

Elizabeth Brake

Minimizing Marriage: Marriage, Morality, and the Law

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Reviewed by Ann Ferguson, 2014

Narrated by Theodra Bane

Minimizing Marriage is a timely summary in analytic philosophical style of the various arguments for and against marriage, as well as a policy recommendation for marriage reform. Elizabeth Brake gives us a closely argued approach to the literature, which includes conservative, liberal, and feminist critiques and defenses of marriage as a social institution, defending her own view that we should adopt legal reforms to set up what she calls "minimal marriage" as well as expanding legally recognized family structures for parenting. Along the way she shows how traditional monogamous, heterosexual marriage as enshrined in US law and practice has failed to achieve its stated goals of moral transformation, equality for partners, and fostering caring partnerships and parenting relations.

There are two parts to the book. Part One involves Brake's summaries and initial critiques of the moral rationales given for marriage, including views that marriage is a promise, that it involves a lasting commitment, that it transforms spouses into a moral unity, and that society is better off when monogamous marriage is the legal and social norm. She introduces the concept of *amatormativity*, which is a norm that privileges dyadic love relations over other kinds of caring relationships. She critiques this norm, which supports monogamous marriage whether heterosexual or same-sex. She argues that it automatically undervalues other important kinds of lifestyles, including caring relationships such as friendships, polyamory, single parenting, and urban tribes, as well as what she calls "quirky-alone" ways of living. She concludes Part One by claiming that traditional marriage does not justify its present moral standing since it fails to achieve the moral goals it aims for, and thus should be "demoralized."

In Part Two, she presents in depth her critiques of existing institutionalized marriage, including natural law, utilitarian, and pragmatic defenses. She emphasizes feminist critiques of marriage that point out the exit difficulties that may keep women in situations of domestic abuse. This occurs not only because of the stigma of divorce (lessened in recent years), but because of disproportionate economic dependency (due to shouldering the bulk of unpaid housework) and concern for economic support for children after divorce: women face single parenting in a welfare state system that does not guarantee adequate child support for single parents.

Same-sex, monogamous marriage campaigns that attempt to reform the heteronormative bias of existing North American and European legal forms of marriage also fail to solve the *amatormativity* bias, since they privilege dyadic couples at the expense of other forms of caring relationships. Not only is it unfair and counterproductive to label some offspring legitimate and others illegitimate, but condemning nonmonogamous sexual relations between consenting adults as "adulterous" or "bigamous" is not only socially counterproductive, but it is also undemocratic, since it denies equal opportunity to be socially valued to alternative lifestyles involving consenting adults.

As a solution, Brake offers her own marriage-reform proposal, which she calls minimal marriage. She argues that her conception, which "might also be described as marital pluralism

or disestablishment . . ." is the "most extensive set of restrictions on marriage compatible with political liberalism" (158). She proposes a marital status that will keep just entitlements that facilitate caring relationships between spouses (immigration rights, employment benefits, preferential [spousal] hiring, visitation rights), but eliminate or restructure entitlements that could be handled in a less discriminatory way, such as financial support for children, tax benefits, health insurance, and social security benefits. Her intended philosophical justification for minimal marriage is that the liberal state should support caring relationships, and that "a law performing the functions of designating, recognizing, and supporting caring relationships is justifiable, even required" (160).

In defending same-sex marriage, Brake challenges the basic assumption of heterosexual legal marriage, that "the state should provide a parenting framework, and second that it should be bundled together in one legislative package with a framework recognizing adult relationships" (148). She argues instead that the state should support both dependency and caring relationships but in separate legal packages: since "the state has an interest in its own continuance, it has an interest in ensuring that its citizens are reproduced. . . . [R]eproductive labor is socially necessary labor" (148). She agrees with Martha Fineman that the state needs to provide for the welfare of all children, including the one-third of children outside of the traditional marriage framework (149). She argues that legal parenting relations should also expand the definition of "family" and "parent," allowing "inclusion of 'othermothers' and 'revolutionary parents,' and secondary caretakers as well as primary guardians. Co-parents who wished could connect themselves to one another laterally through minimal marriage rights as well as establishing their roles relative to the child through parenting frameworks" (161).

I appreciate the wonderfully rigorous way that Brake formulates the philosophical issues involved in defending and critiquing traditional marriage. Her discussion of the way that philosophers have understood marriage in the history of Western philosophy highlights the convoluted defenses offered by Plato, Aquinas and the natural law school, Hobbes, Locke, Kant and Hegel, as well as the valuable critiques of marriage law by J. S. Mill and Mary Wollstonecraft. Her chapters questioning whether marriage is a promise and arguing instead that marriage is a commitment to practices are great analytic philosophical exercises, as is her development of the concept of *amatognormativity* and its relation to marriage and care in chapter 4. She is extremely thorough and fair in rehearsing the conservative defenses of marriage, including those based on theories of natural law. She also captures well the critiques of marriage by present-day feminist critics such as Paula Ettelbrick, Laura Kipnis, and Claudia Card and defenses of same-sex marriage by Cheshire Calhoun and Richard Mohr.

I applaud the goal of having a liberal state acknowledge that justice does apply to caring relationships, something Susan Moller Okin critiques in John Rawls's approach to justice, since it tends to exclude private family relationships. Brake defines her reforms of minimal marriage and expanded family relationships by correcting Rawls's views concerning the obligations of the state: she argues that caring relationships are primary social goods (something Rawls left out of his list of primary goods). Hence the state has an obligation to distribute fairly the material conditions allowing individuals equal opportunity to achieve these goods. However, I balk at her argument that these goods should be considered primary because they are "essential to the development and exercise of the moral powers and pursuit of varied conceptions of the good" (175). Why should we have to appeal to the goal of moral development in order to justify giving and receiving care as a primary human good? Why

can't it be considered a human end or good in itself, something as basic to human nature as the good of meeting one's needs for material survival?

Moreover, as a feminist who critiques marriage (see Ferguson 2007), I have some practical concerns with Brake's reforms. On the one hand, it is refreshing to see her defend her claim that a liberal principle of autonomy (the right to choose diverse, caring, consensual relationships) should support the rights of polygamy, polyamory, urban tribes, and friends, even siblings, to marry. But on the other hand, Brake glides over lingering moral doubts as well as practical questions about the transition from present-day marriage to these new legal reforms.

Defenders of same-sex marriage such as Calhoun have argued that the status of marriage is one of the basic rights of citizenship, so same-sex partners will never be free of stigma until they are legally permitted to have that status. In my 2007 article I agreed with that argument but also sided with Ettlbrick and Card: simply adding same-sex rights to traditional marriage rights leaves stigmatized those who cannot or do not want to marry. It also maintains exit and economic dependency issues that continue to apply to those with woman-defined roles in the marriage (the biological and/or primary social parent). I also argue, as does Brake, that same-sex marriage reform leaves out polyamorous and committed relationships such as friendships, thus relegating them to lesser value in the over-emphasis on the romantic dyad. On the other hand, Brake brings up a very good point against feminist marriage abolitionists, which is that eliminating the legal status without something to take its place cedes "control of this still socially powerful institution to the churches and other private-sector groups, such as commercial 'wedding chapels'" (187).

However, there are still feminist moral concerns that Brake does not consider with minimal marriage reform that allows polygamy and polyamory. In traditional one man-many wives, heterosexual polygamy in patriarchal societies, it is unlikely (though possible) that "sister wives" will have equal power with one another and with the man, and more likely that they will be in competition with one another for favors from the husband. Brake has not specified whether all the partners in a polygamous marriage have the right to refuse the deal, which is not the case in traditional polygamy. Polyamory, as a newer, more self-conscious institution that often involves anarchist feminists, is less likely to privilege the men involved, but it has its own problems from a feminist perspective. That is, it has the risk that with the time involved to negotiate issues of primacy, jealousy, children, and so on, such networks (and urban tribes as well) tend to funnel caring energy into private life at the expense of other caring relationships, such as friendships outside the network, and public life, including solidarity networks to fight social injustice.

Practically speaking, I find mind-boggling the possible complications of legalizing the number of relationships allowed in minimal marriage. At one point Brake gives examples of multiple minimal marriages, which might include a committed friendship with one person as well as a committed sexual dyad, triad, or more, plus a legal marriage to a friend who will be given executor rights to manage one's estate. Brake has not considered the problem of the lack of consent that may be present in the network of marriage relations a person has when he or she wants to include another person. Do all the spouses have to agree if I decide to include another wife? Another friend? A sibling? In the present-day US, with such mobile lifestyles, how would disagreements about which of one's spouses gets the right to relocate with one as an employment benefit, or how to deal with division of property in divorce, be worked out? Even with the default "dependency laws" Brake theorizes to replace alimony, it might take a judge with the wisdom of Solomon to separate out what someone owes in support when

divorcing two dependent people but who also have responsibilities for themselves and two or more other dependents, including children. And what about inheritance laws? I shudder to think of the complications the death of a person encumbered by many marriages would cause to the trustee of his or her estate, let alone to probate in the case of someone who dies intestate!!

One obvious solution to some of these problems would be a democratic, socialist welfare state that would replace entitlements such as family health care and social security with entitlements for each citizen (single-payer health care and citizen retirement benefits), eliminate the right to inheritance, including property rights upon divorce, and instead have the state assume the burden of distributing property to those in dependency situations. But that would go beyond the parameters of Brake's attempt to give us a marriage reform that will work in a capitalist, liberal society.

Although I approve in principle the idea of expanding family rights to include other-mothers and revolutionary parenting, in practice (having been there, done that?see Ferguson 1981), I would say that the squabbles that can occur over who gets primary parenting rights when co- and step- and other-mother parents break up sexual love relations, or have political or religious disagreements about how to bring up children, will only be complicated by having family courts have to negotiate such messy relationships.

Maybe all these practical issues can be worked out with carefully crafted minimal marriage and divorce laws, property rights laws, and parenting network laws. Somewhat more concerning are the residual moral concerns that I mentioned above. It is hard to know whether they could be resolved by some combination of minimal marriage and parenting legal reforms and strengthened feminist countercultures that could end up persuading the mainstream as to how to better combine autonomy and care in couples and in parenting.

My final concern is political. I just don't see how such radical reforms to marriage and to parenting as legal institutions are feasible proposals in our present individualist capitalist and not very social-welfare state of the United States. The growth of the radical Christian right has already undermined legally acquired women's reproductive rights. Given this, the strategy of achieving same-sex marriage as a liberal addition to the existing flawed marriage contract seems much more likely in our contradictory political situation than do Brake's reforms. But this concern does not take away from the impressive case she has made from a moral point of view against the rationale for traditional marriage and for serious consideration of her marriage and parenting reforms. So for this reason and others mentioned above, I am glad to recommend this book very highly.

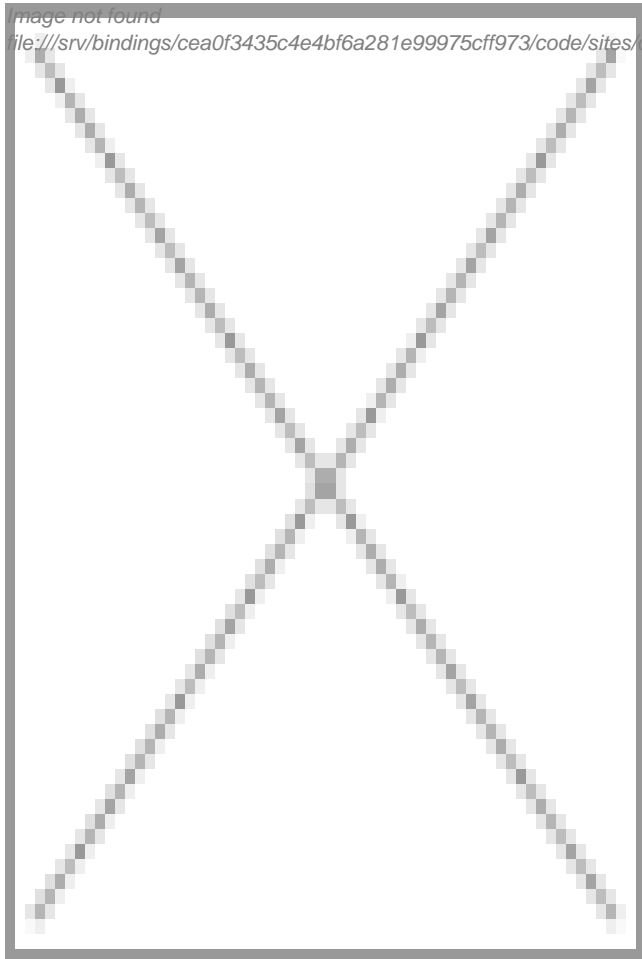
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