extreme version would also abolish official marriage, but at the same time recognize the legal status of "civil unions," whose availability and meaning would remain to be decided. In one version of this state of affairs, civil unions would be available to both heterosexual and homosexual couples. The meaning of the status, in terms of its concrete material consequences, would be decided independently, through debates akin to those that now occur over such issues as the "marriage penalty," spousal privileges in court, and so forth.

Whatever the precise form of the reform, privatization of marriage would automatically quiet the current battle over same-sex marriage. It would fully recognize, and respect, the autonomy of those religious institutions that do not want to celebrate same-sex unions (or unions of any other kind). It would simultaneously recognize that if same-sex couples want to make commitments to one another, the state should allow them to do so -- and should not treat them as second-class citizens within the eyes of the law. Privatization would eliminate a serious current problem for democratic debate, which is that official marriage is now conflated with religious marriage, in a way that makes alterations in the first seem to threaten the second. It would be highly desirable to have separate terms for what governments do and for what private institutions do.

Privatization would have another large advantage, which is to focus attention on an extremely important question: the proper default rules for intimate relationships. What is the best way to protect people who make commitments to one another? What is the right way to protect children who need help? Instead of debating government monopolies and mandates, we should consider allowing people to sort out their private relationships as they see fit, so long as coercion is absent and children are not harmed. And as we allow them to sort out those relationships, we should select default rules and requirements that promise to make people's lives go better rather than worse -- especially the lives of children. The debate over marriage obscures all the important questions; it operates as if officially licensed marriage, in something like its current form, is part of the fabric of nature, as it clearly is not.

3. WHAT IS MARRIAGE?

"Marriage" is no more and no less than an official status, imposed by law and accompanied by government entitlements and mandates. When people marry, they receive many material benefits, economic and noneconomic. (FN1) State law varies, but these benefits fall into six major categories.

1. Tax benefits (and burdens'). The tax system offers significant rewards to many couples when they marry -- at least if one spouse earns a great deal more than the other. Hence the government provides a large marriage "bonus" for couples in traditional relationships, in which the man is the breadwinner and the woman stays at home. Of course married couples are permitted to file joint returns. Married people can transfer property between one another without being subject to various penalties. The tax system makes it financially advantageous to be married -- unless both people are earning significant amounts of money. (The marriage penalty can be significant if the spouses both earn substantial incomes.)

2. Entitlements. Federal law benefits married couples through a number of entitlement programs. Under the Family and Medical Leave Act, for example, employers must allow unpaid leave to workers who seek to care for a spouse; they need not do so for "partners." Those who are married to federal employees can also claim benefits unavailable to those who are unmarried. Veterans' benefits provide a range of economic advantages (including medical care, housing, and educational assistance) to the spouses, but not the partners, of veterans. State law provides analogous advantages to members of married couples.

3. Inheritance and other death benefits. A member of a married couple obtains a number of benefits at the time of death. Legal rules favor wives and husbands of those who die without a will, and some states forbid people from refusing to leave money to the person to whom they are married. Under the Uniform Probate Code, those who die intestate give much of their estate to their spouse, even if they had children. In wrongful-death actions, spouses automatically qualify for benefits; the status of members of unmarried couples is far less clear.

4. Ownership benefits. Under both state and federal law, spouses may have automatic ownership rights that mere partners lack. In community-property states, people have automatic rights to the holdings of their spouses, and they cannot contract around the legal rules. Governments impose firm mandates here. Even in
states that do not follow community-property rules, states often "presume" joint ownership of property acquired after marriage and before legal separation. The idea of "tenancy by the entirety" establishes legal unity to married couples, in a way that also grants ownership benefits (and burdens) to those involved.

5. Surrogate decision-making. Members of married couples are given the right to make surrogate decisions of various sorts in the event of incapacitation. When an emergency arises, a spouse is permitted to make judgments on behalf of an incapacitated husband or wife. More generally, a spouse might be appointed formal guardian -- entitled to make decisions about care, residence, and money, as well as about particular medical options. Mere "partners" are far less likely to obtain these benefits.

6. Evidentiary privileges. Federal courts, and a number of state courts, recognize marital privileges, including a right to keep marital communications confidential and to exclude adverse spousal testimony.

- To the least, this is an immense and diverse set of benefits. The benefits also tend to be fairly stable over time; the status quo can be a powerful force, and there are sharp political constraints on any effort to rethink it in any significant way. But economic and material benefits of this kind hardly exhaust the meaning of marriage. Crucially, the state also provides the symbolic and expressive benefits associated with the status of marriage. For many people, perhaps most, these symbolic and expressive benefits are much of what it means to be married. So long as the state grants marriage licenses, the status of official marriage has immense importance. Someone who is married within a religious tradition, but not with the authority of the state, lacks an important kind of validation.

Suppose, for example, that interracial couples were told that they could have access to all of the material benefits of marriage, but that they would be in a status called "civil unions" rather than marriages. Exclusion from the institution of marriage -- from the official status -- would itself be an offense to interracial couples. In fact it would be unconstitutional. The state cannot tell people in such couples that they receive material benefits without entering into the legal institution of marriage. For interracial couples, it would not matter if their marriages were supported and validated by private organizations. In sum: When people marry, they receive not only material benefits, but also a kind of official legitimacy from the state.

4. WITHOUT STATE LICENSES

We can now see that insofar as it operates through the government, marriage is an official licensing scheme -- and that when the state grants marriage licenses, it gives both material and symbolic benefits to the couples it recognizes. But should this continue? Would privatization be appropriate here? Should marriage be privatized?

IS OFFICIAL MARRIAGE ANACHRONISTIC?

In several ways, the official licensing system no longer fits modern reality. For one thing, the institution of marriage has a highly discriminatory past, enmeshed as it has been in sex inequality. The present is surely better, and the institution of marriage need not be discriminatory; but the past cannot be entirely severed from the current version of the institution. Recall that the tax system benefits the most traditional families, in which the husband earns a great deal and the wife earns a little -- and when both spouses have high earnings, marriage is penalized.

For another thing, the marital institution was originally a means of government licensing of both sexual activities and child-rearing. If people wanted to have sex or to have children, they were in a much better position if they had a license from the state. Indeed, the license was a way of ensuring that sexual activity would not be a crime; and it was very difficult to adopt children outside of the marital relationship. But official marriage no longer has this role. Indeed, people now have a constitutional right to have sexual relationships outside of marriage -- and people become parents, including adoptive parents, without the benefit of the marital form. In an era in which marriage is not a necessary condition either for sex or for children, the state's licensing role has become far less essential. Indeed, it has lost a significant amount of its point.

As a matter of history, a primary reason for the official institution of marriage has been not to limit entry but to police exit -- to make it difficult for people to abandon their commitments to one another. Of course there are good reasons for this form of policing. Marriage might be seen, in part, as a solution to a self-control problem, in which people take steps to make it more likely that their relationship will endure. If divorce is difficult, then marriages are more likely to be stable. Marital stability is often good for children. It can also be good for spouses, who may benefit from protection against impulsive or destructive decisions that are detrimental both to their relationships and to their long-term welfare. The legal institution of marriage might well be understood as a precommitment strategy, in which people knowingly choose a process that will protect themselves against their own errors. Some states have in fact experimented with forms of marriage that make exit extremely difficult. People can voluntarily enter into such marriages, just
as they can take other steps to protect their long-term interests.

But in the modern era, exit is much less rigorously policed. In most states, people can leave the marital form whenever they wish to do so. Experiments in firmer commitments through law have been a failure. Few people sign up for them, and such experiments show no signs of obtaining broader popularity. Increasingly, marriage resembles a not-so-extraordinary contract, dissoluble at the will of the parties, rather than a permanent status. Now that exit is not policed, through law or accompanying social norms, it is much harder to contend that the official institution of marriage is essential as a way of promoting the stability of relationships. In any case private institutions, and diverse norms, might well do the desirable work in promoting such stability. If legal safeguards are thought to be desirable, there is no reason to think that the state must use the word 'marriage'; contract law, or the civil-union form, could do as well. It is worth emphasizing that civil unions might well operate as precommitment strategies no less than marriage itself. Everything depends on the law and on accompanying social norms. By itself, the idea of official marriage is neither necessary nor sufficient to create a successful precommitment strategy.

**IS OFFICIAL MARRIAGE BENEFICIAL?**

Marriage has often been understood as a means of protecting dependents, above all children and women. It should be unnecessary to say that protection of dependents is important. But the official institution of marriage is an exceedingly crude tool for providing that protection, which could easily be ensured in better, more direct ways. If the state's goal is really to ensure protection of those who need it, the law should require such protection.

It could do so in many different ways. For example, the law could do much more to ensure that absent parents provide financial help for their children. When a child's interests are involved, mandates are perfectly appropriate. To ensure that fathers pay, some simple tools might help. Consider, for example, automatic enrollment of absent fathers in a payment plan, so that a certain amount is deducted from any relevant checking account on a monthly basis. If the concern is dependents at risk after the dissolution of a long-term relationship, good default rules are the best place to start. For a variety of reasons, members of couples tend not to think seriously about the division of property if the relationship collapses, and so default rules tend to be exceedingly important. Of course there is a detailed literature on this question, (FN2) and this is not the place to attempt to describe the ideal rules. The simple point is that the official institution of marriage is neither necessary nor sufficient for good default rules (or, for that matter, mandatory rules).

Official marriage licenses also have the unfortunate consequence of dividing the world into the status of those who are "married" and those who are "single," in a way that produces serious economic and material disadvantages for the latter (and sometimes for the former). Many of these economic and material inequalities are not simple to defend. Consider the fact that people who have been together for decades, but who lack the marital form, are often deprived of the power of surrogate decisionmaking in the event of incompetence. In any case one or the other status has a number of signaling Junctions, some of them incompatible with the desires of those involved -- and in this sense the official licensing scheme disserves liberty. Private relationships, intimate and otherwise, might be structured in many different ways, and the simple dichotomy between "single" and "married" does not do justice to what people might choose.

Indeed, that simple dichotomy is an increasingly imprecise description of what people actually do choose. Many people are in relationships that are intimate, committed, and monogamous -- but without the benefit of marriage. Many people are in marriages that are neither intimate nor monogamous. Countless variations are possible. Why not leave people's relationships to their own choices, subject to the judgments of relevant intermediate organizations, religious and otherwise?

Of course no one is forced to marry, certainly not by law. In this way, the institution of marriage is altogether different from the kinds of rigid government commands that most threaten personal freedom. When democratic societies license marriage, they are doing something very different from what they would do by requiring (say) all employers to provide a specified level of vacation time, or all employees to save a specified amount of money. Marriage might even seem to be a way of facilitating private choices, rather than eliminating them. But the licensing scheme is not merely a device for facilitation. It is very different from the law of contract. The state does not simply permit people to marry within their religions; it does not merely enforce people's agreements. It also creates a monopoly on the legal form of marriage; imposes sharp limits on who may enter and how; polices exit, at least to a modest degree; and accompanies the legal form with material and symbolic benefits that it alone confers. For those who believe in liberty, this is hardly an unambiguous good.

An independent concern, one of unquestionably great importance, involves the well-being of children.
State licensing of marriage might be defended by reference to that concern. But such licensing is neither necessary nor sufficient for the protection of children. As already suggested, the protection of children is best ensured directly, through requirements of care and support. To the extent that children need material support, that support should be required through legal institutions. To the extent that children benefit from stable homes, the question is whether an official licensing scheme using the word 'marriage' contributes enough to family stability to be worth the candle. Under current circumstances, marriages are highly unstable; about half end in divorce. It is hardly clear that social norms, private institutions, and ordinary law cannot do the relevant work in protecting stability.

In this light, what is the balance sheet for official marriage? Its benefits are surprisingly modest; in many ways, it is an anachronism. To be sure, it can be speculated, not implausibly, that official marriage might contribute to a kind of precommitment that benefits both couples and children. But why would it not be possible to permit precommitment through other means, including private alternatives? On the cost side, official marriage does not do a great deal of harm. But it does produce a kind of political polarization, and intense grappling over fundamental issues, that would easily be avoided with a simple declaration that "marriage" should be for private institutions, not for the state.

For those who object to full privatization, or complete reliance on the civil-union form, consider a more cautious solution. States should offer all couples the option of choosing either "civil unions" or "marriages." In terms of legal form, civil unions would come with all the rights and responsibilities of marriage. It is likely that numerous heterosexual couples would give serious consideration to civil unions. If they do, they could also choose "marriage" within their religious institutions.

5. INCOMPLETE THEORIZATION

There is a more general point in the background. Much of the time, legal practices are possible only because those who accept them are willing to bracket the most fundamental questions. Such practices permit diverse people, with different theoretical commitments, to converge on certain practices across their disagreements. Many social practices, in short, represent incompletely theorized agreements. (FN3) Such agreements allow people to concur on what to do amidst uncertainty or disagreement about why, exactly, to do it. In this way, incompletely theorized agreements accomplish a great goal of a diverse society: to make it possible for people to reach agreement where agreement is necessary, while making it unnecessary for them to reach agreement where agreement is not possible. For example, people can support freedom of speech and property rights on diverse grounds, and the principle of religious toleration can be accepted from a variety of diverse perspectives, theological and nontheological.

So long as marriage is an official institution, named as such and operated by the state, an incompletely theorized agreement is exceedingly difficult to obtain. Many people believe, on principle, that same-sex relationships should not be treated as "marriage." Many such people do not disapprove of civil unions for same-sex couples, and many more are willing to accept the use, by such couples, of ordinary principles of criminal law. Their own convictions could be accommodated through an incompletely theorized agreement to the following effect: Religious (and other private) institutions should be permitted to define 'marriage' as they see fit, while the government should rely on the law of contract, civil unions, or both.

The broader point is that all of the longstanding arguments for official marriage have been weakened, now that exit is freely available, and now that private alternatives are legally permissible. Is it possible to accommodate the autonomy of religious institutions while also allowing couples to commit themselves to one another? If an incompletely theorized agreement is possible in this contentious domain, it almost certainly lies in privatizing marriage. (FN4)

ADDED MATERIAL

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FOOTNOTES