

# wedlocked

THE PERILS OF MARRIAGE EQUALITY



KATHERINE FRANKE

*How African Americans and Gays  
Mistakenly Thought the Right to Marry  
Would Set Them Free*

WEDLOCKED

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Would Set Them Free*

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*To Janlori Goldman, who helped me think through the most  
difficult parts of the argument, and to Paula Ettelbrick, who  
taught us all about how marriage was a precarious place  
from which to fight for justice.*

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This book is in so many ways a testament to my evolution as a scholar. I began research on slave marriages, war widow pensions, and post-Civil War meanings of marriage for newly freed people when I was teaching at Fordham Law School almost twenty years ago. I was instantly entranced by the stories the archives held and the tactile evidence they preserved: locks of hair from a husband killed fighting in a “colored regiment” in the Union army; dried pressed flowers from the wedding of two enslaved people; and thumb prints from ink spilled when a marriage license was signed in 1866 by a newly freed couple in North Carolina whose love and life together could be marked only with an X since learning how to write their own names could land them in prison.

Many people have helped me write this book. Megan McClintock’s work on war widows’ pensions gave me early inspiration for this project. Her article “Civil War Pensions and the Reconstruction of Union Families”<sup>1</sup> and discussions we had over dinner introduced me to the archives documenting the intimate lives of enslaved people. In fundamental ways she got me started down this path.

The research I subsequently did with the Freedmen’s Bureau records, civil war pension files, and in state archives across the South were aided invaluablely by archivists working in those locations who were willing to show me a special collection that only they knew of, sneak me in the back to look through unindexed boxes, and helped me think through the meanings of gaps in the records. These archivists included Reginald Washington at the National Archives, Debbie Cano at the Mississippi Department of Archives and History, Pamela Coleman at the Georgia

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## Introduction

When George Washington wrote his will on July 9, 1799, he put a price on his wife Martha's head—though that may not have been exactly what he thought he was doing. He and Martha owned 277 slaves—124 were his and 153 Martha had inherited from her first husband. In his will George gave Martha 123 of his 124 slaves, but with the proviso that they be freed upon her death. One has to wonder how much George cared for Martha, since the enslaved people at Mount Vernon learned shortly after George died in December 1799 that their freedom turned on Martha's death. Fearing that George's slaves were trying to poison her, Martha stopped eating and locked herself in the attic, not allowing anyone but close family members to visit her, and forbidding any of George's slaves to accompany them. While the end of the story is a bit murky, most likely a terrified Martha freed George's slaves a year after his death on the recommendation of George's nephew Bushrod Washington.

George's will, while complicated when it comes to Martha, is full of kindness toward his slaves. He expressed a strong desire to free them immediately, but recognized that to do so might cause them terrible hardship. "To emancipate them during her life," he wrote, "would, tho' earnestly wished by me, be attended with such insuperable difficulties on account of their intermixture by Marriages with the dower Negroes, as to excite the most painful sensations, if not disagreeable consequences from the latter."<sup>1</sup> By today's lights, it is hard to imagine how freedom would entail hardship, but in important respects Mr. Washington was right. Given the complex laws of marriage and inheritance in the eighteenth century, neither George nor Martha was permitted to le-

gally free her slaves. Since many of George's slaves had married and had children with Martha's slaves, to free George's slaves would likely result in the wrenching breakup of many families—her slaves would remain at Mount Vernon while his slaves, once freed, would be forced to leave the Commonwealth forever. At the time Washington died it was not uncommon that worried white Virginians would chase freed slaves out of the state. According to the 1800 census, there were 20,000 free Negroes living in Virginia. Most of these people had been freed either through a will or, like the Washington slaves, by their owner liberating them voluntarily. The presence of so many free blacks<sup>2</sup> made many white Virginians uneasy. Who knew what kind of uprisings they might organize or inspire in the enslaved people of Virginia simply by their very presence in the Commonwealth? In 1805 the legislature dealt with the problem by passing a law that required freed men and women to leave Virginia immediately after being set free. Once exiled from their homes and families many newly freed black people lived furtive lives, belonging nowhere and one step ahead of bounty hunters who sought to capture and return them to bondage. (Making exile the price of gaining new rights has a robust tradition in Virginia—recall that Richard and Mildred Loving, an interracial couple, were prosecuted in 1958 under a state law making it a crime for a white person to marry a person of another race, and the judge gave them the choice of either going to jail for a year or leaving the Commonwealth of Virginia for twenty-five years. They opted, quite reasonably, to leave.)

The story of George Washington's will lays bare two fundamental ironies lying at the core of many civil rights movements: First, the deeply gendered nature of marriage renders the "freedom to marry" a radically different experience for men than for women. And second, gaining rights—certainly a good thing—can sometimes make life *worse* for some of the people who "enjoy" those new rights. Freedom, in other words, shouldn't end the consideration of complex questions of justice and equality, but rather inaugurates a new set of hard questions about what it means to be liberated into a social institution that has its own

complicated and durable values and preferences. Paradoxically, gaining rights can have the unintended effect of conscripting the beneficiaries of a civil rights movement into gendered roles they have little interest in inhabiting. Gaining rights can also, in some cases, even contribute to an intensification of societal hatred and resentment toward previously disenfranchised minorities.

We know well the stories of families torn apart by the ravages of slavery—husbands or wives being sold to other owners without any concern for the children and other family members they left behind. We have heard less about the families that were destroyed by freedom, as the story of the slaves at Mount Vernon so well illustrates. That George Washington believed he could best protect his slaves by prolonging their enslavement is a searing example of the complexities of freedom at that time. His will also gave his long-serving loyal “manservant” William Lee the option of being immediately freed or remaining, enslaved, at Mount Vernon with an annuity for his support—“this I give him as a testimony of my sense of his attachment to me, and for his faithful services during the Revolutionary War.” Surprisingly, the former president considered ongoing enslavement as a gift or bequest he could leave his most trusted servant.

Yes, slavery was evil, but freedom was no easy matter either. Freedom had rules, and those rules were not always the ones the freed people might have chosen had they been in charge of their own independence. As many newly emancipated black people found in the nineteenth century, freedom meant that their lives transitioned from private control by their owners to public control through law. The experiences of black people emerging from slavery hold out lessons for other movements for freedom and equality today, particularly, as we’ll see in this book, for those gay men and lesbians seeking to gain greater freedom and equality through a right to marry.

Exile from family and home was only one of the prices of emancipation that the Washington ex-slaves experienced in the antebellum South. As freed black people, even in the relatively progressive upper South,



Washington's former slaves learned firsthand that being *freed* was not the same thing as being *free*. Though no longer held in bondage, freed people enjoyed far fewer rights and liberties than did free white people. Instead, they lived in a netherworld between slave and citizen. Being freed did not erase the badge of inferiority that made black people enslavable in the first place, as the moral stain of race proved more durable than the sovereign endowment bestowed by their legal emancipation.

Throughout the South, numerous laws and customs structured the world of the freedmen, a world in so many respects better than the world of the enslaved, but certainly one inferior to the world of free white people. Blacks in the South were usually presumed to be slaves and had to carry passes, papers, or bills of sale to disprove this presumption. These documents quite often didn't protect them from horrible violence or re-enslavement. They were limited in the professions they could hold, in their ability to travel within their home state, and in their capacity to return should they leave the state. They paid higher taxes than did their white neighbors, and if they couldn't come up with the money to pay the tax bill they could be sold back into slavery. Some states required free blacks to have a white legal guardian through whom the free black person was required to conduct all his or her business. The guardian acted as a guarantor of all debts and other financial transactions his black charge might undertake, and thus had enormous power over him—a power that most guardians could not resist exploiting or abusing.<sup>3</sup> In some states, free black men and women who had been accused of crimes were tried in front of *ad hoc* tribunals rather than regular juries, they had no right of appeal, they were denied the right to self-defense against a white person, and they could not testify against a white person. Criminal penalties, including the death penalty, were much harsher for free blacks than for whites. Indeed, in many states the death penalty did not apply to a white person who murdered a black person. Social rules also regulated the behavior of free blacks in ways that reinforced their degraded status. For example, Charleston, South Carolina, adopted an ordinance prohibiting free blacks from “whooping or hallooing” any-

where in the city, making clamorous noises, singing aloud any indecent songs, or engaging in any loud or offensive conversations at street corners. They could not dance or engage in other merriment without prior permission from the city wardens, nor could they smoke pipes or carry walking canes in public.<sup>4</sup>



What drew my attention to this period and to the role of legal marriage in notions of safety, citizenship, and belonging was the complex way in which freedom could be both exhilarating and crushing for newly freed people. Standing alone, the unfolding of freedom for enslaved people by and through marriage was enough to sustain a book-length treatment of this complex social moment. Yet I could not resist looking at the ways in which many of the experiences of African Americans held out a message to the same-sex marriage movement today. It felt like a neglected resource for today's advocates who have thought hard about the merits and risks of elevating marriage equality to the top of the lesbian, gay, bisexual, transgender (LGBT) movement's "to do" list.

When I began research on this book over ten years ago I was drawn to the historical material as cautionary tales: gaining new rights in a society that still hates you can trigger a wide range of backlash, discipline, and punishment as the cost of civil citizenship. As I sat down to finish the book in 2015, however, this lesson seemed to no longer fit with the rapidly changing marriage landscape in the United States. The backlash against married same-sex couples that I expected has not taken place, or at least has been isolated to a few regions of the country. Instead, with speed unimaginable even five years ago, same-sex marriage fever has swept the nation and the predictable foes of marriage equality are revisiting their opposition to including same-sex couples in the domain of legal marriage.

This swiftly shifting political landscape forced me to reevaluate the thesis of this book and the lessons to be drawn from the experiences of freed people in the mid-nineteenth century who were newly able to

marry. While I continue to believe that the “perils of rights” lesson has enduring salience for today’s readers, what these stories more pressingly reveal to me now is a different set of insights—insights about both the continuities and discontinuities of the role of marriage in liberation movements for formerly enslaved people and same-sex couples. As more and more same-sex couples marry I have become acutely aware, in new ways, of the enduringly gendered nature of the institution of marriage. The stories in this book show how marriage produced gendered violence against black people in the nineteenth century, and same-sex couples experience its coercively gendered nature today. As for discontinuities between these two experiences of marriage, part of the success, stunning success really, of today’s marriage equality movement lies in the capacity of homosexuals to cleave the sex out of homosexuality—a tactic unavailable to people of color, who are unable to separate themselves from the racial mark that underwrites their second-class social, legal, and political status.

While the conclusions of the book have shifted over time, the structure has remained the same. The book is made up of parables in which marriage figures at the core, parables that help us see connections between two fundamental struggles for human dignity, equality, and justice that have not yet been considered in relation to one another in the way I orient them in this project. They teach us important lessons about the possibilities and limits of rights. We can learn today from the experiences of newly freed people at the end of the Civil War: Once you set your sights on a right, the values of the right may overtake the values and aims of the people who seek it. These parables also show us that rights are complicated in the sense that each step forward brings with it new forms of vulnerability and even unfreedom, risks for which we should be prepared.

Much has been written about the failure of postwar reconstruction in the U.S. South. In this book I turn to that era not to retread familiar ground but for a different purpose: to offer a strange, some might say “queer,” pairing of the experiences of freedom of newly emancipated

people in the immediate post-Civil War period and that of lesbians and gay men today. I write these words just as same-sex couples in state after state are gaining the right to legally marry and are poised to gain a constitutional right to marry from the Supreme Court. I find it curious that marriage rights, rather than say, employment rights, educational opportunity, or political participation, have emerged as the preeminent vehicle through which the freedom, equality, and dignity of gay men and lesbians is being fought in the twenty-first century. Why marriage? In what ways are the values, aspirations, and even identity of an oppressed community shaped when they are articulated through the institution of marriage? What kind of freedom and what kind of equality does the capacity to marry mobilize?

What we are witnessing today with same-sex couples echoes the experience 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 this strategy might be, I look to an earlier 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.

Since the birth of the same-sex marriage movement, advocates have argued that if miscegenation laws (laws prohibiting interracial marriage) were an unconstitutional form of race discrimination, then laws prohibiting same-sex marriage should amount to unconstitutional sex discrimination. This reasoning formed the basis of the first victory for the same-sex marriage movement in 1996 when the Supreme Court of Hawaii found that same-sex couples should have the same right to marry as different-sex couples.<sup>5</sup>

This analogy never sat well with me. I've 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-too," we ought to take a closer look at what "they" have before "we" insist on getting in on it. Don't get me wrong, I'm the first to admit that while what motivates some opponents of same-sex marriage is a hatred or intolerance of gay and lesbian people, otherwise

known as homophobia, what underlies most same-sex couples' desire to walk down the aisle is love and an embrace of the structures of societal recognition, romance, and family creation with which marriage is so closely associated. Judith Kaye, the former chief justice of the New York Court of Appeals, summed it up best. "For most of us, leading a full life includes establishing a family. Indeed, most New Yorkers can look back on, or forward to, their wedding as among the most significant events of their lives," she wrote in *Hernández v. Robles*, the pivotal 2006 case in which five same-sex couples sought access to marriage rights. "They, like plaintiffs, grew up hoping to find that one person with whom they would share their future, eager to express their mutual lifetime pledge through civil marriage."

The whole nursery-rhyme conception of marriage ("First comes love, then comes marriage . . ."), despite being kind of trite, still holds true for most people—straight and gay. They marry for love, romance, commitment, and acknowledgement by their family, friends, and community. Yet for some same-sex couples who've been together for years, if not decades, and are now able to marry for the first time, they tie the knot not for romantic reasons but in order to take advantage of the legal rules, identities, economic benefits, safety, and structure that marriage makes available. They may not be proposing to each other like this: "Honey, let's get married so that if or when we break up the rules of divorce will determine how our stuff gets split up," or "Let's get married so that if you have an affair I can get your cheating ass arrested for adultery." (Adultery remains a crime in many states to this day.) But some of them are doing something pretty close: "If we get married and you give me HIV or hepatitis you'll have to pay me \$100,000." Or "If we get married and you have an affair you have to pay me \$50,000." (A lawyer friend of mine reported being asked to put these clauses in prenuptial agreements.) For these people, marriage brings with it a new sense of entitlement, or as some call it legal consciousness, that invites them to treat the rights and wrongs of a relationship as monetizable claims against one another. Interestingly enough, for some couples what before marriage amounted

to the inevitable heartbreaks and betrayals of a relationship become opportunities to cash out the breach of an agreement once the relationship is framed by the legal structure of marriage.

For the most part, though, when couples say “I do” they are oblivious to the many legal rules that now govern their marriage, rules they can’t just pick and choose (how many soon-to-be ex-husbands are shocked when they find out that they have to split all their assets with and pay alimony indefinitely to their soon-to-be ex-wives? “She’s soaking me, and she’s the one who wanted the divorce!”).

If Judge Kaye is right that people think of marriage as part of what it means to live a full life, then they might want to have a wedding to solemnize their relationship in front of friends and family, but why a marriage license? State licensing means your relationship is now governed by law, and that you have to play by law’s rules. An affair or a breakup now has legal in addition to emotional consequences. Put most bluntly, when you marry, the state acquires a legal interest in your relationship. Cloaking freedom in state regulation—as the freedom to marry surely does—is a curious freedom indeed, for this freedom comes with its own strict rules.

This has always struck me as sort of strange. Not very long ago lesbians and gay men found themselves harshly regulated by criminal law, subject to long prison terms for having sex with other persons of the same sex. Now we clamor to have the state regulate our romantic lives in a new way. You’d think that we might have wanted a bit of a break from the state. “Leave us alone while we figure out what it means to be free.” But no, once the Supreme Court declared, in 2003, that we could not be criminalized for our private, consensual sexual conduct, we committed ourselves to the fight for marriage rights and the legal structure those rights entailed.

This odd yearning for state recognition is something we share with freed people in the nineteenth century. Just like today, marriage played a prominent role in the transition from enslavement to freedom. Freed people wanted to be free from control by their oppressors *and* to enjoy

marriage rights for the first time. They found, as we might today, that you can't have both, or at least that having both creates new problems.

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 the blessing that the state can confer on relationships that it deems legitimate. A politics that turns on our being recognized by the state as worthy of its approval provides few tools with which to transform or render more just the fundamental underlying norms by which some ways of life are valued more highly than others. As Judith Butler 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?"<sup>6</sup>

In the present moment we can learn something from the struggle for racial justice, not by analogizing today's marriage movement to the fight against miscegenation laws as many advocates do, but by looking at what happened last time a previously reviled and disadvantaged group won the right to legally marry for the first time. This is what led me to look into the immediate post-Civil War regulation of freed peoples' marriages. I suspected that this period might hold out some cautionary tales for us today. And it does.

Even as I urge this analogy, I'm aware that the racism experienced by the freedmen was very different from the homophobia or heterosexism gay and lesbian people experience today. The devastation of slavery and the durability of American racism have left an indelible mark on the U.S. Constitution and on our society that we have failed miserably to adequately address. Along with the conquest, massacre, and forced expulsion of native people in North America, the enslavement of black people is the original and founding sin of American society, and its history is looked to by virtually all subsequent social movements organized to secure the dignity, equality, and freedom of marginalized people, in-

cluding women, immigrants, and the disabled. Advocates of race-based justice have built the constitutional scaffolding upon which all subsequent minority groups have hung their claims, sometimes uncomfortably. For instance, should the color-blind value that emerged from the race-based equality cases in the 1950s serve as a model for a sex-blind constitutional norm in the gender discrimination cases?<sup>7</sup>

Now comes the civil rights movement for LGBT equality and freedom. Today's marriage equality advocates have made explicit reference to the constitutional paradigms forged in race-based cases, typically claiming that if laws prohibiting interracial marriage violate the Constitution's equal protection clause, so too do laws prohibiting same-sex marriage. This analogy has been fiercely resisted in some quarters of the black community not only for homophobic or other bad reasons, but out of a concern that racism and homophobia are too different from one another to bear the comparison. My aim here is not to equate the two, but rather to associate the suffering and injustice endured by the gay community to the experiences of others. To this end the book offers a juxtaposition rather than an analogy between these two periods and civil rights movements in which marriage figured so prominently in the political conditions of belonging. The project is one of contextualization of the problem—as Edward Said put it: “to give greater human scope to what a particular race or nation suffered, to associate that experience with the sufferings of others.”<sup>8</sup> What we can take away from this juxtaposition is a continuity and a discontinuity, both of which are important for the purposes of thinking across movements and within movements that focus their liberation strategies on formulations of freedom and equality that necessarily entail state regulation or governance.

As for the similarities, we can learn from this association something important about 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 a shift in status from *outlaws* to *inlaws*, from living outside the law to finding their private lives organized in both wonderful and perilous ways by law. Being



subject to legal regulation is something to think carefully about. The experiences of the freedmen suggest some caution with respect to how rights—and specifically a right to marriage—can both burden you and set you free. A desire for rights should come with an awareness of the costs, constraints, and hidden agendas they bring with them.

But the dissimilarities are compelling and instructive as well; the recent successes of the drive for marriage equality illuminate how you can pull the sex out of homosexuality and thereby win major civil rights gains. The gay rights movement has rebranded itself as no longer about the right to non-normative sex and sexuality but rather about the dignity of gay families and kin who share a normative similarity to heterosexuals and the nuclear family. This rebranding campaign reached its nadir when the cause for same-sex marriage was taken up, if not taken over, by David Boies and Ted Olson, the mainstream, heterosexual, legal “dream team” who went all-in with a legal strategy that emphasized the dignity of marriage and of gay couples that deserved to be married. By contrast, people of color, particularly African Americans, have been unable to separate themselves from an indelible moral identity that licenses their subordinate social, legal and political status. In ways that few of us would have imagined only a dozen years ago, homosexuals have escaped the curse of Sodom much more readily and successfully than have African Americans the curse of Ham.

But more than this, the stories in this book aim to illuminate how the same-sex marriage movement is itself racialized, and that this racialization has redounded to the benefit of the gay rights movement while contributing to and reinforcing the ongoing subordination of people of color and the diminishing reproductive rights of women. Whether by deliberate strategy or unfortunate tragedy, a legal-political plot that rests on isolating sexual orientation as a singular characteristic of human identity that deserves special constitutional protection risks disaggregating sexualized from racialized subordination by equating homosexuality with whiteness. This is a troublesome consequence of modern gay rights politics not only for the way it erases people of color who may identify

as lesbian, gay, or queer,<sup>9</sup> but also for the ways in which claims to rights for same-sex couples and families are based on appeals to their inherent dignity and decency, thereby distinguishing them from other undeserving, dysfunctional, or immoral sexual or kin formations that are almost always understood in racial terms. The book's association of today's same-sex marriage movement to the role of marriage in freedom for former slaves "does not mean a loss of historical specificity, but rather it guards against the possibility that a lesson learned about oppression in one place will be forgotten or violated in another place or time."<sup>10</sup> The stories in this book aim to unpack how the implicit whiteness of normative homosexuality has delivered a racial endowment to the same-sex marriage movement that has most certainly helped the cause of marriage equality, but sometimes at the expense of the rights and interests of both normative and non-normative families of color.

Gays and lesbians have celebrated the ways in which we have developed innovative families and relationships, combining friendship, kinship, love, and romance in ways that far exceed the narrow boundaries of the marital couple or nuclear biological family. Just as the black community has experienced acute societal, legal, and political judgment for maintaining families that are considered "dysfunctional," "unhealthy," or "pathological," so too the LGBT community should be ready to reap similar scorn for the non-traditional families we have forged. Gaining the right to marry risks bringing with it the expectation that all in the community conform to traditional notions of coupling, and can have the unintended consequence of making the lives of lesbian and gay people who aren't in traditional relationships more precarious, not less.

This book explores several contexts in which marriage figured centrally in the transition to greater freedom for formerly enslaved people in the nineteenth century. The parables of freedom herein are in many ways cautionary tales for today's marriage rights movements. Most of these stories contain versions of the message "be careful what you wish for," but they also teach us how rights-bearing subjects are almost inevitably shaped by the very rights they bear, most often in ways that

reinforce stubbornly durable racialized gender norms and stereotypes. In fact, racial and gender norms are often braided together, deriving their meaning and force from each other, such that it often makes sense to speak of gender stereotypes as racialized, and vice versa.

Where possible I tell these stories through the voices of newly freed people themselves. In search of their words describing what it meant to be freed and why marriage was such an important part of their new lives, I spent months opening musty boxes containing old court records and other papers in Vicksburg and Jackson, Mississippi; Raleigh and Oxford, North Carolina; Nicholasville, Kentucky; Morrow, Georgia; and the National Archives in Washington, D.C. When I gently opened up the yellowed packets containing black women's petitions for war widow pensions after their husbands had been killed fighting for the Union, out would fall a lock of hair, or a faded scrap of cloth cut from a wedding quilt. Most were signed with a shaky X since few of these women could write their own names and they were no doubt nervous submitting such formal documents to a government official. Sometimes there'd be a faded fingerprint, left behind by an inky hand when a woman gave over the signed document testifying to her marriage to the now-dead soldier, her husband. Their stories moved me in their own right, while also making me think in new ways about what it means to be free and more equal today.

Chapter 1 tells the story of marriage as bounty. In 1864 President Lincoln was having a terrible time raising enough troops to fight the Civil War. Despite his early reluctance, he finally came around to the idea that the war would be lost without enlisting black soldiers. The Emancipation Proclamation freed enslaved people in the rebel states on January 1, 1863, and made black men available to join the Union cause. But the people held in bondage in the four slave states that had remained loyal to the Union (Kentucky, Missouri, Maryland, and Delaware) were not covered by Lincoln's freedom proclamation. To entice enslaved men in those states into running away from their owners and joining the Union cause, they were promised not only their freedom from enslavement,

but that their wives and children would be freed as well. As a result, thousands of enslaved men ran away from their owners and volunteered for the Union army. The chapter explains how in Kentucky marriage was used as a kind of bounty that resulted in the wives and children of the men who took the deal being horribly abused by white Kentuckians who fervently clung to the slave system. Northern officials had little concern for the welfare of the families of the new black recruits—it was troops they wanted, and they used the promise of freedom for their families to lure them into military service. These women and children needed physical protection from their owners' lashes, but what they got were marriage rights—something that sounded noble and progressive on paper, but left them worse off than they'd been while enslaved. When these women's common law marriages rendered them subject to violent retribution for their "husbands'" enlistment in the Union army, the U.S. Congress decided that what they needed was more marriage rather than more protection from white violence. The enslaved men of Kentucky won their freedom as *soldiers*, while the women were liberated as *wives*. Neither would be allowed full citizenship rights until decades later. This story shows us how rights can be a cheap way to "do the right thing," buying the loyalty and sacrifice of an oppressed minority, but in ways that leave some members of that community more vulnerable than before they gained those new rights. The experiences of enslaved Kentuckians freed by marriage teach us something important about the durability of racial bigotry, but also illustrate how marriage can render women particularly vulnerable to public and private forms of violence when their subordinate racial and gender statuses amplify one another.

Chapter 2 tells the story of the intimate lives of enslaved people. While none of them could legally marry, many were married in "the eyes of god" and their community by clergy and other lay officials, and lived, while enslaved, as married couples. Others formed more fluid relations, "taking up" with each other—something more than dating and less than marriage—entering into trial marriages, or taking on more than one spouse. The many ways in which enslaved people formed intimate rela-

tionships may have been the result of the absence of formal legal marriage or the remnant of African customs, or perhaps were forged as an adaptation to the threat that at any moment their owners could break up their marriages and families by selling them away. Once they were freed, however, the multiplicity of their intimate relationships had to yield to one legal form: monogamous marriage, and those who “kept up the old ways” paid a dear price for doing so. In this sense, gaining the right to marry resulted in marriage “occupying the field,” as we say in law, crowding out all other kinds of relationships as illegitimate, immoral, and unworthy of legal and social contempt. This chapter offers today’s same-sex marriage movement a lesson in how gaining a legal right to marry may result in the marginalization of other non-marital kinds of relationships—many of which are quite common in both the African American and LGBT communities.

In chapter 3 the experiences of marriage rights for formerly enslaved people shows us, in ways that have a clear resonance today, how gaining a right to marry can quickly collapse into a compulsion to marry. While the Civil War was ongoing, many of the Northern military and civilian agents who were assigned to assist the black people fleeing enslavement felt strongly that marriage would help “civilize” their charges and would do much to repair the “degraded moral character” they found in them. “One great defect in the management of the negroes down there was, as I judged, the ignoring of the family relationship,” observed a Freedmen’s Bureau agent in late 1863. “My judgement is that one of the first things to be done with these people, to qualify them for citizenship, for self-protection and self-support, is to impress upon them the family obligations.”<sup>11</sup>

Newly freed men and women quickly found that the importance of the marital relation was often “impressed” upon them through arrest and prosecution for violating the state’s criminal laws prohibiting fornication, adultery, and bigamy. Many of them found themselves married without their knowledge, while others knew little of the laws of marriage. When their relationships ended and they separated from one