Review Essay

The uncertain future of marriage

Against marriage: An egalitarian defence of the marriage-free state

Clare Chambers

Oxford University Press, Oxford, 2017, ix + 226 pp.,

ISBN: 978-0-19-874400-9

After marriage: Rethinking marital relationships

Elizabeth Brake (Ed.)

Oxford University Press, Oxford, 2016, x + 247 pp.,

ISBN: 978-0-19-020508-9

Contemporary Political Theory (2020) **19**, S7–S13. <https://doi.org/10.1057/s41296-018-00286-9>; published online 13 December 2018

Not that long ago, a liberal was someone who thought the marital status quo was unjust because same-sex couples could not marry. Since the end of that debate in the United States, the majority of liberal scholars still believe that marriage reform is necessary. However, they disagree about what should be done. *Against Marriage* and *After Marriage* make distinct contributions to the growing literature on marriage reform by illuminating the sources of disagreement. The former is an argument for the abolition of marriage and its replacement with a new regulatory regime, whereas the latter consists of an impressive collection of nine essays, written by analytical philosophers, which largely takes for granted that the state will remain in the marriage business.

Clare Chambers' *Against Marriage* is an extremely well-written, well-researched, and thoughtful book not only about marriage but also about liberalism. Although she targets egalitarians, this book deserves a wider audience. Unlike many theorists who reject marriage in its current form and propose civil union as a more inclusive substitute, Chambers argues for its abolition. In her 'marriage-free state,' the term 'marriage' would have no legal meaning. People would be free to use the phrase, 'however they want' and 'marry whomever they want.' Religious institutions could marry people, as they do now, subject to justice. 'Marriage' need not be monogamous, sexual, or permanent. The marriage-free state would continue to regulate personal relationships to shield the vulnerable, adjudicate legal disputes, and promote justice.

But it would do so on a piecemeal basis. Rights and duties would no longer be bundled in a holistic status like marriage or civil union. There would be different

kinds of mandatory regulations involving different practices like parenting, emotional interdependence, property ownership, care, cohabitation, and sexual intimacy. People would form different relationships ‘with different people for different functions’ (p. 147). In fact, ‘the marriage-free state starts by working out what would be the just way to regulate relationships between unmarried people, and then applies that regulation to everyone’ (pp. 3–4). The special status of marriage would cease to exist. The very idea of abolishing marriage may seem too radical on its face, but Chambers does a wonderful job of making this case by engaging the relevant literature, even work done by nonanalytic philosophers.

The book is divided into two parts. The first part introduces her ‘negative thesis,’ where as noted, she rejects any kind of state-recognized marriage or ‘marriage regime.’ This is the most persuasive part of the book inasmuch as she argues that marriage always discriminates against someone and violates liberal neutrality. In the second, more constructive part, Chambers develops her ‘positive thesis’ by elaborating on what ought to be put in the place of marriage: a regime with contracts and default directives (in which the state dictates the responsibilities and rights of all persons in advance). This part is bound to be more controversial because of her defense of employing such compulsory directives to protect everyone and her advocacy of using the power of the state to make egalitarian religions more egalitarian.

At the outset, drawing on past and contemporary feminist literature, Chambers describes how marriage is sexist and heterosexist. Even a more inclusive alternative, like civil union status, continues to discriminate against those who lack the status, namely those who are single or who are romantically involved but choose not to have such a status. As she points out, traditional marriage oppresses women. Even today, marriage reinforces a gendered division of labor, rendering women more vulnerable, portraying them as inferior, and subjecting them to a greater risk of domestic violence. Chambers concludes that ‘it is impossible to escape the history of the institution’ (p. 27). Furthermore, traditional marriage privileges heterosexuality.

One might think, then, that the progressive solution would be to open the institution to same-sex couples to make marriage less gendered and to preclude discrimination against such couples. No doubt the status of civil unions for everyone is an improvement over the status quo, both practically and symbolically, but such a status for all couples still discriminates against unmarried couples and single persons. Only the abolition of state-recognized marriage can solve the equality problem.

After knocking marriage off its pedestal, Chambers develops her positive thesis: that in the marriage-free state, personal relationships must be regulated in accordance with their function to protect the vulnerable, adjudicate disputes over joint property, determine the rights and duties of third parties, and allocate benefits and burdens. Although this could be done contractually, contracts without

directives could exacerbate inequality. For example, when they bargain, the two parties may not be on a level playing field. And there are various problems with enforcement. According to Chambers, neither specific performance nor fault-based alimony (as compensation for breach) would be workable. Thus, the contract approach is problematic for egalitarians. Default directives still are necessary for nonconsenting third parties, such as children, employers, and businesses. Some contractual deviations (like prenuptial agreements) may be permitted but not those that undermine justice.

This embracing of default directives might be seen as a serious restriction on personal freedom, rooted in an unacceptably paternalistic rationale. Why not let people choose from a menu of options rather than imposing directives upon them? One might be convinced that competent adults should be able to contract out of whatever default scheme is in place. At present in the United States, women can enter into an unequal two-person marriage and live accordingly. After all, they may prefer a more traditional role. During their marriage, couples are left free to have the kind of marriage that they want, equal or otherwise, when it comes to their division of labor. A spouse cannot sue her spouse nor have her right of support enforced until she is legally separated or divorced.

In the last chapter, Chambers considers the extent to which the state should regulate private religious marriages. This is likely to be the most memorable part of the book. Chambers writes, 'The existing legal structure gives far too much leeway to religions, allowing them to violate equality to an unacceptable degree' (p. 184). Many children grow up in a religion. For them, membership is not a matter of choice. 'But if religions want to contravene equality then they must, as a minimum,' Chambers states, 'be willing to restrict themselves to adult members. It is wrong to allow *more* [her emphasis] leeway to discriminate than private clubs...' (p. 184).

One has to admire her unwillingness to give ground to her critics, who think that religions ought to be able to control their own affairs in the name of separation of church and state. Chambers does not qualify her egalitarianism to make it more palatable for the reader who is less egalitarian or less feminist than she is or for the person who cares about the policy implications of her position. For her, religions may transmit themselves to children only if they meet certain basic egalitarian requirements. Religions must either respect equality or restrict themselves to consenting adults. The implication is that many parents – unless their respective religions change their inequalitarian ways – would not be able to bring up their children in their preferred religious tradition.

The marriage-free state also has an interest in religious divorce. Chambers uses the example of the *get*, a document in Jewish law that requires the husband's consent for the divorce to be finalized. Without the *get*, the wife would remain married in her religious community. The state could make it illegal for a man to refuse to provide a *get* and use the law to enact other egalitarian reforms. As she

puts it, ‘The fact that changing a religious tenet would mean the end of a religion is not a decisive reason against requiring such change’ (p. 193). This radical proposal will strike some and perhaps many readers as using the authority of the state inappropriately. As stated, Chambers has qualms about undermining Orthodox Judaism. Nonetheless, she believes that ‘The state must do whatever it can to ensure that women and other vulnerable people are not trapped in oppressive religious marriages’ (p. 198). At the very least, liberal states will have to figure out how to incentivize religions to become more egalitarian.

One response to this proposal is that religions should not be enticed, pressured, or compelled by the state to find new ways to become more egalitarian. Liberals can (and do) argue about where lines should be drawn when it comes to tolerating certain practices. At some point, any liberal will have to admit that even a well-intentioned proposal to make marriage more egalitarian goes too far because competent adults should have the freedom to personalize their private lives. Liberalism has the widespread appeal that it does precisely because liberal societies eschew paternalism and do not intervene in cultural or religious practices in the absence of demonstrable harm.

This short overview does not do justice to the nuances of her argument. Surely Chambers would insist that her liberal egalitarianism is a better interpretation of the liberal tradition, and it may be. It certainly is a more egalitarian interpretation than my own. In any event, I hope that this part of the review helps the reader appreciate why *Against Marriage* is a book that deserves as much praise as Tamara Metz’s *Untying the Knot* and Elizabeth Brake’s *Minimizing Marriage*. Simply put, Chambers’s book is the best book ever written on why egalitarians should just say ‘no’ to marriage.

The essays in *After Marriage* do not have a single theme. Some of them focus on the relationship between marriage and the state. Others seek to replace marriage with another legal framework. One essay separates parenting from marriage. Others want polygamy and temporary marriage to be institutionalized. One essay models marriage on friendship rather than on romantic love. Another essay calls into question the value of marital commitment. All but two of them reject the marital status quo.

The first two essays – by Simon May and Ralph Westwood – address whether marriage violates liberal neutrality (and as such, ought to be abolished). They conclude that political liberalism (neutrality) does not require the abolition of marriage, contrary to Chambers’s aforementioned position. May argues that marriage does not necessarily violate the principle of liberal neutrality because the state does not have to justify marriage on the basis of a controversial ‘matrimonial ideal’ (where marriage is assumed to be a superior form of relationship). Rather, the state must come up with an instrumental justification that does not appeal to the truth of any such ideal. One such justification could be the ‘presumptive

permanence' of marriage that renders it distinct and worthy of being supported by the state.

Like May, Ralph Wedgwood tries to show that the justification of marriage does not have to rely on a controversial conception of the good. He begins by suggesting that it is possible for monogamous marriage, same-sex, and opposite-sex, to be defended against calls for its abolition. Marriage in its current form can be justified as long as it is made available to same-sex couples, and it conveys a shared social meaning to others. If marriage were disestablished or reformed to include polygamists and polyamorists, couples could no longer signal the value of their relationship. Neither May or Wedgwood wants the institution to be fundamentally changed beyond allowing gays and lesbians to have access to it. In this sense, they take a conservative position relative to other contributors who advocate for more radical changes.

Elizabeth Brake's essay, 'Equality and Non-Hierarchy in Marriage,' is one of the most interesting essays because, unlike the other essays, Brake spells out how a couple ought to treat each other. In doing so, she develops a 'feminist ideal of egalitarian relationships modeled on friendship' (p. 100). Brake exposes the sources of gender inequality and then introduces the 'non-hierarchy principle' (NHP) to explain why certain kinds of power inequality (hierarchy) in intimate relationships are wrong. One source of the problem is that the social and legal meaning of marriage as a union encourages the loss of individuality on the part of the participants, usually more so for the woman. As an alternative, Brake proposes a friendship model of marriage where each person treats the other as an equal by sharing not just material assets but also decision-making power over important matters. Unfortunately, background conditions almost inevitably lead to a gendered division of labor and economic inequality despite a progressive couple's sincere commitment to an egalitarian way of life. This situation has a detrimental effect on women, who continue to do a disproportionate share of the unpaid labor in the home and remain economically vulnerable as a consequence.

For Brake, friendship could represent the kind of relationship in which couples have a shared life but do not sacrifice their individuality. Normally, we expect love and/or sex to be the basis of an intimate relationship. In Brake's view, this is not the best way to conceptualize marriage. It is possible that the couple would be more autonomous (and happier) over time if they did not predicate their relationship on romantic love or sex. After all, friends treat each other as equals, and friends usually keep their individuality as long as the friendship lasts. While strict equality is too stringent, people can take turns making major decisions during their time together. That way, neither of them will be subsumed in the relationship. Brake may be on to something. After all, power has to be shared more or less equally for both persons to pursue their respective conceptions of the good life. Neither person's life plan is more important than the other's. To be a good friend is to want

to advance the other's good as if it were one's own good. The same should be true of spouses.

Like Brake, Daniel Nolan doubts that most people think about the marital relationship in the right way. He takes issue with the idea that marriage has to be intended to be permanent. As an alternative, he advances temporary 'marriage,' where the marriage expires after a fixed amount of time. Temporary marriages might allow the spouses to enter into marriages with more honesty (an unrealistic 'until forever' would not have to be a promise made by all couples as part of their wedding vows). Even if permanent marriage is superior, it does not follow that such marriage is always better for everyone.

For similar reasons, Anca Gheaus challenges the conventional wisdom that marital commitment is always particularly valuable. Whether such commitment is good is contingent on the costs and benefits. While commitment may secure other marital goods, it is not an effective way of maintaining romantic or sexual love. Like Nolan, she considers the possible benefits of temporary marriage, writing that 'The legalization of temporary marriage can be a way of recognizing that the opportunity costs of marriage are onerous' (p. 220). In fact, temporary marriage may be superior to permanent marriage because divorce is traumatic and costly.

Laurie Shrage draws on the success of the legal reform of monogamy in contending that polygamy could be reformed along egalitarian lines. If a thruple were to have identical rights and duties – such as an equal share of the community property and the same right of exit – their relationship would be formally equal. As such, the government probably should implement polyfidelity – where A is married to B, B is married to C, and A is married to C – so that everybody has the same power.

Peter de Marneffe is less optimistic than Shrage is about the possibility of egalitarian polygamy. He distinguishes sharply between the decriminalization of polygamy (making behaviors associated with it no longer illegal) and its legalization (state recognition of being married to more than one person at the same time). His limited aim is not to argue for "an all-things-considered judgment that the government should not legalize polygamy" (p. 125-126) but to defend the view that legalization does not necessarily follow from decriminalization. For de Marneffe, there must be a relevant difference between polygamy and monogamy if the state is only going to recognize the latter. Before he makes a case for their relevant differences, he admits that polygamy might be the right choice for some persons under some circumstances and that perhaps government 'is warranted in legalizing polygamy' (p.132).

That said, de Marneffe puts forth two rationales for believing that decriminalization does not have to lead to legalization. The first rationale is that monogamous marriage is superior to polygamy when it comes to raising children because children in polygamous families tend to experience material and emotional

scarcity. The second rationale is monogamy fosters a distinct human good called ‘exclusive life partnerships’ (p. 149).

One could reject both rationales. By ‘polygamy,’ he means Fundamentalist Latter-Day Saints (FLDS) polygyny, which is only one form a plural marriage could take (polyandry and polyamory are forms of such marriage as well). As de Marneffe notes, more progressive polygynist families, like that of Kody Brown featured on TLC’s *Sister Wives*, can raise children as well as a nuclear family does. And there is no reason to think that a polyamorist unit, other things equal, would be worse on average than a nuclear family when it comes to parenting. In theory at least, there are advantages that come with polygyny and polyamory, namely being able to pool resources and share parenting responsibilities with a more efficient division of labor. De Marneffe relies on field research that is outdated. Janet Bennion’s much more recent anthropological research paints a much rosier picture of independent FLDS (like the Browns) who tend to be more progressive in their beliefs and behaviors, as does Elizabeth Sheff’s sociological research on polyamorous families.

Second, monogamy (exclusive life partnership) may not be all that it is cracked up to be. An equally plausible case can be made that an exclusive life partnership is inferior to poly alternatives not only for some people but more generally. Many people are miserable in their monogamous relationships. Nor are they open and honest with their partners. Polygamy (nonexclusive life partnership) could be a distinct human good as well. A polygamous arrangement, with its lack of sexual and emotional exclusivity, forces the participants to be radically honest, to get over their jealousy, to improve their communication skills, to cooperate, and to put others before themselves. A polygynous family might have more love, more caring, more sex, and more fun. If both monogamy and polygamy are distinct human goods, people should be able to choose between them without the state’s favoring the former by putting its imprimatur on it.

At least for now, *After Marriage* is the best book of its kind because of its breadth, depth, and clarity. The volume offers not only stimulating ideas about marriage reform but also surprisingly provocative suggestions about how people can improve their closest relationships. *Against Marriage* makes an equally important contribution by explaining why egalitarians must reject marriage and replace it with a new regulatory framework. Both of them pose profound challenges to the marital status quo.

Ronald C. Den Otter
California Polytechnic State University, San Luis Obispo, CA 93407, USA
denotter@calpoly.edu