

The Future of Marriage

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Anglican Archbishop Rowan Williams set off an international firestorm this month by suggesting that some accommodation of Muslim family law was “unavoidable” in England. His suggestion, though tentative, has already prompted more than 250 articles in the world press, the vast majority denouncing it. England will be beset by “licensed polygamy,” “barbaric procedures” and “brutal violence” against women and children, his critics argued, all administered by “legally ghettoized” Muslim courts immune from civil appeal or constitutional challenge. Consider Nigeria, Pakistan and other former English colonies that have sought to balance Muslim Sharia with the common law, other critics added. The horrific excesses of their religious courts — even calling the faithful to stone innocent rape victims for dishonoring their families — prove that religious laws and state laws on the family simply cannot coexist. Case closed.

This case won’t stay closed for long, however. The archbishop was not calling for the establishment of independent Muslim courts in England, let alone the enforcement of Sharia law by state courts. He, instead, wanted his nation to have a full and frank debate about what it means to be married in a growing multicultural society. What forms of marriage should citizens be able to choose, and what forms of religious marriage law should government be required to respect? These are “unavoidable” questions for any modern society dedicated to protecting both the civil and religious liberties of all its citizens.

These are quickly becoming “unavoidable” questions for America, too. We already have a lot more marital pluralism than a generation ago -- with a number of legal options now available. Massachusetts offers traditional marriage and same-sex marriage to their citizens. Several more states will likely follow suit. Vermont leads four states in offering straight couples marriage and gay couples civil union, with comparable rules governing each form. A dozen more states are considering this two-tier system. Six states, including California, offer domestic partner registration status, providing straight and gay couples with some of the same benefits and protections of marriage. Louisiana, Arkansas and Arizona offer couples either a simple contract marriage or a covenant marriage with more traditional and rigorous rules of entrance and exit.

While these marital options remain firmly under state law, other options now draw in religious law, too, implicitly or explicitly. Utah and surrounding states, for example, house some 30,000 polygamous families. These families and the fundamentalist Mormon churches that govern them are openly breaking state criminal laws against bigamy, but the states will not prosecute unless minors are forced into marriage. In New York, Orthodox Jewish couples cannot get a state

divorce without first obtaining a rabbinic divorce. This privileges Jewish family law over all other religious laws, and it forces some New York citizens to discharge a religious duty to gain a civil right to divorce. In more than 20 states, marriages arranged by Hindu, Muslim and Unification Church officials have been upheld, with divorce the only option left for parties who claim coercion or surprise. A number of religious couples now choose to arbitrate their marital and family disputes before religious courts and tribunals rather than litigate them in state courts. Courts generally uphold the judgments of Jewish and Christian tribunals in these cases. Muslims, Hindus and other religious minorities are now pressing for equal treatment for their systems of religious arbitration of marriage and family disputes.

Granting Muslims and others equal treatment in these cases does seem “unavoidable” if the parties have freely consented to this method of dispute resolution. To deny Muslims divorce arbitration while granting it to Jews and Christians is patently discriminatory. But the bigger question is whether state recognition of any religious marriage tribunals and laws puts us on a slippery slope that ends with parallel state and religious legal systems of marriage, and no control over the latter if they become abusive. What if religious parties want freedom to “covenant” out of the state’s marriage laws and into the marriage laws maintained by their own voluntary religious communities? Which religious laws deserve deference from the state: just those governing husband and wife, or those on parent and child, property and inheritance, education and maintenance as well? Which religious communities have religious laws that deserve state deference – Christians? Jews? Muslims? Mormons? Hindus? What about the 1,200 other religions now in place in America, a few with very different marriage and family norms? May a state recognize only some religious laws but not others consistent with the non-discrimination rules of the First Amendment free-exercise clause? May a state cede any of its authority over marriage consistent with the non-delegation rules of the First Amendment establishment clause? These are the frontier questions of religion and marriage that will soon face American courts and legislatures. We don’t have much constitutional guidance yet.

It’s unlikely that courts will invoke the principle of separation of church and state, return all marriage and family questions to the state, and roll back the concessions already made to religious laws and tribunals. Not only is separation of church and state increasingly a constitutional dead letter today, but this solution would have enormous implications for the complex laws of labor, charity and education where religions and states cooperate closely.

We have better guidance in the law of religion and education. A century ago, states wanted a monopoly on education in public schools. Churches and parents claimed a right to educate their children in religious schools. In the landmark case of *Pierce v. Society of Sisters* (1925), the Supreme Court held for the churches and ordered states to maintain parallel public and private education options for their citizens. But later courts also made clear that states could set basic educational requirements for all schools – mandatory courses, texts and tests, minimal standards for teachers, students and facilities, common requirements for laboratories, libraries, gymnasias and the like. Religious schools could add to the state’s minimum requirements, but they could not subtract from them. Religious schools that sought exemptions from these requirements found little sympathy from the courts, which instructed the schools either to meet the standards or lose their licenses to teach.

This compromise on religion and education, forged painfully over a half century of wrangling, has some bearing on questions of religion and marriage. Marriage, like education, is not a state monopoly. Religious parties have always had the right to marry in a religious sanctuary or before a state official. Religious officials have long had the right to participate in the weddings, annulments, divorces and custody battles of their voluntary members. But the state has also long

set the threshold requirements of what marriage is and who may participate. Religious officials may add to these state law requirements but not subtract from them. A minister may insist on premarital counseling before a wedding, even if the state will marry a couple without it. But if a minister bullies a minor to marry out of religious duty, the state could throw him in jail. A rabbi may encourage a bickering couple to repent and reconcile, but she cannot prevent them from filing for divorce. An imam may preach of the beauties of polygamy, but if he knowingly presides over a polygamous union, he is an accessory to crime.

If religious tribunals get more involved in marriage and family law, states will need to build on these precedents and set threshold requirements in the form of a license. Among the most important license rules to consider: No polygamy, child marriages or other forms of marital union not recognized by the state. No compelled marriages or coerced conversions before weddings that violate elementary freedoms of contract and conscience. No threats or violations of life and limb, or provocations of the same. No blatant discrimination against women or children. No violation of basic rules of procedural fairness, and more. Religious tribunals may add to these requirements but not subtract from them. Those who fail to conform will lose their licenses and will find little sympathy when they raise religious liberty objections.

This type of arrangement worked well to resolve some of the nation's hardest questions of religion and education. And it led many religious schools to transform themselves from sectarian isolationists into cultural leaders. Such an arrangement holds comparable promise for questions of religion and marriage. It not only prevents the descent to "licensed polygamy," "barbaric procedures" and "brutal violence" that the archbishop's critics feared. It also encourages today's religious tribunals to reform themselves and the marital laws that they offer.

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