
LET'S HOPE THEY'RE RIGHT.

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“The legalization of homosexual marriage will quickly destroy the traditional family.”

JAMES DOBSON, FOCUS ON THE FAMILY

I have been reading and learning from Katherine Franke's scholarship for over two decades now and therefore welcome the Law Review's invitation to engage with her recent book, *Wedlocked*. As expected, it has been a pleasure. This book is characteristic of all of Professor Franke's work: careful, rigorous, and analytical, while at the same time provocative and even paradigm-shifting. I was fascinated by and learned a great deal from the sections of the book exploring the historical materials concerning the regulation of newly emancipated people through the laws of marriage. As Professor Franke acknowledges, this story stands on its own as an important one to be told and understood, particularly in relation to myriad ways that the African American community is regulated through the norms of family law. Her account of how the so-called freedom to marry enlarged the regulatory power of the state in ways that had unanticipated, negatives effects on freed men and women is quite compelling. Although I found it intriguing, I was less convinced by her application of these arguments to the modern marriage equality context, and it is that aspect of *Wedlocked* that I will focus on here.

As I finished reading the book, the following thought occurred to me: Katherine sounds like the queer mirror image of the conservative opponent of marriage equality: Marriage equality is going to ruin it for us patriarchal, heteronormative folks happily ensconced in traditional man/woman marriages. How can we possibly continue to thrive if gay people can get married? Franke instead seems to be claiming, at times anyway: Marriage equality is going to ruin it for us queer, sex-radical, freedom-loving iconoclasts happily creating our own alternative ways of organizing life, love, sex, and relationships. How can we possibly continue to thrive if gay people can get married?

In response to these claims, whether those made explicitly on the right or implicitly by Professor Franke, it is a mistake to answer blithely: If you don't like gay marriage, don't have one. Whether or not one chooses to marry, the definition of marriage does matter. It regulates us all, whether married, single, cohabiting, divorced, widowed, or excluded from marriage altogether. None of us can opt out completely. Where I depart from Professor Franke is that I am more optimistic the she is about the threat marriage equality poses to traditional

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marriage, and I am less pessimistic about the impact it will have on the lives and choices of gay men and lesbians, whether or not they choose to marry.

First, Professor Franke is concerned that the availability of marriage will lead some couples to marry when they would have been better off in an alternative arrangement. Why might this happen? Will couples marry because they believe wrongly that it will be better for them? If so, what leads them mistakenly to the altar? At points, Professor Franke seem to invoke false consciousness: Gay couples, despite full information about the options, believe falsely that they will be better off married than in some other arrangement. But why? Do they really not know what is best for themselves? It may be that, in the heady days and months or even year or two post-Obergefell, many couples head to city hall and “marry in haste,” but surely this is a short-term phenomenon. It seems more reasonable to assume that some couples will decide that marriage suits their needs and others will resist it, social pressure notwithstanding. Maybe the best evidence for the likelihood of this outcome is that the degree to which marriage is felt to be compulsory by the heterosexual community seems to be diminishing. The rate of “never-married” people is at an all-time high. Accordingly to one study, approximately twenty percent of adults over the age of twenty-five in the United States have never been married, a rate that has doubled since 1960.¹ Also, the fraction of the population that is currently unmarried (including never married, divorced, or widowed) is now roughly fifty percent, also an all-time high, up from twenty-eight percent in 1960.² For heterosexuals, then, marriage is not the only option and, with so many people living outside of marriage, we might not even say that it is the norm. Why expect that many same-sex couples will be seduced by marriage contrary to their best interests when the institution is losing its pull on the rest of us?

Professor Franke also argues that some couples may simply find irresistible the package of legal benefits that inhere in marriage and thus make the decision to wed notwithstanding its downsides. “It may not be perfect, but it’s the best deal around.” Pressure to make this choice increases, of course, when existing alternatives to marriage such as domestic partnerships are eliminated in favor of marriage. Nevertheless, it seems to me that couples who are sufficiently well-informed to understand correctly the legal and tax benefits of marriage as compared to their existing situation are also likely to be able contract out of the standard package of default assumptions that come along with marriage should they find them not to their liking. Here again, heterosexual couples seem to be

¹ See Wendy Wang and Kim Parker, *Record Share of Americans Have Never Married*, Pew Research Center: Social and Demographic Trends (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/>.

² See D’Vera Cohn, Jeffrey S. Passel, Wendy Wang and Gretchen Livingston, *Barely Half of U.S. Adults are Married—A Record Low*, Pew Research Center: Social and Demographic Trends (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/>.

heading in this direction, increasingly taking advantage of prenuptial agreements to redefine marriage's contours and obligations to suit their relationship.³ More troubling is the likelihood that couples who are not well-informed about the default rules of marriage or the possibilities of opting out will find themselves governed by rules not well-designed for their situation. I completely agree with Professor Franke that those default assumptions are sometimes (though not always, surely) inappropriate for same-sex couples, but they are also sometimes inappropriate for heterosexual couples. This is inevitably the case with default rules. Yet, in any particular case, whether those background assumptions are less likely to result in a just outcome than the non-marital default rules of no obligation is not clear. Surely for every story of an individual such as Ruth, for whom default rules premised on a heteronormative, gendered allocation of roles within marriage created injustice when the marriage ended, there is another story in which the absence of such default rules and the protections they afford to the less powerful partner similarly created injustice when the relationship ended. The key, of course, is to continue to interrogate the system of default rules in place so as to maximize the likelihood that the terms of dissolution will result in a fair outcome relative to the couple's expectations and choices and to educate anyone considering marriage about the possibilities of opting out.

A more subtle argument about the impact of marriage equality is that the very availability of marriage changes the social landscape in which relationships previously ineligible for marriage develop. Professor Franke worries that marriage equality will function as a sort of Good Housekeeping Seal of Approval for acceptable relationships, leaving nonconforming ones more marginalized. For example, couples in non-marital committed relationships may suddenly find their relationships suspect because they are (presumably) deliberately not quite marriage. This is one possible outcome but not the only one. Instead, one might imagine that, whatever the arrangement two women or two men have worked out for themselves outside the confines of marriage, they might benefit from the increased acceptance of their relationship signaled by the recognition of legal same sex marriage. In other words, society's judgment that their relationship is not unworthy of marriage might matter, whether or not they elect to marry. One need not embrace marriage as the measure of all things in order to acknowledge the stigmatizing impact of exclusion and applaud its elimination.

In a different context, one of my gay friends, who has never been interested in marriage or anything remotely like it, laments that even the possibility of marriage has cast a shadow over his social interactions, obliging him to wonder

³ This is a difficult trend to document, as such agreements may not become a part of the public record unless a divorce is litigated. Nevertheless, a recent survey of matrimonial attorneys found that 63% reported an increase in the use of prenuptial agreements between 2010 and 2013. See AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, *Increase of Prenuptial Agreements Reflects Improving Economy and Real Estate Market: Survey of Nation's Top Matrimonial Attorneys Also Cites Rise in Women Requesting Prenups* (Oct. 16, 2013), <http://www.aaml.org/about-the-academy/press/press-releases/pre-post-nuptial-agreements/increase-prenuptial-agreements-re>.

whether men he meets are married, looking for marriage, happily single, or somewhere in the middle. On this view, the possibility of marriage has transformed him unwillingly from simply gay to unmarried gay. It's a category he does not like. Of course, at the same time, the possibility of marriage opens up the opportunity of communicating new positions toward marriage in a clearer way. My friend might decide to embrace his new status as unmarried because it unambiguously conveys a rejection of the institution. Lives lived outside of marriage perhaps gain something from being understood more clearly as chosen and deliberate rather than a by-product of exclusion from the "ideal."

Ultimately, freedom is a tricky concept. Maybe more than anything else, this is the insight I take away from *Wedlocked*. Professor Franke rightly notes that, for formerly enslaved people, being freed was not the same thing as being free. Something more is required than simply the absence of constraints. But this is also, at least in part, an answer to why, after having recently been released from the threat of criminal punishment for their sexual acts, gays and lesbians declined to "take a break" from state regulation rather than rush headlong into a fight for marriage. Marriage, of course, does make one less free in important ways by introducing state control where it had not before existed. But, as the experience of formerly enslaved African Americans shows us, the state is not the only threat to freedom. Part of what advocates of marriage equality sought was the freedom from private discrimination, bias, and exclusion that they believed access to marriage would bring them. As the example of Randy and Curt shows, they also sought freedom from questions about their status as partners, from the skeptical looks of teachers when they showed up at conferences or of medical staff when they sat at the bedside of sick loved ones. Although it is true that their claim might have been framed in terms of anti-discrimination law rather than the right to marry, the reach of such a claim, at best, would have been employment contexts and places of public accommodation. They can hardly be blamed for pursuing instead a status that is shorthand for relationships that outsiders must take seriously.

Was seeing marriage equality as a form of freedom a mistake? Franke still fears that it might have been, that too much was sacrificed and too little gained. I am not so sure. In part for the reasons I have already discussed, I am less convinced of the perils of marriage equality for gays and lesbians. But, I am also more convinced of the perils of marriage equality for traditional marriage itself. Notwithstanding the conservative tone of the marriage equality litigation strategy ("we are just like everyone else"), I never really believed it. First of all, "everyone else" is not a monolithic group. Among married heterosexuals, reactions to marriage equality tend to fall pretty starkly into two camps, either "of course, makes perfect sense" or "that's crazy." If you view marriage as about two spouses inhabiting a legal framework that defines the terms of their economic and especially parenting rights and obligations, marriage equality makes sense. For you, little about the institution is tied to the sex (or gender) of the participants. If instead you view marriage as a legal/social/religious bond in which women become wives and men become husbands, then you are more

likely to see marriage equality as crazy or worse. For this group, the “we are just like everyone else” argument is never going to be convincing because it just is not accurate. It is inherently destabilizing to the husband/wife paradigm of marriage to open it up to two men or two women. At least that’s what I am hoping.

For further evidence, I look to another argument about freedom that is raging right now: the demand of those who oppose gay marriage to be “free” from any association with it, the claim that religious freedom somehow means being able to shun or marginalize gay couples. To some, perhaps to Franke, this is the backlash that might have been predicted, evidence that marriage equality aggravated rather than ameliorated bias. But maybe not. Maybe the perceived loss of freedom of the would-be discriminators is evidence of the power of marriage equality to provide exactly the kind of acceptance that its advocates sought. The fact that they feel burdened by the social mandate of respect that marriage brings to same sex couples is at least some evidence of the potential power that status brings.

Again, this kind of social change does not come without costs, as Professor Franke rightly points out, and the path to greater respect for a range of relationships both within and outside of marriage is not, ahem, a straight one. Nevertheless, (and maybe because I am married), I am hopeful that, now that the battle for marriage equality has been won, the conservatives turn out to have been more prescient than Professor Franke. For the sake of us married folk who also aspire to resist the constraints of traditional gender roles, I hope that their worst fears come to pass: that marriage equality does hasten the dismantling of traditional, patriarchal marriage in favor of a less gendered alternative that is enriched and complicated by the various forms of relationship that come to inhabit it.