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FROM OUTLAW TO OUTCAST TO IN-LAW? CONTESTING THE PERILS OF MARRIAGE EQUALITY

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> [W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.
>
> *Obergefell v. Hodges*[1]

> Like same-sex couples today, the freed men and women experienced a shift in status from *outlaws* to *inlaws*, from living outside the law to finding their private lives organized in wonderful and perilous ways by law. Being subject to legal regulation is something to think carefully about.
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> KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY[2]

I am pleased to offer the opening commentary in this *Boston University Law Review Annex* symposium on Professor Katherine Franke's provocative new book, *Wedlocked: The Perils of Marriage Equality*. As previewed by the book's additional subtitle, "How African Americans and Gays Mistakenly Thought the Right to Marry Would Set Them Free," Franke aims to provide "cautionary tales" gleaned, or lessons learned, from juxtaposing post-Civil War regulation of the marriages of African Americans freed from slavery with today's movement for marriage equality for gay men and lesbians.[3] Long a skeptic about the gay community's focus on the goal of marriage—its (in Franke's memorable phrase) "Longing for *Loving [v. Virginia* (1967)],"[4] Franke aims to buttress the case for caution with archival research on post-Civil War meanings of marriage for newly freed people. As my two opening quotations from *Obergefell v. Hodges* and *Wedlocked* suggest, while Justice Kennedy views same-sex couples' gaining access to the right to marry as fulfilling the Constitution's "promise of liberty" and affording freedom, Franke views such access more through the lens of subjecting oneself to a new form of state regulation at the expense of freedom. Indeed, though they are ideologically poles apart, Franke seems more aligned, in this regard, with dissenting Justice Scalia, who

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1 135 S. Ct. 2584, 2600 (2015).

2 KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 11 (2015).

3 *Id.* at 10.

4 Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008).

mockingly answered Justice Kennedy's argument that, "through [marriage's] enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality," with "Really?" Scalia countered that "Freedom of Intimacy is abridged rather than expanded by marriage."[5]

Wedlocked is not only dubious about the association of marriage with freedom, but also worries about the cost of that freedom on those who find the "promise of liberty" better realized by not taking the further step from outlaw to outcast to in-law. Franke contends that same-sex couples' new freedom to marry—and the constitutional framing of that right—impose costs on others. It is this argument on which my commentary will focus. Readers familiar with Franke's call to "unseat marriage as the measure of all things" and a "normatively superior status"[6] will not be surprised by *Wedlocked*'s contention that premising the right of gay men and lesbians to marry upon remedying a denial of dignity and respect and an exclusion that constitutes a "badge of inferiority" will inevitably cast the nonmarital, "innovative" families and relationships formed by gay men and lesbians as inferior and lacking respectability.[7] *Wedlocked* predates *Obergefell*'s landmark holding that gay men and lesbians have a fundamental right to marry in every state. Nonetheless, Franke would likely concur with Nan Hunter's critique that, in cataloging "the ways in which same-sex couples measure up to the ideals of 'nobility and dignity' embodied in the institution of marriage" and reasoning that marriage "serves the same functions for lesbian and gay couples as for different-sex couples," Kennedy's opinion implies that "the deserving queer" (like "the deserving poor") have earned the right to marry "by pledging allegiance to a particular cultural flag and the norms for which it stands."[8] Where, Hunter asks, "does that leave the presumptively un-deserving (poor or queer or both)?" And "how much dignity should attach to individuals who choose not to marry?"[9] While, in my view, there is much to praise in Kennedy's opinion, it is a fair criticism that, by contrast to *Obergefell*'s rhetoric extolling the unique value of marriage, a different rhetorical framing might have addressed the constitutional injury of exclusion from a basic social institution sponsored by the state in a way that "encompass[ed] respect for variation in kinship, sexuality, and affiliation."[10]

[5] *Compare Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015), *with id.* at 2630 (Scalia. J., dissenting).

[6] Franke, *supra* note 4, at 2686.

[7] FRANKE, *supra* note 2, at 12-13.

[8] Nan Hunter, Interpreting Liberty and Equality Through the Lens of Marriage, 6 Cal. L. Rev. Circuit 107, 109 (2015). See, e.g., Franke, *supra* note 4, at 2688, 2689 (cautioning about "crafting arguments that support the extension of marriage rights to same-sex couples who want them" without reinforcing marriage as the "standard by which all other forms of kinship, family, friendship, temporary alliance, and love are . . . rendered legible and assigned value").

[9] Hunter, supra note 9, at 109, 111.

[10] Id. at 110. For an insightful mixed assessment of Obergefell, see Serena Mayeri, Marriage (In)equality and the Historical Legacies of Feminism, 6 Cal. L. Rev. Circuit 126 (2015).

More startling and disturbing at least to this reader is *Wedlocked*'s further contention about another cost or externality of civil marriage equality for gay men and lesbians beyond its impact upon the diversity of LGBT family forms: that when "judges, policy makers, or the media are persuaded" by the basic sameness between different-sex and opposite-sex couples with respect to marriage, it is African Americans who are a "constitutive outsider that gay couples are not like."[11] Franke contrasts the dramatic transformation—indeed, redemption—of gay identity through the marriage equality movement's presentation of gay people as "just like us" with the seemingly more indelible "logic of difference that structures racial identity in this country."[12] How, Franke asks, have proponents of marriage equality achieved such "stunning" success analogizing to racial discrimination in arguing that exclusion from marriage is a "badge of inferiority," a marker of "second-class" citizenship, and an unconstitutional injury, while the social movement for racial justice and equality has been less successful in removing the "badge" or "moral stain" of "inferiority"?[13] Franke contends that "blackness . . . marks the residue of racism that no legal victory has been able to dissolve."[14]

Franke's sobering and sophisticated analysis of the different ways in which homosexuality and race are "sutured" to the body invite further thought. That said, I am not persuaded by *Wedlocked*'s contention that securing marriage equality is done through an implicit, if not explicit contrast with African Americans as the "constitutive outsider," for whom marriage has been "a tool of discipline and failure rather than security and full citizenship."[15] If anything, I would counter that the continual references, in litigation for marriage equality for gay men and lesbians, to racial prejudice and to its repudiation in the law of marriage—and, more generally, in other spheres of society—has put racial inequality front and center as an example of an unjust and unconstitutional practice that once seemed "natural." The central role played by *Loving v. Virginia*[16] in marriage equality litigation and most recently in *Obergefell* offers support for my argument.

Franke has resisted the analogy between antimiscegenation laws and laws restricting marriage to one man and one woman, insisting that the more fruitful historical comparison is that undertaken in *Wedlocked*: looking back to post-Civil War experiences of freed women and men, or "what happened last time a previously reviled and disadvantaged group won the right to legally marry for the first time."[17] Arguably, the Supreme Court's decisive repudiation in 1967 of

[11] FRANKE, *supra* note 2, at 205.

[12] *Id.* at 202-04.

[13] *Id.* at 198-99.

[14] *Id.* at 202.

[15] *Id.* at 204.

[16] 388 U.S. 1 (1967).

[17] FRANKE, *supra* note 2, at 10. For Franke's earlier critique of the analogy to Loving, see Franke, *supra* note 4, at 2687-88.

antimiscegenation laws as "invidious" racial discrimination based on "White Supremacy" (albeit nearly twenty years after the California Supreme Court's repudiation of California's law[18]) is a more recent historical moment when such a disadvantaged group won "the right to marry" free from restrictions premised in notions of racial inferiority. The Lovings argued that antimiscegenation laws were "both relics of slavery and expressions of modern day racism which brands Negroes as an inferior race."[19] To use Franke's terms, the *Loving* case challenged the "moral stain" – the "indelible" mark – of racial difference by repudiating laws barring interracial marriage and (implicitly) the racial pseudo-science on which they rested. To be sure, in the 1950s, Dr. Martin Luther King Jr. recognized and decried the strategic and "continual" invocation by civil rights opponents of "inter-marriage" as a "tragic distortion of the real issue," countering that: "The Church can help by showing . . . that the Negro's primary aim is to be the white man's brother, not his brother in law."[20] But civil rights groups who opposed antimiscegenation laws also understood the symbolic and practical roles such laws played in maintaining racial hierarchy and creating intimate outlaws.[21]

Loving featured in many ways in the decades of marriage equality litigation culminating in *Obergefell*. Rather than painting African Americans as the constitutive outsider, these various deployments of *Loving* keep the Nation's "original sin" of slavery and its gradual realization of constitutional ideals of liberty and equality front and center. Countering the portrayal of marriage as universal and unchanging in definition and original meaning, rooted in natural imperatives relating to heterosexual procreation, litigants and courts have pointed to antimiscegenation laws and their demise as an example of changing

[18] Perez v. Lippold, 198 P.2d 17 (Cal. 1948).

[19] Brief for Appellants at 15, Loving v. Virginia, 388 U.S. 1 (1967), *reprinted in* 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 749, 763 (Philip B. Kurland and Gerhard Casper, eds., 1975).

[20] Reverend Martin Luther King, Jr., The Role of the Church in Facing the Nation's Chief Moral Dilemma (Conference on Christian Faith and Human Relations, Vanderbilt University, Nashville, Tennessee, April 25, 1957), in Rhetoric, Religion, and the Civil Rights Movement, 1954-1965, at 217-220 (Davis W. Houck and David E. Dixon, eds. 2006). Prominent social scientists also recognized this strategic deployment of interracial marriage to justify segregation. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

[21] On the NAACP's stance, up until the early 1960s, of criticizing—and opposing the spread of—antimiscegenation laws without endorsing the practice of interracial marriage, see PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 163-204 (2009). By the early 1960s, the NAACP Legal Defense Fund ("LDF") was ready to support a challenge to Florida's bars on interracial cohabitation and interracial marriage. *Id.* at 246-70 (discussing McLaughlin v. Florida, 379 U.S. 184 (1964)). Both the NAACP and the LDF filed amicus briefs in support of the Lovings. *See* Landmark Briefs and Arguments, supra note 20, at 887-924 (reprinting briefs).

understandings of marriage.[22] Once thought "natural," and part of God's created order, racial and sex-based restrictions in the law of marriage yielded to a newer, more egalitarian model of marriage. In *Obergefell*, drawing on the work of historians of marriage, Justice Kennedy cites both to the demise of antimiscegenation laws and of sex-based classifications within marriage that had persisted even after the "gradual erosion of the doctrine of coverture" as examples of how evolving understandings of constitutional principles shape the evolving institution of marriage.[23] In the extensive pre-*Obergefell* jurisprudence, courts invoked *Loving* to support the proposition that history and tradition are not reasons for perpetuating a legal rule that is unjust and discriminatory. Gay men and lesbians, their amici, and courts have pointed out parallels between present day defenses of the one-man-one-woman definition of marriage and rationales previously offered to justify bars on interracial marriage: appeals to nature, to the divinely created order, to pseudo-scientific theories about race or gender, and to child wellbeing.[24]

Beyond the specific context of the injustice of prior restrictions on interracial marriage, courts have drawn more general parallels between racial prejudice and discrimination once upheld but now repudiated to make a larger point about gradual realization of the Nation's and the Constitution's aspirational principles. This theme of generational progress and of gaining "new insight" about injustice is an earmark of Justice Kennedy's four landmark gay rights opinions. Thus, most recently, in *Obergefell*, Justice Kennedy reiterated: "The nature of injustice is that we may not always see it in our own times. When new insights reveal discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."[25] Kennedy then turns to *Loving*, emphasizing its twin Equal Protection and Due Process holdings. As noted above, "invidious sex-based classifications in marriage" are the Court's other primary example of how "new insights and societal understandings" revealed "unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," leading the Court, "responding to a new awareness," to act.[26]

In sum, marriage equality litigation of the last few decades, in focusing on the history and transformation of the institution of marriage, has fruitfully forced

[22] A good example is the contrast between the majority opinion and the dissent by Justice Cordy in *Goodridge v. Department of Public Resources*, 798 N.E.2d 941 (Mass. 2003). Amicus briefs filed by historians (particularly historians of marriage) in *Goodridge* and other cases trace this history of antimiscegenation laws.

[23] Obergefell v. Hodges, 135 S. Ct. 2584, 2602-04 (2015).

[24] *See, e.g.*, Brief of Amicus Curiae Carlos Ball in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Indeed, to illustrate the ideas of racial inferiority, Franke quotes from some earlier judicial opinions upholding antimiscegenation laws. FRANKE, *supra* note 2, at 193-95.

[25] *Obergefell*, 135 S. Ct. at 2598.

[26] Id. at 2603-04.

attention to how race and sex discrimination were inextricably intertwined with marriage for much of the Nation's history and how repudiation of such discrimination is consistent with constitutional aspirations and principles. It is striking that, as Franke recognizes in her discussion of the "afterlife" of homophobia, in the proliferating conflicts between religious liberty and LGBT rights, participants treat the repudiation of race discrimination as a baseline but differ in the import of that civil rights past for evaluating religiously-motivated discrimination on the basis of sexual orientation or gender identity and opposition to civil marriage equality on the belief that marriage between two women or two men is immoral. In a remarkable deployment of the language of discrimination, Mississippi's comprehensive new law, the "Protecting Freedom of Conscience from Government Discrimination Act," signed by its governor, shifts the focus from protecting LGBT persons and same-sex couples seeking to marry from discrimination to protecting a wide range of public officials and employees, religious persons and organizations, and for-profit corporations from governmental "discrimination" if they act—or refuse to act—in many spheres of society on the basis of "sincerely held religious beliefs or moral convictions" that marriage "is or should be recognized as the union of one man and one woman," that "sexual relations are properly reserved to such a marriage," and that being "male" or "female" is immutably fixed at birth by one's biological sex.[27] This new law invites careful critique of its underlying ideas of "freedom" and the free exercise of religion, since—to return to my opening quotations—it empowers this wide swath of persons to be "free" from "being subject to legal regulation" without being considered "outlaws;" in so doing, it allows them to treat others as "outcasts" and to hinder their attempts to realize the "full promise of liberty," whether by becoming "inlaws" or simply by not being singled out for unequal treatment on the basis of moral disapproval.[28] Alas, this Mississippi law, along with the flurry of efforts by conservative state and federal lawmakers to pass laws protecting religious liberty, conscience, and moral convictions in ways that limit LGBT rights suggest that the "stunning" success Franke noted in transforming gay identity is far from complete.[29]

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[27] House Bill No. 1523 (Regular Session 2016), *available at* http://index.ls.state.ms.us/isysnative/UzpcRG9jdW1lbnRzXDIwMTZccGRmXGhiXDE1MDAtMTU5OVxoYjE1MjNpbi5wZGY=/hb1523in.pdf.

[28] Such unequal treatment based on moral disapproval would be contrary to the Court's prior gay rights precedents, including *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See generally* Linda C. McClain, *From* Romer v. Evans *to* United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351 (2013).

[29] FRANKE, *supra* note 2, at 201. Readers should know that Professor Franke, to her credit, has, in conjunction with her Public Rights/Private Conscience Project, co-authored a memorandum critiquing H.B. 1523 on numerous constitutional grounds. See Memorandum to Interested Parties from Public Rights/Private Conscience Project, April 5, 2016.