

Reframing Marriage equality as death equality

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A provocation: what would it mean to reframe the marriage movement as a crusade for death rights and death equality?

Even though weddings are the performative centerpiece of the activism that successfully challenged the Defense of Marriage Act (DOMA), the ground-breaking case of *Windsor vs. The United States* (2013) is one about death rights. When Edie Windsor's partner of over forty years, Thea Spyer, passed away, Windsor found herself in a precarious position; Spyer had left Windsor her estate, but was not considered to be a "surviving spouse," the term spouse referring "only to a person of the opposite sex who is a husband or a wife" under DOMA.[1] These legal restrictions famously cost Windsor \$300,000 more in inheritance taxes than she would have been charged if she and Spyer had been in a heterosexual marriage. In other words, the "price" of being LGBT in the United States had a concrete figure, which Spyer's attorneys used to make their case.[2]

Ogerbefell vs Hodges (2015), which effectively made gay marriage legal across all fifty states, centered around questions of death as well. James Ogerbefell was denied the right to be listed as partner John Arthur's surviving spouse upon Arthur's death. This denial not only renders the two "strangers even in death," but also makes it impossible for Ogerbefell to receive survivors' benefits as heterosexual widowers or widows would.[3] Additional plaintiffs in the case joined in order to protect their families in the event of unforeseen death or injury. Without legalized same-sex marriage, both partners could not be equally considered parents to their adopted children, leaving the family unit vulnerable. Similar situations are brought by plaintiffs in the twenty-seven other cases brought before the courts regarding same-sex marriage.[4]

Viewing *Windsor v. the United States* through the lens of death exposes marriage equality as about determining legal kinship for purposes of inheritance. In this light, the conservatism of marriage is revealed, as the passing down of property and wealth is revealed to be at the heart of the institution. *Ogerbefell v. Hodges* adds the dimension of protection in life, and the concerns regarding death or injury that acutely effect the living, particularly minor children. When we remove the performative apparatus of the wedding, we are left with raw kinship ties. Although the wedding is designed to make these ties public, durable, and communal, these ties become exposed in the face of loss, when we strip them down to questions of bodies and access.

The recognition of kinship relations is a legal process in the United States. Legalized kinship matters when it dictates who has access to the physical body of another person, whether that body is living, injured, or dead; romantic partner, blood relation, or dependent child. Despite

the legalization of marriage in individual states, same-sex couples must have a durable power of attorney in addition to multiple (and costly) other documents enabling each other access to not only each other's finances but also to their bodies in the case of injury or death.[5] Because, according to U.S. Supreme Court Case *De Sylva v. Ballentine* (1956), "there is no federal law of domestic relations," the jurisdiction of many of these types of (non-tax related) claims belongs to the individual state (and thus the slow state-by-state legalization popping up across the country).[6] Marriage equality has not completely solved questions of equity for all forms of coupled kinship in the United States. Coupled kinship is by no means the only kind of kinship. Kinship emerges when adults come together to care for loved ones, themselves and others, both adults and minors, which may or may not involve cohabitation, monogamy, biological offspring, sexual intimacy, etc. Marriage precludes many of these kin relations that become important when we think of end-of-life concerns.

Who has the right to access the deceased and determine burial and memorial practice? The ability to call a group of people a family and have them treated that way legally (not just taxation, but also mobility and travel, health benefits, etc.) is at stake – the definition of family and how it relates to wealth, capital, and access to resources. During the AIDS crisis, bodies and their vulnerability to state neglect were at the heart of queer activism. Bodies and their vulnerability to state violence/genocide are at the root of the contemporary Black Lives Matter movement. When viewed through the lens of death rights, gay marriage has the potential to put bodies and kinship ties back at the center of politics. This is where queer politics have the potential to be truly revolutionary and to work in concert with human inequality as a whole.

After the massacre at the Pulse Nightclub in Orlando, where forty-nine men and women were killed, primarily LGBTQ+ people of color, intersectional questions of death rights are tantamount. When queer folks utilize stage names, drag personas, and other non-legalized forms of identification, including but not limited to gender identity, the precarity of legal frameworks to dictate not only access to bodies but also information, demonstrates that LGBTQ+ people continue to live their authentic lives somewhere outside of legal limits. When homophobia and racism cut short the lives of LGBTQ+ people, these folks have generally not made the extra legal preparations to ensure that their chosen families and extra-legal kinship networks can carry out their last wishes. Tackling the questions of equitable kinship and death rights widens the umbrella of marriage politics. A focus on death rights and equality places gun control, poverty and discrimination, and criminal justice at the center of LGBTQ+ civil rights. Our activism must continue to include, but also be fought beyond, the courthouse and the ballot box.

If there's anything that over a decade of research into queer funerary ritual and mourning has taught me, it's that queer folks are especially adept at transforming grief and rage into creative and often efficacious activism and social justice work.[7] Strategies like the die-in, for instance, have been utilized in various forms by a host of other social justice movements. This, coupled with reports of generosity surrounding funeral and memorial efforts for the victims of the Pulse Orlando massacre, leads me to believe that LGBTQ+ politics will not be guided by the wedding, but by the funeral.

NOTES

1. *Windsor v. The United States*, 570 U.S. 2 (2013).
2. Of course, this figure does not even begin to address the psychological price of fulfilling the role of abject within a normative society, a price which is realized differently due to a host of other intersecting identities, and which would be impossible to calculate in financial terms.
3. *Ogerbefell v. Hodges* 576 U.S. 5 (2015)
4. Many thanks to my colleague Katherine Mason for extended discussion of this matter. For more on the protection of children vis-a-vis same-sex marriage see Katherine Mason, "Reproductive Futurism and Same-Sex Marriage" (2016, unpublished at this time)
5. The high price-point of legal services renders some same-sex unions more protected than others, exposing poverty as an essential barrier to LGBTQ+ equality.
6. *De Sylva v. Ballentine*, 351 U. S. 570 (1956).
7. This is a well-documented phenomenon, particularly in scholarship around AIDS activism. See Douglas Crimp, *Melancholia and Moralism* (2002), Deborah Gould, *Moving Politics: Emotion and ACT UP's Fight Against AIDS* (2009), Benjamin Shepard, *Queer Political Performance and Protest* (2010).

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