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A CRITIQUE OF PRACTICE-BASED DIRECTIVES FOR PERSONAL RELATIONSHIP
LAW

by

ROBERT STANTON

Under the Direction of Christie Hartley, PhD

ABSTRACT

Whether a liberal state should sanction marriages, and if so, in what form, is a hotly contested topic in liberal political theory. This essay responds to a radical proposal by Clare Chambers to end state sanctioned marriage and replace the institution with a network of practice-based directives aimed at ensuring gender equality and liberty. I argue that this proposed framework suffers from the serious defect of not only failing to ensure liberty but actively undermining it due to the way directives will inevitably either include too many people under their scope to preserve liberty or too few to ensure equality. While the presence of this defect does not settle the debate concerning how liberal states should handle marriage, it makes clearer the tradeoffs involved in selecting new personal relationship law frameworks to replace marriage.

INDEX WORDS: Political Philosophy, Marriage, Liberalism, Liberty, Equality, Law, Status, Practice

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1 SECTION 1: INTRODUCTION

Within the last decade there has been an upsurge of interest in marriage's role as a political institution. Liberals and feminists of various stripes have discussed whether the state can or should recognize legal marriage. Some, such as Tamara Metz (2010) and Elizabeth Brake (2012), argue that marriage as it is currently structured in the U.S. infringes on liberty and needs to be significantly transformed. Others, such as Ralph Wedgwood, defend marriage's current status and resist calls for significant change. Opposed to both these views is Clare Chambers, who in *Against Marriage: An Egalitarian Defense of the Marriage-Free State* claims that we should abolish state sanctioned marriage in the interest of equality and liberty.

In Chambers' view, government recognition of marriage violates equality because of the hierarchy it creates between those who are married and those who are not and because of its past as a sexist institution. It also violates liberty because of the way state recognition of marriage entails an endorsement of a certain way of life. This endorsement results in privileging marital relationships over other kinds of relationships which unjustly interferes with people's free choices. Despite these failings, Chambers acknowledges the need for government regulation of personal relationship practices (for reasons such as legal determinacy and protecting the vulnerable) and so proposes a framework of practice-based directives from which persons can opt-out in some circumstances. Chambers believes that her framework is both able to secure equality better than competing frameworks by regulating relationships that lack an official status and at the same time avoid violating liberty through the careful formulation of directives and opt-out clauses (AM 163).

In this paper I argue that while it is possible that Chambers' framework does a better job of protecting the vulnerable than competing opt-in frameworks, she is wrong to claim that her

view is superior to status-based frameworks for two reasons. The first reason is that despite what Chambers believes, neither crafting directives with autonomy in mind nor allowing opting-out does enough to preserve liberty. By making personal relationship laws applicable on the basis of practices she reduces the chances of vulnerable people slipping through the cracks but simultaneously ensures many will be subject to regulations inappropriate for them. In trying to resolve this issue by allowing opting-out Chambers faces a dilemma. Either the conditions for opting-out are so broad that her framework fails to protect the vulnerable better than opt-in frameworks or so narrow as to not sufficiently ameliorate violations of liberty. Secondly, Chambers is wrong to claim that state conferrals of relationship status inevitably carry with them inegalitarian meanings and privilege some relationships above others.

2 SECTION 2: AGAINST MARRIAGE

Before getting into the weeds of how her framework differs from current personal relationship law, it is important to understand how Chambers justifies her approach. Chambers begins her book by leveling the objection that marriage violates equality. Chambers notes that historically, marriage has been a key location of the oppression of women. Chambers states that marriage “has been used to consolidate legal, economic, cultural, and symbolic oppression by confining women to a private sphere in which they are seriously disadvantaged” (AG 13). One example of this was the legal system of coverture where the identity of the wife was legally subsumed into that of the husband’s. This system forced women to obey their husbands, granted custody of all children to the husband and forbid women from voting. For large swaths of history in Europe and the US, the law did not protect women’s choices about where they wanted to live, how they wanted to use their property or whether they wanted to have sex with their

spouse. Even after coverture was dismantled it took until 1991 for marital rape to be outlawed in the UK.

Admittedly, most liberal democracies have removed formal legal inequalities in marriage between women and men. However, Chambers argues that this legal change did not make marriage fully just. She identifies two kinds of inequality still present. Inequality between women and men and inequality between those who are married and those who are not. Marriage in its modern form still perpetuates gender-based inequality because of the practical effects that the institution has on the lives of women. Chambers identifies at least three ways that women are systematically disadvantaged by marriage (AM 19). The first is that women are encouraged by the institution to perform disproportionate caregiving labor in the home. Chambers points to empirical work suggesting that women do more caregiving work when they are married than when they are single, cohabitating or in a non-marital romantic relationship due to the pressure to “display gender” that marriage brings (AM 20-21).

Secondly, married women are more likely than non-married women to be subjected to violence as a method of control. Married women are more likely to experience long term and escalating domestic violence than those only cohabitating with or dating their romantic partner. Married men, on the other hand, generally do less housework than unmarried men and do not experience a rise in the risk of being subjected to violence (AM 20-21). Chambers posits this may be due to the historically grounded expectations and symbolic meaning associated with marriage and points to research that establishes a link between marriage and sex-based inequality to support this hypothesis¹. While Chambers does not think that there has been enough research to make any bold pronouncements, she suspects that marriage’s history as a male dominated

¹ Specifically, Chambers cites Sara Arber and Jay Ginn’s work ‘The Mirage of Gender Equality: Occupational Success in the Labor Market and within Marriage’ in *The British Journal of Sociology* 46(1) (1995) p. 26

institution encourages people to conform to that expectation of gender roles, resulting in more inter-partner violence and the increased economic dependence of women (AM 20).

Finally, Chambers argues that while marriage is thought to be an ideal for men and women, women face disproportionate pressure to get married and disproportionate social backlash if they don't. She points out that the gender pay gap and workplace discrimination mean that women are much more dependent on marriage for financial support than men are. Additionally, "cultural pressures on women to get married [mean] that women are much more likely to feel that they have to get married in order to be valuable" (AM 26). Chambers approvingly cites Beauvoir's observation that the pressure on women to marry is sometimes so great that women view themselves as inadequate or as a failure if they do not find a husband. (AM 15).

The second kind of inequality that Chambers identifies in modern marriage is between those who get married and those who don't. Because marriage comes with advantages, those who either cannot² or do not want to get married are comparatively worse off (AM 42-43). The unmarried are worse off because they do not have access to some economic benefits (such as tax breaks and the ability to put one's spouse on their healthcare plan), social rights (such as prison visitation and next-of-kin status) and social status. Problematically in Chambers' view, these benefits are not distributed equally because there are race and class-based differences in who gets married³. These differences in marriage rates result in greater inequality between the privileged and the least advantaged in society (AM 42). Another consideration is that tying benefits to

² Chambers has in mind here gay and lesbian couples in particular but as this paper is most concerned with the American context where homosexual marriage is legal, I do not cover her argument for gay marriage in detail. Chambers still leaves open the possibility that polyamorous marriage should be made legal and thus polyamorous couples may be unjustly excluded from the benefits of marriage.

³ Chambers cites Lisa Dettmer's argument that white and wealthy people are more likely to be married than non-white or poor people are (*Beyond Gay Marriage: the assimilation of Queers into neoliberal culture*).

marriage makes marriage an attractive target for governmental welfare programs. Programs that encourage marriage are unsatisfactory however because of the way that they necessarily entail less resources being allocated to other social programs with a broader scope (AM 43). Taken together, Chambers believes that marriage's past as a sexist institution and the way it inevitably creates hierarchy between those who are married and those not, mean that "traditional marriage violates equality. While marriage can be reformed so as to mitigate some of its inequalities, equality is best served by the abolition of state-recognized marriage" (AM 47).

As for liberty, Chambers argues that marriage undermines personal autonomy. Several of the concerns described above are not just problems for marriage's effect on equality, but also infringe on women's freedom. For instance, Chambers believes that the cultural expectation that women marry and the legal benefits of doing so both unfairly disadvantage women and unjustly interfere with their decisions. For many liberals, these arguments will be sufficient to persuade them that we have good reason to dismantle legal marriage. However, some liberals may remain unconvinced. So, Chambers offers another argument as to why legal marriage is unjust by drawing on the tradition of political liberalism. Political liberalism is the doctrine that holds that since laws are enforced by the coercive power of the state, they must be justified to all citizens. The most important upshot of this for Chambers' project is that laws must not rest on a controversial view of what is valuable in life and they must aim to secure goods that are valuable to all (or almost all⁴) citizens. These restrictions are often framed as the requirement that the government remain neutral among competing conceptions of the good by not enacting laws that are only justified in reference to those conceptions of the good.

⁴ Traditionally some exceptions are acceptable. Housing is generally thought to be one such broadly valuable good even though there may be some who wish to live outside in a tent all their lives.

Marriage is problematic for political liberals in Chambers' view because marriage involves non-neutral bundling, meaning and hierarchy. State endorsed marriage involves non-neutral bundling because of the way the state does not allow married couples to pick and choose which rights they wish to receive. This way of regulating marriage only makes sense if one assumes that all marital relationships should look a certain way (AM 65). It involves a non-neutral meaning in that there are shared social assumptions about what marriage typically entails, particularly assumptions about women's subordination (AM 57). In Chambers' view this social meaning is inescapably promoted whenever marriage is, which means that the government is involved in favoring some conceptions of the good over others. This relates to the non-neutral hierarchy in marriage because part of marriage's meaning is that it is something to aspire to. Chambers explains that the "formalized [and] ceremonial act of naming some relationships and not others gives those named relationships a veneer of state-sanctioned respectability and approbation" (AM 66). If this is right, then any state endorsement of marriage will violate liberty because the meaning of marriage includes the idea that the best life is one that includes marriage.

3 SECTION 3: THE MARRIAGE-FREE STATE

Chambers concludes that the marriage-free state is morally necessary. However, the marriage-free state does not entail a ban on the practice of marriage. Chambers differentiates between her proposal for the marriage-free state and what she calls a marriage-free society. The marriage-free state is a state where the government does not promote, endorse or confer a status upon marriage, while a marriage-free society would be a society where the very practice of marriage is prohibited or non-existent. Chambers' advocates for the government to get out of the

marriage business but accepts that people will engage in marriage like relationships⁵ and that individuals should be allowed to label their relationships with the terms they choose⁶. Another way to put this is that Chambers' advocates for the removal of all legal dimensions of marriage, not for the elimination of marriage as a whole (AM 142-144).

It is important to understand the difference between the marriage-free state and a marriage-free society because Chambers' endorsement of the marriage-free state has implications for what other laws need to be in place. Chambers points out that given that people in the marriage-free state will continue to engage in marriage like relationships, there is still a need for laws regulating the interactions between individuals in relationships, as well as between individuals in marriage like relationships and third parties such as employers (AM 143). One of the most interesting aspects of Chambers' book is her positive project to identify the most appropriate legal framework to replace our current institution of marriage. Chambers elaborates on three key elements of her proposed framework. She claims that personal relationship law in the marriage-free state should be piecemeal and not holistic, practice-based and not status-based, and opt-out not opt-in. Let us start with regulations as piecemeal and not holistic.

Marriage as it is currently practiced in the United States and the United Kingdom is holistic. Chambers explains holistic frameworks as entailing that "when entering into... relationships, individuals take on a bundle of rights and responsibilities covering multiple areas of life. On a holistic model of marriage reform, the state continues to award some people a bundle of special rights and duties" (AM 145). The key distinction between holistic and

⁵ I sidestep the issue of what the central elements of marital relationships are, as this is a contentious topic which I do not need to resolve here. Roughly we can sketch that long term, committed, amorous relationships certainly qualify as marriage like relationships. For differing views on what characteristics define marriage see Wedgewood "Is civil Marriage Illiberal?" and Den Otter "In Defense of Plural Marriage".

⁶ With some exceptions including incest and forced marriage (AM 173).

piecemeal approaches is whether our legal rights and duties come as a package deal or whether each right or duty is separate from other rights and duties. For example, if one gets married in the United States, one has the right to enter any property their spouse owns and has privileged access to their spouse in the hospital. In the marriage-free state it might be possible for someone to have the right to enter into an intimate partner's property but not have the right of hospital visitation.

We could, if we chose, replace marriage with a legal framework that is still holistic. One example of this is Tamara Metz's intimate caregiving union status. In Metz's framework, ICGU status is distinct from traditional marriage but people with the status always exchange the full bundle of rights and duties associated with the status. Similar to marriage as it is structured now, ICGU status does not allow individuals to pick and choose which rights and duties they wish to exchange (Metz 134-5). Chambers considers this possibility but rejects it. Chambers argues that holistic regulation is unacceptable because it assumes that "all the most important functions of life are met within one core relationship... [and this] bundling... does not capture the complexity and diversity of real lives" (AM 146). The failure of holistic regulations to capture the diversity of people's intimate relationships is a problem because by bundling rights and duties the government is implicitly making assumptions about what are better and worse ways of structuring a relationship. This implicit endorsement of some kinds of relationships over others results in a violation of the liberty of those whose relationships do not fit the mold (AM 147-147).

One might wonder if the problem Chambers identifies above could be sidestepped by structuring marriage not as meeting all of an individual's needs but only meeting some subset of their needs (such as their needs related to care, romance or sex). This more limited approach is

better than assuming marriage meets all the individual's needs but still runs into the same problem to a lesser degree. Structuring marriage assuming individuals satisfy all their, let's say care, needs is still problematic because this structure still excludes those who meet their care needs through multiple relationships and not just one core relationship. Another argument Chambers presents against holistic frameworks is that adopting piecemeal regulation allows relationships to be structured in a more efficient manner. Piecemeal regulations are more efficient because often some of the rights involved in holistic frameworks don't help achieve the policy goals of the regulation and don't suit the preferences of those in the relationship⁷. This is true even in the case where each right is individually justified from a justice and policy perspective because the diversity of relationships means that few if any rights will be suitable for all relationships. In light of these considerations the marriage-free state uses a multitude of discrete regulations to determine the rights and duties people have respective to one another.

A further question is how we should determine which regulations apply to which individuals. Chambers' answer is to tie each regulation to a specific practice. If an individual is engaged in that particular relationship practice, then the regulation applies to them. Chambers contrasts this practice-based approach with status-based regulation. Under status-based regulation, rights and duties apply because some relationship or individual has acquired a status (AM 150-151). Marriage as it is currently structured in the United States is an example of a status-based framework. Couples register and gain the status of married and regulations apply to all those who are married. In the marriage-free state however, the state does not grant or rely on

⁷ Consider laws allowing special care leave from work and designating the spouse as the next-of-kin in case of incapacitation. The purpose of the latter is presumably to ensure that someone who cares about and is close to the patient will make decisions in that patients' best interest more reliably than a stranger will. However, this is not always the case and one may wish to marry someone in part to gain access to special leave to care for them but not want to grant them privileged decision-making power in emergency scenarios.

a status to apply regulations. Moreover, Chambers claims that the state should not even “concern itself with defining or identifying A Relationship at all... It asks not ‘are these people in A Relationship with each other?’ but rather ‘are these people engaged in a relationship practice that places them in need of state regulation?’” (AM 151). Chambers believes that by avoiding identifying a relationship the marriage-free state does not have to intrude on individuals’ privacy because the scope of information needed by the state is less than in holistic frameworks. By focusing only on individual practices, the state does not need to know a wide array of facts that would be necessary to pick out certain kinds of relationships (AM 153).

In addition to privacy considerations Chambers prefers practice-based regulations over status-based regulations because practice-based regulations do a better job at protecting the vulnerable. Chambers points out that “regulations via status, whether holistic or piecemeal⁸, excludes those whose relationships do not have the relevant status. People who have not, or not yet, chosen to acquire the status... are left unprotected – even if they are in relationships that are functionally identical to those who have acquired such a status” (Chambers 152). There are a variety of reasons that one may not have acquired the status in question. One may simply not have gotten around to registering yet due to the various demands of everyday life. Those in relationships may not fully understand the consequences of not registering or the benefits of doing so. Perhaps even more problematically, one may not be able to register because doing so requires their partner’s agreement. In a traditionally gender structured partnership a woman may not be able to get her male partner to adopt a status if refraining to do so benefits him⁹. All these

⁸ It is important to note that it is possible to create a legal framework that is any combination of practice/status and holistic/piecemeal.

⁹ Consider a traditional gender structured relationship where a man works in the labor market and a woman stays home and raises children. The man may benefit from refusing to register for a status if doing so gives his partner a claim on a portion of the wealth he makes through his job.

possibilities have the potential to leave women or others who are vulnerable without legal recourse for what Chambers judges to be no good reason.

The third element of Chambers' proposed framework is that it is opt-out and not opt-in. Contrary to those who propose a model based on opting-in to pre-determined legal rights and duties or those who propose a contract based legal framework, Chambers argues that personal relationship law should consist in directives. Directives are regulations determining individuals' rights and duties in regard to one another (and to third parties) that apply automatically to citizens based on some fact about them. Rather than requiring that individuals explicitly agree to the regulations that they are bound by, regulations concerning cohabitation, joint property, immigration, visitation and other important issues currently dealt with through marriage would instead be dealt with through generally applicable laws (AM 160).

Practice-based directives solve the problem status-based directives have of leaving people who cannot or do not register for a status vulnerable. For example, women in a traditional relationship who are unable (or simply do not happen to) acquire the relevant status will still be protected because the application of regulations will not depend upon registration (AM 152). Simply being engaged in certain practices is sufficient. So, in Chambers' view, everyone who should be covered by a regulation will be, including those who would not bother with registering for a status. However, while there is a need for automatically applicable regulations to help protect the vulnerable, Chambers acknowledges the possibility for some legitimate variation in relationships, so it may be that there are just outcomes other than what the regulation dictates¹⁰ (AM 161-2).

¹⁰ For instance, she implies there may be more than one just way to divide joint property on the dissolution of a relationship.

In these cases, Chambers suggests that allowing individuals to opt-out of the default regulation may be appropriate. Chambers describes how “opting-out would be a matter of drawing up a contract or trust expressly setting out how the relationship deviates from the default. The law would stipulate when opting-out is possible, and any limits that might apply” (Chambers 162). By combining directives with the possibility for opting-out, Chambers believes that she has articulated a framework that can secure both equality and liberty. Equality by ensuring that no women are left without protection due to not having a status and liberty by giving people the ability to opt-out and thus structure their relationships to fit their desires.

4 SECTION 4: THE MARRIAGE-FREE STATE IN PRACTICE

Chambers offers what at first seems like a compelling view. However, I contend that it has a serious, unrecognized problem that either spells the death of practice-based directives for personal relationship law or at the very least significantly undercuts its appeal when compared to piecemeal status-based frameworks. Namely, I believe that piecemeal practice-based directives will violate many people’s liberty because using practices to set the scope of regulation will paint with far too broad of a brush. People will be subject to directives that substantially harm their interests despite there being no inequality (or other pressing state interest) ameliorated. This will become clear, I hope, once we examine the specific regulations that Chambers uses to illustrate how her framework would work in practice. In this section I will discuss two of these examples

in depth and show not only how they are undesirable for their own sake but are representative of the other directives her framework could offer.

The first example directive she offers deals with compensating caregivers who provide labor in the home. She articulates the directive thus:

“A person acquires full or partial ownership of a residential property by: being named on the lease; or residing in the property and contributing financially to that property for a year or more without a formal tenancy or lodger’s agreement; or by residing in the property and providing unpaid domestic services to the household for a year or more. Ownership is assessed according to the proportion that each has contributed to maintaining the property. Unpaid domestic services are assessed as an hourly contribution equivalent to the hourly wage of the other owner’s paid work” (AM 157).

Although not explicitly acknowledged, this directive is clearly inspired by the analysis of gender inequality in the first half of the book. As women disproportionately perform caregiving and household work, they are at a disadvantage compared with their male peers who work in the labor market because our society does not compensate caregiving work despite its social importance. Recall that gender inequality is an appropriate target for state remedy in part because financial inequality creates situations where women are dependent on their partner for monetary support which in turn makes those women vulnerable to abuse. It seems like this directive is aimed at resolving this problem by compensating those who perform caregiving work through the medium of home ownership. And to this directive’s credit I believe that it would do that. Unfortunately, it will also do much more than that due to the over broad conditions for acquiring partial ownership.

The third condition for gaining a property interest (residing in the property and providing caregiving or domestic work to those living in it) is so sweeping that almost all people living together will be subject to this regulation. Consider the various kinds of practices that would fall under the aegis of labor that maintains the property or household¹¹. Cooking for others, taking out the trash, cleaning shared spaces, maintaining the yard, and basic home repair could all be things reasonably deemed domestic labor¹². With these activities or similar in mind it is hard to imagine how those living together could avoid being subject to the suggested regulation even if they wanted to. One would have to be the roommate that everyone dreads to get out of it, one who doesn't contribute to the household or perform any common chores. The overbroad nature of the directive would result in the directive applying in many more situations than the one it is intended to improve which has implications for people's freedom to live the way they want to. Christie Hartley offers a particularly clear example of this kind of problem in her review of *Against Marriage*. She imagines herself in a situation where

“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 cohabit 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 (Hartley 4).”

¹¹ Of course, there is ambiguity in how the directive would define “providing domestic services to the household” which I do not expect Chambers to detail in what is supposed to be an illustrative example. Never the less, it is worth considering the difficulty that would no doubt be involved in picking out what would count and what wouldn't.

¹² For my point here it does not matter overmuch what kinds of activities are determined to be domestic labor as almost anything (or in fact everything) that women in long term romantic relationships do to contribute to a household is done by others who are not especially vulnerable as well.

I agree with Hartley's intuition that her roommate shouldn't gain partial ownership of the property. It is unreasonable for Hartley's roommate to gain a property interest when Hartley is performing just as much housework as they are and there is no connection between Hartley's income and the work her roommate performs. Without positing a robust theory of justice or other foundational commitments, we generally operate with the assumption that the state should refrain from interfering with people's personal property unless is some compelling countervailing interest at stake. Chambers may be right that the state's interest in establishing equality and protecting the vulnerable outweighs a person's interest in solely controlling their property but neither of those interests are at play in this situation. Hartley's friend is not dependent on Hartley to provide for her basic needs, nor is she made any less equal to Hartley by performing an equal share of the domestic labor. So, despite Chambers assurances that practice-based directives will help promote equality and liberty, one of the directives she proposes would infringe on people's freedom to allow friends to live with them without relinquishing full ownership of their house, even when there is no need for the state to correct inequality.

Hartley's example is a good one, but by no means is it the only one. As formulated, Chambers' example does not even require that the individual not named on the lease contributes financially to the property *and* perform unpaid caregiving work, either will suffice. This would affect far more than just friends and grad students. Strangers living together with a formal rental agreement would still have to split ownership so long they all contribute to the maintenance of the household (which they almost certainly will, one way or another). Similarly, parents with underaged children would also be caught within the net of this directive. After all, even very young children will sometimes perform basic household chores when directed to by their parents. However, we don't want a large number of parents to have to share ownership of their property

with their children once they become of age, even if their children were performing important domestic labor (or at least we would only want the children to get partial ownership in unusual circumstances). Perhaps this problem can be fixed in regard to children by simply exempting minors from the statute, however, it is not possible to do the same with friends or strangers living together. Therefore, this directive, while it may succeed at protecting women who are made vulnerable by their non-participation in the labor market, results in undesirable outcomes for those living together on a financially equal footing.

The second directive that Chambers offers deals with property division. This directive, like the one discussed above, also aims to protect vulnerable women, but tries to accomplish that goal in a different way. Both directives would give people who live together a claim on some portion of the property where they live. The first directive accomplishes this via the practice of caregiving and domestic labor, while this directive does so through the practice of cohabitating permanently. Although Chambers does not herself write out the details of the directive, she approvingly references the Swedish Cohabitation Act of 2003 (which, like her directives, applies to people automatically without explicit consent) shortly after proposing the caregiving work directive discussed above. Chambers summarizes the cohabitation act as stating:

“Two people, regardless of sex, become ‘cohabitees’ when they live together on a permanent basis, and as a couple, and as a joint household (sharing chores and expenses), and are neither married nor in a registered partnership. If the cohabiting relationship ends (by marriage, separation or death) either cohabitee can request a division of the cohabitees’ joint home and household goods¹³ according to the rules set out by the act” (AM 158).

¹³ What is meant here is that cohabitees will have a claim only on the residence itself and household goods purchased for joint use.

Chambers quickly notes that the marriage-free state will drop the requirement that the two people live together as a couple because the marriage-free state is concerned with practices and not relationships. The problem with this directive is much the same as the last one. Once again, many people who are not vulnerable or unequal to others will end up having to give up some of their property. For instance, it seems likely that under this definition my two roommates and I would be considered a joint household. We share a number of chores such as vacuuming the common areas, cleaning the bathroom and taking out the trash. Additionally, we share expenses for cleaning supplies, paper towels, furniture and utilities. While we happen to live together in an apartment owned by a landlord, if one of us owned the property they would have to share their ownership with the other two if they requested¹⁴.

This also strikes me as quite unfair and undesirable. It is one thing for the state to give a person a stake in the property where they live, if their uncompensated labor in the home is what allows the owner to work in the labor market or that person is dependent on the wage earned by the owner, but another when the roommates' relationship is much less interdependent. It is common for roommates who are nothing more than acquaintances to share substantial chores and expenses out of mere practicality and efficiency. But we don't want people who have independent income and social lives to be suddenly financially tied to each other in such a significant way. Doing so would undermine their autonomy to make free choices about who they want to live with and how they get along together. By Chambers' own central value of liberty, these directives should be rejected.

¹⁴ There are also some ambiguities in this directive that make discussing the effects of its adoption difficult. Chambers doesn't endorse any particular set of rules for how the joint property and house are supposed to be divided. Presumably this is supposed to allow the reader to insert whatever rules they believe would be appropriate into the directive (AM 163). This falls flat not only because the division itself is inappropriate but also because any one set of rules is going to be inappropriate for some people. As people engage in the same practices in different relationships and contexts, it will be impossible to craft rules that we think are fair across all the various circumstances people find themselves in.

Now, Chambers makes a special point to emphasize that she is not committed to the examples she has given. Of the caregiving work directive, she says “the point of this example directive is not the justice or otherwise of its content, but rather its form. Such a directive is responsive to the realities of each particular relationship but is determined in advance and is formulated with egalitarian justice in mind” (AM 157-8). She then goes on to explain “Another way of describing the practice-based approach of the marriage-free state is the thought experiment... [where you] consider what you think the ideal regulations should be for those who are not married in the current marriage regime” (AM 160). In line with this sentiment, Chambers might argue that while I am correct that the examples she gives are problematic, this is not a problem for her framework as a whole because we can abandon the example directives and use other, less problematic ones.

This line of thought would be mistaken because while the details of the directives can be modified, Chambers cannot abandon directives aimed at protecting those vulnerable to abuse altogether. A critical statement in the first quote is that directives must be formed with egalitarian justice in mind. This means that the caregiving work directive cannot be replaced with just whatever regulation the reader thinks is appropriate, it must be a directive that is in line with values that give rise to the marriage-free state in the first place. This is because the marriage-free state is only justified in relation her arguments that status-based marriage undermines women’s equality and liberty. The marriage-free states’ directives then, must also be able to realize those values or else we would have specific laws that defeat the very goal that the framework was created to accomplish¹⁵. So while it is true that Chambers does not have to

¹⁵ After all, if one had explicitly inegalitarian commitments then that would create the odd scenario where we get rid of state sanctioned marriage to ensure equality and then replace the traditional marriage regime with something that undermines equality even more so than the original regime did (perhaps by reinstating old patriarchal laws as new directives).

be committed to either of the directives she suggests as being required in the marriage-free state or being the best option, she is committed to the claim that her framework of piecemeal practice-based directives can produce regulations that protect the vulnerable better than status-based regulations and simultaneously secure everyone's liberty. My contention is that her framework cannot do this because any practice-based regulations aimed at securing equality by protecting the vulnerable will result in violations of liberty. Think back to the problems with Chambers' suggested directives. The critical flaw in both of them was that they couldn't distinguish between those Chambers had identified as needing more protection and those who didn't because both groups of people engage in the same practices. This strongly suggests that the foundational issue is not the details of any specific regulation but rather the practice-based framework itself being too blunt a tool for personal relationship law.

5 SECTION 5: OPTING-OUT TO PROTECT LIBERTY

But what about the possibility for opting-out? As discussed in section 3, opting-out is a key element of Chambers framework that is included specifically to prevent any of the violations of liberty caused by the over-broad nature of practice-based regulations. Chambers introduces the possibility for opting-out in response to an objection similar to the one I am making. She says "A regime of state-recognized marriage allows people to choose whether to marry, and one reason people choose not to marry is to avoid the consequent legal regulations. So, it might seem illiberal for the marriage-free state to impose regulations on people who may not want their relationship to be subject to it" (AM 161). In other words, practice-based directives give rise to worries about liberty because people do not consent to the regulations the way they would in a status-based regime. She continues "*if* there are areas of relationships that need regulation but in which there can be legitimate diversity then the right approach is to allow people to opt out of the

default regulations... rather than to leave people unprotected unless they opt in to some privileged status” (emphasis original) (AM 162). So, a strategy of adding opt-out clauses to directives aimed at protecting the vulnerable may be more fruitful than modifying details.

I believe this approach fails as well. Opt-out clauses cannot effectively prevent the violations of liberty involved in directives aimed at protecting the vulnerable because if the condition for opting-out is broad enough to rectify acquaintances who both work in the labor market from being subject to the directive then it will also allow homeowners with dependent partners to opt-out as well. This creates a dilemma. Either practice-based directives will restrict opting-out to relatively marginal cases and thereby infringe on individual’s autonomy or it will have a permissive opt-out policy which will prevent the regulation from fulfilling its intended purpose of protecting the vulnerable. I will demonstrate that Chambers’ framework really does face this dilemma in the next section by investigating the plausible opt-out conditions (suggested by what problems the example directives run into in the previous section) and showing that they either let too many individuals opt-out, too few individuals opt-out, or both.

6 SECTION 6: POSSIBLE OPT-OUT OPTIONS

As the opt-out conditions I will be considering apply to both proposed directives I will discuss them together. To reiterate, the problems with both directives as they stand are that they would force homeowners to give up some of their property to those who don’t have a legitimate claim to that property and who are not in a vulnerable position of dependence on the homeowner. Those living together as independent friends or acquaintances are inappropriately bound by the

regulation aimed at protecting vulnerable women. Several initially plausible possibilities present themselves to rectify this.

The first thought one might have is that we can allow people to opt-out of either of the directives so long as everyone in the household consents. Chambers suggests this option herself saying that the property division directive could be added on with the following:

“Deviation from this directive is permitted by explicit contract, but any such contract must be compatible with the following requirements: any children of the contracting parties must be left no worse off than they would have been without the deviation; and neither party can be left with a share smaller than the 20 per cent of the property or that which they would have received with the deviation, whichever is smaller” (AM 162)

This approach of letting the parties agree upon limited deviation is appealing in that it would allow regulations to apply without people having to register (and so avoids leaving people vulnerable due to misinformation or practical difficulty) but still preserves liberty through recognizing personal choice. Furthermore, the requirement that neither party is left with nothing may protect people who might willingly agreeing to totally give up their safety net.

The problem is that twenty percent ownership of a residence is still too much to award someone who shouldn't have a stake in the property at all. Just because two people live together for a substantial number of years sharing some expenses or chores is not sufficient grounding to give even partial ownership of the property unless one of the parties is at risk of exploitation or made unequal through a gendered division of labor. Even with this opt-out addendum there will be many homeowners who will lose out financially without good reason. But Chambers can't get rid of the twenty percent ownership floor (or some other minimum) because that would leave

open the possibility that the genuinely vulnerable might completely contract away their safety net. The state cannot rely on vulnerable persons not consenting to letting others in the household out of the regulations because people in financially dependent relationships often place significant trust in one another. It is probable that significant numbers of romantic couples with a gendered division of labor would opt-out of the regulations simply out of a desire to avoid state involvement in their relationship or a belief that they will never need to make use of it.

However, we know that things change and that relationships that seem stable and secure may fall apart and leave one party with few ways to make a living if they do not have an independent income. Additionally, either version of the opt-out condition (with a minimum stake or without) does not allow enough people to opt-out because there will be people living with friends or acquaintances who won't agree to opt-out of the regulation (even when none of the parties are dependent on each other) out of a mercenary attitude to take whatever financial gains they can get.

Perhaps it is simply better to jump to the heart of the issue and allow the owner of a residence to opt-out of the regulation so long as everyone in the household makes a certain amount of income or has a certain amount of wealth¹⁶. This is a more promising option than the previous because it narrows down the scope of who's allowed to opt-out to exactly those people who are not financially interdependent on others. Additionally, it allows the owner of the residence to be the sole one initiating the opting-out which prevents self-interested residents from taking advantage of an over broad default regulation. Despite these positive features, this opt-out condition is still not satisfactory because there will still be significant numbers of people who cannot make use of the condition who should be able to. Recall Hartley's example of her

¹⁶ The state could verify this through tax returns.

buying a house and allowing a fellow graduate student to live with her. Depending on the program, the graduate student would likely not make enough money through their stipend to allow Hartley to opt-out of the default regulation. This would leave Hartley with no recourse but to either live alone (which may be impossible depending on how expensive the mortgage is) or be willing to let her friend have partial ownership of the property.

This examination has not and cannot cover all possible or even seemingly promising opt-out clauses. However, the same argumentative moves can be extended to any practice or criteria that Chambers might choose as a qualification for opting-out. Any criteria that is permissive enough to allow almost all relevant persons to opt-out will also allow those the regulation is intended to protect opt-out as well, defeating the purpose of the marriage-free state. Conversely, any opt-out clause that is restrictive enough to prevent those the regulation wishes to apply to from opting-out will also prevent opting-out by those who are not particularly vulnerable or in a position of inequality. Allowing residence owners to opt-out so long as only their family lives with them is possible but doesn't address other kinds of households that should be able to opt-out. We could allow opting-out so long as those in the household are all performing proportional domestic work. But this would not allow those living with persons who do disproportional work for reasons other than a gendered division of labor (due to simply liking a cleaner house or enjoying aspects of domestic labor) to opt-out. Furthermore, determining proportional work would be impossible to quantify and require extensive state intrusion into issues such as how often one vacuums the carpet. In light of the failure of these possibilities, and the recurrent problem of the tradeoff between equality and liberty, it appears impossible for any combination

of a practice-based directive and an opt-out condition to can carry the weight of addressing gender inequality without significant sacrifices of liberty.

7 SECTION 7: ALTERNATIVES AND MARRIAGE'S MEANING

But where does this realization leave us? If Chambers is right that traditional marriage violates equality and freedom, and I am right that piecemeal practice-based directives are not able to both respect liberty and protect the vulnerable, what kind of framework should we endorse? It might seem that there are no viable options available. Luckily, this is not the case because while Chambers is right that status-based marriage is unacceptable in its current form in the U.S., she is mistaken in thinking that status-based marriage regimes will necessarily violate liberty or equality. Recall that Chambers argued that even legally equal status-designation violates liberty because marriage carries with it inegalitarian connotations. If the only option were to confer a status of marriage (or something similar such as a civil union) this might be the case. However, what her argument overlooks is the possibility of changing the status that a piecemeal status-based framework confers to something radically different from marriage.

Consider Elizabeth Brake's proposal for a personal relationship law framework she calls minimal marriage. She argues, the same as Chambers, for a piecemeal approach. Where she differs is in endorsing a status-based regime that revolves around caring relationships¹⁷. In her framework the state would determine which rights and duties should be available for personal relationships (such as prison and hospital visitation, care leave and immigration) and allow citizens to fill out a simple form checking off which rights they want to exchange with their intimates (Minimizing Marriage 307)¹⁸. There would be no limits to the number of people one

¹⁷ Which she argues the social bases for constitute a neutral state interest.

¹⁸ Another interesting detail of her framework is that rights do not have to be symmetrical (i.e. one could grant one's parent the priority to visit them in the hospital but not have the parent allow the child the same right).

could exchange rights with, and two people do not have to exchange the same rights¹⁹. Contra Chambers, it seems to me likely that these are differences robust enough that something like Brake's framework would not entail the same problematic meanings of gender inequality that traditional marriage does. Rather, the independent nature of the rights opens up the possibility of changing the meaning associated with that status. In fact, it is not the meaning of *the status* that we change but we instead replace the status of marriage with a number of independent and fundamentally different *statuses*.

Now, as suggested above, Brake thinks that the state should categorize people who exchange rights under her framework as minimally married as an explicit strategy to carry over some of the meaning of traditional marriage into her new framework. This decision has the distasteful result of labeling friends or family members who exchange some rights as being minimally married to each other, which has an odd ring to it. She argues for this approach by claiming that labeling people in this way will buttress minimal marriage against others viewing it as a second-class designation. Brake worries that allowing private citizens and associations to determine their own meaning of marriage may result in a lower social standing for gay and lesbian relationships in a dominantly Christian society such as the United States. I find this line of argument interesting but ultimately unconvincing.

I appreciate that this is an attempt to elevate the standing of platonic and homosexual relationships to the level normally reserved for married partnerships, but it strikes me as being foreign enough our normal ways of thinking to be ineffective. While it is true that state recognition can carry force in the minds of the public, I am skeptical that those likely to view homosexual minimal marriages as second class will be won over by retaining the symbolic

¹⁹ No formal numerical limits at least. The only requirement is that you are in a caring relationship with the other person, so the limit is one of the individual's capacity to create relationships.

association with marriage. Both during and after the fight for gay marriage in the United States religious leaders across a variety of Christian organizations issued declarations affirming heterosexual relationships as the only kind of sexual relationship intended by god²⁰. If the actual legalization of gay marriage was not enough to convince them otherwise I am not sure why an alternative personal relationship law framework styling itself as marriage would. Additionally, given the dramatic shift in public opinion on the issue of gay marriage in the last 20 years, it may be that associating an alternative framework with marriage is unnecessary to get a majority of Americans to view homosexual relationships as having the same legitimacy as heterosexual ones.

Regardless, it is at least possible to imagine a piecemeal status-based approach similar to what Brake advocates but that instead take steps to divorce itself from the meaning of marriage. This could be accomplished through giving each right its own name. Prison visitation, hospital visitation, immigration rights, rights to enter other's property, rights to take care leave, whatever rights are appropriate to offer to people in light of their relationships could have a corresponding status that does not invoke, and is not related to, marriage. For instance, we could refer to a person who is granted emergency decision making powers in the case of the incapacitation of another as a surrogate. Similarly, we can refer to a person who was granted the right to take leave from work in order to support another as a caretaker. And so on. Rather than assigning the status to the relationship itself, we assign the status to the individual.

These ways of referring to the people who hold rights combined with the fact that the rights are not bundled and that these rights will be exchanged among those not in romantic relationships (perhaps even exchanged more commonly in these relationships than romantic

²⁰ See the Manhattan declaration <https://www.manhattandeclaration.org/> and the Nashville statement <https://cbmw.org/nashville-statement>.

relationships) will make it highly unlikely that the general public will see this personal relationship law framework as another kind of marriage. Avoiding the label and baggage of marriage would help alleviate the equality-based problems Chambers identifies at the start of her project. If the symbolic meaning of marriage and the pressure to perform gender is what encourages women to get married, perform disproportionate caregiving work and makes them more likely to be subjected to inter-partner violence, then this approach of getting rid of the status of marriage and filling the gap with a framework disassociated with those gendered meanings will be materially beneficial for women. Additionally, the state will not be violating political neutrality because the piecemeal nature of the statuses means that the state makes no assumptions as to people fulfilling their needs through one core relationship. Finally, the piecemeal nature of the framework avoids the issue of the state elevating some relationships over others because on this approach, surrogates or caregivers would be no more singled out for approbation than guardians or others who hold legal designations are. A piecemeal status-based regime can do all of this while at the same time providing legal determinacy and supporting caring relationships. At the very least, Brakes framework with the modification I have sketched here is a rival framework that does not fall into the trap of the state endorsing a non-neutral or sexist meaning and so is not unjust. Furthermore, under such a framework there is little to no possibility for liberty violations because individuals must explicitly consent to be bound by the regulations affecting them. This is a distinct advantage that status-based regimes have over practice-based ones.

8 SECTION 8: CONCLUSION

To the issue of her framework being disposed towards regulating people who are not the intended target of the regulation Chambers may reply that this possibility is simply not that

worrisome compared to vulnerable people not being protected. It may be that fostering gender equality and preventing abuse is worth the price of some people be subjected to regulations that they do not like or approve of. This is plausibly the case in the situation of caregiving work and cohabitation. Chambers could argue that protecting women caretakers outweighs the limiting of personal liberty of those who, for whatever reason, do not or are not able to opt-out. I am sympathetic to this line of thinking and all things considered it may be that the tradeoff made by Chambers' framework of liberty for equality is one worth making. However, Chambers is wrong to claim, as she does in *Against Marriage*, that her framework secures equality while avoiding any infringements on liberty. The loss of liberty created by Chambers framework is a clear downside to her approach and it may be the case that status-based frameworks can secure equality without comparable sacrifices of liberty. If so, we have a strong reason to prefer these competing frameworks over Chambers'.

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