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Cut the Connection: Marriage and the State

Daniel J. Hill

Chair Elect

Tyndale-Fellowship Study Group for Philosophy of Religion

United Kingdom

Abstract: I attempt to argue that the connection between the state and the institution of marriage should be severed, i.e. that the state should take no cognizance of the marital status of anyone; there should be no laws mentioning the marital status of anyone, and in particular, there should be no legal registration of marriages, still less insistence on state agents' solemnizing or witnessing them. I respond to various objections and discuss some examples of the actual laws surrounding marriage in various jurisdictions.

Background

In the various states of the US, in England and Wales,¹ and in almost every other legal jurisdiction,² the state attempts legally to take cognizance of the marital status of its subjects. The most obvious way in which this happens is by the law's keeping a register of marriages (along with births and deaths). In England and Wales the state goes further: at English-and-Welsh-law every marriage that begins in England and Wales does so only because an agent of the state (a registrar, or authorized religious minister, for example) effects or witnesses it.³ This contrasts with other jurisdictions⁴ in which so-called common-law marriages (i.e. ones whose beginning has not been effected or witnessed by a state official) are legally recognized. Another way in which the state attempts legally to take cognizance of the marital status of its subjects is by making laws that treat

¹ Scotland and Northern Ireland are, of course, separate jurisdictions.

² Exceptions seems to be the Indian jurisdictions of Jammu, Kashmir, and Manipur, as far as Christians therein are concerned:
https://en.wikipedia.org/wiki/Christian_Personal_Law#Marriage (accessed September 5, 2015).

³ This has been the case since at least the Marriage Act 1753, full title 'An Act for the Better Preventing of Clandestine Marriage', popularly known as 'Lord Hardwicke's Marriage Act' (26 Geo 2 c 33).

⁴ US jurisdictions in which this holds are listed at
<http://www.unmarried.org/common-law-marriage-fact-sheet/> (accessed October 17, 2015). In Scotland marriage 'by cohabitation with habit and repute' is still legally recognized if the cohabitation began before 4 May 2006: Family Law (Scotland) Act 2006 s 3(2)(c), on-line at <http://www.legislation.gov.uk/asp/2006/2/section/3> (accessed October 17, 2015).

the married differently from the unmarried, for example by making laws giving tax breaks to the married.⁵

The thesis of this paper is that the state should take no cognizance of the marital status of anyone; there should be no laws mentioning the marital status of anyone, and in particular, there should be no legal registration of marriages, still less insistence on state agents' solemnizing or witnessing them.

Arguments for Cutting the Connection

Argument 1 (the argument from libertarianism):

Libertarianism is the thesis that the state should do only what is strictly necessary. Arguments for libertarianism would take up too much space, and are heavily debated in contemporary philosophy, so I shall not repeat them here.

The second premise of this argument is that it is not strictly necessary that the state should register marriages or have its agents conduct weddings or even take cognizance of its citizens' marital status in laws. I shall address objections to this premise later.

It follows from these two premises that the state should not register marriages or have its agents conduct weddings or even take cognizance of its citizens' marital status in laws.

Argument 2 (the argument from non-discrimination)

The first premise of this argument is that the state needs compelling reasons if it is to treat the unmarried differently from the married. Indeed, in many jurisdictions, under equality legislation it is illegal to treat the married differently from the unmarried in certain contexts (e.g. employment).⁶ More generally, the point is that the burden is on the state to show how the marital state of the citizen is relevant to the law being enacted, so as to justify the proposed discrimination. This is particularly important if the proposed discrimination favours one class over the other.

The second premise of this argument is that there are no compelling reasons to treat the unmarried differently from the married. I shall address certain alleged reasons later.

⁵ The UK's Marriage Allowance (<https://www.gov.uk/marriage-allowance> (accessed October 17, 2015)) and Married Couple's Allowance (<https://www.gov.uk/married-couples-allowance> (accessed 17 October 2015)) are examples, though these are also available to couples in a civil partnerships.

⁶ See, e.g., the UK's Equality Act 2010 Part 5, Ch. 1, on-line at <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/1> (accessed September 5, 2015).

It follows from these two premises that the state should not treat the unmarried differently from how it treats the married.

Argument 3 (the argument from the lack of agreement concerning marriage)

The first premise in this argument is that the state should not act in the name of its citizens if its action is highly controversial and not strictly necessary, so as to avoid offending the consciences of those in whose name it takes action. I admit that there are some strictly necessary actions, e.g. defending its citizens against external attack,⁷ that are highly controversial; nevertheless, if a state action is both highly controversial and strictly unnecessary then I say that it should not be undertaken. For example, it used to be the case that many states promoted a particular religion. This is now highly controversial in most states, and, I assert, is not strictly necessary (even if the particular religion is true), so the state should not promote any particular religion (or religion in general, for that matter).

The second premise in this argument is conjunctive. The first conjunct is that there is no agreement in our society concerning the nature of marriage. There is, first and foremost, no agreement whether the state is actually creating marriages or merely registering ones that God or the parties create. Secondly, there is no agreement on the question of which relationships ought to be registered by the state. In particular, there is still disagreement in society over:

- Whether, and if so under what conditions, marriages can be dissolved.⁸
- Whether marriages can be voided *ab initio* by the will of the parties.⁹
- Whether one can marry a non-human animal.¹⁰
- Whether one can marry an inanimate object.¹¹

⁷ Some may dispute this, however, pointing out that (i) some states today have no armed forces (cf. the list at https://en.wikipedia.org/wiki/List_of_countries_without_armed_forces (accessed October 17, 2015)), and (ii) historically, some important states had their defence ensured by private armies up until early-modern times.

⁸ For example, the Roman-Catholic Church's position on when a marriage can be dissolved are set out in the Code of Canon Law, Canons 1141–1143, on-line at http://www.vatican.va/archive/ENG1104/_P44.HTM (accessed October 17, 2015).

⁹ Cf., for example, section 12 of Matrimonial Causes Act 1973 (England and Wales) <http://www.legislation.gov.uk/ukpga/1973/18> (accessed October 17, 2015).

¹⁰ See the examples listed at https://en.wikipedia.org/wiki/Human%E2%80%93animal_marriage (accessed October 17, 2015).

- Whether marriages can be registered after the death of one or more parties.¹²
- Whether someone can be party to more than one marriage at the same time.¹³
- How many parties there can be to a marriage.¹⁴
- Whether the parties to a marriage have to be of different sexes.¹⁵
- How closely the parties to a marriage can be related.¹⁶
- Whether one can marry oneself.¹⁷
- How old the parties have to be.¹⁸
- What mental capacity is required of the parties.¹⁹

¹¹ Cf., for example, Erika Eiffel, who considers herself married to the Eiffel Tower, https://en.wikipedia.org/wiki/Erika_Eiffel (accessed October 17, 2015).

¹² This is possible at French law: Act no 59-1583 of 31 Dec. 1959, Article 171 of the French civil code, on-line at http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_2_2.pdf.

¹³ For examples of states and institutions that recognize polygamy see <https://en.wikipedia.org/wiki/Polygamy> (accessed October 17, 2015).

¹⁴ For background on group marriage see https://en.wikipedia.org/wiki/Group_marriage (accessed October 17, 2015). For examples of ‘throuples’ whose members regard themselves as in a three-person marriage see <http://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/> (accessed October 17, 2015), and <http://www.brusselsjournal.com/node/301> (accessed October 17, 2015).

¹⁵ For background on same-sex marriage and the jurisdictions that permit it see https://en.wikipedia.org/wiki/Same-sex_marriage (accessed October 17, 2015).

¹⁶ For background on the degrees of kinship that have been held at English-and-Welsh law to invalidate marriage see https://en.wikipedia.org/wiki/Prohibited_degree_of_kinship (accessed October 17, 2015). The famous English case of *Thompson v Dibdin* [1912] AC 533 (HL) concerned degrees of affinity and whether a minister of the established church had a right to refuse the sacrament to someone he considered invalidly married if the state held it to be a valid marriage.

¹⁷ For an example of someone that considers herself married to herself, see <http://www.theguardian.com/lifeandstyle/2014/oct/04/i-married-myself-wedding> (accessed October 17, 2015).

¹⁸ For a list of the different ages that different jurisdictions regard as being the minimum age of marriage see https://en.wikipedia.org/wiki/Marriageable_age (accessed October 17, 2015).

¹⁹ For one such difficult case in England see *Sandwell MBC v RG and GG and SK and SKG* [2013] EWHC 2373 (COP), judgment at <http://www.bailii.org/ew/cases/EWCOP/2013/2373.html> (accessed October 17, 2015), also covered at <http://www.telegraph.co.uk/news/uknews/10226057/Sikh-woman-asks-court-not-to-annul-marriage-to-mentally-disabled-man.html> (accessed October 17, 2015). The judge here did not annul the marriage, but did threaten the wife with imprisonment were she to engage in sexual intercourse with her husband.

- Whether sexual intercourse, or the capacity to engage in it, is necessary for there to be a marriage.²⁰
- Whether there can be a marriage if each party intends it to finish after a short time.²¹
- What act of will or intention is necessary for there to be a marriage.²²
- Whether it is possible to engage in marriage solely to gain citizenship in a country.²³
- Whether it is possible for one party to be married to another, without the second party's being married to the first.²⁴
- Whether a living person can marry a ghost.²⁵
- Whether a ghost can marry a doll.²⁶
- Whether members of the British Royal Family are able to marry in civil registry offices.²⁷

²⁰ For example, canon 1084 of the Canons of the Catholic Church states that 'antecedent and perpetual' impotence nullifies any attempted marriage: http://www.vatican.va/archive/ENG1104/_P3Y.HTM (accessed October 17, 2015).

²¹ For discussion of Islamic Nikāḥ al-mut'ah ('temporary marriage'), see https://en.wikipedia.org/wiki/Nikah_mut%E2%80%98ah (accessed October 17, 2015).

²² See, for example, canons 1095–1107 of the Canons of the Catholic Church, online at http://www.vatican.va/archive/ENG1104/_P3Z.HTM (accessed October 17, 2015).

²³ For discussion of so-called 'sham marriage', see https://en.wikipedia.org/wiki/Sham_marriage (accessed October 17, 2015).

²⁴ This possibility was discussed in Clarence Bouma, Report XXV (Minority Opinion) to CRCNA Synod 1934, Christian Reformed Church, *Acts of Synod, 1934*, p. 290.

²⁵ Compare the Chinese phenomenon (not legally recognized) of 'ghost marriage': [https://en.wikipedia.org/wiki/Ghost_marriage_\(Chinese\)](https://en.wikipedia.org/wiki/Ghost_marriage_(Chinese)) (accessed September 5, 2015).

²⁶ Compare the Japanese practice (not legally recognized) described at <http://www.atlasobscura.com/articles/corpse-brides-and-ghost-grooms-a-guide-to-posthumous-marriage> (accessed September 5, 2015).

²⁷ See the discussion at https://en.wikipedia.org/wiki/Wedding_of_Charles,_Prince_of_Wales,_and_Camilla_Parker_Bowles#Questioning_a_royal_civil_wedding (accessed September 5, 2015), the piece by Toby Young at <http://blogs.telegraph.co.uk/news/tobyyoung/100064426/camilla-cant-become-queen-because-shes-not-legally-married-to-charles/> (accessed September 5, 2015), the Parliamentary Briefing paper at <http://www.parliament.uk/briefing-papers/SN03417.pdf> (accessed September 5, 2015), and the official written ministerial statement of Constitutional Affairs Secretary and Lord Chancellor, Lord Falconer, of 23 February 2005, at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/pubs/statements/royalmarriage.htm> (accessed September 5, 2015).

There is no realistic prospect of society's coming to a common mind on these matters. Even within religions there is considerable disagreement over the answers to these questions. Inevitably one group or another will feel discriminated against or unfairly omitted if their favoured concept of marriage is not recognized. The fairest way to avoid these problems is to treat all alike by omitting all possible concepts of marriage, i.e. having no references to marriage at all in any laws. This would also save considerable money and legal time in not having courts determining who is married to whom.²⁸

The second conjunct of this premise is that it is never strictly necessary for a state to register a marriage, or to discriminate on grounds of marital status, still less in the person of one of its agents to witness or effect a marriage. I shall discuss this further in responding to objections, but one point to mention here is directed against those that believe both that marriage is an institution not created or governed by the state and that it is strictly necessary for the state to register a marriage or to discriminate on grounds of marital status. Some of these people have had the ground taken out from under their feet by the preceding point, since some holding these views will have to admit that the state is not tracking what they take to be real marriage at all (though it might be tracking an approximation to it).

Argument 4 (the argument from the conscience of state employees)

This argument is related to the third, except that while the third considered those in whose name the state acts (its citizenry), this considers those tasked with carrying out the state's acts. The disagreement to which allusion has already been made affects state employees too: if a state employee is asked to certify a marriage that he or she thinks is not a marriage then the employee will be placed in a difficult position. His or her conscience may dictate that he or she not do what the state is asking him or her to do. Similarly, if a state employee is asked to treat as unmarried (e.g. by enforcing higher tax contributions) people that he or she considers married this too may offend his or her conscience. The state will be able to draw from the best pool of employees if it does not put its workers in difficult situations like this. In general, not all controversial actions can be avoided, but if the state took no cognizance at all of the marital status of its citizens then there would be fewer controversial cases to put its employees in difficult circumstances.

Having given four arguments for the cutting of the connection between marriage and the state, I now turn to consider objections.

²⁸ According to the Office for National Statistics, the number of divorces in England and Wales in 2012 was 117,849. There were also 291 annulments. Office for National Statistics, 'Divorces in England and Wales, 2012', 6 February 2014, on-line at http://www.ons.gov.uk/ons/dcp171778_351693.pdf (accessed October 17, 2015).

Objections to Cutting the Connection

The Objection from the Family: Marriage is the foundation of the family, and the state should promote the family.

Response: There are different competing notions of what a family is in modern society, and any choice by the state of one of the competing notions to be promoted will be highly controversial. There are also families in which almost everyone would agree there is no marriage, e.g. a widow and her young children.

The Objection from Children: Marriage helps us know which children belong to which parents, and the safeguarding of that relationship is an important and legitimate function of the state's.

Response: It is perfectly possible, and not uncommon, for the parents of a child not to be married to each other, and for a couple to be married without being parents. It is not part of the present proposal that the registration of children to parents be abolished.

The Objection from Statistics: Statistics show that children of married parents do better under certain measures, or that adults do better when married. So the state should promote marriage.

Response: It is by no means certain that these statistics will be tracking real marriage, rather than the state's, perhaps faulty, view of marriage. Secondly, and more importantly, it isn't the duty of the state to promote every good thing. It may well be that people with access to the latest hi-tech assistance do better under some measures, but it isn't the case that the state has to provide the latest hi-tech assistance to everyone.

The Objection from the Goodness of Marriage: Marriage is a good thing, and the state's promotion of marriage in tax breaks etc., and making it hard to divorce is, in consequence, a good thing.

Response: Many people that believe that marriage is not effected or governed by the state will have to concede that the state is not in fact promoting real marriage, even if it is promoting something approximating it. Further, this objection seems to assume that if something is good then it is good for the state to promote it. I deny this, however. It seems to me that there are goods of many different kinds (children, religion, reading, philosophy, sport, culture, hobbies) that it wouldn't be good for the state to promote.

The Objection from Democracy: Your proposal is un-democratic. Most people do not want the state to cease registering marriages, so we should not implement it.

Response: It is not being suggested that this proposal should be foisted on an unwilling electorate. The proposal should be campaigned for and subjected to the ballots of the general public or the elected representatives in the usual way. The fact that a proposal does not yet command 50% of the popular vote does not show that it is wrong.

The Objection from Unpopularity: Hardly any current society does it your way, so your way must be wrong.

Response: Some societies, such as the Indian jurisdictions of Jammu, Kashmir, and Manipur, as far as Christians therein are concerned, do follow this pattern.²⁹ The fact that very few current societies implement a suggestion does not imply that that suggestion is wrong. Central registration of marriages began in England only on 1 July 1837; it does not seem to me that the country was in a terrible plight before then.

The Objection from the Security of Women: Your proposal would deprive women of the security of marriage.

Response: My proposal would not deny anyone the security of marriage. It would deny only the legal registration of marriage. It does not seem to me that the legal registration of marriage affords significant protection to wives (or to husbands): battered and exploited wives (and husbands) exist just as do battered and exploited unmarried partners.

The Objection from Separation: Your proposal would mean that on splitting up there would not necessarily be a prospect of a legally enforced fair settlement.

Response: There is in principle no reason why the law could not enforce a fair settlement in the break-down of a relationship of any kind. Further, every adult of sound mind is already legally able to enter into a legally binding contract with respect to assets and possessions. One example would be that of transferring a property to joint ownership.

Objection from Plight of Children: Children are protected by the legal registration of marriage; your proposal puts them at risk.

Response: In the event of a break-up of a family the marital status of the natural parents of the children makes no difference in English-and-

²⁹ Compare https://en.wikipedia.org/wiki/Christian_Personal_Law#Marriage (accessed September 5, 2015).

Welsh law to the obligation to pay maintenance to the children.³⁰ On my proposal the legal registration of parents would continue as is currently the case, I do not think that legal registration of marriage adds any extra safeguard for children.

The Objection from Incest, Child Marriage, and Polygamy: Your proposal opens the door to incest, child marriage, and polygamy.

Response: My proposal concerns marriage only, not sexual relations. It would remain an offence on my proposal to engage in sexual relations with a minor or with a close relative. There would be no practical difference here. Nor would there be any practical difference with respect to polygamy: in England and Wales it is legal to have more than one sexual partner at once, so it is possible to be a polygamist in practice, just not at law. My proposal does not change the status quo here.

The Objection from Discrimination: Your proposal would allow rampant discrimination against people because of their marital status. For example, it would allow employers to sack married women.

Response: My proposal is independent of, and does not concern, anti-discrimination law. The laws forbidding discrimination on grounds of marital status could be kept unaltered on my proposal. This is because, at least at English-and-Welsh law,³¹ it is illegal for someone to discriminate in the relevant circumstances against someone else on the grounds of the marital status that the discriminator believes the victim to have, whether or not the victim does have it. (For comparison: many jurisdictions, such as England and Wales, do not have state registration of religious beliefs or of sexual orientation, yet it is still an offence in many such jurisdictions to discriminate against someone because of his or her perceived religious beliefs or perceived sexual orientation.³²)

³⁰ See, e.g., <http://www.thisismoney.co.uk/money/guides/article-2650606/What-money-rights-unmarried-couples-break-up.html> (accessed September 5, 2015).

³¹ See Explanatory Notes to the Equality Act 2010 Part 2, Chapter 2, Section 13, para 63, on-line at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/2/1> (accessed October 17, 2015).

³² For the case of England and Wales see sections 10 and 12 of the Equality Act 2010, on-line at <http://www.legislation.gov.uk/ukpga/2010/15/section/10> and <http://www.legislation.gov.uk/ukpga/2010/15/section/12> (accessed October 22, 2015).

The Pragmatic Objection: Marriage is too deeply embedded in the law. For example, there are more than eight thousand references to marriage in English-and-Welsh law;³³ it is just not practical to eliminate them all.

Response: In the case of English-and-Welsh law, the Marriage (Same Sex Couples) Act did not make changes to these eight thousand different references, or the just under 2,000 references to “husband” and approximately 1,800 to “wife”.³⁴ Rather, the Marriage (Same Sex Couples) Act provided a schedule of interpretation, which dealt at one sweep with any relevant passage in any earlier statute.³⁵ It is not, therefore, necessary to go piecemeal through every law and pass a new specific piece of legislation to deal with it.

The Objection from Romance: You are trying to abolish marriage, or, at least, the romance of it.

Response: I am not proposing the abolition of marriage, merely wresting it back from state control. The involvement of the state in marriage seems to me to detract from, rather than add to, the romance.

Conclusion

It seems to me that both as a matter of principle and as a pragmatic response to the current deep disagreements in society over marriage, the connection between the state and marriage should be cut: the state should take no cognizance of the marital status of anyone; there should be no laws mentioning the marital status of anyone, and in particular, there should be no legal registration of marriages, still less insistence on state agents’ solemnizing or witnessing them.³⁶

Daniel J. Hill is Chair Elect for the Tyndale-Fellowship Study Group for Philosophy of Religion in the United Kingdom.

³³ According to the then Minister of State, Department for Culture, Media and Sport (Sir Hugh Robertson), Marriage (Same Sex Couples) Bill Deb 7 March 2013, col 430, on-line at <http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/130307/pm/130307s01.htm> (accessed October 17, 2015).

³⁴ According to the MP for Enfield, Southgate (Mr David Burrowes), Marriage (Same Sex Couples) Bill Deb 7 March 2013, col 426, on-line at <http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/130307/pm/130307s01.htm> (accessed October 17, 2015).

³⁵ Marriage (Same Sex Couples) Act 2013 Schedule 3, on-line at <http://www.legislation.gov.uk/ukpga/2013/30/schedule/3/enacted> (accessed October 17, 2015).

³⁶ Many thanks to Lorraine Cavanagh, Sarah Spear, and Peter J Williams. None of these should be thought to agree with the contents.