

## **Temporary Marriage**

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Most marriages begin with an agreement that the relationship be permanent: “till death do us part”, or various equivalents. It is widely recognised that such agreements are not always kept, and in societies where divorce is common, the partners may even reasonably suspect the arrangement will not last until one of the parties dies. Still, marriage until one of the partners dies is the norm.

Legal recognition of marriage in most countries reflects this expectation that marriage is a permanent arrangement. Few jurisdictions recognise explicitly temporary marriages: a marriage that automatically expires at the end of five years, for example. If a couple wants their marriage to expire after five years, they must engage in the usual “permanent” marriage and then later initiate divorce proceedings to end the marriage.

Marriages limited to a pre-established time period are a special case of marriages that are specified in advance to automatically end upon some condition obtaining (other than the death of a partner). While the more general topic of conditional marriages is an interesting one, the focus of this paper will be on marriages that, when entered into, are due to expire after a fixed amount of time. These are what I will call “temporary marriages”. By “temporary marriages” I thus mean something more specific than

marriages that *in fact* last a period of time less than the remaining life of the spouses: any marriage that ends in divorce is a “temporary marriage” in this more general sense. I also mean to include marriages that contain an option to be extended for another period of time or even an option to be made permanent: as long as the marriage automatically would end after a period of time fixed in advance (unless actively extended), I will count it as a “temporary marriage”. For want of a better term, I will refer to the more usual marriage, contracted as lasting until the death of the first partner, as “permanent marriage”, even though of course many such marriages are dissolved before death.

There are several interesting questions about temporary marriages, so specified. One is whether they are, or would be, genuinely *marriages*, or whether alleged temporary marriages are really temporary arrangements of a different sort ('quasi-marriage', perhaps). A second is whether it could be moral to enter into such an arrangement, and if so when is it morally permissible. A third is whether the state should recognise such marriages as genuine marriages: whether, for example, the state should recognise marriages that expire after a certain length of time fixed on the occasion of the marriage, without requiring divorce proceedings, even when both parties are still alive.

Of these three questions, my focus will be on the third: I will argue that the state should recognise temporary marriage, and offer temporary marriage as another form of marriage registered in the same sort of way that standard “permanent” marriages are. I will not much discuss the question of whether it would be morally permissible to enter into a

temporary marriage, were one available. I think it is very plausible that temporary marriages are morally permissible in general, whatever moral problems there might be with particular special cases; but I will not try to defend this here. The question of whether temporary marriage is genuinely marriage is one I will discuss below, where I will defend the view that these arrangements are indeed marriages: but for most of the purposes of the paper, if a reader wants to interpret my talk of “temporary marriage” as talk of “temporary quasi-marriage”, or the like, this should not make much difference. Even if so-called temporary marriage is only temporary quasi-marriage, I still want to argue that it should be recognised by the state in the way marriage is.

What am I calling for when I call for state recognition of temporary marriage? One important thing is that the state record these relationships, when appropriately solemnised, as “marriages” in marriage registries in the way that permanent marriages are recorded.<sup>1</sup> I also think states should have provisions for automatically registering when temporary marriages have expired: it would not be enough to allow only permanent marriage and require divorce for couples wishing to have a temporary marriage. As well as this symbolic equality, many jurisdictions confer substantial financial and other benefits on married couples. Not all of these will be appropriate for temporarily married couples: paying a survivor’s pension well past the original expiry date of the marriage, for example. But many of these financial and other arrangements will be appropriate, and

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<sup>1</sup> Many states are under international obligations to register marriages under the United Nations *Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages*.

where appropriate they should be extended to temporarily married couples. (I shall have a little more to say about some of the rights and benefits of marriage, below, but my focus here is not on the minutiae of exactly how best to implement temporary marriage regulations.)

There are weaker forms of recognition a state could extend that would also be steps in the right direction. For example, a state could recognise couples as married when they are in a temporary marriage that was contracted validly in the jurisdiction in which they married, even if that state does not allow people in its jurisdiction to *enter into* temporary marriages. A number of states take this attitude to certain marriages: some states recognise same-sex marriages contracted elsewhere, even when they do not themselves allow same-sex marriage. Some states recognise polygamous marriages which are validly contracted elsewhere. Some states recognise marriages, contracted validly elsewhere, where one of the partners would be considered too young to be allowed to contract marriage in the state. And so on. So far as I can tell, most Western countries *do* recognise certain child marriages but *do not* recognise temporary marriage. A forty year-old who marries a fourteen year-old in New York State can have his marriage recognised throughout the US and most of the rest of the world<sup>2</sup>, but two twenty-five year olds who wish to enter into a five-year temporary marriage cannot. The law in the United States, at

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<sup>2</sup> See the *New York Code* Article 3 sections 15 and 15a.

least, takes a considerably less dim view of marriage to children than it does of temporary marriage.<sup>3</sup>

I mean the argument in this paper to be a general argument that all states should recognise temporary marriage, but I will mainly have liberal democracies in mind. My examples of the current situation will mostly be from English-speaking Western countries, especially Australia, the United Kingdom, and the USA, since I am most familiar with the situation in those countries.

I will begin with a discussion of what seem to me some of the more important arguments in favour of state recognition of temporary marriages; followed by discussion of arguments against temporary marriage that are important to address (either because of their strength or because of their influence). Then I will address the question of whether what I am calling temporary marriage is a kind of marriage. Finally, I will discuss what immediate practical consequences my discussion might have: even if we accept that ideally the state would recognise temporary marriages, is it worth trying to produce that change in current institutions?

Temporary marriages have received very little discussion in contemporary English-language philosophical literature, despite the distinctive questions they raise about the

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<sup>3</sup> The situation in many other Western countries is often about as lenient when it come to recognising marriages to children, particularly ones contracted in jurisdictions favourable to child marriage.

role of the state in marriage and the nature of marriage itself. This paper is one step in rectifying that deficiency.

### ***Arguments For Recognition***

The first argument I will offer for recognition of temporary marriages is an argument from marriage equality. One tempting marriage equality principle is that we should recognise marriages that people are in, or wish to enter, unless there is a significant social reason not to. This does not mean that there should be complete *carte blanche*: it seems to me that there are good reasons to not recognise involuntary marriages or marriages with children below a certain age, for example, and arguably there are good reasons to not recognise, and perhaps even forbid, marriage with non-humans, polygamous marriages, incestuous marriages, and so on. This principle of marriage equality does provide an initial presumption in favour of recognising marriages, however, and insofar as there is something good about recognising marriages that people want to enter into (even if that good can be outweighed), this general appealing feature of recognising the marriages people wish to contract should carry over to the temporary marriage case.

The reason this is a principle of marriage *equality* is that it is a principle that, at the level of state action, there should be a presumption of we should not treating one marriage, or intended marriage, as privileged over another. The mere fact that one form of marriage conforms better with what is ordinarily done, or what has historically been done, should not be enough of a reason to refuse to recognise the marriages of people who want to do things differently. The standard of restricting marriage only where there are significant

social reasons to do so seems to me a non-arbitrary standard, and does not seem incompatible with the sorts of equality we care about. (Compare: we can have *both* equality before the law *and* a legal code where some actions are illegal and others not, when there are non-arbitrary reasons for the illegal actions to be illegal.)

One limitation of appealing to marriage equality is that it might be in dispute whether so-called temporary marriages could be *marriages* at all. (Presumably some opponents of same-sex marriage do not see themselves as opposed to “marriage equality” because they do not think those relationships could be marriages in the first place. Likewise, perhaps, for some opponents of plural marriage.) I will have something to say about whether such relationships can count as marriages, below, but I think the thrust of the principle of marriage equality often does not depend on the fine points of what can count as a marriage. The principle of “marriage-like” equality is also a strong one. I think, for example, that permanent, exclusive same-sex sexual relationships, with a public ceremony like a marriage ceremony, should be treated by the state just as it treats marriages: and this seems very plausible *even if* our current word “marriage” does not cover such cases. I both happen to think our current word does cover such cases, and other same-sex relationships besides—but I think the relevant principle of equal treatment does not depend on this for its application.

A principle of near-marriage equality, as far as state recognition goes, primarily concerns which relationships deserve the kind of recognition, support and benefits the state

currently extends to some marriages. (E.g. the ones Australia recognises in the Commonwealth *Marriage Act*.) I think the most plausible principle is that the state should extend this sort of recognition and benefits to relationships that are sufficiently like marriage, when couples in those relationships so desire and apply for such recognition, *unless* there are sufficiently good social reasons not to do so. Depending on exactly what the word “marriage” means in English, this may include some non-marriages. I think it will very likely *exclude* some marriages as well, since I suspect the English word “marriage” applies to some relationships that the state rightly declines to extend recognition and benefits to.<sup>4</sup> One thing that may potentially cause confusion is that it might be that the *stipulative use* of a word like “marriage” in an act of parliament might vary its application from its ordinary English use. I see no problem with stipulative uses of statutory language in this way, and it would be a mistake in general to confuse interpretation sections of statutes with any attempt to change the meaning of words in their ordinary English use.

Once we have a principle that any relationship that is sufficiently marriage-like ought to receive the same general kind of recognition that the state extends to marriage, unless there is sufficient social reason not to, debate about temporary marriage should focus on two things. One is whether it is even enough like marriage to trigger the operation of the

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<sup>4</sup> Some plausible examples: marriage by the already married undertaken behind the back of their current spouse, some marriages of children, some marriages between close relatives, for instance father-daughter marriages.

equality principle. The second, more pressing, matter for debate is whether there are good reasons not to recognise temporary marriage. I am inclined to think that evaluating arguments against temporary marriage should not occur in a vacuum: we should look at comparative costs and benefits, to see whether there are any serious harms that are not already the sorts of things we tolerate from other arrangements. And we should also consider what benefits there are to temporary marriage: if it had some drawbacks but sufficiently important social and individual benefits, it could be fit for recognition on balance. Establishing the principle of marriage equality I mentioned above provides a framework for the rest of this defence of temporary marriage.

While many might already be convinced of a marriage equality principle somewhat like the one I have articulated, others may wish for a justification of it. If a justification is to be convincing, it should be tailored to the values and principles of the person demanding the justification, so what I will say here will not please everyone. But let me offer a few of the more general defences. A principle of not arbitrarily denying some groups privileges given to others seems like a fairly general principle of social justice, and this is particularly so when the rights involved are important and intimate rights like marriage. (For what it is worth, the right to marry is recognised as a fundamental human right in Article 16 of the *United Nations Universal Declaration of Human Rights*.) General considerations of liberty can also be invoked: at a first pass, people should be free to enter into the arrangements they want to, unless there are good reasons to prevent them. If we are to have a state-recognised institution of marriage at all, considerations of liberty

suggest that we should not be unduly restrictive in who can participate in the institution and how. Respecting and accommodating the lives of others is one of the great goods of a liberal society, and we should not impair this good without a good reason. We should be reluctant to disparage people's important human relationships without good cause. It is possible to subscribe to these general principles and yet resist marriage equality: it is usually possible to find a way to endorse a general principle and resist any particular proposed application of that principle. Nevertheless, I think it is plausible that the principles of justice, liberty and respect indicated here are best understood as supporting the sort of ideal of marriage equality (and near-marriage equality) articulated above.

A final limitation of the argument from marriage equality should be noted. It is consistent with marriage equality, even in my formulation, to hold that the state should not recognise *any* marriages. This might be because someone thinks the state has no role here, or even that the state has a role, but the state ought to discourage or suppress marriage. I will not have much to say here to defend the state's recognition of marriage, since that would take me rather too far afield.<sup>5</sup> I concede that those who think it is on

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<sup>5</sup> One strong argument for state recognition of marriages, it seems to me, is the need to take state action *against* some forms of marriage. If we are to require consent for marriage, or prevent marriage of young children, or marriages between close relatives, state involvement in marriages is needed: and one natural way to involve the state is to require, by legislation, that certain standards must be met for a marriage to be valid.

balance best for the state to not recognise marriages in general are unlikely to be convinced that the state should recognise temporary marriages in particular.<sup>6</sup>

### *Equality of Treatment of Religious and Cultural Traditions*

Another consideration in favour of recognition of temporary marriage stems from the role it plays in some religious and cultural traditions. Perhaps the best known form of temporary marriage is mutah (sigheh in Persian), a form of temporary marriage

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<sup>6</sup> It is worth discussing the connection between the principle of marriage equality outlined in the text and a “minimal marriage” proposal recently defended by Elizabeth Brake (Brake 2010). Brake argues that political liberalism allows for very few restrictions on which marriages are recognised by a liberal state, and that such a state should have a marriage law that allows for extensive disaggregation of the different obligations and benefits traditionally associated with marriage. “The central idea is that individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each” (Brake 2010 p 303). While Brake does require “publicly justifiable grounds” for marriage laws, she adopts a particular philosophical conception of what sorts of grounds they can be, grounded in the sort of liberalism defended by writers such as John Rawls and Joseph Raz (see Brake 2010 p 313-315). I do not wish to rely on such specific premises, but hope that the principle of marriage equality I articulate will be of wider appeal. Nevertheless, Brake’s principle would support state recognition of temporary marriage, as far as I can tell, and a Brake-style liberal about marriage should be able to agree with something like the principle I enunciate, with perhaps a specific understanding of what sorts of “significant social reasons” ought to be considered when deciding whether to recognise particular marriage relationships.

traditionally recognised in Shia Islam, and which has legal recognition in Iran. In this form of temporary marriage, a marriage contract for a definite period of time is entered into, and a well-established body of religious law governing these arrangements. Mubah is sometimes vilified as a front for prostitution, and indeed mubah contracts for an hour or a night or a weekend with a significant cash payment sometimes might serve that purpose, but there is no evidence that this is the main purpose, or even among the main purposes, to which mubah is put. (It is true that the man in a mubah arrangement often gives the woman some money or property. But the requirement for the husband to give a dower (mahr) to the wife is a Koranic requirement (4: 24) common to most traditional Islamic marriages, and by itself no more signals prostitution than dowers and dowries in other marriage traditions.)

Mubah does not just exist in Iran: with the fall of Saddam Hussein, it is becoming more common in Shia areas of Iraq as well, for example. And Shia Islam is not the only religious tradition that recognises temporary marriage. A number of contemporary neo-pagan communities practice temporary marriage, though without state recognition.

Temporary marriage also arguably existed for a time in late-medieval and early modern Scotland, though this is disputed.<sup>7</sup> A contemporary example of neo-pagan temporary

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<sup>7</sup> Marriages for a term of years were declared illegal in Scotland in 1609. The Statutes and Band of Icolmkill, more often called the Statues of Iona, declared “the suppression in particular of the inveterate Celtic practice of marriage for a term of years” (Statute 1). This very strongly suggests that marriages for a term of years were occurring before (and perhaps after) the legislation was passed. See the “Register of Privy Council of Scotland”, Vol IX, 1610-1613 (1889).

marriage is *handfasting*: this commitment ceremony is often treated by the participants as marriage and can be done for a fixed period of time (a year and a day, or two years, for example) though sometimes time-limited handfasting is treated more as a betrothal or engagement than as a marriage.<sup>8</sup> Of course, it is not a conclusive argument for allowing a social arrangement, let alone giving some kind of legal approval of such an arrangement, that it is part of a religious tradition, even a large religious tradition. It is no part of my argument that religious mores are immune to challenge. However, it is a serious cost to a policy if it bars a part of someone's religious or cultural tradition, unless there is a good reason to do so.

Furthermore, we might hope for evenhandedness between religious traditions, as much as practical, in secular law. The current secular institution of marriage in Western Europe and countries such as Australia or the USA are historically outgrowths of Western Christian traditions concerning marriage. This runs the risk of de facto privileging Christian religious understandings of marriage over rival religious traditions. Those who object to using secular law to privilege one religion over another should be especially sensitive to this effect of the status quo. Legal recognition of temporary marriage would (in a small way) undermine this privileging of Western Christianity by our secular institution of marriage, and would extend more recognition to the marriage practices endorsed by some alternative religious traditions. Secularism and religious tolerance both give us some reason to do so. Those reasons might even be sufficient in the absence

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<sup>8</sup> See, e.g. Hovey 2008.

of sufficiently good reasons to prohibit temporary marriage: “religious accommodation” per se seems valuable given the important role religion plays in people’s lives.

### *Benefits to the Participants in Temporary Marriages*

Concerns for equality, whether equality of treatment of marriages, or equality of treatment of religious and cultural traditions, are not the only kind of reason to recognise temporary marriages. There are also the benefits which would be gained by those who consider themselves to be in temporary marriages, or who are not in temporary marriages but who would like to be in recognised temporary marriages. These couples are unlikely to enjoy the state giving the impression that they are not in a “real” marriage. If marriage benefits anyone, it is hard to see why it would not benefit some who wish to enter into a temporary marriage. Temporary marriage might be of use in providing some reassurance through relationship troubles, for example, just as traditional marriages do. A public ceremony of commitment in the presence of friends and family is something many couples who marry think is worth the trouble and expense of the ceremony: the happiness that can come with a couple’s big day would be there in marriage ceremonies celebrating temporary marriages too. Furthermore, marriage is in fact something valued by people other than the couple involved: many parents hope to see their children happily married, and many children value their parents’ marriage. Some traditionalist parents might not be pleased by a temporary marriage in the way they might be by a

permanent marriage, but many other parents want to be at their son's or daughter's wedding, and would be happy for their children to marry in the way their children want.

Perhaps it might be argued that any of these benefits could be secured at least as well, or to a higher degree, by some other mix of institutions (permanent marriage, or publicly recorded engagements, or something else). The fact that other arrangements might also be beneficial does not undercut the claim that temporary marriage would sometimes be, but it might be thought to undercut the claim that the benefits it brings give us a reason to recognise these arrangements (or otherwise encourage them). But there are reasons to think that these benefits are not as available without temporary marriage. It should be familiar from the same-sex marriage debate and the attempt to placate demands for same-sex marriage with a "civil union" surrogate that this is not seen as good enough by many of those who want to marry and to be considered married. It is widely perceived as conferring only a second-rate status, or signals that the state does not fully respect the relationships which the partners themselves often see as marriage. No doubt sometimes these "separate but equal" legal statuses are created with good intentions: but the fact that they are perceived, both by same-sex couples and society at large, as not being "real marriages" or full marriage recognition is enough by itself to ensure that they do not play the same role as full state recognition of relationships *as marriages*. Just as in the case of same-sex marriage, fobbing off those who wish to publicly enter a temporary marriage with a status that is not seen as amounting to marriage would upset and hurt the participants, and tend to produce and support a societal attitude that those relationships

were somehow ersatz and inferior. This is not a claim that this would have to be the outcome as a matter of necessity: just that as attitudes currently are, this would be the foreseeable result. So nothing less than recognition of temporary marriage *as marriage* would bring all the benefits of recognition of temporary marriage. (This is not to deny that recognition of temporary civil unions might bring some benefits, of course.)

Another legal benefit to recognising temporary marriages flows from the fact that in many jurisdictions, purporting to go through a ceremony of temporary marriage may amount to a criminal offence. Section 103 of Australia's *Marriage Act*, for example, makes knowingly going through an unauthorised ceremony of marriage a criminal offence, punishable by a fine or up to six months in prison. Purporting to solemnise a marriage without the authority to do so is also grounds for a fine or up to six months prison (sections 100, 101). While the law *criminalises* forms of marriage it does not recognise, those seeking to go through a ceremony of marriage, even if they do not want state recognition, run a serious legal risk. There does not seem to be a history of this sort of law being enforced against those engaging in temporary marriage ceremonies in Western countries, but removing the risk of prosecution and potential criminal penalties would still be an obvious benefit for those wishing to enter into temporary marriages.<sup>9</sup>

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<sup>9</sup> It is not obvious such a prosecution would succeed, but the risk that it would, together with the threat of arrest and trial even if followed by an acquittal, seem to me disadvantages already.

One reason sometimes suggested for temporary marriages, particularly those with the possibility of renewal, is that the fact that they have to be positively renewed contributes to their value. This might be because partners are less likely to take each other for granted. Or it might be because it minimises the risk that partners will stay married merely due to inertia. (Many people would rather not be in a relationship that the other person stays in only because it is too much trouble to get out of.) Many couples in traditional marriages are unlikely to think that *their* relationships would be better in these ways if their marriages were temporary. But if some couples estimate that they will derive benefits, or avoid risks, from the requirement to positively renew the marriage in order for it to continue, I am inclined to not substitute the judgement of the state for their own judgements of these matters.

Some people find it difficult to honestly promise that they will stay married to another person for life. This might be because of misgivings about the institution of permanent marriage, or beliefs about themselves and their future, or even because they find it difficult to predict or empathise with their situation in the future. Many people in their early 20s do not have much confidence in their judgments of what they will be like in their early 60s, and some at least will have this lack of confidence in judgments about what they will feel about their current romantic partner at that distance. Not everyone has this difficulty, and some who do willingly choose nonetheless to engage in a permanent marriage. But at present people who do not feel they could make this commitment honestly either must risk dishonesty in their wedding vows, or miss out on marriage

altogether. It may well benefit some people who find themselves in this situation to have the option of temporary marriage, and greater confidence they can live up to the commitment that requires. This is not the claim that *everyone* who finds themselves with these doubts would be better off engaging in temporary marriage than permanent marriage: only that some may well be.

Specific benefits for temporary marriage in particular may be available in specific situations. One recent proposal for temporary marriage in Mexico City (Leff 2011) suggested two-year temporary marriages might reduce the divorce rate. Jeremy Bentham, in unpublished manuscripts claims that young adults, in particular, might benefit from short-term marriages, before maturing to the point where “one feels the need for a companion of all moments” (quoted by Sokol 2009 p 13). Whether speculative benefits like these, or others, would flow from temporary marriage is an open empirical question<sup>10</sup> – but we might want to leave the decision about how best to guard against risks and pursue benefits of marriage and marriage-like relationships up to the couples involved, as much as is feasible.

## **Arguments Against**

### *The Slippery Slope*

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<sup>10</sup> Shrage 2013, section 2, discusses a number of examples of benefits participants in temporary marriages have said they have derived from those marriages. The empirical case that some people derive some benefits they value from temporary marriages is firmly established by the sort of evidence Shrage provides, in my view: though the relative value of any particular benefit versus overall benefits that might be gained from alternative arrangements might be harder to establish.

One argument against temporary marriage, familiar from the debate over same-sex marriages, is the slippery slope argument. If you allow temporary marriage, the argument goes, you will “weaken marriage” somehow, so after a few more steps down the “slippery slope” some loathed social arrangement occurs, or occurs with societal sanction, at the bottom of the slippery slope. (The infamous argument attributed to Rick Santorum that recognition of same-sex marriage would somehow lead to “man-on-dog” sex, or perhaps “man-on-dog” marriage, whatever that might be, is perhaps the best known version of this argument<sup>11</sup>, though there are slippery slope arguments worth taking at least a little more seriously.)

The general problem with slippery slope arguments is that it is hard to make plausible that there is a slope like this. Even after some steps have been taken away from a starting point, this does not do much to show that the “slide” is irreversible, let alone unstoppable. And one obvious way to draw a red line of how far to go in expanding marriage recognition is to draw it in terms of what marriages would be good to recognise, all things considered. If we thought that line would hold, then the slippery slope argument has no force against proposals to recognise forms of marriage that it would be good to recognise, apart from worries about slippery slopes.

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<sup>11</sup> The issue of exactly what point Santorum intended to make with his remarks on the relevant occasion is controversial.

I suspect what some advocates of the slippery slope argument have in mind is a fear that allowing marriage rights to people who deserve them will not stop there: somehow, political momentum or social change will steam-roller us into going too far. In general, this seems like a poor piece of political prediction. Almost any political or legal institution can be put on a hypothetical spectrum of alternatives, and it can be seen that the institution is not yet at one of the extremes. We stop in the middle of hypothetical slippery slopes *all the time*. It is also true that social changes sometimes go too far—but even in those cases, the powers of reaction are not helpless and social trends can move in the opposite direction. Of course any social change *might*, somehow, go too far. As might any attempt to keep a status quo. The mere possibility of undesirable downstream consequences does not seem to be an argument for or against any social movement, or any lack of social movement, in particular.

So I think we must examine temporary marriage on its merits, and resist those who try to raise the prospects of radically different forms of marriage, that we do oppose for good reasons, in an attempt to derail the discussion. If temporary marriage is desirable, embracing it need not and should not lead us to embrace undesirable marriage institutions. And if temporary marriage is undesirable, it can and should be opposed on its own merits, without ungrounded assertions that recognising temporary marriage would somehow force us to recognise a parade of horrors.

*Won't Someone Think of the Children?*

Some temporary marriages will result in children. When those temporary marriages end, those children may be left without married parents. If this led to bad outcomes for these children, that would count against the desirability of temporary marriages, and so perhaps form the basis of a public policy argument against recognising such marriages.

The welfare of children is important, and protecting children from unwise decisions of their parents is an area where most agree society has a role to play, though that role should be traded off against our interest in respecting and protecting the autonomy of parents. There is a lot of research that shows that certain positive outcomes for children are more likely for children of (permanently) married couples who stay together.

Statistically, it is more likely that such children will do better in various ways (e.g. finishing high-school, avoiding emotional and developmental problems, and so on) than children of cohabiting couples, or children of single parents, or children who live in families that go through divorce while they are growing up. However, it is hard to tell whether marriage *per se* helps with these outcomes. When these studies are controlled to compare like with like (e.g. controlling for the effects of race or poverty), much of the correlation between marriage and positive outcomes disappears: a recent large study in the UK, for example, concluded “Once we take these factors into account, there are no longer any statistically significant differences in these child outcomes between children of married and cohabiting parents” (Goodman and Greaves 2010 p 5). Goodman and Greaves 2010 compares non-divorcing married parents and never-married cohabiting

parents, but similar reductions in the statistical differences between different child-rearing arrangements can be found when we control for other factors that might predict child welfare.<sup>12</sup>

Even when studies suggest that there are positive differences for children of permanently married couples that survive controlling for observable features of parents such as race or class or age, it remains very difficult to rule out common-cause explanations of the correlation between marriage and positive outcomes for children: maybe those who engage in permanent marriage are also likely to have traits that make for good parenting, and it may be that permanent marriage itself makes little contribution.

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<sup>12</sup> Once apparently confounding factors are controlled for, there can be some real surprises. In the USA, higher percentages of children born outside marriage drop out of high school than those who grow up with married parents. However, Finlay and Nuemark 2010 suggest that once we control for some other influences, some data from the USA suggests that, in the case of Hispanic mothers, “never-married motherhood *reduces* the likelihood that children drop out of high school [compared to mothers who marry], and the estimates are often statistically significant” (p 1079). Any particular study will be controversial, of course, and Finlay and Neumark’s focus on groups sensitive to male incarceration might just show that Hispanic mothers who have a choice between remaining unmarried and marrying a man likely to be incarcerated may do better remaining unmarried. Still, the fact that sometimes when we control for other factors relevant for the success of children we can get a statistically significant *negative* correlation between marriage and child outcomes illustrates how cautious we should be in inferring much about the role of permanent marriage *per se* in children’s welfare.

Many children who are born in marriages but grow up outside marriage do so because of divorce. It is relatively hard to know how much the divorce process is a cause of later problems, rather than the absence of marriage between parents. (There is some evidence that children brought up outside marriage because of the death of a spouse do much better than children of marriages that end in divorce<sup>13</sup>, which suggests the divorce itself is part of the problem, especially when it is remembered that having a parent die is also a traumatic experience for most children.) Temporary marriages, in which children are born in a marriage but the marriage does not end in divorce, might, for all the research shows, be considerably better for children than being born into a marriage that ends in divorce before the children are grown.

I can see no particular reason to think that children of temporary marriages will do worse, on average, than children of never-married parents. They may even do better. Children of the never-married often do very well, of course, and circumstances like child poverty are much better predictors of trouble for children than the marriage status of children's parents. More research can be usefully done on what child-rearing arrangements are good for children, and if temporary marriage is legally recognised it will make sense to do research on its effects. The most negative conjecture that would be reasonable on the available evidence, it seems to me, is that children of temporary marriages might be slightly worse off, on average, than children of low-conflict permanent marriages where there is no divorce. (Even when factors like poverty are controlled for.) The relatively

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<sup>13</sup> Parke 2003 p 4.

slight difference in average child welfare does not seem sufficient to bar recognition of temporary marriage. It has not seemed a good enough reason to bar recognition of *de facto* relationships, for example.<sup>14</sup> If research that shows that children raised by lesbian couples have better average outcomes even than children in low-conflict permanent heterosexual marriage, for example, that would not justify the banning of recognition of permanent heterosexual marriage. Likewise, even if research suggested that permanent (heterosexual) marriage of parents was slightly better for children, that would by itself be little reason not to recognise other child-rearing arrangements as legitimate.

Note that all of the concerns discussed above are reduced further for children born in temporary marriages that last until the children are adults. There is no evidence I know of that shows that children in families where the parents divorce after children reach adulthood have worse outcomes than those where their parents stay married. (Of course, such divorces might still be hurtful or traumatic for some adults whose parents divorce: but there is little evidence that in general the sons and daughters suffer worse life outcomes.) We are free to speculate that a long-term temporary marriage somehow is

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<sup>14</sup> “*De facto*” relationships have different names in different jurisdictions (this is the standard label for them in Australia). Confusingly, in England and Wales they are often informally known as “common law marriages”, despite not being recognised as marriages by English and Welsh common law. The status known as “common law marriage” in Canada and most of the USA is similar, though it arguably differs in being a form of marriage (as its name suggests), and in some US states “common law marriage” is treated as a permanent state, only terminated by death or divorce. “Domestic Partnership” is perhaps the closest equivalent to the status I am talking about in the USA.

worse for children's upbringing, because of children's attitudes to their parents' marriage, parents' attitudes to each other, or other factors, but this speculation is at present not based on any firm evidence, and I do not see how it could be made terribly plausible to someone not already casting around for a rationalisation of their distaste for temporary marriage.

It would make sense for those entering temporary marriages to be clear with each other, and perhaps publicly clear, in agreeing what will happen to any children conceived or born during the relationship. Perhaps there is even a case for this to be legally mandated. But it is hard to find a reason, based on considerations of child welfare, for banning temporary marriage outright, or barring its recognition.

#### *Are The Temporarily Married Missing Out?*

One might suspect that temporary marriage is an inferior rival to some other arrangements. If so, then perhaps recognising temporary marriages, especially if this has the effect of encouraging temporary marriage, will lead to people foregoing the better option for temporary marriage. If temporary marriage tends to make people worse off than they would be with another alternative, that *prima facie* is a reason to discourage it.

One could think that temporary marriage is inferior to being single, or inferior to standard *de facto* relationships. But I suspect that the main line of response that will be developed along these lines will be from those who think there is something superior about

permanent marriage. Something about the relationship being unconditional in various ways, perhaps, or something about its suitability for raising children (though a temporary marriage of a long enough duration to last beyond where children are raised is not obviously very different as a relationship for child raising).

One kind of response to claims that permanent marriage has special features that temporary marriages lack would be to argue that, on the contrary, temporary marriages would not lack anything very valuable that permanent marriages typically have.

Temporary marriages can be expressions of commitments that are of central importance to the parties involved; can provide public affirmation by families and friends of a intimate and loving relationship; can provide the framework for joint projects of living together and raising children; and so on. A claim that permanent marriage brings some benefit with it so important that temporary marriages should not be recognised by the state requires evidence, and the case has not been made that temporary marriages cannot have the virtues that permanent marriages have.

Even if it could be shown that permanent marriage has special benefits that temporary marriages must lack, (and that there were no important enough compensating benefits to temporary marriage), more would need to be done to show this should motivate non-recognition. One serious problem with this style of argument is that the paternalism it embodies will be objectionable to many: there should be serious limits to the extent which we should use the law to pressure people into doing things we think would be good

for them. The most serious problem with this style of argument however, it seems to me, is that even if it is shown that permanent marriage is best for some people who permanently marry, it would not follow that it is the best option for everyone, at every stage of their adult lives. Whether it is a good idea for someone to get permanently married depends on who their potential marriage partner is, whether the other person wants to marry, and a host of other factors. *Even if* the very best off people are permanently married, it does not follow that everyone else ought to immediately engage in permanent marriage. Among the people who are currently best off not immediately permanently marrying, there may well be some who would be best off engaging in temporary marriage.

This does not entirely end the argument: one could try to argue that, for example, being single is best for everyone who would not be best served by immediately engaging in permanent marriage. Or that temporary marriage would have the overwhelming effect of leading people who would be better off permanently marrying settling for temporary marriage instead. These speculations about what is best for people do not seem to me strong enough to justify withholding marriage recognition from those who want it, even if they might justify e.g. advocacy campaigns encouraging permanent marriage.

*Social Complications*

A final concern about recognising temporary marriages is that a lot of decisions will need to be made and implemented about what legal and institutional mechanisms go along with this social status. Decisions will have to be made about superannuation and pension laws, laws about child custody, immigration rules for temporary spouses, taxation rules, inheritance when the parties do not have valid wills, and so on. What sorts of property rights are vested by temporary marriage, or divorce from temporary marriage, would need to be decided. The question of whether a streamlined divorce system should be offered for the temporarily married would have to be answered. And so on. Just as it is not entirely uncontroversial what these rules should be for married people now, it is unlikely to be entirely uncontroversial how to treat temporarily married couples.

As well as institutional questions, there are questions about informal social norms as well. There is a social norm that married people are considered “taken”, ought not be courted by others, and so on. (Not every sub-group or every individual adheres to this custom, and how it is adhered to varies very widely even by those who recognise it.) But what should the conventions be about someone who is nearing the end of the time-limit of a temporary marriage? How do we treat friends whose temporary marriage ended: in the typical way when a relationship ends, or somehow differently? Are couples who were formally married treated like divorced “exes”, or in a different way?

Neither the formal nor informal decisions that would need to be made about the institutions and conventions of marriage seem to me serious obstacles to allowing

temporary marriage. Many of the legal rules for temporary marriages can be modelled on the existing rules for de facto relationships, which already provides answers for what happens to these couples when they pay tax, immigrate, have children, and so on. Some changes might be appropriate, but a handful of competent lawyers could draw up reasonable changes in the laws in a matter of days. Informal conventions are harder to put in place, but again there seems little problem in principle in these growing up. It would be absurd to continue the ban on temporary marriage on the grounds that the temporarily married might need others to extend existing informal conventions to form expectations in dealing with them.

### **Is “Temporary Marriage” Marriage?**

Most of the arguments for or against temporary marriage discussed above do not rely on temporary marriage being a kind of *marriage*, as long as it is at least enough like marriage in relevant respects. But it is an interesting question in its own right whether “temporary marriages” really are, or would be, genuine marriages. (At least, the question will be interesting to some philosophers.) In my view, many, perhaps all, would be. I doubt this can be made uncontroversial, since there is a wide range of deeply held views around about what is required for genuine marriage. However, in this section I will offer some considerations in favour of taking them to be genuine marriages that might at least sway those who do not already have a firm view.

Let me start with two relatively straightforward points. The first is that institutions like *mutah*, seventeenth-century Scottish “marriage for a term of years” and the like, are called marriages by competent people, including marriage experts, anthropologists, specialist historians and the like. The interminable debates about *mutah* in the Islamic jurisprudential tradition are about whether it is allowed to Muslims, not whether it is marriage at all. Insofar as we should be guided either by the practice of competent speakers or of the usage of experts, this suggests that our expression “marriage” would cover temporary marriage as well as the more usual marriage-until-death. Note that you can get a fair idea of the kind of social relationship intended just from the expression “temporary marriage”, or slightly longer descriptions like “marriage when it is decided ahead of time that it will only last for a fixed duration”, and those descriptions do not strike most people as paradoxical. Of course it might *be* paradoxical even if it does not seem to so apparently competent users of the expression “marriage”: but it seems to me the plausible starting assumption should be that it is a coherent possibility when it seems so to both laypeople and experts.<sup>15</sup>

The second point is that paradigm “temporary marriage” is very similar, in a vast range of cases, to many paradigm permanent marriages. It tends to go with couples cohabiting, forming a household, being publicly recognised to be committed to each other, often

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<sup>15</sup> By the same token, the fact that same-sex marriages in traditional societies were referred to as “marriages” by explorers, anthropologists and others seems to me a good argument that the English word “marriage” does not by definition rule out same-sex marriages, even though the view that marriage is by definition between opposite-sex couples is sometimes encountered.

sexual exclusiveness, and an array of other similarities. Of course, not all temporary marriages have all these characteristics, or would have, and neither do all permanent marriages. But as social relationships go, there are wide and deep similarities. It is true, of course, that there are non-marriages that are similar to marriages (more or less wherever we draw the line between them). But “temporary marriage” is at least a prime candidate to be a kind of marriage, whereas sharing an icecream or working in the same occupation or even mere co-habitation are not.

Thirdly, recall that there are bad marriages that are nevertheless genuinely marriages. Sometimes spouses are unhappy, sometimes they are neglected, sometimes they are unfulfilled. Marriages can persist in the face of adultery, social disapproval, lack of trust, withholding of property, long physical separation, and so on. *Even if* you think that temporary marriage lacks some valuable features that your idea of an ideal marriage would possess, do not forget that relationships that genuinely are marriages need not be ideal ones.

To say something more, it might be worth at least briefly discussing some accounts of what marriage amounts to. (These remarks will be brief, partly because this is not a “what is marriage?” paper, and partly because relying on a controversial general theory of marriage is unlikely to be very persuasive.) The first general conception of marriage I want to discuss is a “positivist” or “institutional” one, according to which marriage is basically whatever the law or other institutional rules says it is. A view need not entirely

defer to the law or other institutions (such as established churches), of course: one might think that not even the law or a church can marry someone to a non-agent, or without the awareness or consent of the marriage participants. But even a mixed theory will be effectively positivist about a given case insofar as that case is resolved by deference to the law or other institutions.

According to this positivist criterion, we only need to look at the marriage law, and perhaps look at some law-like rules of institutions such as major churches, to determine whether temporary marriage is genuinely marriage. And the answer in most Western countries, (barring a few exceptions extended for ambassadors and the like) is that they are not. According to this positivist conception, even if couples in the Western Isles of Scotland wish to engage in the “inveterate Celtic practice of marriage for a term of years” through ceremony to that effect, they would not be genuinely married, because of current Scottish law (or would perhaps be accidentally permanently married, depending on the ceremony and paperwork). It is a tougher question whether temporary marriages are genuine marriages in the USA, since there is a colourable argument based on the fourteenth amendment to the US constitution that temporarily married couples, like same-sex married couples, have a right to have their marriage recognised, given recognition extended to permanent heterosexual marriages.<sup>16</sup>

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<sup>16</sup> See the reasoning in *Perry v Brown* for the case of same-sex marriage.

While the positivist criterion rules out temporary marriage as genuine marriage, it does suggest that if temporary marriage received legal recognition it would at that point *become* genuine marriage. Once the law says a couple is married for a term of years, that will be decisive for a positivist. So a positivist conception of marriage should allow that temporary marriage *would be* marriage, once it secured recognition.

My own view is that while marriage laws and institutions are somewhat relevant, they are not by themselves settle the question of whether a marriage exists. A racist government that tomorrow declares all mixed-race marriages in its jurisdiction dissolved, for example, does not seem to me to successfully dissolve all such marriages (though it does remove state recognition of those marriages, and the legal status associated with marriage for those couples). There is no need to take a stand for or against positivism about marriage for current purposes, but I think it worthwhile to discuss a rival account of marriage. Let me label this rival the “functional” theory of marriage.

According to functional theories, a relationship is a marriage provided that relationship plays enough of the key roles of marriage. Some of these roles might be public: marriage is typically a public commitment to another person, and influences not just the spouses’ treatment of each other, but others’ treatment of those spouses. Some of the important roles concern spouses’ treatment of each other. Functionalists could recognise legal and institutional features of relationships as being among the relevant functional roles, too. Some might concern joint property, roles of children conceived by the

spouses, and so on. In determining the functions of marriage, some attention should be paid to the goals of marriage: how it contributes to other social organisations, how it contributes to typical desires and intentions of marriage partners, and so on. Particular functional accounts may well vary in the importance they attribute to different aspects of marriage. Functionalism of this sort seems particularly appealing when we consider the anthropological exercise of discovering whether a community has practices that deserve the name “marriage”.

For functionalists, the question of whether temporary marriage would be a kind of marriage becomes the question of whether it would play enough of the roles of marriage, and in particular would it serve the social ends marriage serves. Given its similarity to permanent marriage, it is hard to see how it could fail to play those roles pretty well, and serve the same purposes. This is particularly true when we consider societies with “permanent” marriage but high rates of divorce: it is hard to see e.g. how a 20 year temporary marriage which successfully raises children, and involves sexual exclusiveness, cohabitation, shared property and projects, and the like, fails to perform important roles worse than a permanent marriage without children that results in divorce after two years filled with acrimony and physical abuse, let alone a two-week “Vegas marriage” ending in divorce, which the participants would not have agreed to sober. Set the functional criteria to be restrictive enough to rule out temporary marriage, and they will rule out many permanent marriages: on the other hand, set functional criteria

keeping in mind the imperfection of many genuine marriages, and many temporary marriages will pass that hurdle.

Functionalism should not be uncontroversial, but it is a plausible enough approach to be worth serious consideration. And since temporary marriages apparently can play enough of the functional roles that permanent marriage does, that suggests temporary marriage is, or at least could be, genuine marriage.

Ralph Wedgwood (Wedgwood 1999) offers a significantly different picture of the “essence of marriage”, or rather the “essence of Western marriage”. It is a little difficult to know what he means by “essence” here, since he allows there are genuine marriages (and even genuine Western marriages) that do not have all of these features. Whatever he has in mind, he offers four criteria which are arguably at least relevant to determining whether a relationship is fit to be considered a genuine marriage. The first is a legal criterion, somewhat similar to the sort of positivist criterion discussed above: “marriage law is essential to our modern Western conception of marriage” (p 229). The rest of the “basic core”, somehow essential to Western marriage, are three “generally shared expectations”: “that a married couple’s relationship typically involves the following three elements: (1) sexual intimacy; (2) domestic and economic cooperation; and (3) a voluntary mutual commitment to sustaining this relationship” (p 5). Wedgwood has much to say about the legal criterion and his three criteria of general shared expectations. I doubt any of his three “generally shared expectations” really are essential to the

institution of marriage: scenarios where only a minority of marriages had all three can easily be envisaged, and scenarios where many people *did not know* whether or not a majority of marriages conformed to all three are even easier to imagine. And I suspect that many married couples, presented with the opinion that it is essential to their marriage what people they have never met expect about that couple's sexual practices, would find the suggestion either risible or offensive.

Even if Wedgwood's three expectations are not essential to marriage, they might still be useful, if fallible, indicators of the sort of relationship that counts as marriage (or even "Western marriage"). It is easy to see that temporary marriages could easily have all three features, and be expected to have such features once awareness of temporary marriages were sufficiently widespread. Of course, a voluntary and mutual commitment to sustaining the relationship might come with a time-limit, but that hardly makes it not voluntary, or means that such relationships do not call for maintenance. As discussed above, if legal recognition is required for marriage, temporary marriages in many Western countries do not yet exist. Whether or not they currently do, legal recognition would remove this barrier, so with the recognition I am arguing for, temporary marriages would meet Wedgwood's four criteria for genuinely being marriages.

## **Conclusion**

Even though I have argued in this paper that the state should recognise temporary marriages, and that they are indeed genuine marriages, I doubt this paper will trigger legal changes anytime soon. Still, if I am right about what form of marriage equality we

should support, and that this is indeed a case where some can be given the freedom to have the marriage they want without terrible side-effects, it might serve as one of the early steps in a long march to more principled marriage laws. Working out what the state should do in principle seems to me a worthwhile project even when this does not hold out the immediate practical prospect of change.

Consideration of temporary marriage raises a number of further issues of philosophical interest, beyond the interest of the case itself. One is the more general question, if we are to expand recognised marriage beyond permanent marriage, of what sorts of conditional marriages should be recognised: what sorts of conditions are appropriate, and while are not? Another interesting philosophical question is the question of what, if anything, is particularly valuable about marriage, and to what extent non-traditional marriages might have less of this value, or for that matter which non-traditional options may better realise these values. A third question of interest is what social relationships are appropriately temporary, in the sense that they might be appropriately entered into with a pre-established expiry date. Business arrangements are appropriately temporary, parent/child or sibling relations are ordinarily thought not to be: but where do the boundaries in the middle lie? (Is friendship ever appropriately temporary in this fashion?)

Rational reflection on our social institutions is likely to be a never-ending project, but the search for general defensible principles about how to organise society has often served us well, and plays a valuable role in our social thinking as well as reacting to particular new

social pressures with particular ad hoc adjustments. There is not currently an outcry in the West demanding respectful treatment for temporary marriage, but the principles that should support our recognition of it are no less correct for that.<sup>17</sup>

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