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REFLECTIONS

A Marriage Proposal: Privatize It



COLIN P. A. JONES

A fundamental problem with marriage is that it comes in only one size. As a legal relationship, matrimony is a monopoly product supplied by the government. As a personal relationship, however, the institution is one of unique, personal importance to those who partake of it; to some, it even has deeply felt religious significance. Thus, in essence, a mismatch exists between what is demanded of marriage and what is supplied. This imbalance makes the prospect of same-sex unions a seemingly intractable problem: with only one legally sanctioned version of marriage available, those who (rightly or wrongly) view homosexuality as a mortal sin are hostile to the prospect of sharing it with gay couples.

As with many things in life, a free-market approach that offers people a choice may provide a solution. As one of the oldest types of contractual relationship, marriage has always been a form of partnership. Subject to certain statutory constraints, businesspeople have long been free to form whatever sort of partnership they consider appropriate to their needs. Why not make the same flexibility possible for marriage? We have already moved in that direction in some respects: no-fault divorce states, such as California, treat the dissolution of a marriage in much the same way as the dissolution of a business partnership.

Couples entering into marriage should also be allowed to use a partnership agreement tailored to their own circumstances and aspirations, one that reflects the values and expectations that they themselves attach to marriage. Of course, not

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everyone can draft a workable partnership agreement to govern a lifelong (one hopes) relationship, so lawyers and other private enterprises would develop off-the-shelf marital partnership kits to fill this need, just as suppliers have developed kits and other legal documents already available in bookstores and online. Customized products would be available to those willing to pay for them.

Even greater efficiencies might be achieved through the establishment of marital corporations (MCs), each having hundreds or thousands of couples as stockholders, all sharing common values about marriage. Couples getting married would subscribe to the shares of an existing MC, whose charter documents would set forth the terms of the type of marriage to which the subscribing couples agree.

Thus, a plethora of choices might be made available to prospective newlyweds. A Catholic MC would forbid its members to divorce. Progressive MCs would allow gay marriage. Islamic or Mormon MCs would allow polygamy. Plain vanilla MCs would probably be popular among people who just want to get married without thinking about it too much. In any event, numerous options would be available, and consideration of these options might actually encourage people to think about what they want out of their marriage. When individuals with strong feelings about homosexuals, divorcees, Republicans, or other “disfavored” types of people can exclude such people from their own version of marriage by joining a like-minded MC, they will be less likely to object to same-sex couples joining different MCs (perhaps even MCs that accept *only* same-sex couples). Exclusivity and the use of choice to define one’s identity lie at the core of modern society already. Extending this flexibility to marriage is only logical. Those who believe for religious or other reasons that only “their” version of marriage is the real thing will be free to conduct their affairs accordingly without insisting that their views be forcibly imposed on others.

MCs would be a huge boost to the multi-billion-dollar wedding industry, and they would open up a vast range of possible business opportunities throughout society. Some MCs might be established as nonprofit organizations that also work to further social or environmental causes about which some couples have strong feelings. Others might become investment vehicles whose assets formed the marital nest egg. Still others might charge a subscription fee that would be invested and then pay dividends to lasting marriages at significant anniversaries. Exclusive brand MCs can charge extravagant membership fees; getting married through, say, the Tiffany Marriage Corporation might be a huge status symbol for which some people would pay a hefty premium. Some MCs might become social clubs through which like-minded couples developed friendships or business contacts. As a community of like-minded individuals, an MC would be a fabulous marketing vehicle, offering members affinity credit cards, group life insurance, and other benefits. In any case, with incentives to develop MCs tailored to all segments of society, marriage would turn into an even bigger business than it already is—the usual outcome of offering people more choice.

Numerous issues would have to be worked out, of course. Just as with any contractual relationship, minors below a certain age would be incapable of joining an MC. Exemptions from securities laws would be needed to free MCs from having

to register with the Securities and Exchange Commission. MC shares would not be freely transferable, except perhaps to children (like precious family assets, such as mom's wedding ring). The messy issues that arise in a divorce would still exist, just as they do in any bankruptcy or corporate dissolution. And what would you do if you want to get divorced and remarry, but have made your first marriage contract through an MC that does not permit divorce? Subscribe to an MC that allows polygamy, perhaps, or at least be willing to assume whatever financial liabilities attend a breach of the shareholder terms of your first MC. Freedom of choice means freedom of contract, which includes the freedom to breach a contract if you are willing to accept the consequences. But because the MC charter would also be a perfect place to include prenuptial terms, divorce under MCs might actually be simplified, as more people would be likely to have at least some terms in place clarifying their rights and obligations when the union goes bad. The issues that need to be resolved need not be insurmountable because the entire scheme assumes the use of long-standing contractual and partnership structures.

The reproductive aspects of marriage will also raise questions—not because MCs would change the way the law deals with children in divorce situations (I am *not* suggesting that we contractualize the parent-child relationship), but because allowing same-sex unions, through either an MC regime or the ad hoc approach that some states are already following, eliminates the presumption of reproduction that underlies traditional marriage.

Big deal, respond gay marriage proponents, who point out that nobody looks at the reproductive capabilities of male-female couples before allowing them to marry and that many such couples marry even after child-bearing age. Many argue further that whether the family involves legal marriage or not, its focus should be on child rearing, rather than on sex (procreative or not). This argument is a perfectly reasonable one, which doubtless explains why adoption by gay couples has generally been less controversial than marriage for gay people. These arguments, however, do not eliminate the *presumption* of reproduction that underlies marriage.

Presumptions can be very useful in law, even if they seem unfair in specific cases. For example, the law presumes that minors are incapable of consenting to sexual intercourse, no matter how precocious they might be. This presumption spares us the messy factual inquiry into a minor's "maturity" in individual cases. Similarly, a presumption of reproduction spares society the need to inquire into the sexual activities and reproductive capabilities of individual couples. After all, getting government out of the bedroom has long been a central objective of those who support reproductive rights and of those who support rights for homosexuals. But if marriage is no longer about sex (hetero, reproductive, gay, or other), why do we care about incestuous marriages (as opposed to incest itself, which I am emphatically *not* endorsing here)?

More to the point, to allow same-sex marriage but none of the other types of marriage now excluded under the existing regime would be merely to redraw the line that once excluded gays, but still excludes other, more widely accepted forms of

marriage. Polygamy, for example, is recognized in many countries and by at least one major religion. By what logic do we continue to prohibit polygamy once we allow same-sex marriages?

The references to polygamy and incest may seem like a typical alarmist “slippery-slope, where will it end” argument against gay marriage, but that is not my intent. Marriage may be about a loving, lifelong relationship, but in today’s world it is also about benefits. I have an unabashedly heterosexual female friend who works for a major corporation. Because she lives in Massachusetts, where same-sex marriages were recently legalized by judicial fiat, she has started talking about marrying one of her best girlfriends for the sole purpose of giving her friend access to her company’s health-care benefits. Fraudulent, some might say; but why not? Does *anyone* want to get into the business of determining who is really gay and who is not? Once gays can get married in same-sex unions, why can’t heterosexuals? And if my friend can marry her friend to get spousal benefits, why can’t I do the same thing for my widowed mother? Or my brother? If marriage is not at least presumptively about reproduction anymore, there is no real reason to disallow any of these marriages. These examples may seem ridiculous, but with the cost of health care in the United States reaching dizzying new heights every year, it is only a matter of time before someone with a good job brings a lawsuit demanding to be allowed to marry his seriously ill, unemployed brother. Thus, those who want to allow gay marriage (or polygamy, for that matter) under the current system should probably get ready to pay much more for health-care insurance because many more “spouses” may sign up for benefits than anyone expects.

MCs would solve this problem, again by providing freedom of choice (which, after all, is one of the things that gay marriage is supposed to be about). Although people would be free to use an MC to enter into whatever type of marriage they prefer, governments and corporations might limit the types of MCs that they recognize *for benefits purposes*. For their members to be eligible for federal spousal benefits, MCs might be required to have mandatory provisions in their corporate charters that, for example, prohibit gay unions but permit interracial ones. Such limitations might reflect public policies or economic realities, but they would not keep us from getting the government out of the business of deciding who can and who can’t get married. Changing federally mandated MC charter provisions prohibiting gay marriage would require only an act of Congress. Though not wholly satisfactory, such a regime would certainly be more conducive to gradual change than would a situation in which gay marriage had become an issue of *constitutional* prohibition—which, in the absence of any middle ground, seems to be where the religious right threatens to take it.

Choice of marital forms would also give governments more flexibility by allowing them to recognize a range of MCs for different purposes. For example, the federal government might recognize same-sex MCs for immigration purposes, but not for federal benefit purposes. Liberal states might choose to go beyond the federal government in recognizing marriages for benefits purposes, whereas conservative

states might choose to do less. Most states would have no good reason not to recognize all types of MCs for purposes of applying their inheritance laws: in the absence of a written will, a freely chosen MC is more likely to reflect my testamentary intent than a one-size-fits-all statutory scheme that says my partner can inherit only if he or she is a of a different sex.

Just as governments and corporations would “choose” MCs for benefits purposes, employees would also choose them. Benefits providers who are too restrictive in the range of spouses to whom they offer benefits might have trouble attracting qualified employees. MC recognition would be another way for companies to compete for talent and define their corporate cultures. MCs that did not qualify for corporate or government benefits would at least provide a potential vehicle for group health-insurance benefits, so even the polygamists might be able to find coverage. “Disfavored” MCs might also provide a vehicle for organizing their members to lobby for change in benefits regimes. Again, however, the most important benefit would be the separation of the fundamental issue of what constitutes a marriage from secondary issues about benefits.

The MC regime would not satisfy everyone, but more people will be at least partially satisfied, which is the sign of a good compromise. And the new regime would surely be an improvement over the simplistic “marriage/no marriage” dichotomy that currently defines the institution. More important still, people would be able to exercise some choice in how their marriage is treated rather than having the government impose the result. For example, yes, you may contract for a polygamous marriage, but you would do so on the understanding that you may sacrifice your access to many spousal benefits.

Free-market economics rests on the assumption that choice is a good thing. We already enjoy tremendous freedom to choose how we structure the legal aspects of our business relationships. The same flexibility can apply to marriage. Most marriages are not business relationships, of course, but they are usually economic ones in one way or another. To the extent that we already infuse this important part of our lives with certain values and expectations, no good reason exists to continue to limit marriage to a single government-sponsored version. There are, after all, as many types of marriage as there are marriages. Incorporating this social reality into the law would doubtless save us all from endless strife among those who would seek to turn the institution into something that they can control by defining what it is. The tremendous business opportunities from privatizing marriage would be a happy side benefit.