
PERILS OF MARRIAGE AND NEOLIBERAL POLITICS OF CARE

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Franke's analysis of African American and LGBTQ experiences with marriage as a vehicle for (or impediment to) civil rights is exciting precisely because it resists the familiar claim of analogy. Instead, Franke looks at the African American experience for clues about the unexpected costs of gaining recognition and inclusion through legalized marriage. Her insights are deep and important.

Marriage, Franke writes, is "a powerful vehicle for a subjugated minority to express a demand of full rights and belonging,"¹ but its blessings are mixed. The downsides include: increased regulation by government, new gendered and racialized imperatives, and normalizing sex and family pressures. The effects of legalizing same sex marriage do not, however, end with the couple and their kith and kin. As a civil rights agenda and now as a right, the establishment of same sex marriage revivifies what the establishment of opposite sex marriage already accomplished: it reifies the place of the marital family at the heart of public policy and imagination to the detriment of those who do not—whether or not by choice—fall within its confines. As Franke shows, same sex marriage contributes to a policy vision that leaves behind those matters that marriage can't solve (e.g., systemic, racialized poverty). Worse, it occludes, stigmatizes, and punishes those who do not or cannot participate (e.g., single people of all ages). Further, it provides new means for enemies of equality to express racist and homophobic influence.

Like many observers, Franke was surprised by the speed of the broad acceptance of same sex marriage. What, she asks, explains this remarkable turn of events and attitudes? Her answer: successful "rebranding" of gay marriage as "normal" by major LGBTQ actors of gays, lesbians and their families.² Pushed out of the picture was all talk of strange sex, queer love, and alternative family forms. Pulled to the fore were the needs, hopes, and desires of couples and families "just like you."

Franke is, I am sure, right on this front. But there's more to the story. The rebranding and its success have much to do with the neoliberal politics of care. Specifically, same sex marriage was rebranded in the ways Franke outlines but also in the language of neoliberalism: first, there's the emphasis on freedom:

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¹ KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 21 (2015).

² *Id.* at 201.

commentators noted a crucial shift on the part of major activist organizations from the rhetoric of marriage equality to freedom to marriage. And that rhetorical shift had the intended effect. Polls showed that support for legalization of same sex marriage rose significantly when the question was posed in terms of freedom, which aligns same sex marriage with the privileged political value of the day.

This points to a second, more general force that is also an essential part of the story of the remarkable, meteoric rise in acceptance of same sex marriage—the rise of the logic of neoliberal politics of care itself. Same sex marriage was rebranded in ways that tapped into broader trends where marriage is cast at once as a free and private choice, and as the site of responsible intimate care, hence a choice no rational actor would refuse. This version of same sex marriage is related to the version of marriage that has been deployed by a politics that “responsibilize[s] freedom” – where you are free to take care of yourself³ or, crucially, as Joan Tronto puts it, “care for one’s own.”⁴ In a world populated by freely choosing, personally responsible, entrepreneurial actors, the marital family is the black box in which these actors are reproduced free of charge. Wendy Brown argues that “familialism” is that only group project neoliberalism condones.⁵ It must; even entrepreneurs need to be cared for. To this we must add that the ideal neo-sentimental family is one – gay or straight – wrapped in the marital shroud. Marriage is a key to the sentimentalizing.

Same sex marriage, then, fits the mood of our moment. So, for instance, Justice Kennedy’s paean to marriage stresses both that it is a private choice and that secures individuals against the vagaries of life and loneliness by tying them to each other and thus, at its core Obergefell resonates with this key note in the chorus of neoliberal familialism. Further, many, including those inside the movement made the case that same sex marriage would be good for business. Not at all surprisingly, some of the earliest converts to the cause of same sex marriage were business people and defenders of neoliberal politics such as Judge Richard Posner in *Baskin v Boggan* (which Franke cites).

I do have one serious quibble with Franke’s position. In a very thoughtful final chapter, she offers insights into “what marriage equality teaches us about gender and sex.”⁶ In this context, she considers the idea that perhaps marriage should be abolished. Given all the negatives she reveals in her investigation, one might expect, as she says, to answer with an unequivocal “yes.” But she takes the opposite position. The status plays too important a role, she argues, in protecting women against the structural inequalities of sex and gender. In particular, laws regulating property division, alimony and child support provisions at dissolution have been crucial bringing some equity to the post-divorce economic and legal situation of men and women.

³ DAVID SCOTT, *REFASHIONING FUTURES: CRITICISM AFTER POSTCOLONIALITY* 87 (1999).

⁴ JOAN TRONTO, *CARING DEMOCRACY*, chps. 2, 4 (2013).

⁵ WENDY BROWN, *UNDOING THE DEMOS* 105-06 (2015).

⁶ FRANKE, *supra* note 1, at 207.

Franke is right: these laws are essential mechanisms of securing an important degree of equality and security for many women. Indeed, I would add, following Susan Moller Okin,⁷ that the improved security at exit has important positive implications for power during marriage. But I think Franke concedes too much to marriage. There are plenty of good ways, indeed, I propose, much better ways of securing these ends without keeping marriage on the books.

If what we think the (liberal democratic) state should be concerned with is securing political and legal freedom, promoting equality, and protecting the vulnerable—women who do unpaid labor in the private sphere or children, the elderly and infirm, etc.—then it seems to me that there are very good, general reasons for getting the state out of the marriage business, not only because its involvement in marriage stretches the state into roles and realms well beyond the standard limits the liberal democratic and American constitutional traditions puts on state action.

The establishment of marriage is bad for real equality and for protecting the vulnerable. Or, put another way, for protecting families—most broadly defined as those units that engage in the essential and costly work of intimate care. The vulnerable here are not just the obvious—children, elderly and infirm who cannot, for the meantime, take care of themselves. (But then who, really, can ever take care of themselves?) But they are also those who do the underpaid labor of caregiving. Indeed, we might think of this kind of care as vulnerable in the face of neoliberal pressures to marketize and commodify everything.

Imagine, for instance, a scheme of registered domestic partnerships or what I've called elsewhere, no more elegantly, intimate caregiving union status, open to any unit (pair or group) engaged in the activities of intimate care or at least committed to doing so, willing to assume the rights and responsibilities of a status carefully tailored to protecting care and the vulnerabilities it trades in.⁸

Marriage, with its deeply contested, thick social meanings would be left to the diverse ethical communities for whom it is important. My sense is that getting the state out of the marriage business is a move truer to the findings of Franke's important study than the proposal she offers. She notes that without marriage, African American and LGBT people proliferate non-normative "intimate, romantic and sexual attachments."⁹ Some read this as making the best of a bad situation; others, as a sign of depravity. Franke, rightly, suggests that we consider these to be the benefits of freedom from the bonds of normative/marital family forms. Looking at it this way encourages us to ask: what other worlds are possible without marriage?

⁷ SUSAN MOLLER OKIN, *JUSTICE GENDER AND THE FAMILY* (1989).

⁸ TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE AND THE CASE FOR THEIR DIVORCE* (2010).

⁹ FRANKE, *supra* note 1, at 64.