Clare Chambers
Against Marriage: An Egalitarian Defense of the Marriage-Free State
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The institution of marriage has played a central role in the oppression of women and other groups, including gays, lesbians, bisexuals, people of color, and children. Feminists have questioned whether equality and freedom for all persons require extensive reform of the legal institution or abolishing it altogether. Clare Chambers powerfully argues for abolishing legal marriage in her new book *Against Marriage: An Egalitarian Defense of the Marriage-State*.

Chambers argues that legal marriage is a violation of equality and liberty and that it is not needed for the provision of other public goods held dear by contemporary liberals. In its place, she proposes a radical restructuring of personal relationship law that is practice-based and piecemeal. She contends her proposal is crucial for justice, for equality in particular, and, especially, for protecting the vulnerable. *Against Marriage* is an excellent book. It is not merely a new spin on a topic that has received sustained attention. Chambers develops thoughtful arguments for rejecting legal marriage, and her novel approach provides an important challenge to other recent proposals for personal relationship law, such as Tamara Metz's intimate care-giving unions (Metz 2010) or Elizabeth Brake's proposal for minimal marriage (Brake 2012). Here, as elsewhere, Chambers is uncompromisingly feminist. Although she champions the liberal values of freedom and equality, she unapologetically emphasizes equality when the values are in tension. She claims that liberal egalitarians must do the same. Important challenges can be made to Chambers's view, but anyone interested in feminism, liberalism, and marriage should read this book.

Chambers divides her book into two parts. In part I, she defends a negative thesis, "a critique of the institution of marriage as it is traditionally understood, and a rejection of the state recognition of marriage in any form" (2). In part II, she makes the case for her positive thesis, "an outline of a state in which personal relationships are regulated, the vulnerable are protected, and justice is furthered, all without the state recognition of marriage or any similar alternative" (2). Consider Chambers's main arguments in part I. First--and most important--Chambers argues that traditional marriage is inegalitarian and that marriage reforms can't rectify all the inequalities of

the institution. She shows that traditional marriage is sexist and heterosexist and that it unjustly discriminates against those who do not partner. She contends that even if legal marriage is reformed to remove formal inequalities between spouses and is available to both different-sex and same-sex couples, it will still preclude singles and persons in nonamorous or nonmonogamous relationships from enjoying valuable benefits, opportunities, and rights (24-25). Furthermore, the institution of marriage, with its social meaning, derives from as well as maintains and perpetuates social norms of gender inequality that practically disadvantage women (for example, through caring for dependents, performing housework, and experiencing domestic violence) and that symbolically harm them (19-27). Although Chambers thinks that a marriage regime that permits legal marriage for different-sex and same-sex couples is an improvement over those regimes that allow only different-sex couples to marry (41-42), such regimes still pressure persons to structure their personal relationships and lives in accordance with heteronormative and patriarchal patterns. And marriage regimes unjustly benefit those that do (29-46).

Next Chambers argues that legal marriage compromises liberty. She focuses on political liberalism, given its current popularity and core tenets, and she charges that legal marriage conflicts with the kind of neutrality central to the view. Political liberals hold that "state action must not be justified by reference to reasons that conflict with some reasonable conception of the good" (52). She argues that legal marriage violates this principle in three ways. 1) Marriage has a social meaning, and state recognition of legal marriage will involve the state's recognition of values that are incompatible with some reasonable (partially) comprehensive doctrines (57-64). 2) Legal marriage, by definition, "provides a bundle of rights and duties to married people because they are married, such that access to those rights and duties requires opting in to marriage" (50); any particular bundle is a view of the good and is incompatible with some reasonable (partially) comprehensive doctrines. 3) "State recognition means that the state withholds certain rights and duties from those who have not opted in to the relevant status"; the state thus creates hierarchy; this is not compatible with some reasonable (partially) comprehensive doctrines (66).

Finally, Chambers discusses five public-good arguments defended by liberals for legal marriage. In particular, she considers arguments to the effect that 1) legal marriage has a communicative good, 2) legal marriage can promote gender equality or protect against discrimination and vulnerability, 3) legal marriage (in some form) is important for caring relationships, 4) legal marriage helps to cultivate stability and the civic virtues needed for citizenship in a liberal democracy, and 5) legal marriage is needed given children's interests. She argues that all these arguments fail for one or more of the following reasons: the good at stake conflicts with equality or liberty, the specified good is insufficiently weighty given countervailing considerations, state action is not needed to deliver the good, or legal marriage is not the appropriate form of state action for providing the good in question.

In part II, Chambers considers how personal relationships should be regulated in a marriage-free state. Her interest is in the appropriate legal form of regulation, not in defending particular regulations. She notes that laws will be needed for the protection of the vulnerable, for assessment of joint property disputes, for state benefits, rights, and entitlements, and to determine the rights and duties of third parties. Although some claim that relationship contracts

should replace legal marriage, Chambers rejects this approach on several grounds, including that contracts can entrench existing inequalities between persons or produce new ones (120-24). And she stresses that, in any contract regime, directives would still be needed for personal relationships. For example, default directives will be needed for certain matters when persons fail to contract, such as property matters and child support and custody (125-26). Directives must also establish "the principle and limits" of contract law for personal relationships (including enforcement), and obligations of and regarding third parties given certain sorts of contracts (126-27). Furthermore, she argues that specific performance and compensation, the paradigmatic remedies for contractual breach, are often inappropriate or unjust in the context of personal relationships (133-39).

Instead of a contract regime for the marriage-free state, Chambers defends practice-based, piecemeal directives to govern personal relationships, which allow contractual divergence only if such is consistent with justice. By "directives" Chambers means regulations in which the "state dictates responsibilities and rights, in advance for all relevant parties" (116). She contrasts piecemeal regulation with regulation that is holistic (144-49). Holistic regulation bundles rights, duties, and entitlements. It is nearly always status-based, as in the case of legal marriage, civil unions, or Metz's intimate caregiving unions; however, holistic regulation could be practice-based, such as common-law marriage. Chambers argues that holistic approaches to personal relationship law are more or less problematic, depending on what is bundled, for whom, and the connection of the bundle to patriarchal norms as opposed to a public good such as caregiving. However, she claims that any personal relationship law that bundles rights, duties, and entitlements will be problematic insofar as the state privileges a particular type of relationship for the bundle and not all persons' relationships and lives will fit the model. This will result in symbolic and material disadvantage for some persons.

Alternatively, Chambers's piecemeal regulation "involves the state regulating the different practices or activities of a relationship separately" (147). There will be distinct regulations, then, for activities such as parenting, property ownership, next-of-kin designation, and so on. It may be that, for some person, regulations concerning different activities apply to her and just one other person, but for someone else, because of her relationship practices, those same regulations may apply to her and a different person in each case.

Chambers also emphasizes that her proposal for personal relationship law is practice-based, not status-based. This distinction has to do with the state's justification for why a regulation is relevant for a person (150). Practice-based regulations have to do with "the practice-based character" of a relationship as opposed to an "acquired status." Key to the practice-based approach is that, with respect to matters in which the state must regulate, persons don't have to opt in for regulation to apply but, rather, are permitted to opt out, if doing so is consistent with justice (162), so everyone who needs protection will be protected. I discuss the difference between practice-based and status-based regulation in more detail below, as this aspect of her view raises some concerns.

In short, I think Chambers convincingly argues that equality and freedom require radical reform of personal relationship law. However, even if equality and freedom require unbundling the rights and entitlements properly associated with personal relationship law (whatever those are), I

am unsure whether, all things considered, feminists and liberal egalitarians should favor practice-based directives over a status-based regime. The law is a blunt instrument, and it may be difficult to craft policy that is neither over- nor under-inclusive in the domain of relationship practices. Individuals, after all, can engage in the same practice for very different purposes or with different intentions.

Consider the case of property. The state must regulate property, and in a marriage regime, women who don't marry can be disadvantaged when it comes to property rights even if they have the same relationship practices as women who do. Suppose Sue lives with a romantic partner in a house initially purchased by her partner; I also live with a romantic partner in a house initially purchased by my partner. Sue and I each contribute to the mortgage payment of the respective homes. Sue marries her partner, but I don't marry mine. In a marriage regime, Sue will have a property interest in the home, and I won't.

In a marriage-free state with practice-based directives, we both might. It depends on the content of the directive(s) regarding property. Chambers does not defend the content of particular directives in her book. However, when illustrating the idea of a directive, she says it could be proposed that one way a person "acquires full or partial ownership of a residential property" is by "residing in the property and contributing financially to the property for a year or more without a formal tenancy or lodger's agreement" (157). In the case above, this may seem appealing. But, I don't have that intuition in other cases with seemingly the same practice. Perhaps I purchase a home when I start a PhD program, and a fellow graduate student moves in with me. I use my stipend to make part of the mortgage payment, and my friend and roommate gives me money to live in the house over the course of several years. We share the mundane tasks of housekeeping, just as romantic couples who cohabitate do. It may have been unwise of me not to draw up a rental agreement, but I don't think the state should confer on my roommate a property interest. I wanted the benefits and burdens of homeownership, and I purchased a home. My roommate did not. Or, suppose my adult child moves home after his divorce and offers me some money every month for my mortgage payment. Suppose that after a year I get tired of his untidiness and obnoxious friends. I tell him it is time for him to leave the nest (again). We never drew up a rental agreement; after all, he is my son. I don't think my son should have a property interest in this case. Again, I do not mean to suggest that Chambers endorses this particular directive. I want to suggest, though, that practice-based directives will likely always be under- or over-inclusive.

Consider next-of-kin designation. The state must have regulations for designating a person's next-of-kin for emergency decision-making, among other issues. In Chambers's marriage-free state, there will be practice-based regulation for this. I imagine it may be suggested that if an adult lives with another adult for a certain period of time and shares in various activities of daily living, then the state will designate that the person whom the adult lives with will be her next-of-kin, absent legal documents specifying otherwise. Maybe individuals have to live together for a year or two for the regulation to apply. In many cases, something like this sort of regulation would get matters just right. However, imagine a young woman who moves in her with romantic interest at age nineteen. They enjoy each other's company and share expenses. She has not given any thought to making a permanent, relationship commitment to anyone; she is not ready to settle down. She is school- and work-oriented and having fun. The young woman is in a car

accident about two years after the arrangement begins. According to this regulation, her roommate/romantic interest at the time should be her next-of-kin, as opposed to, say, her parents. This might not at all be what she would want if she had ever thought about what she wanted, but she didn't think about it. She was young.

I also worry that practice-based personal relationship law will sometimes be under-inclusive. In a just society, there should be some sort of regulation allowing persons some reasonable amount of leave from a job in order to provide care to others. Suppose I need to have surgery and will need someone to care for me for a few days. During my adulthood, there isn't anyone who has had a history of caring for me in times of need or with whom I am in a practice-based relation of caretaking. I have lived by myself, have been in good health, and have been free from accident. I would like my sister, whom I occasionally talk with on the phone and visit, to care for me. I am not sure how a practice-based regulation can be specified to cover this kind of case (if the regulation is meant to apply because of how lives have been lived); but maybe my conception of a practice is too narrow. Chambers also suggests that perhaps caring for others could be handled by a generic right "giving all employees rights to additional discretionary time off work" (94). Although certainly all employees should have some discretionary days off work, I don't think that all days used for the socially necessary work of caring for others should fall into the category of discretionary days. Two people may each get fifteen discretionary days a year, but a certain amount of reasonable time necessary to care for an ill mother or child should not fall under this. I do favor a policy like the University of Cambridge's career-break scheme as a model for caregiving leave, which Chambers approvingly cites. But, as I understand it, it does not apply because of a practice or activity; rather, when the need for care arises, one can take advantage of the policy. So, it is not exactly status-based or practice-based (if what makes practice-based policies apply is the fact that individuals live or have lived in a certain way).

Chambers may have something convincing to say about these particular cases; or, perhaps these particular cases are just not worrisome for others in any way. However, my point is less about the particular cases and more about the fact that I worry that practice-based regulation as opposed to status-based regulation will be over- or under-inclusive, given the complexity of relationships, including the fact that practices absent consideration of intentions may lead us astray.

The impetus, though, for practice-based regulation is (primarily) equality and the protection of the vulnerable. And if the best way to secure equality and to protect the vulnerable when it comes to personal relationship law is practice-based regulation, then the risk that such regulation will be overly broad or under-inclusive is worth taking. But people live in such different ways; line-drawing in this area will be tough. So, I wonder, is it preferable to secure equality and protect the vulnerable via other policies and make personal relationship law status-based and piecemeal, as Brake proposes? For example, perhaps women's dependency and vulnerability as caregivers could be addressed primarily through restructuring the labor market and government support for caregivers such that labor-market participants can be primarily responsible for caring for dependents, including their children, and not be financially dependent on others. In cases in which caregiving responsibilities are so substantial that labor-market participation is not possible, then entitlements to caregiving stipends and job retraining, if caregiving ends, are in order. Caregiving is socially obligatory work for which all members of society are collectively

responsible, and those who perform that work should not be disadvantaged relative to other citizens because they do.

Chambers emphasizes that "the problem with status-based regulation . . . is that it requires individuals to acquire a particular status in order to access protections," so this means "(f)or example, one partner may wish to acquire the protected status but the other may be unwilling (a situation that works in favour of the already-powerful), or their relationship may not meet the requirements of the status, or they may simply not have got round to acquiring the status yet" (153). These considerations are important. However, a piecemeal, status-based regime will have default regulations for cases in which no one has the relevant status but regulation is needed, and it could address the vulnerability of caregivers through labor-market regulations and government entitlements. Of course, some relationships will have a status, and others won't "even if there is no functional difference between them" (153). Chambers thinks this is a problem. I am not sure. I think it depends on the norms, practices, and other policies of the society. If the requirements for obtaining a particular status are not unjustly discriminatory, then it could even be a virtue insofar as, as I noted above, functionally identical practices--as they would have to be narrowly defined in her marriage-free state--do not tell us about what people want or intend. And that is important for freedom and equality too.

In summary, Chambers's *Against Marriage* is an extremely important work that will surely spark debate and further discussion on this topic. I hope it also helps to bring radical reform--for the sake of equality and freedom--to the domain of personal relationship law.

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