

Elizabeth Brake (editor)

*After Marriage: Rethinking Marital Relationships*

Oxford: Oxford University Press, 2016 (ISBN 978-0-19-020508-9)

Mara Marin

Mara Marin is a postdoctoral associate at the University of Toronto's Centre for Ethics. Her work focuses on the social organization of care, theories of oppression and domination, the social-contract tradition, legal theory, political obligation, and authority. She is the author of "Care, Oppression, and Marriage" (in *Hypatia*, 2014). Her forthcoming book, *Connected by Commitment: Rethinking Relations of Oppression and Our Responsibility to Undermine Them* (Oxford University Press, 2017), is an investigation of our collective responsibility to dismantle structures of oppression.

maramarin.weebly.com

maramarin2012@gmail.com

\*\*\*\*\*

Over the last two decades the institution of marriage has become the subject of a growing field of theoretical inquiry. Partly motivated by the social and legal debates around same-sex marriage, this field came also to address philosophical issues such as the nature of families, the social importance of caregiving, or the reasons for the state interest in intimate relationships. *After Marriage* advances this discussion with nine original essays by authors who have already contributed to debates in this field. What is exciting about this new collection is the sense of dialogue it conveys: most essays engage with central claims made in this debate, as well as claims made in some of the other essays in this collection. In what follows I offer brief summaries of the central claims and arguments of each essay, and discuss in some detail some of them.

The first two essays take issue with the view--articulated by Elizabeth Brake, Clare Chambers, and Tamara Metz--that in its current form the marriage institution is incompatible with liberal neutrality because it endorses a particular conception of the good, the matrimonial ideal (Metz 2010; Brake 2012; Chambers forthcoming). On this view, liberal neutrality requires either reform (Brake) or disestablishment of the marriage institution (Metz and Chambers).

Simon Căbulea May's essay argues that, if certain empirical claims are true, a neutral justification for the public institution of marriage is available. He clarifies the notion of neutrality by reference to the distinction between primary goods and ultimate goods. Primary goods are means to a wide variety of ends, whereas ultimate goods are ends in themselves. Some goods--such as health and education--can be both primary and ultimate ends. The liberal neutral state can pursue goods of this sort, but only as primary goods. A neutral state can promote health, for example, but only as a primary good. Similarly, the state can endorse marriage without violating neutrality, even though some people value the marital relationship as an end in itself, as long as the state's endorsement of marriage is based solely on its instrumental value. Marriage is a primary good because it is, among

alternatives to it, the best way to ensure care. This is so because it is the only "presumptively permanent" relationship, in the sense that "there is a social norm against marrying without the intention to stay married for life, not because social norms also make it difficult or undesirable to divorce" (16). Better care is delivered by those who know one and whom one can trust, both of which take time to build, which makes long-term relationships better at producing care. Marriages have a better chance to become such long-term relationships because "the surrounding community's expectation of permanent commitment enhances their stability" (19).

However, in advancing this argument, Cābulea May conflates *actually* permanent with presumptively permanent relationships. For marriage to be more stable than the alternatives to it--and thus a better care relationship--it has to be the case that the social norms around it refer not only to the initial intention at the time of entering the marriage (as "presumptively permanent" is defined by Cābulea May) but to changing one's mind about staying married. It has to be the case that there are social norms against the desirability of divorce. And such norms would undermine the instrumental value of marriage as a relationship of care. They could, for instance, undermine the trust required by care. If I think that my partner continues to care for me because of social pressure, not out of commitment, my trust would be eroded.

For Ralph Wedgwood, marriage has a shared social meaning with a communicative role. The social meaning of marriage, "reflected in the legal powers and obligations that spouses have towards each other," allows married couples to use marriage as a communicative signal. By saying "we are married," the couple is confident that their audience will interpret their utterance in light of this social meaning (35). The law is essential to stabilizing and reinforcing this social meaning and keeping it from disappearing. In the absence of the law of marriage, marriage could lose its generally understood social meaning, which would undermine its communicative role. Without the law, "I am married" would fail to have its current communicative function.

Given that civil marriage is consistent with justice and is not harmful, there is a neutral justification for it. This is the fact that participating in the institution of marriage "is a central part of many people's *most fundamental goals and aspirations in life*," and "a legal institution of civil marriage is the best way for these people to satisfy these aspirations" (39). This aspiration does not include the desire to exclude other types of relationships from state benefits, but only to keep the core shared social meaning of marriage so that marriage continues to perform its communicative role. For example, if law recognized polyamorous relationships as *marriages*, then someone saying "I am married" could not confidently get a clear message across, because the audience would not be able to form a clear expectation about the number of people involved in the marriage in question. In contrast, Wedgwood argues, same-sex marriage does not change anything essential about the shared meaning of the institution.

However, I find this argument unconvincing. There is certainly *some* uncertainty introduced by allowing same-sex couples to marry: the audience can no longer presume the speaker to be married to an opposite-sex partner. The question of the (neutral)

legitimacy of some reforms cannot then be understood in terms of the desire to keep a core, shared meaning of marriage. It has to engage controversial questions about what constitutes this shared meaning and what does not.

If the first two essays reject the claim that civil marriage should be abolished as a legal category, the third, by Clare Chambers, one of the best known advocates of that claim, moves the debate beyond that issue by raising the question of how, in the absence of marriage law, personal relationships should be regulated. In the critical part of her essay, she takes issue with the very influential view that the space left by marriage law should be filled by contract law. Her critique is nuanced and lucid, and space does not allow me to do justice to it. Among the most interesting contributions in the volume is her argument that a contract regime for intimate relationships does not exclude its opposite, which Chambers calls "state directives," since contract alone does not create rights or obligations on nonconsenting third parties that are affected by marriage and that the state has a legitimate interest in protecting. Moreover, she shows at great length that, contrary to the intuitions that explain the appeal of the contract-regime proposal, "the choice between directive and contract is not a choice between liberty and constraint"; the liberty in each regime depends on the content of the directives or contracts (63).

One of the implications of the idea that marriage law violates liberal neutrality is that protecting the vulnerable is "the only good reason to have the state involved in marriage in the first place." Taking this as their starting point, Samantha Brennan and Bill Cameron argue that children rather than romantic love should be the basis of the family. At first sight, their claim seems similar to Martha Fineman's arguments for the disestablishment of marriage and a refocusing of family law on the relation between child and primary caregiver (Fineman 1995, 228-31). But Brennan and Cameron's talk of "parenting contracts" seems to suggest that they endorse a regime of contracts between adults in their parenting roles, not a regime of state directives that would govern the relationship between parent and child. These contracts would refer to the adults' relationship as parents, not as romantic lovers, thus decoupling parenting from romantic relationships and removing the state from the latter. I find this line of argument problematic for several reasons. First, I see little evidence in the current *law* of anything about romantic love or any other feelings married adults may have toward each other. The law of marriage creates legal rights and obligations in virtue of the relationship the adults have, and I see no reason to think that romantic love plays any role in defining these rights, obligations, or the relationship given legal recognition. Second, it is unclear whether Brennan and Cameron's "parenting contracts" govern the relationship between the adult parents or (maybe also) that between the parents and the children. If the latter, then, given that the state has a legitimate interest in the protection of children and for reasons developed by Chambers's article in this collection, the relations between parents and children will have to be governed by directives, not by contract alone. Then the question is whether and to what degree parenting contracts could be allowed to deviate from those directives. Further, Brennan and Cameron seem to suggest that relationships between adults, which they discuss exclusively as relationships of romantic love, have no claim to state protection. But the state's legitimate interest in protecting the vulnerable includes the state's legitimate interest in regulating any relationship of care, including

those between adults, as Brake and I have argued (Brake 2012, 160; Marin 2014, 342-43). Moreover, if adults too can be made vulnerable by their relationships, then one reason against Brennan and Cameron's claim of decoupling regulations for adult relationships from regulations for adult--child relationships is that often the vulnerability that affects women is what Fineman calls "derivative dependency": dependency developed in the process of caring for children and other "inevitably dependent" persons (Fineman 1995, 162).

Elizabeth Brake's essay takes up the question of the role of marriage in creating and sustaining gender inequality. She dispels the common mistake of understanding the feminist claim that marriage contributes to gender inequality as a claim about hierarchy inside the relationship by pointing out that the feminist critique is a systemic critique, one that claims that hierarchy inside marriage cannot be understood in isolation from larger social phenomena, of which she discusses three: the gendered division of labor, gendered social norms, and gendered violence. This argument advances the discussions of the nature of gender oppression and the role of everyday practices in sustaining it, and I expect that it will figure prominently in future discussions. But I also think that some of the clarity of this analysis gets muddled by the second argument of the essay, according to which hierarchy in a marriage is wrong in itself, that is, even when it is not gendered, even, that is, when men are subordinated in marriage. The problem with putting the point in this way is that it conflates a relationship between groups with one between individuals. The virtue of the first argument is that it shows that gender hierarchy--of which women's lack of power inside their relationships is an aspect--is a relation between groups, one that cannot be reduced to relations between individuals. In contrast, when we talk about what if anything is wrong with one partner being dominated in a relationship we ask a question about the justice of relations between individuals.

Whereas Brennan and Cameron think that the demands of adults' romantic relations are in tension with the demands made by the care of children, Peter Marneffe argues the exact opposite. He thinks that it is precisely the ability of monogamous relationships to harness most adults' desire for a romantic partnership in the service of children's welfare that constitutes a nonarbitrary distinction between monogamous and polygamous relationships, a distinction that justifies the state to recognize monogamous relations but refuse to recognize polygamous relationships as married. Children fare better in monogamous than in polygamous relationships, and part of the reason for this, Marneffe argues, has to do with the fact that monogamous marriage identifies one's child's other parent as one's romantic partner. In contrast, polygamous relationships are ill-suited as romantic partnerships for adults and consequently are less well suited for the care of children. Yet polygamous cohabitation should be decriminalized, Marneffe argues, because its criminalization violates the right to sexual freedom between consenting adults. The main claim of the essay--established successfully in my view--is that the question of whether polygamous cohabitation should be decriminalized is distinct from the question of whether polygamy should be recognized as marriage.

Laurie Shrage's essay continues the discussion of polygamy by rejecting three objections to it: first, that polygamy is inconsistent with the full equality of women; second, that

polygamous practices exclude same-sex partners; and, third, that polygamy is incompatible with forms of privacy necessary for marital happiness and stability. Whereas Marneffe's account of plural marriages focuses entirely on religiously inspired and patriarchal polygyny, Shrage's argument relies on an analysis of nonhierarchical and nongendered forms of plural relationships. She argues that bigamy--the act of intentionally marrying someone while one is legally married to another--should be decriminalized when no fraud or coercion is involved. This decriminalization of open and consensual bigamy would provide polygamists one form of access to civil marriage. She also argues that in another, arguably more egalitarian, form of state recognition, the state would issue a single marriage license to a polygamous unit, making all spouses subject to the same marriage laws, and giving them the right to approve or contest the entry or exit of any other spouse. Although legal recognition of polygamy would require some changes in the distribution of marital benefits to different spouses, she follows Adrienne Davis in arguing that these changes can rely on legal norms and models in commercial partnership law (Davis 2010).

If Marneffe thinks polygamous relations are inimical to romantic love, Anca Gheaus argues that all committed relationships, even monogamous ones, are ill-suited to secure romantic and sexual love. Gheaus argues that commitment (which, following Calhoun 2009, she understands as a species of intention) has only instrumental, not intrinsic, value. As a means, it is only as valuable as that which it brings about. As a means of securing the permanence of intimate relationships, it is only as valuable as the relationship. This means, first, that commitments to bad relationships are not valuable and, second, that other, more valuable ways to sustain relationships would be preferable. Love, "the inclination to seek another's companionship and advance her well-being" (215), is such an alternative means. Love can safeguard marriage against the threats that commitment guards against. In addition, love also has intrinsic value. Hence, an enduring love-based relationship is preferable to a commitment-based one, even if most long-term marital relationships would not endure without commitment.

Moreover, commitment is not even a wise means to secure love. To love without commitment is to love out of inclination, out of one's spontaneous reaction to the reality of one's beloved, independently of the history of the relationship, as if you now met them for the first time. In contrast, when we make a commitment to (continue to) love someone, we take on the intention not only to continue to love them, but to take other steps to ensure that our love lasts. To replace the former attitude with the latter is to give us what is most satisfying about love.

Although this image of spontaneous love is attractive, I find this argument ultimately unpersuasive. It rests on the difference between falling and being (or staying) in love, not between love and commitment. It is true that when we first fall in love we react to someone's reality independently of our history together. But what would that look like in a long-term relationship? To love, according to Gheaus, is to react directly "to the reality of the beloved" (218). But in long-term relations that reality includes our history together. To exclude that reality, to treat my lover of ten years as if I have just met him, is to treat him as if he were someone else. In short, the argument rests on a false dichotomy

between love and commitment. Relatedly, I am not persuaded that the former attitude is more satisfying than the latter. Each comes with its own satisfactions (and frustrations) and each is appropriate for a different stage of one's love. I wonder if Gheaus has a different contrast in mind: that between being loved out of inclination (or free will) and being loved out of duty, with the former being more satisfying than the latter (which might even be conceptually incoherent), and the latter being based on a sort of commitment. If so, this is commitment as promise, which creates obligations owed to the beloved, a completely different sense of commitment than the Calhounian "commitment as intention," which does not create obligations.

Finally, Daniel Nolan's essay argues that a principle of marriage equality is violated as long as "temporary marriages" are not recognized by the state. "Temporary marriage" is an institutional arrangement by which one's marriage is due to expire after a fixed amount of time. The principle of marriage equality Nolan invokes is that the state should recognize marriages that people are in, or wish to enter, as well as relationships that are "sufficiently like marriage" (184) "unless there is a significant social reason not to" (183). His arguments aim to show that no such social reasons apply to temporary marriage.

Although I have raised objections to several of the arguments presented in the book, I believe that this collection is impressive in the range of the views it includes and the sophistication of the arguments. I expect it to take central stage in future debates around marriage, the family, and the social organization of care.

### ***References***

Brake, Elizabeth. 2012. *Minimizing marriage: Marriage, morality, and the law*. Oxford: Oxford University Press.

Chambers, Clare. Forthcoming. *Against marriage: An egalitarian defence of the marriage-free state*. Oxford: Oxford University Press.

Calhoun, Cheshire. 2009. What good is commitment? *Ethics* 119 (4): 613-41.

Davis, Adrienne. 2010. Regulating polygamy: Intimacy default rules and bargaining for equality. *Columbia Law Review* 110 (8): 1955-2046.

Fineman, Martha A. 1995. *The neutered mother, the sexual family, and other twentieth century tragedies*. New York: Routledge.

Marin, Mara. 2014. Care, oppression, and marriage. *Hypatia* 29 (2): 337-54.

Metz, Tamara. 2010. *Untying the knot: Marriage, the state, and the case for their divorce*. Princeton: Princeton University Press.