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## RHETORIC AND REALITY IN *WEDLOCKED*

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Katherine Franke's new book, *Wedlocked*,<sup>1</sup> is really two books in one. In the first, she undertakes a critical, and profoundly disturbing, examination of the effect of marriage on the African-American community. Let's just say this: The right to marry wasn't exactly an unalloyed blessing for the freed slaves. As she notes, "marriage produced gendered violence against black people in the nineteenth century."<sup>2</sup> Franke also takes on the vilification of blacks for having lower marriage rates than other groups in the population, casting this phenomenon within the broader historical and cultural contexts of African-American kinship (and economic) structures.

But that's all I have to say about that thought-provoking book. My own interests and expertise better intersect with Franke's other topic: the recent achievement of marriage equality for gay and lesbian couples. The parallels between the experiences of African-Americans and same-sex couples are few, as Franke acknowledges—apparently, she'd expected a stronger backlash against same-sex marriages, and was going to use the similarities to the difficulties faced by African-Americans to drive her thesis.<sup>3</sup> As it turned out, though, the book is more about the dissimilarities between the two movements.

Perhaps the unexpected obstacles to drafting a book that pulled these two strands together helps explain one of the maddening—and often repeated—assertions Franke makes: that the marriage equality movement is really a triumph of white privilege, a privilege that "has underwritten the plausibility of this positive transformation in the meaning of gay identity."<sup>4</sup> Everywhere she looks—at the lawyers bringing the cases, at the big gay rights organizations, and at the images of the plaintiffs she saw in a *New York Times* article—she sees piles of white folks. Well, OK . . . but what if she'd looked at some of the families whose cases actually resulted in the Supreme Court's gay marriage proclamation in *Obergefell v. Hodges*? For instance, Gregory Bourke (white) and Michael DeLeon (Latino) had two children—one biracial and one African-American. Matthew Mansell (white) and Johno Espejo (Latino) adopted two

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<sup>1</sup> KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* (2016).

<sup>2</sup> *Id.* at 6.

<sup>3</sup> She should have waited a minute. Backlash is all the rage this Spring. See, e.g., Mark Joseph Stern, Mississippi Governor Signs LGBTQ Segregation Bill Into Law, Slate, April 5, 2016.

<sup>4</sup> FRANKE, *supra* note 1, at 205.

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non-White kids. These multiracial families aren't unusual among the gay and lesbian community, either: same-sex couples are more than twice as likely as opposite-sex couples to be interracial or inter-ethnic. To the extent these couples are attracted by marriage, the marriage equality movement has disturbed, rather than furthered, a "whites only" outcome. To me, that's more important than the genesis and leadership of the movement.

The multiracial complexity of these families—including the children who have been adopted, often from the foster care system—presents a challenge to another of Franke's concerns. She is unsparing in her assessment of Judge Posner's decision in *Baskin v. Bogan*,<sup>5</sup> in which the prolific jurist noted the potential of same-sex marriages to increase the rate of adoptions by same-sex couples who, he noted, were far more likely than their straight counterparts to adopt kids in the first place. Good, right? Not according to Franke, who sees in this valorization of gay and lesbian parents an unstated (and perhaps unrecognized) complicity in the "situation where black children are being removed from black families to be raised by white people."<sup>6</sup> In so doing, gay (white) couples are engaged in "a kind of passive collaboration in the racial violence of African American children's overrepresentation in the foster care and adoption systems."<sup>7</sup>

This rhetorical abstraction quickly wilts in the face of reality. It would be interesting to hear Franke make these statements to folks like the couples mentioned above—couples who often adopt the most difficult to place kids, children (of every race and color) who have no realistic prospect of returning to their birth families. This isn't to say, of course, that the system isn't racist, or that judges aren't too quick to terminate the parental rights of African-American parents. But the sad truth is that the foster care system—for a complex stew of reasons—contains disproportionate numbers of children of color, and that there are many kids in need of good, permanent homes. The long-term imperative of dealing with the systemic, horrendous racism at the base of these problems is no excuse for leaving kids today in non-functioning, sometimes dangerous situations. To call gay and lesbian parents "collaborators" in racism is offensive, and dangerously blind to reality.

Franke is also concerned, rightly, about the complex issue of how same-sex couples and marriage might affect each other. The concern about the normalizing effect of marriage on same-sex couples (and on queer culture, more broadly) isn't new, but Franke makes it well and creatively. Marriage might flatten same-sex couples into a conforming sheet (as is already happening), while at the same time pushing other, less conforming members of the LGBTQ community to the periphery, making their legal and social recognition more challenging.

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<sup>5</sup> 766 F.3d 648 (7th Cir. 2014).

<sup>6</sup> FRANKE, *supra* note 1, at 186.

<sup>7</sup> *Id.* at 187.

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Franke's point on the effect that same-sex couples might have on the institution of marriage itself is provocative. She worries that the lives and expectations that many same-sex couples carry into marriage could lead courts to decisions that would be bad for opposite-sex couples—especially women.

She illustrates her concern with a couple of stories. “Steve” and “Rob” are presented as cartoon caricatures of an older guy (kind of dumpy) and his early middle-aged partner (kind of hot). They want to marry, but also want to be able to walk away from their relationship free and clear if their union dissolves. So they could enter into a prenuptial agreement—but then why marry? Franke is worried that this kind of opt-out arrangement could undermine the laws of equitable distribution that feminists have fought so hard to achieve.

No, it wouldn't—at least not more than is currently possible with all prenuptial agreements, even those entered into by straight couples. Courts in many states are today willing to assume that a woman can freely enter into a bargain that divests her of the rights that typically accompany marriage—even if doing so unravels the very rights that feminists, recognizing the economically subordinate position of women, fought so hard to attain. Franke's real issue is with pre-nups, not with the gender of the parties. (It's a legitimate concern.) Steve and Rob may want a marriage for the “fabulous wedding” (in Franke's parlance), but they might also want a deal that protects the economically weaker Rob.<sup>8</sup> But those things can be true of any couple, straight or gay.

Franke also tells the story of a lesbian couple, Beth and Ruth. (Unlike the Steve and Rob account, this story is true, but the names have been changed.) Their relationship, which included an ill-advised marriage several years after the couple had been in an on-again, off-again relationship and then cohabitated for a period of time, reads like a Family Law final examination—in fact, I used a similar set of facts on my exam just last semester, except that the couple was an academic opposite-sex couple. The problem in this case was that the court “backdated” the effective start date of Beth and Ruth's marriage to when the couple first got together (well before they cohabitated), on the theory that they would have married if they could have. This, of course, is wrong (and borderline outrageous) and unfair, in all likelihood, to Beth, who was financially much better off. But the decision isn't much worse than many cases where an opposite-sex couple has been “married” by a court (via common-law marriage), or considered cohabitating domestic partners, so that a court could protect the economically dependent spouse.

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<sup>8</sup> *Id.* at 216. A related point here is that the law should consider recognizing other kinds of legal relationships, so that one isn't forced to choose between marriage (with or without pre-nups) or nothing. Franke mentions this possibility, but it is not her focus. In a forthcoming book, I explore the lives of couples for whom other relationships, such as domestic partnerships or designated beneficiary agreements (currently available only in Colorado) might be a better fit. I also briefly address these points in John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 SAN DIEGO L. REV. 375 (2015).

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Whatever the shortcomings of the decision in the *Beth v. Ruth* case, Franke sees positive potential in same-sex unions, too, recognizing that same-sex couples have the potential to undermine the traditional roles courts assign men and women—practically speaking, at least, women can be husbands; men, wives. And not just in the playful, yet erotic way depicted in, say, *Twelfth Night*, but fundamentally; by forcing decision-makers to consider the actual roles, responsibilities, and reasonable reliance of the parties in front of them. She’s right, but courts are already doing this, at least to some extent. Thumb through any family law text<sup>9</sup> to find examples of bread-winning women and economically dependent men, with courts increasingly (but by no means always) willing to go where the financial realities, and the parties’ reasonable expectations, take them. (There are still plenty of counterexamples, too, where courts don’t properly value the contributions of stay-at-home spouses; usually, women.) Will the relatively small number of same-sex couples entering the system gender-queer marriage more than has already been done by the opposite-sex couples populating the state case reporters? Maybe, but my guess is: not much.

At bottom, Franke really doesn’t like marriage. She tips her hand with a statement about the “nursery rhyme” view of the institution (“first comes love, then comes marriage”), and then tells gays and lesbians who choose to marry what they “must” do in order to participate in the critique of marriage. Some of these prescriptions are sound (continue to argue for domestic partnership laws; don’t accept “religious accommodation” laws), but others are bossy and out-of-touch. That tax benefit you’ve been denied for many years because you couldn’t marry, and file a joint return? Give that money away. (She makes no allowance for the couple’s financial condition.)

In 2006, I had the good luck to share a cab with Paula Ettelbrick, author of the most persuasive tract against the positive effects of same-sex marriages I’d ever read.<sup>10</sup> During the short ride, the voluble Ettelbrick stunned me by saying that her opposition to same-sex marriages had eroded in the face of the stories she’d been listening to over the past few years—tales of joyful same-sex couples who had been moved beyond their expectations when they’d been able to share in the basic right to marry. Franke movingly dedicates the book to the late Ettelbrick. Would that *Wedlocked* had more fully integrated her fellow pioneer’s changed view.

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<sup>9</sup> Especially ALICIA BROKARS KELLY & JOHN G. CULHANE, *CHARTACOURSE FAMILY LAW: CASES, POLICIES, AND PRACTICES* (2015).

<sup>10</sup> Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *OUT/LOOK*, Fall 1989, at 14-16.