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The Curious Relationship of Marriage and Freedom

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The Curious Relationship of Marriage and Freedom

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Marriage is surely at a crossroad, as the chapters in this volume so richly attest. In fact, marriage may be at more than one crossroad, some pointing toward new, uncharted terrain, while others amounting to intersections we have visited before. My principal interest in exploring this dynamic moment in the evolution of the institution of marriage is to better understand why and how today's marriage equality movement for same-sex couples might benefit from lessons learned by African Americans when they too were allowed to marry for the first time in the immediate post-Civil War era. I find it curious that the right to marry, rather than say, employment rights, educational opportunity or political participation, has emerged as the preeminent vehicle by and through which the freedom, equality and dignity of gay men and lesbians is being fought in the present moment. Why marriage? In what ways are the values, aspirations, and even identity of an oppressed community shaped when they are articulated in and through the institution of marriage? What kind of freedom and what kind of equality does the capacity to marry bring forth?

I write this chapter just as same-sex couples have won the right to legally marry in the state of New York. While there is much to celebrate in this victory, I am concerned that this new form of legal recognition for some members of the lesbian and gay community may come at a cost of rendering more marginalized and vulnerable other forms of family, kinship, and care (Franke

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2011). Now that same-sex couples *can* marry, many employers have announced that they *must* do so in order to retain benefits to which they had previously been entitled without the legal sanction of the state (Bernard 2011) “We can now treat you just as we treat heterosexual couples,” they say. “Heterosexuals must marry to gain benefits for their spouses and children, you must now as well.”

In important ways, what we are witnessing today with same-sex couples echoes the experience of another group of new rights-holders almost 150 years ago. To better understand how the gay rights movement today has collapsed into a marriage rights movement, and what the costs of such a strategy might be, I will look backward in history to another time when marriage rights intersected with the rights of freedom, equality and dignity of a marginalized population: newly emancipated Black people in the mid-nineteenth century. The experiences of formerly enslaved people in the 1860s with newly won rights to marry hold lessons for the gay rights/marriage movement today.

Since the birth of the same-sex marriage movement, advocates have argued that if miscegenation laws (laws prohibiting inter-racial marriage) were an unconstitutional form of race discrimination, then laws prohibiting same-sex marriage should amount to unconstitutional sex discrimination. Andrew Koppelman (1998) has made this argument earliest and most often. Indeed, this reasoning formed the basis of the first victory for the same-sex marriage movement in 1999 (Baehr, 1996) when the Supreme Court of Hawaii found that same-sex couples should have the same marriage rights as different sex couples.

This analogy never sat well with me. I have long felt that before the gay and lesbian community committed to a civil rights strategy based on “if-they’ve-got-it-we-want-it,” we ought to undertake a little better due diligence about what “they” have

before “we” insist on getting it too. Don’t get me wrong, I am the first to admit that what motivates most opponents of same-sex marriage is a hatred or intolerance of gay and lesbian people, otherwise known as homophobia. So too, I understand that many gay and lesbian couples want to get married. Who can deny the pull of an institution that is so religiously, socially, legally and financially privileged, particularly as compared with the alternatives? Even as domestic partnership and civil union laws increasingly equalize the financial and legal benefits that same-sex couples can get in lieu of marriage, they can’t match the respect, dignity and social meanings of being married full stop.

While I recognize why marriage matters so much to some members of the gay and lesbian community, I would have preferred if we, as a community, had paused before we invested so heavily in a politics of recognition, that is, in the blessing that the state can confer on relationships that meet its requirements for legitimacy. A recognition-based project of this sort provides few tools with which to transform or render more just the fundamental underlying norms by which some forms of life are valued more highly than others. As Judith Butler (2009) has observed in another context: “The problem is not merely how to include more people within existing norms, but to consider how existing norms allocate recognition differentially. What new norms are possible, and how are they wrought? What might be done to produce a more egalitarian set of conditions for recognizability?” (Butler, 2009, p. 6).

It strikes me that in the present moment we could learn something from the struggle for racial justice, not by analogizing today’s marriage movement to the fight against miscegenation laws, but by looking at what happened last time a previously reviled and disadvantaged group won the right to marry for the first time. That’s what leads me to look into the immediate post Civil War regulation of freed peoples’ marriages. I suspected that

that period might hold out some cautionary tales for us today. And indeed it does.

Even as I urge this analogy, I won't argue that the racism experienced by the freedmen was the same as the homophobia or heterosexism gay and lesbian people experience today. Nor could I even suggest that the institution of marriage is the same now as it was then. That said, I think we can learn from the comparison of what it means to elaborate a new conception of freedom and equality through a form of state licensure. Like same-sex couples today, the freed men and women experienced moving from outlaws to inlaws, from living outside the law to finding their private lives organized in both wonderful and perilous ways by and within law. Being subject to legal regulation is always something to think carefully about. The experiences of the freedmen suggest some caution with respect to whether, and if so how, rights – and specifically a right to marriage – will set you free. Of course rights are something we cannot not want. But our desire for rights is something we should indulge with an awareness that they come at a cost.

In what follows I'll highlight three principal concerns I have about the moral hazards associated with a civil rights struggle that prioritizes marriage rights. Each of these concerns – marriage as a civilizing institution, the potential collapse of the right to marry into an obligation to do so, and the disciplinary effects of marriage meted out through criminal enforcement of adultery laws – was borne out in the experiences of newly emancipated former slaves when they won the right to marry in the 19th century, and is in play in the contemporary same-sex marriage movement.

* * *

As early as 1774, enslaved people identified the inhumanity of slavery as lying, in significant part, in the inability to marry. In

a petition to the new government of Massachusetts a group of enslaved men wrote: “[W]e are deprived of every thing that hath a tendency to make life even tolerable, the endearing ties of husband and wife we are strangers to for we are no longer man and wife than our masters or mistresses think proper marred or onmarred.” (Davis, 1997, p. 109). Abolitionist Angelina Grimké (1837) argued that both positive and natural legal principles required that the United States “[n]o longer deny [African Americans] the right of marriage, but let every man have his own wife, and let every woman have her own husband.” (Hawkins, 1972, pp. 61-63; Richards 1998). In 1850, Henry Bibb, an enslaved man, observed: “I presume that there are no class of people in the United States who so highly appreciate the legality of marriage as those persons who have been held and treated as property.” (Bibb, 1850). Arguing in favor of the 1866 Civil Rights Act, Illinois Senator Lyman Trumbull specifically identified the right to marry as a necessary aspect of citizenship. (*Protection of Civil Rights*, 1866).

Echoing contemporary arguments in favor of same-sex marriage, the right to marry figured prominently in the bundle of rights understood to have been denied to enslaved people, and was considered necessary to any robust conception of liberty. (Davis 1997; Foner 1988; Grossberg 1985; Gutman, 1979; Malone 1992). Marriage “provided a way to establish the integrity of their relationships, to bring a new security to their family lives, and, to affirm their freedom . . . If the prohibition on marriage had underscored their dependent position and the precariousness of their family ties in slavery, the act of marriage now symbolized the rejection of their slave status.” (Edwards 1996, p. 101). Formerly enslaved people and abolitionists generally deemed the right to marry one of the most important ramifications of emancipation.

In countless ways, the role of marriage as part of what it meant for newly emancipated people to be free parallels the struggles of lesbian and gay people today. Then as now the

inability to marry inflicted a stinging badge of inferiority on couples whose love, care and interdependence otherwise mirrored that of the couples who could legally marry. In important ways for both groups, the incapacity to marry produced and reinforced their identity as a lower caste, and the struggle to win marriage rights figured at the top of the civil rights agenda to expand their equality and freedom as full citizens in modern society.

That said, the prominence of marriage as the lever by which both formerly enslaved people and lesbian and gay people might be elevated from their subordinate status has entailed noteworthy hazards that are worthy of better understanding. Marriage, then as now, has been a curious and complicated vehicle through which to address the injustice of racism and homophobia.

MARRIAGE HAS ITS OWN AGENDA

Unlike other fora that have provided the setting for important civil rights struggles, such as lunch counters or public transportation, marriage is a particularly value-laden institution within which to lodge claims for full citizenship. The same might be said of military service and even equal educational opportunity. But for present purposes, when claims for full citizenship are articulated through a demand for marriage rights, the disenfranchised group's interest in equality and freedom must contend with the values of dignity, discipline, respectability and security which are entailed in the institution of marriage itself. Surely, exclusion from the institution of marriage inflicts a subordinating harm on those excluded. Yet a demand that the exclusion be lifted in the name of equality and freedom must take account of the fact that marriage has its own, well-entrenched agenda.

The role of marriage in the lives of formerly enslaved people in the 1860s illustrates just what it means to elaborate a

notion of freedom through the values and commitments of marriage.

In its reports to the Secretary of War in the early 1860s, the American Freedmen's Inquiry Commission reflected the view dominant among whites at the time that Black people were uncivilized, degraded, undisciplined, and lived in wholly unchristian ways, and that the rule of law as well as patient guidance from whites would tame and civilize them. Thus the Commission observed that "[t]he law, in the shape of military rule, takes for him the place of his master, with this difference – that he submits to it more heartily and cheerfully, without any sense of degradation." (American Freedmen's Inquiry Commission, 1863). Urging an active role for the federal government in the moral cultivation of Black character, the Commission's Final Report concluded on an optimistic note: "[T]hey will learn much and gain much from us. They will gain in force of character, in mental cultivation, in self-reliance, in enterprise, in breadth of views and habits of generalization. Our influence over them, if we treat them well, will be powerful for good." (American Freedmen's Inquiry Commission, 1864). In support of this claim, the Commission referred to a Canadian high school principal who maintained that proximity to whites could even "whiten" Black people's "unattractive" physical features: "[c]olored people brought up among whites look better than others. Their rougher, harsher features disappear. I think that colored children brought up among white people look better than their parents." (American Freedmen's Inquiry Commission 1864).

Thus, federal officials acted as the guardians of the moral practices of Black people in order to qualify them for freedom and citizenship. The enforcement of marriage laws was widely regarded as the best tool to accomplish these ends. As Michael Grossberg (1985) notes,

[a]lthough their response to most black demands for legal rights was negative, southern whites readily granted the matrimonial request of their former charges. The prevailing belief that marriage civilized and controlled the brutish nature of all people encouraged the use of formal matrimony as a remedy for the widespread immorality and promiscuity that whites believed to prevail among blacks. (Grossberg 1985, p. 133).

Much of the rhetoric of the time related to the need to civilize the freed men and women. Herbert Gutman summarized these beliefs as follows: “As slaves, after all, their marriages had not been sanctioned by the civil law and therefore ‘the sexual passion’ went unrestrained.” White officials informed the freed people that “[t]he loose ideas which have prevailed among you on this subject must cease,” (Edwards, 1996, p. 93),¹ and that “no race of mankind can be expected to become exalted in the scale of humanity, whose sexes, without any binding obligation, cohabit promiscuously together.” (Edwards, 1996, p. 93).²

Many African American people were acutely aware of the symbolic role that marriage played in the transformation of their status from slave to citizen. Northern Black elites were often as judgmental as whites when it came to the practices of poor Blacks. Laura Edwards (1997) notes that

[m]any African-American leaders were quite aware that white northerners and southerners alike used marriage as a barometer of their people’s fitness for freedom, and they urged poor blacks to adopt the domestic patterns common among elite whites. This, they argued, would help convince the nation that ex-slaves deserved the rights and privileges of freedom. (Edwards 1997, p. 56).

In support of this effort, one African American leader, James H. Harris, argued, “[L]et us do nothing to re-kindle the slumbering fires of prejudice between the two races. Remember, we are on trial before the tribunal of the nation and of the world, that it may be known . . . whether we are worthy to be a free, self-governing people.” (Edwards 1997, p. 56).³

As such, the work of transforming formerly enslaved people into citizens may not have been left to the state alone. The task of discipline and punishment for those who kept up the old ways was taken up by Black people themselves. Dan Johnson, it appears, did not consider marrying the woman with whom he had lived for many years until he sought to become a member of the St. John's Lodge of Odd Fellows in 1868. After his death, his widow applied for a war widow's pension, and one witness testified that “they were living together in adultery at the time he petitioned to become a member [T]he Lodge would not let him join until he married.” (Pension File of Dan Johnson, 15).

Colored newspapers also played a role in encouraging African American people to understand their responsibilities relative to the marriage relation. The Savannah Tribune, formerly The Colored Tribune, printed an editorial in November 1876 strongly counseling Black women against “Marrying in Haste”:

Do not place yourself habitually in the society of any suitor until you have decided the question of marriage; human wills are weak, and people often become bewildered and do not know their error until it is too late A promise may be made in a moment of sympathy, or even half delirious ecstasy, which must be redeemed through years of sorrow and pain. (“Marrying in haste,” p. 4).

In like fashion, the Semi-Weekly Louisianan cautioned its readers to consider the sanctity and magnitude of the marital obligation so as to avoid a wedding being a “sudden and unconsidered thing – the freak or the passion of an excited hour.” (“Hasty marriages and divorces,” p. 1).

These examples show that by the mid-1870s some African Americans were performing within and serving Victorian cultural institutions, at once evidencing their own successful domestication and regulating those who did not conform to larger cultural norms relating to sex, gender, and sexuality. For some, conformity to these norms was a price paid instrumentally for the respect they believed it would buy. For others, no doubt, this was what it meant to be a freed, if not free, person. Freedom and citizenship entailed a wide range of self-discipline.

Do we have reason to worry that marriage will operate as a civilizing institution for lesbians and gay men today as it did for newly emancipated people in the nineteenth century? Are the Victorian values that structured marriage rights then no longer with us today? Well, there may be some reason for concern today as same-sex couples make the case that they have a right to marry. After the devastating loss that was the Supreme Court’s *Bowers v. Hardwick* decision in 1986, the lesbian and gay community understood that it had work to do. It had not made itself recognizable to the public and to legal authorities as a community worthy of full constitutional protection and the dignity that recognition would confer.

So that work began. On school boards, on little league fields, at PTA meetings, in churches, workplaces, grocery stores – everywhere. Lesbians and gay men set out to demonstrate in fora both quotidian and extraordinary that they were not a perverse Other, but rather that they were respectable citizens, that they were just like everyone else. It is important to understand the turn this

work took. The project was not one of sexual liberation, as had been the approach of the early Stonewall activists, of “live and let live,” or “keep your laws off our bodies.” This was not a politics of neutrality or sexual liberty, nor did it echo the kind of liberal arguments made by H.L.A. Hart in his debates with Lord Patrick Devlin about the legitimacy of criminalizing sodomy.⁴ Rather the gay politics of the 1990s took a decidedly normative turn in favor of demonstrating to a skeptical American public that gay men and lesbians were normal, respectable, and responsible citizens, not the perverts that Chief Justice Burger had described in *Bowers*. In short, the shame of *Bowers* was met with a politics of redemption.

This work paid off in the Supreme Court’s reversal of *Bowers* in the *Lawrence v. Texas* decision wherein Justice Kennedy, writing for a slim majority, wrote that the Texas sodomy statute “demeans the lives of homosexual persons,” they “are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” (*Lawrence v. Texas* 2003, p. 578) He then repeated soaring language that had been used in an earlier abortion rights case: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁵ The moralizing of *Bowers* that left a homosexual minority vulnerable to the disgust and judgment of the majority was not replaced in *Lawrence* with a rule respecting sexual freedom or even sexual orientation-based equality, but rather Justice Kennedy gave the boot to the *Bowers*’ Court’s strong negative moral visions by substituting his own moral reasoning grounded in an almost spiritual reverence for the dignity of the human and a call that the law respect the most intimate choices each person makes about the meaning of their lives.

This turn to morality, respectability and the dignity of the person as the core value that now animates gay rights litigation set the stage for the marriage cases to come. *Perry v.*

Schwarzenegger, the case challenging the California proposition that amended the state's constitution to limit marriage to one man and one woman (Proposition 8) perhaps best illustrates the degree to which gay men and lesbians' right to marry is now being articulated through the values and vernacular of interests that marriage holds dear, more so than the values that the gay community has traditionally treasured, such as sexual liberty, diversity, autonomy and freedom. The testimony by the four plaintiffs in the Proposition 8 trial, two men and two women, focused primarily on their desire for respectability, their longing for the sacred blessing and societal recognition that marriage confers, on the fact that being married would be better for raising children, and finally on the disgrace of exile from the sacred domain of marriage. On top of that, they argued that the state should play a vital role in promoting the institution of marriage and that including same-sex couples in the institution would be good for marriage more generally.

When asked by Ted Olson, one of the gay couples' lawyers: "Have you encountered instances where because you are not married you were placed in embarrassing or awkward situations?", Jeff Zarrillo, one of the plaintiffs, testified: "One example is when Paul and I travel, it's always an awkward situation at the front desk at the hotel. The individual working at the desk will look at us with a perplexed look on his face and say, "You ordered a king-size bed. Is that really what you want?" Or "It is always an awkward situation walking to the bank and saying, "My partner and I want to open a joint bank account," hearing, you know, "Is it a business account? It would be a lot easier to be able to say: "My husband and I are here to check into a room. My husband and I are here to open a bank account." (Zarrillo Testimony, p. 84)

When asked by Mr. Olsen about why they haven't had children, Mr. Zarrillo said: "Paul and I believe that in order to have

children it would be important for us to be married. It would make it easier for -- for us, for our children, to explain our relationship, for our children to be able to explain our relationship.” (Zarrillo Testimony, pp. 81-82)

Mr. Olsen then asked Mr. Zarrillo why he and his partner were not domestic partners – the California domestic partnership law confers on same-sex couples all of the legal and economic benefits of marriage, just under a different legal name. Zarrillo answered: “we hold marriage in such high regard ... Domestic partnership would not give due respect to the relationship that we have had for almost nine years. Only a marriage could do that.” (Zarrillo Testimony pp. 82-83)

That the values that motivate much of today’s same-sex marriage movement share common ground with the efforts to secure marriage rights for newly freed people in the 19th century is perhaps no better illustrated than by a short piece Ted Olson wrote to explain why he was joining the Proposition 8 challenge as co-counsel with David Boies. In “The Conservative Case for Gay Marriage” Olson wrote:

Many of my fellow conservatives have an almost knee-jerk hostility toward gay marriage. This does not make sense, because same-sex unions promote the values conservatives prize. Marriage is one of the basic building blocks of our neighborhoods and our nation. At its best, it is a stable bond between two individuals who work to create a loving household and a social and economic partnership. We encourage couples to marry because the commitments they make to one another provide benefits not only to themselves but also to their families and communities. Marriage requires thinking beyond one’s own needs. It transforms two individuals into a union based on shared aspirations, and in doing so establishes a formal investment

in the well-being of society. The fact that individuals who happen to be gay want to share in this vital social institution is evidence that conservative ideals enjoy widespread acceptance. Conservatives should celebrate this, rather than lament it. (Olson, 2010).

In important ways the success of today's marriage-rights movement is premised upon a promise of discipline, respectability, and obedience to a set of civilizing norms that portray those who fall short of those norms as an embarrassment, or worse, undeserving of the full and equal blessings of civic belonging. The African American community has paid dearly for the "failure" of many of its members to form respectable families, the Moynihan Report being only one salient example thereof. (U.S. Department of Labor, 1965). I worry that we will witness an increasing divide in the gay community as well: between those who bend their lives toward marriage's expectations and are rewarded therefore, and those who do not or cannot and suffer a price as a result.

A RIGHT TO MARRY COLLAPSING INTO AN OBLIGATION TO DO SO

Without question the right to marry figured prominently in the minds of newly emancipated Black people in the U.S. South as they imagined what it meant to be free. The ability to order their private lives with spouses of their own choice, and to protect their families from the wrenching separation created by their sale and other forms of exploitation by hostile outsiders was among the first aspects of freedom on which the freed people insisted. As such, the right to marry not only signaled the new capacity of Black people to enter into civil contracts which were binding upon themselves and others, but it also held out a form of security which newly freed people imagined would erect legal pickets around their families to protect them from the malevolent interference of white people.

Many freed people naively thought that the freedom to marry meant a freedom to marry according to their own rules and customs and in family formations of their own choosing free from white interference. (Franke, 1999). What they quickly found, however, was that with this new right the freedom to marry collapsed in short order into an obligation to do so according to an inflexible definition set out in existing laws. For some time prior to the establishment of the Freedmen's Bureau in 1865, federal officers played a significant role in the promotion of marriage among Black people. In 1862, John Eaton was appointed by General Grant to set up what were termed "contraband camps," settlements that housed Black fugitives in Tennessee and northern Mississippi. In April 1863, Eaton reported that "all entering our camps who have been living or desire to live together as husband and wife are required to be married in the proper manner . . . This regulation has done much to promote the good order of the camp." (Eaton, 1863, pp. 89-90). In March 1864, the Secretary of War made Eaton's regulation official United States policy, and ordered Freedmen's Bureau agents to "solemnize the rite of marriage among Freedmen." (Order from Edwin Stanton 1864; Gutman 1979). Thereafter, superintendents of the contraband camps uniformly observed that "the introduction of the rite of Christian marriage and requiring its strict observance, exerted a most wholesome influence upon the order of the camps and the conduct of the people." (Report by Chaplain Warren, 1864). Recall that the people seeking entrance to these camps, which today we would call refugee camps, were in many cases suffering from starvation, illness, and the other effects of abuse by their "owners." That the officers administering the camps saw the ennobling influence of marriage as the most pressing need of the immiserated fleeing slaves is quite remarkable.

After emancipation, formerly enslaved people traveled great distances and endured enormous hardships in order to reunite families that had been separated under slavery. Shortly after the

end of the war, southern states acted quickly to amend their constitutions or enact statutes validating marriages begun under slavery. Laws that simply legitimized slave marriages if the couple were cohabiting as husband and wife when the law went into effect were quite common. Mississippi's 1865 civil rights law was typical: "All freedmen, free negroes and mulattoes, who do now and have heretofore lived and cohabited together as husband and wife shall be taken and held in law as legally married." (Civil Rights Act of Nov. 25, 1865, Ch. 4, § 2, 1865 Miss. Laws 82, 82.)⁶

Some states took a different approach to the marriage of former slaves, giving "all colored inhabitants of this State claiming to be living together in the relation of husband and wife . . . and who shall mutually desire to continue in that relation," nine months to formally re-marry one another before a minister or civil authority. (Act of Jan. 11, 1866, 31). These laws further required newly married couples to file a marriage license with the county circuit court, a bureaucratic detail that carried a prohibitively high price for many freed people. In every state with such laws, failure to comply with these requirements while continuing to cohabit would render the offenders subject to criminal prosecution for adultery and fornication. North Carolina gave the freed people just under six months to register their marriages with the county clerk. Each month they failed to do so constituted a distinct and separately prosecutable criminal offense.

While many formerly enslaved people merely allowed the law to operate upon them, automatically legitimizing their marriages, others "swamped public officials with demands to validate old and new unions." (Grossberg 1985, p. 134). Mass wedding ceremonies in the postwar South sometimes involved seventy couples; in seventeen North Carolina counties in 1866, 9000 marriages were registered (Litwak, 1979) Thus, the right to marry for African Americans in the immediate postbellum period had both symbolic and practical significance--symbolic in the

sense that enjoyment of the right signaled acceptance into the moral community of civil society, and practical to the extent that social and economic benefits flowed from being legally married.

However, the right to marry was not merely an unconstrained liberty enjoyed by African Americans independent of state interest or control. Even prior to the end of the war, state and federal officials played an active role in impressing upon Black people the responsibilities, rather than the rights, that marriage imposed.

After emancipation, when formerly enslaved people struggled to reunify relationships shattered by slavery, the first husband might reappear and expect his wife to live with him as his spouse. So too, many women had had children with more than one man and, after emancipation, sought to unify these complex family formations. Thus, many formerly enslaved people found themselves with two or more spouses and with complex, blended families at the end of the war (Gutman 1979).⁷ Given that bigamy was a crime in every state, persons with multiple spouses were forced to choose one and only one legal spouse and to cease intimate relations and/or cohabitation with others (Bernard 1996, pp. 10-11). Georgia's 1866 law relating to "Persons of Color" set forth the following: [P]ersons of color, now living together as husband and wife, are hereby declared to sustain that legal relation to each other, unless a man shall have two or more reputed wives, or a woman two or more reputed husbands. In such an event, the man, immediately after the passage of this Act by the General Assembly, shall select one of his reputed wives, with her consent; or the woman one of her reputed husbands, with his consent; and the ceremony of marriage between these two shall be performed (1866 Ga. Laws 239, 240). The statute then instructed that persons who fail or refuse to comply with these requirements were to be prosecuted for fornication, adultery, or both. South Carolina imposed a similar statutory duty of election. (1865 S.C. Acts 291,

292). Even though some state laws were silent on the question of multiple spouses, state and federal officials forced freed men and women to choose one and only one spouse as a matter of practice. In some cases where a freed man or woman was unwilling or unable to choose, Bureau agents felt free to do so for them. An agent in North Carolina reported that “[w]henver a negro appears before me with two or three wives who have equal claim upon him . . . I marry him to the woman who had the greatest number of helpless children who otherwise would become a charge on the Bureau”(Litwack 1979, p. 242; Gutman 1979).

The manner in which newly emancipated Black people in the United States managed the right to marry offers several lessons for today with respect to the risk that a right to marry can collapse into an obligation to do so for lesbians and gay men. Just as newly freed people expected that the right to marry would include a recognition of the complex families they had formed outside of legal marriage, so too lesbian and gay people have been surprised to discover the ways in which winning the right to marry has diminished the rights they had enjoyed as domestic partners, cohabitating partners, or in other non-marital family forms. Consider the following:

When the state of Connecticut amended its marriage law in 2009 to allow same-sex couples to marry, the law automatically married all of the same-sex couples who had entered into civil unions in Connecticut or in neighboring states, such as Vermont, without providing those couples adequate notice or giving them an option to remain in a civil union (Public Act No. 09-13 Sec. 12(a), 2009). While this provision of the new law was likely intended to be a benevolent blessing on same-sex couples by conferring full marital status upon those couples who had entered into civil unions during a period when they could not marry, it presumed i) that civil unions are an inferior civil marital status, and ii) that all of the couples in civil unions *wanted* to be married. It seemed

unthinkable to the drafters of the Connecticut marriage equality law that some couples might prefer a civil union over a marriage. Thus, in some cases, same-sex couples have found themselves to be automatically married in circumstances very similar to that of freed people in the nineteenth century. As a woman recently wrote me in response to an Op-ed I had published in the New York Times (Franke 2011):

“I purposely did NOT get a civil union in Connecticut when they recognized civil unions, and didn’t even know that my Vermont civil union turned into a marriage when Connecticut then recognized those civil unions as marriages. The VT CU was largely to support the general movement. I knew it expressly did not mean anything in Connecticut. I find myself in the unfortunate and unanticipated position of going through divorce proceedings having never been married.”

These sentiments, written by a well-educated woman in 2011, echo the incredulity expressed by freed men and women who had no idea that they had to follow formal divorce proceedings to dissolve their marriages after they had been automatically married by operation of law.

What is more, same-sex couples are finding that they must marry in order to retain rights they had previously enjoyed without being married, such as employment-related health insurance coverage for one’s partner. Immediately on the heels of the New York State legislature amending the state’s marriage law to include same-sex couples several large employers announced that their gay and lesbian employees would have to marry to continue coverage for their partners. Never mind that New York City has a domestic partnership law (which covers both same and different sex couples) and that many public and private employers had deemed domestic partnership registration a sufficient bureaucratic filter for

benefits eligibility. Here, as in other ways, the right to marry has rendered alternatives to marriage less viable and less secure. A right to marry has collapsed into an obligation to do so.

DISCIPLINARY EFFECTS OF MARRIAGE, REAL AND ANTICIPATED

Marriage laws provide a form of economic and legal security for those who qualify, but they also include a set of expectations that are enforced through both civil and criminal laws. Exclusivity, sexual fidelity, and duties of support are some of the most important, but not the only, rules of marriage that ones spouse and public prosecutors are empowered to enforce. Newly freed people learned quickly that the right to marry brought with it the risk of severe sanction in the event that marriages rules were not followed. Indeed, these rules offered both racist public officials and judgmental members of the African American community itself a tool with which to punish anyone who got caught violating marriages rules. For a significant number of former slaves, mostly men, legal marriage was not experienced as a source of validation and empowerment, but as discipline and punishment when the rigid rules of legal marriage were transgressed, often unintentionally. Recall that in most states the automatic marriage statutes were accompanied by a provision requiring the freedpeople to choose one and only one spouse if the reunion of formerly fractured families left an individual married to more than one person. If a man, for instance, failed to make such a selection and continued to cohabit with two women, he would be considered married to neither, while at the same time vulnerable to a fornication prosecution. This is exactly what happened to Sam Means. A Georgia jury convicted him of fornication upon a finding that Means, “a negro man, was living with two women as his reputed wives, and had never selected either and made her his lawful wife, as required by the [1866] act.” (*Means*, 1896).

Southern judges stepped in after a period to address this unhappy situation, and, as the following cases demonstrate, the technical requirements of marriage laws were enforced uncompromisingly against African Americans, regardless of whether they were shown to have understood the details or implications of this new regulatory regime. In *Williams v. Georgia* (1881), the male defendant, whose first name is never mentioned by the court, was shown to have been married to Elizabeth Williams when they were both enslaved. They were separated by their master and sold to different owners, but were reunited on December 21, 1864, two months after General Sherman marched to the sea. Thereafter, Elizabeth “associated immorally with another, and the defendant quit her and married another woman.” Since Williams had reunited with Elizabeth before March 9, 1866 (the effective date of the act legitimizing pre-existing slave marriages) and did not “quit” her until after that date, he was determined to have been legally married to Elizabeth when he married his second wife. The court rejected the defendant's argument that he did not intend his cohabitation with Elizabeth in 1866 to amount to a legal marriage. Instead the court ruled that the 1866 Act married the couple and that “[h]is wife was unfaithful; he got mad and married again without divorce. Being a free citizen, he must act like one, carrying the burdens, if he so considers them, as well as enjoying the privileges of his new condition.”

Other freed men and women found themselves in legal jeopardy when they knowingly complied with the legal requirements pertaining to the creation of a marriage, but persisted in the old ways by refusing to dissolve their marriages according to the technical requirements of divorce. In 1867, Celia McConico married David Hartwell. After two and a half years of marriage, they “mutually agreed to separate and did then separate from each other as husband and wife” (*McConico* 1873). A year later McConico married Edom Jacobs and was thereafter prosecuted for bigamy. At trial McConico argued that since Alabama's 1867 law

automatically solemnized pre-existing slave marriages without legal formalities, she assumed she was able to dissolve her marriage without legal formality. An Alabama jury convicted her of bigamy and the court sentenced her to two years in the state penitentiary. Her conviction and sentence were affirmed by the Alabama Supreme Court.

Living as marriage rights-holders was thus a complicated matter for African Americans in the second half of the 19th century. Marriage held out both security and danger, as they found themselves in a new regulatory relationship with the state. These regulations both secured their families and provided opportunity for public officials, scorned lovers, and judgmental members of the community⁸ to invoke the laws of fornication, adultery and bigamy to discipline and punish those who transgressed the rules of marriage. Conviction under these laws carried a heavy penalty, usually a felony, thereby disenfranchising those men found guilty and often subjecting them to the crushingly harsh, sometimes deadly, convict leasing system. (Franke, 1999, pp. 305-307).

I have no evidence to suggest that public prosecutors in New York are about to ramp up adultery prosecutions against married gay men or lesbians who are unable to live up to their vows of monogamy.⁹ But I can imagine a scenario in, say, upstate New York where a local official who opposes the marriage rights of same-sex couples decides to take the seldom enforced criminal statute prohibiting adultery very seriously, and initiates a prosecution against a married lesbian or gay man who has had sex with someone not their legal spouse, just as we saw in the post-bellum period with African Americans. After all, Dan Savage, a prominent gay journalist and political activist, has argued in the New York Times Magazine, to the outrage of many, that marital infidelity is a virtue (Oppenheimer 2011). So too, it is not unthinkable that a cuckolded spouse, acting out of hurt or revenge, might find a willing partner in the local district attorney's office.

This is exactly the scenario that launched the prosecution in *Lawrence v. Texas*, the 2006 Supreme Court case that invalidated laws criminalizing consensual sex between two adult persons of the same sex in private. (Carpenter 2004).¹⁰

* * *

Some commentators have resisted the analogy between the civil rights movement today for lesbian and gay people and that of African Americans in the United States. To some degree they are no doubt right. Homophobia and racism are not equivalent forms of social, legal and political disadvantage. Their sources and their consequences are quite different. So too, the disadvantage and hatred that gay and lesbian people have suffered cannot in any way be analogized to “the badges and incidents of slavery.” Our histories of oppression are in so many ways incommensurable.

That incommensurability does not, however, disable us from gaining lessons from one another’s experience of oppression and of expanded equality and freedom. For both African Americans and gay people,¹¹ the right to marry has figured prominently in ongoing struggles for full rights as citizens. Given the prominence of marriage in both public and private civil life, it makes sense that exclusion from civil marriage has been understood as a significant form of social disadvantage, both materially and symbolically. Yet using marriage as the primary container for the advancement of a community’s claims for full equality and citizenship brings with it significant moral hazards. Those hazards, to my mind, have not been sufficiently addressed in today’s movement to secure marriage rights for same-sex couples. Those hazards might be better confronted and ameliorated were we to take seriously the lessons to be learned from the experiences of African Americans when first able to marry in the immediate post Civil War period. For them, as for us today, we ought to tread carefully in securing the right to marry. Surely it is a right we

cannot not want, but without critically engaging that desire we risk rendering more vulnerable significant sectors of our community who cannot or will not conform to marriage's rules and discipline.

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Endnotes

¹ Quoting Alfred M. Waddell, a Confederate army officer and newspaper editor.

² Quoting a member of the Commission that designed the North Carolina Black Codes. See also Stamp 1956, p. 12.

³ Immediately after the war, Federal Freedmen's Bureau officers also compiled lists of exemplary African American men who might be appointed to various political offices in the military governments set up by the Bureau after Congress passed the first Reconstruction Act. See Lowe, 1993, p. 989. Lowe (1993) argues that the "black men who, in [the Bureau's] opinion, had demonstrated some ability and capacity for leadership in the two years since the end of slavery," were more than likely light-skinned. (Lowe, 1993, p. 992). Bureau agents explicitly disfavored "black men who had already established a reputation for alienating the native white community." (Lowe, 1993, p. 995). Thus, Lowe concludes, the "black leaders" listed by Bureau officers were not, in many cases, the people whom the Black community would have identified had they been asked. Here, as elsewhere, the freedmen who won the praises of white military and civilian authorities served as examples against which "bad blacks" were unfavorably compared for refusing to play within the bounds of white supremacy and Victorian ideology. (Lowe, 1993).

⁴ Hart's view turned on the application of the harm principle: if no one is harmed by the practice the state has no legitimate reason to regulate or criminalize it. Hart, H.L.A. (1959, July 30); Devlin, P. (1965).

⁵ *Lawrence v. Texas*, 539 U.S. 558, at 574 (2003) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

⁶ Georgia, North Carolina, South Carolina, and Virginia passed similar laws during this period. See, e.g., Act of Mar. 9, 1866, tit. 31, § 5, 1866 Ga. Laws 239, 240 (prescribing and regulating the

relation of husband and wife between persons of color); Act of Mar. 10, 1866, ch. 40, §§ 1-5, 1866 N.C. Sess. Laws 99-101 (concerning negroes and persons of color or of mixed blood); Act of 1865, 1865 S.C. Acts 291, 292 (establishing and regulating the domestic relations of persons of color, and amending the law in relation to paupers and vagrancy); Act of Feb. 27, 1865, ch. 18, § 2, 1865 Va. Acts 85 (legalizing marriages of colored persons now cohabitating as husband and wife), in Guild, J.P., 1996, (p. 33.); see also Howard, 1866, (p. 179) (a collection of Black Laws assembled by the head of the Freedman's Bureau and submitted to Congress in 1866-67).

⁷ Gutman (1979) describes how in some cases women who emerged from slavery with more than one husband would choose a legal husband based upon a number of different factors, such as the man's wealth, or the man's willingness to provide for all of her children, even those fathered by other men. Gutman, 1979, pp. 423-425. Litwack (1979) describes how some women chose to reunite with their first husbands, to whom they felt a special moral connection because their marriages had ended due to the forced separation of the couple. Ex-slave Jane Ferguson chose to reunite with her first husband, Martin Barnwell, even though she had married a man named Ferguson after her master had sold away Barnwell: "I told [Ferguson] I never 'spects Martin could come back, but if he did he would be my husband above all others."

⁸ Often bigamy or fornication prosecutions were initiated not by racist law enforcement officials but by members of the Black community against their neighbors. While we can't know for sure why newly freed people turned each other in to local law enforcement officials when they failed to follow the formal rules of marriage and divorce, we can supposed that they were acting to get even for other slights or insults, or they were concerned about protecting the reputation of the Black community more generally.

⁹ Adultery remains a misdemeanor in New York State, although it is rarely enforced. See New York State Penal Law Art. 255.17, “A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse.”

¹⁰ Carpenter’s description of Lawrence and Garner’s “relationship” is quite different from that portrayed by Kennedy’s opinion. The two men, Lawrence white and Garner black, were not in a relationship, but were more likely occasional sex partners. The night of the arrest another sex partner of Garner’s called the police to report that “a black man was going crazy” in Lawrence’s apartment “and he was armed with a gun.” (Carpenter notes that a racial epithet rather than “black man” was probably the term used.) The police arrived at the apartment and found Lawrence and Garner having sex.

¹¹ By this phrasing I do not mean to imply that all African Americans are heterosexual or that no gay people are African American. Rather I am referring to the movements on behalf of these communities that, for better or worse, tend to isolate one aspect of identity as the animating subject of their civil rights struggles.