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WHY THE STATE SHOULD STAY OUT OF THE WEDDING CHAPEL

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Responding to pressure from the Christian Coalition and other conservative groups, the 1992 Republican Contract With America called attention to what has come to be known as the "marriage penalty"—the fact that some married couples may pay higher federal income taxes than they would otherwise pay if they were allowed to file separately. Republicans decried this element of the tax code as an immoral threat to the family, and promised its repeal. House Majority Leader and tax reform advocate Dick Armey has spearheaded the effort to repeal this feature of the income tax code, suggesting that the marriage penalty discourages adult children from marrying and moving out of their parents' homes. "The American dream is not to own your own home," Armey claims, "the American dream is to get your children out of it."[1]

According to the Congressional Budget Office, the cost of eliminating the marriage penalty is estimated at $30 billion annually. Of the co-sponsors of the current bill, only Rep. David MacIntosh (R-IN) has identified potential sources to compensate for the lost tax revenue, suggesting that further cuts in welfare spending might finance this $30 billion tax cut. According to the CBO study, not all married couples are penalized by the current tax code. Approximately 38 percent of married couples now receive a marriage benefit averaging $1399 per year, while 52 percent of couples suffer a tax cost averaging $1244. Those paying the greatest penalty are spouses who both have roughly equal incomes, especially those in very low income brackets (who would otherwise have incomes at or near the standard deduction for single filers) and those in the upper income brackets. Those receiving the greatest benefits are couples with widely disparate incomes between spouses, and those couples with only one income-earning spouse. The current bill under consideration by Congress would make filing separately (as though they

were single) an option available to those currently paying the tax, while allowing those receiving a marriage benefit to continue paying the lower rates.

Republicans in Congress who advocate ending the marriage penalty concur with part of the liberal assessment of the proper role of the state in promoting marriage, although the reasons behind this shared conclusion diverge significantly. Both perspectives agree that the state should not be penalizing people for getting married, and the higher tax liability currently paid by some married couples is a form of penalty. The state, I will argue, should not be in the business of regulating marriage (and discouraging it through the tax code is a form of regulation, since it is employing the coercive apparatus of the state to reward some decisions and punish others) because the state ought to be neutral with respect to marriage. The decision to get married is a lifestyle choice—part of what John Rawls calls a "comprehensive conception of the good"—and the state should be silent on these kinds of lifestyle choices. The flip side of this neutrality principle is one that I suspect would find little support in the current Congress. The state cannot be allowed to promote marriage, either. In order to ensure that it does neither, I will argue that the state should not recognize the legal institution of marriage in any capacity whatsoever. Just as the state ought to refrain from entering the bedrooms of consenting adults, the state should stay out of the wedding chapel.

What would it mean for the state to abolish legal marriage? Would this mean that marriage would be outlawed (and that only outlaws would get married)? A legal prohibition against marriage is quite different from the refusal to recognize marriage as a category conferring a distinct legal status. Currently, matrimony includes the receipt of a new legal status for the married couple *qua* state-recognized family unit. Besides the tax advantages (and disadvantages) available exclusively to legally married couples, there are a number of other legal distinctions drawn between those who are legally married and those who are not. For example, spousal insurance benefits are generally not available to unmarried couples. In some states, the penalties for rape or assault are different for couples who are married. The Constitution protects against a married person being required to testify against his or her spouse. Laws banning certain sexual acts distinguish between married and nonmarried participants. Abolishing legal marriage would simply mean that the legal status of marriage would no longer make any difference in these matters. The state would treat people or members of families identically, regardless of whether or not a marriage contract existed.

Would this mean that people couldn't get married any longer? And what about couples who are now legally married? Again, the abolition of legal marriage doesn't outlaw marriage (this would likewise be in

conflict with the principle of state neutrality), nor does it dissolve or absolve existing legal pairings. The most visible aspects of marriage would remain exactly the same. The primary change from the status quo is that the contract (whatever it might include) would involve only the partners and not the state. The couple (or trio, and so on) would still be able to hold a wedding ceremony (should they elect to have one), after which they might receive several toasters (among other private gifts), but they wouldn't get the package of government marriage benefits (and costs) currently included in the state wedding package.

While there are a host of practical and theoretical objections to marriage as an institution, their pursuit is not my project here. Rather, I offer two sets of arguments for the abolition of the legal status of marriage. The first is one based on the liberal principle of state neutrality, and is suggested above. The second is a constitutional argument, and concerns what I take to be the existing reasons why the state currently promotes marriage. As a form of discrimination (against, in this case, either single people or families who are not legally married), the state must demonstrate a legitimate (since the unmarried are not a protected class, only ordinary scrutiny is necessary) state interest served by the discrimination. All of the existing reasons, I will argue, are flawed in one way or another. Moreover, since the promotion of marriage may in effect also discriminate against women and African Americans (warranting intermediate and strict scrutiny, respectively), these various state interests in promoting marriage combine to provide far less than a rationale for the kind of discrimination they allow. The constitutional objection, while it stands on its own, serves also as a surrogate for a more generally normative objection against the discrimination inherent in laws and practices which favor marriage and, in so doing, punish nonmarried people.

State Neutrality and Marriage Promotion

Contemporary versions of liberal theory maintain that state neutrality requires the state to refrain from intentionally promoting one conception of the good life over another. Given the necessity of reaching agreement over shared principles of justice for the purposes of designing institutions of government, and given also the plurality of moral doctrines concerning the good life, contemporary liberals have elevated the need for state neutrality toward various moral views to the status of a secondary principle (necessary for promoting such first principles as toleration and autonomy).[2] The version of state neutrality which Rawls settles upon in *Political Liberalism* is one he calls "neutrality of

aim," in which "the state is not to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it."[3] If the state were to begin promoting particularistic moral aims or discouraging others, it is argued, consensus regarding principles of justice and the proper role of government could not be achieved. State neutrality, then, has the dual purpose of allowing for the range of alternatives necessary for full effective autonomy in making moral decisions, and promoting political stability among holders of conflicting moral views.

Is marriage the kind of good toward which the state should be neutral? Rawls emphasizes that the state "may still affirm the superiority of certain forms of moral character and encourage certain moral virtues."[4] The liberal state is allowed to promote its own interests, so long as they don't interfere with individual autonomy in formulating life plans. Does offering economic incentives for married couples interfere with the ability of single persons to continue being single? To do so would increase the opportunity cost of the single lifestyle, and would further reinforce the moral norm of the traditional married nuclear family; both of which appear to be in violation of neutrality of aim. Is marriage (or does it contain) one of the "certain moral virtues" that the liberal state is allowed to promote? Rawls specifies these as being limited to the "political virtues" which promote "fair social cooperation," including "civility and tolerance, of reasonableness and the sense of fairness." Even if the institution of marriage itself promoted these political virtues (a debatable proposition), the fact that the moral virtues of marriage are not agreed upon as part of an "overlapping consensus" (some, for various reasons, find marriage to be abhorrent) disqualifies it as a legitimate object of state promotion.

State neutrality itself may carry a masculine bias, if neutrality in effect reinforces existing structures of power. All other things being equal, state neutrality toward marriage may, because of the myriad other social conventions and mores which normalize the married couple and nuclear family, create a bias in favor of marriage. Catherine MacKinnon criticizes neutrality on these grounds, suggesting that "if one wants to claim no more for a powerless group than what can be extracted under an established system of power, one can try to abstract them into entitlement by blurring the lines between them and everyone else. Neutrality as pure means makes some sense."[5] State neutrality toward marriage would, to a certain extent, be a pure means to other ends (as previously noted). However, such neutrality would not merely be an apology for the status quo, nor would it leave in place existing masculine or pro-family structures of power. To the contrary, it would overturn and prohibit measures

which seek to normalize any particular structures of marriage or family, and in this sense would be quite radical. The feminist critique of state neutrality carries a great deal more force when it is applied against policies of race or gender universalism; where commitments to neutrality circumscribe the state's ability to remedy past inequalities, and to promote diversity. In the case of the cessation of marriage promotion, it is not the state's aim to actively discourage the traditional family (as it aims to discourage racism or sexism), but rather to acknowledge marriage as containing moral content best left independent of state regulation.

Placing the less powerful group (in this case, the unmarried) on equal footing with a more powerful group (the married, or those who at least favor the promotion of marriage even if they are not themselves currently wed) would not necessarily advantage the stronger group, as this critique suggests. The immediate effect would simply be to make alternative forms of the family (including the single person household) more attractive than they currently are, and to do anything further (like actively promoting or attempting normalize any other forms of the family) would violate the very principles of state neutrality that justify the original objection to legal marriage. The more lasting effect, perhaps, might be to undermine existing norms of the family, opening up a broader range of legitimate and plausible choices for future persons. One must take care not to elevate neutrality to the status of end in itself, since it clearly has value only for what it promotes (namely, greater tolerance toward alternative forms of the family, and more meaningful autonomy in choosing these forms) and for what it discourages (especially the promotion of marriage and the nuclear family for objectionable reasons, and relationships of dependence and domination). So long as the proper role of neutrality is kept in mind, and its original goals are kept in view, the liberal principle seems a good one in making the case for the abolition of legal marriage.

State Interests in Marriage

What possible reasons might the state have in promoting marriage? Since marriage promotion entails a form of discrimination (against unmarried families and single persons), constitutional questions of equal protections must be addressed. Justification of discrimination against a class of persons, which marriage promotion policies contain, requires the demonstration of (depending upon the level of scrutiny applied) some defensible state interest in making the discrimination. One such interest is the promotion of procreation. This rather antiquated state interest assumes that flat or negative population growth constitutes a threat to the

welfare of society at large, and therefore allows for state incentives to encourage married couples to reproduce. Revealingly, this interest in procreation must be served only through procreation within wedlock, rather than to single parents (otherwise no incentives to marry would be needed). Leaving aside for the moment this latter consideration, the state interest in procreation appears ill advised. Rapid population growth already threatens the U.S. with a host of environmental problems,[6] and there seems little threat that a slower growth in the population rate could lead to problems of national defense. Of course, the aging of the current population will require greater levels of payments into the FICA fund in order to cover the costs of the retirement of baby boomers, but the promotion of procreation seems an inefficient way to keep from having to reform Social Security, and hardly requires legal marriage to sanction reproduction.

Another possible state interest is in maintaining a nonstate source of child rearing labor. In the absence of married couples, it might be argued, the state would be forced to provide (at taxpayers' expense) for childcare or risk the neglect of children, since single people lack a nonworking spouse to provide that care. Private childcare, it may be claimed, is both more efficient and preferable in a noneconomic sense (perhaps it strengthens affective bonds between caregiver and care recipient). However, this is no real argument for state promotion of marriage *per se*, since the state would then also have an interest in keeping one spouse at home. Rather, this is an argument for the state promotion of the traditional nuclear family, where one spouse provides childcare labor. A nonmarried couple living together could provide exactly the same childcare as an otherwise-similar married couple. It might be argued that opposite sex couples make better parents, since the child can then have two gendered role models rather than one, but this objection likewise has obvious problems. If the state were sincerely interested in promoting nonstate sources of childcare, it might consider offering a wage to domestic childcare providers, rather than flanking the issue by encouraging matrimony. Historically, arguments for the provision of private childcare have tended to contain the express aim of reinforcing the sexual division of labor, where women were encouraged to provide free home childcare as part of the marriage contract.[7] Any interest the state may claim to have in the welfare of children must be balanced against the very real possibility that women's roles as unpaid care providers are being normalized by the promotion of nonstate child rearing labor through marriage.

A third possible state interest in the promotion of marriage is the generation of a distinct legal category for economic dependence among people who are not biologically related. In the absence of marriage as a

substantive legal status, it might be argued, it would be impossible to provide spousal or partner insurance benefits as an additional means of compensation for work. The practical implication should legal marriage be abolished would be a significant decline in the number of insured persons, since spousal benefits currently cover a great many dependent (either nonworking or working part time for no benefits) spouses. Without the legal category provided by marriage (especially if families of groupings larger than two were allowed), there could be no clear legal standard for the extension of insurance benefits beyond biological relatives (like children). In its absence, too many people might make fraudulent claims to being the partner or spouse of an employed person (raising costs to carriers) to allow any insurance plan in practice to continue to carry a spousal benefit. This loss of a valuable economic benefit (in spousal insurance benefits) would then force an increase in wages to fill its absence.

To be sure, this is a drawback, especially considering the immediate increase in the number of uninsured persons. In the long run, however, this would have a number of advantageous effects. First, though, it should be noted that only those currently married families in which one working spouse receives insurance benefits while the other does not would be affected. As before, this appears not to be a reason for the promotion of marriage *per se*, but rather for the promotion of the traditional nuclear family. In addition, the alternative to employer-provided spousal insurance benefits would be a private contract between spouses whereby the working partner agrees to provide insurance benefits for the nonworking (or part time employed) partner. This arrangement enjoys the advantageous effect of compensating the nonworking partner for domestic labor, since the insurance benefit would no longer be awarded to the working spouse as compensation for work, but would instead be awarded to the nonworking partner as compensation for household work. Domestic labor would therefore be valued in a way that it currently isn't, and since unpaid housework remains predominantly the domain of women, this change would promote some measure of greater gender equality. In short, any attractiveness found in this interest is at least significantly mitigated by the favorable consequences produced by its elimination.

A further drawback to removing the legal category of marriage concerns the progressive taxation system for personal income. Currently, income tax is calculated as a function of household income for married couples, and combining that household income ensures that both partners will pay taxes at the level of the highest tax bracket, rather than the lower brackets each may individually occupy should the income be considered separately. The purpose of considering the combined income of

spouses together is to make household income (which is understood to be, in some sense, pooled within a household economy of shared expenses) reflect the overall economic resources of the family, as distinct from the separate individual spouses, and tax it accordingly. Eliminating legal marriage does away with the ability of the tax system to treat the two separate incomes as one combined household income, and thus allows for a lower tax burden on some couples than would otherwise be the case. As a result, the tax system on the whole would be less progressive than it might otherwise be, insofar as taxes on some currently married couples would decline with the abolition of legal marriage, since some couples who can more easily afford to pay at the higher rates now attached to greater household income would no longer be required to do so.

How serious a drawback is this consequence? It is worth first noting that this would initially constitute a windfall only for some currently married couples in which both spouses work. Perhaps more importantly, however, with the package being crafted by the current Republican Congress to offset the "marriage penalty" there will soon be no significant economic difference (for tax purposes) between legally married and unmarried couples. The GOP package aims to deliver that windfall now to legally married couples (those who are married get to choose whether to pay at separate or joint rates under the current proposal, and will, of course, choose whichever of the two amounts to a lower tax burden), and as a result, there would no longer be any gain to them should legal marriage be abolished. In short, the loss of marriage as a legal category would have no effect on the progressive nature of the income tax system (assuming the current "marriage penalty" legislation passes), so the loss of the category leads to no real additional disadvantages concerning taxes. All personal income would be taxed strictly as personal income under the abolition of legal marriage, and it would be none of the government's business whether or not that income was shared with a spouse, one's children, or anyone else.

A further cautionary note ought to be sounded against the benefits obtaining from the use of marriage as a legal category for the extension of government benefits. The argument is largely historical, but is intended to cast suspicion on the claim that legal categories in themselves are innocuous. Marriage has, in the past, served as a defense against rape and physical abuse of wives by husbands, with the rationale of the "separate spheres" doctrine holding that actions within the family were immune to legal punishment, and that it was therefore not possible to commit marital rape.[8] In addition, the legal category of marriage was the justification for the deprivation of women's property rights through coverture laws, since their full legal identity was subsumed under the

identities of their husbands as part of the marriage contract.[9] Similarly, marriage as a category has been used to prosecute unmarried persons for sexual promiscuity under adultery laws and homosexuals under sodomy laws (since the sphere of privacy extends only to married couples). Even with the case of insurance benefits, marriage has been (and continues to be) used as a category to deny benefits to homosexual domestic partners. Any sort of similar legal classification has the insidious effect of normalizing favored relationships, and marginalizing others, since the classification serves as a legal tool to deny benefits or discriminate against those who don't meet the legal test (which is, in this case, the official state recognition of a legitimate marriage). As such, it carries unavoidable negative consequences.

The final possible state interest (if one pays attention to what the advocates of ending the "marriage penalty" rhetorically claim, this appears to be the overriding current motivation for promoting marriage) is a moral one. Unmarried couples "living in sin" and single parent families offend the moral principles of the ruling elite, and by normalizing the traditional family through the creation of economic incentives alongside existing moral norms, the idea that marriage is the superior form of family life is reinforced. In crafting legislation and other legal benefits that promote marriage, the state is implicitly wielding its regulatory power in an effort to affirm the moral superiority of particular life choices. The distinction between imposing sanctions upon the nonmarried and offering rewards to the married is too fine to withstand careful scrutiny, since the practical effects of either regulatory mechanism are identical. Moreover, the moral interest in promoting marriage is not confined merely to the "nosy preference" in the moral improvement of others, but has a self-interested component, as well. These ruling elites who craft marriage promotion legislation and regulation—already often predisposed to marry (some multiple times)—intend to financially reward themselves for what they take to be their admirable moral choices, as judged by themselves. The objections to this interest are too obvious to warrant further comment.

Susan Thomas criticizes welfare reform legislation recently passed in Wisconsin and New Jersey for promoting marriage among poor women as a means for increasing their economic dependence upon men. The New Jersey Family Development Initiative and the Wisconsin Parental and Family Responsibility Initiative (which together she calls "Bridefare") are examples of marriage promotion incentives carrying an implicit moral condemnation of single motherhood. She describes the rhetoric surrounding the legislation:

> Wayne Bryant, then majority speaker of the New Jersey Assembly and author of the New Jersey Bridefare reforms, dismissed single mother families as "perverted" and "harmful to the community," whereas the architect of Wisconsin's Bridefare program, Eloise Anderson, then head of the Division of Community Services, Wisconsin Department of Health and Human Services, blamed them for "producing a generation of boys that have no worth." Wisconsin Governor Tommy Thompson linked single-mother families to an increase in "child abuse and neglect, cocaine babies, long-term welfare dependence and the breakdown of the nuclear family.[10]

Clearly, these regulative efforts contain a strong and highly objectionable element of state moral paternalism as an overriding aim, in addition to relying upon questionable empirical evidence and making indefensible causal claims.

This testimony suggests a related state interest in promoting marriage—the reduction of poverty among women and their children. If single mothers are more likely to live in poverty than are married couples, then there may be a state interest in promoting marriage as an anti-poverty effort. What else would have to be true to make this a legitimate state aim? First, poverty among single women would need to be directly related to their being single, rather than to other factors (such as difficulty or expenses of securing daycare services, lower wages paid to women for comparable work, etc.). Second, marriage would have to be the best way of reducing poverty among single women (this follows from a constitutional scrutiny test). Little evidence exists that either of these conditional propositions is true. Since marriage offers some financial security, the tradeoffs for that security must be weighed against its benefits. For example, marriage creates a relationship of economic dependence of women on men (at least in cases where matrimony is used as an anti-poverty program) which can be harmful. Existing state welfare programs for single mothers (Bridefare programs excepted) have been designed from the assumption that economic dependence on the state may be preferable to dependence on men,[11] since both relationships are paternalistic, but the latter carries a higher risk of abuse along with less stability and predictability of support. Solely as an anti-poverty program, marriage promotion does not appear to be a particularly promising state aim.

Do any of these state interests justify discriminating against the nonmarried? Single people are not recognized by the Supreme Court as a protected class with a history of discrimination against them (and probably shouldn't be), so such discrimination may warrant only ordinary scrutiny. A 1991 report by the Legal Defense and Education Fund of the National Organization for Women notes several Supreme Court opinions[12]

in which laws that disadvantaged the children of unmarried parents were held to violate the equal protections clause of the 14th Amendment, and another[13] in which the equal protections clause was held to protect a woman's right to make marital and family choices free from state interference. Insofar as state promotion of marriage also discriminates against women (a semi-protected class[14]) in that, for example, Bridefare programs carry a single-mother penalty for benefits, and the "stepparent's bill" promotes marriage by offering greater benefits to women who marry men who are not the biological fathers of their children,[15] the Court has applied heightened scrutiny[16] to such classifications.[17] Most anti-poverty legislation such as the Bridefare programs are clearly aimed primarily at women,[18] and as such ought to warrant at least heightened scrutiny (MacKinnon, for example, advocates the application of strict scrutiny in order to demonstrate sensitivity to the injustice perpetuated by sex-based classifications). Even under ordinary scrutiny, however, I would question the defensibility of state interests in procreation or moral development, and the interest in child rearing would require that only traditional nuclear families be given benefits. Under heightened scrutiny, I can't imagine these interests passing constitutional muster.

The constitutional issue becomes even more complicated when one considers the correlation between nonmarried parents and African Americans. While these are certainly not fully overlapping sets, discrimination against single parents may to a significant degree effectively be discrimination against blacks, which are a protected class and warrant strict constitutional scrutiny. Dorothy Roberts contends that adoption laws which require married parents in effect discriminate against African Americans,[19] and anti-poverty Bridefare laws have a disproportionate racial impact within the black community, where single motherhood is more socially acceptable than in white America.[20] Because policies which aim to promote marriage contain an explicit element of discrimination against the nonmarried and single, but also an implicit element of discrimination against women and African Americans, there must be (according to the strict scrutiny test) some compelling state interest in making such a classification, the state must prove that no alternatives short of discrimination are able to promote those interests, and the burden of proof shifts to the state to clearly demonstrate this interest. Of the various possible interests considered above, none appears to be a likely candidate to justify such discrimination. Moreover, the constitutional problem with marriage promotion mirrors the more general normative objection to such efforts; the promotion of marriage by drawing lines of demarcation between those who will and those who will not receive benefits (especially where these lines often coincide with racial and gender divisions) is simply unfair and unjust, and ought not to be allowed.

Whither the Institution of Marriage?

In the absence of state recognition of marriage, what becomes of marriage as an institution? Does the case for the abolition of legal marriage intend to do away with marriage as a practice altogether? Marriage existed as a practice long before the state began to promote it, and can exist without the state's efforts to encourage it. Even in the absence of state incentives to marry, there remain social, psychological, and economic enticements for some kind of marriage arrangement. If indeed marriage requires the creation of a contractual obligation (that is legally binding) to provide for the other partner(s), then such contracts can be entered into privately, and can be enforced through civil law. These contracts might specify property rights, or alimony obligations, or child custody arrangements, or any other obligation of one partner to another, should the marriage be dissolved. Since the contracts would be made between the consenting partners (rather than with the state), the state could not affect the certain kinds of marriage and family relationships it currently either discourages or prohibits. The state, of course, could not require that partners enter into any kind of contract at all, but neither could it force partners into agreeing to terms unacceptable to an overlapping consensus of reasonable persons (as is currently the case with bans on gay marriage). Partners who wished to have a wedding ceremony to celebrate their mutual civil contracts (should they choose to have them) could do so, but these ceremonies would no longer involve a judge, a clerk of the court, or other governmental official. Catholics who want to be married within the church could still do so, and in so choosing would continue to be bound by whatever contract provisions church officials insist upon, including positions on divorce, contraception, abortion, and so on. The state would simply stay out of the business of marriage entirely.

Would the state find it necessary to require (through legal regulation, for instance) private chapels to admit couples desiring same-sex marriage, as a matter of equal treatment? So long as same-sex ceremonies could be conducted by any such couples who wanted to exchange vows (and the market should provide several wedding service providers for any tastes, so long as demand exists), then there is no reason for the state to interfere. If a same-sex couple wanted a Catholic wedding, and the church prohibited such pairings (as it currently does), the couple should take that issue up with the Catholic Church, not with the state. In order to sustain the principle that marriage is a personal moral decision to be made by consenting autonomous agents free from the interference of state incentive structures, marriage must be fully removed from the public sphere of state regulation. To ensure that the legal status of marriage makes no difference whatsoever in the distribution of state benefits and coercion, the state must not only refrain from recognizing marriage as a legal category, but also from regulating marriage (otherwise it could still normalize favored relationships in a way harmful to difference and otherness) and from regulating the provision of marriage. If the fact that a family (however that gets defined after the Christian Coalition loses its definitional privilege) has entered into a private marriage contract, or held a private marriage ceremony, is to carry absolutely no advantages or disadvantages in terms of state penalties or benefits, then the state can have no possible interest in the surveillance of the marriage process, and ought therefore to remove itself completely.

Conclusion

A weaker version of this argument might recommend doing away with only those economic benefits available to the traditional nuclear family, where one spouse works and the other is assigned unpaid housework and child rearing responsibilities. After all, the bulk of the stated objectives to marriage as a practice concern the normalization of certain forms of families; in particular, the elevation on moral grounds of the nuclear family (in which the man works, the women provides unpaid household and child rearing labor) is seen as an especially unfortunate effect of marriage promotion. It might follow, then, that marriages that don't attempt to normalize the traditional nuclear family (and therefore don't reinforce patriarchy, devalue the labor of women, discriminate against difference, and so on) might be allowed to remain within the purview of state sponsorship, and that the effort ought instead to be directed toward undermining existing norms. This falls short of the mark in several respects. First, it does not adequately value state neutrality toward marriage (or the goals of state neutrality), since it seeks only to circumscribe certain kinds of marriage promotions rather than others. It cannot simultaneously be asserted that the state ought not to promote any particular form of the family, while some forms are held in higher regard than others are. Second, allowing the state to promote families with two working spouses (as an example of a slightly nontraditional family) normalizes that form of the family at the expense of others. Replacing one autonomy-limiting practice with another is simply self-defeating with regard to the original goal of ensuring the maximum range of plausible alternative forms of marriage (or nonmarriage).

As noted above, the impetus to destabilize the norm of the traditional family does not originate in an effort to indict the institution of marriage altogether. There are, I think, sometimes very good reasons why

people might want to make a commitment to each other that for all practical purposes constitutes a marriage. These people, I think, should be allowed to get married, and I certainly don't mean to stand in their way. My objection to the state regulation of marriage (which comes part and parcel with the state promotion of marriage, as I have argued above) is based in part on the fact that, on occasion, the state currently prohibits some such marriages from ever occurring (gay marriage, for example). By making marriage a matter of state interest (as the legal status and promotion of marriage does), marriage itself becomes a public issue, and the public (which, in the contemporary U.S., means political and economic elites claiming to represent the public) therefore decides which forms of marriage of the family are legitimate, and which forms are illegitimate. My contention is that the only effective protection from the normalization of particular forms of the family is to remove from the state the coercive power that allows it to promote or to discourage these forms of the family. Abolishing legal marriage does precisely that.

There are, to repeat, several very good reasons for people to get married. On the other hand, I think that there are a number of very bad reasons to get married, and one of the worst of these is that marriage provides an enticing package of economic benefits. People who get married solely as an income tax sheltering strategy, or unhappy couples who remain married solely for the spousal insurance benefits provided through one partner's employer, harm the institution of marriage as a whole by reducing it to such crass instrumental terms as economic advantage, which degrades the emotional commitment and mutual concern that ought to be the defining part of marriage. While stopping short of saying that these kinds of couples should not get married or should get divorced, I would suggest that these are very poor reasons for getting or remaining married, and that couples married for the wrong reasons are often those who end up causing harm to each other, as well as to their children. Women who remain in abusive marriages because of their economic dependence on their husbands are, I would contend, one consequence of the state promotion of marriage, and one that is perpetuated by the state recognition of marriage as a legal category. If people are to continue to get married (as, I expect, they would), they ought only to do so for the right reasons, and the abolition of legal marriage would assist in encouraging them to do so.

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NOTES

1. Christi Harlan, "Republicans offer simpler plan to end 'marriage penalty'," *Wisconsin State Journal*, 29 April 1998, p. 4A.

2. Ronald Dworkin, in his essay "Foundations of Liberal Equality" (*The Tanner Lectures on Human Values* XI [Salt Lake City: University of Utah Press, 1990]), describes neutrality as an axiom which some liberals mistake for a theorem. While it may not be first principle, it is right up there in the liberal hierarchy of aims, and most political liberals agree upon its necessity in some form.

3. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 193.

4. Rawls, p. 194.

5. Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), p. 167.

6. See, for example, P. Ehrlich and A. Ehrlich, *The Population Explosion* (London: Hutchinson Press, 1990) for the effects of overpopulation on the environment. Even if one does not subscribe to this view, it remains problematic to claim that there remains any strategic interest to be served by the state actively promoting procreation. Historically, underpopulated (by U.S. citizens) parts of the continent may have been at risk for invasion or claims on that land by other nations, but this is obviously no longer the case.

7. See Carol Pateman, *The Sexual Contract* (Palo Alto: Stanford University Press, 1988), and Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (Cambridge: Harvard University Press, 1994). Both discuss in some detail the history of the sexual division of labor as it relates to public policy.

8. See Carol Pateman, "The Patriarchal Welfare State," in *Democracy and the Welfare State*, ed. Amy Gutmann (Princeton: Princeton University Press, 1988), pp. 231–60, for a discussion of women's citizenship and its denial through rape laws (in the U.S., Great Britain, and Australia), and Keith Burgess-Jackson, "Wife Rape," *Public Affairs Quarterly* 12, no. 1 (January 1998): 1–22, for a more thorough canvassing of wife rape laws in the contemporary U.S., as well as the justifications of them.

9. Susan Gluck Mezey, *In Pursuit of Equality: Women, Public Policy, and the Federal Courts* (New York: St. Martin's Press, 1992). Mezey points out that it wasn't until the early twentieth century, with the enactment of Married Women's Property Acts, that women began to acquire a legal identity (with rights to contract, sell property, and sue or be sued) separate from that of their husbands.

10. Susan L. Thomas, "Exchanging Welfare Checks for Wedding Rings: Welfare Reform in New Jersey and Wisconsin," *Affilia* 10 (Summer 1995): 125–26.

11. See Pateman, "The Patriarchal Welfare State" (1988), and Frances Fox Piven, "Women and the State: Ideology, Power, and the Welfare State," *Socialist Review* 14, no. 2 (1984): 14–17. Aid to Dependent Children (ADC), later Aid to Families with Dependent Children (AFDC), was designed with this aim in mind. "Man in the house" rules (since eliminated), in which benefits were decreased if social workers

found a man (employed or otherwise) living in the same residence as a single-mother family, were, in part, a reflection of that concern.

12. Including *Reid v. Campbell*, 476 U.S. 852 (1986), *Mills v. Habluetzel*, 456 U.S. 91 (1982), and *Lalli v. Lalli*, 439 U.S. 259 (1978).

13. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

14. Justice Brennan created a level of intermediate scrutiny for sex-based classifications, where the state was required to demonstrate "important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

15. Thomas (1995).

16. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 314 (1976).

17. National Organization for Women, Legal Defense and Education Fund (1991). *A legal analysis of "caps" on welfare benefits to families with teen mothers, as proposed in Wisconsin's Parental and Family Responsibility Initiative*. Unpublished manuscript, quoted in Thomas (1995).

18. See G. S. Goldberg and E. Kremen, *The Feminization of Poverty: Only in America?* (Westport, Conn.: Greenwood Press, 1990), and B. Ehrenreich and F. Fox Piven, "The Feminization of Poverty," *Dissent* (Spring 1984), for an excellent discussion of trends toward the greater impoverishment of women.

19. Dorothy Roberts, "Racism and Patriarchy in the Meaning of Motherhood," *Journal of Gender and the Law* 1 (1993): 1–38.

20. T. Amott and J. Mattaei, *Race, Gender and Work in the United States* (Boston: South End Press, 1991). Amott and Mattaei analyze marriage from the point of view of race and culture, and find social and moral approbation of marriage far more prevalent in white than in African American culture.