PUBLIC VOWS

A HISTORY OF MARRIAGE AND THE NATION

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INTRODUCTION

Marriage is like the sphinx—a conspicuous and recognizable monument on the landscape, full of secrets. To newcomers the monument seems awesome, even marvelous, while those in the vicinity take its features for granted. In assessing matrimony's wonders or terrors, most people view it as a matter of private decision-making and domestic arrangements. The monumental public character of marriage is generally its least noticed aspect. Even Mae West's joke, "Marriage is a great institution . . . but I ain't ready for an institution yet," likened it to a private asylum. Creating families and kinship networks and handing down private property, marriage certainly does design the architecture of private life. It influences individual identity and determines circles of intimacy. It can bring solace or misery—or both. The view of marriage as a private relationship has become a public value in the United States, enshrined in legal doctrine. In 1944 the U.S. Supreme Court portended a momentous line of interpretation by finding that the U.S. Constitution protected a "private realm of family life which the state cannot enter."[1]

At the same time that any marriage represents personal love and commitment, it participates in the public order. Marital status is just as important to one's standing in the community and state as it is to self-understanding. Radiating outward, the structure of marriage organizes community life and facilitates the government's grasp on the populace. To *be* marriage, the institution requires public affirmation. It requires public

knowledge—at least some publicity beyond the couple themselves; that is why witnesses are required for the ceremony and why wedding bells ring. More definitively, legal marriage requires state sanction, in the license and the ceremony. Even in a religious solemnization the assembled guests know to expect the officiating cleric's words, "By the authority vested in me by the state of . . . I now pronounce you husband and wife."

In the marriage ceremony the public recognizes and supports the couple's reciprocal bond, and guarantees that this commitment (made in accord with the public's requirements) will be honored as something valuable not only to the pair but to the community at large. Their bond will be honored even by public force. This is what the public vows, when the couple take their own vows before public witnesses. The public sees itself and its own interest reflected in the couple's action.[2]

In the form of the law and state enforcement, the public sets the terms of marriage, says who can and cannot marry, who can officiate, what obligations and rights the agreement involves, whether it can be ended and if so, why and how. Marriage prescribes duties and dispenses privileges. The governmental apparatus in the United States has packed into marriage many benefits and obligations, spanning from immigration and citizenship to military service, tax policy, and property rules. Husbands and wives are required to care for and support each other and their children. Social Security and veterans' survivors' benefits, intestate succession rights and jail visitation privileges go to legally married spouses. Even though state governments, not federal authorities, have the power to regulate marriage and divorce, a 1996 report from the U.S. General Accounting Office found more than *one thousand* places in the corpus of federal law where legal marriage conferred a distinctive status, right, or benefit.[3]

From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy, sprouting repeatedly as the nation took over the continent and established terms for the inclusions and exclusion of new citizens. Political authorities expected monogamy on a Christian model to prevail—and it did, not only because of widespread Christian faith and foregoing social practice, but also because of positive

and punitive laws and government policy choices. Political and legal authorities endorsed and aimed to perpetuate nationally a *particular* marriage model: lifelong, faithful monogamy, formed by the mutual consent of a man and a woman, bearing the impress of the Christian religion and the English common law in its expectations for the husband to be the family head and economic provider, his wife the dependent partner. Because mutual consent was intrinsic to it, this form of marriage was especially congruent with American political ideals: consent of the parties was also the hallmark of representative government. Consent was basic to both marriage and government, the question of its authenticity not meant to be reopened nor its depth plumbed once consent was given.

Public preservation of marriage on this model has had tremendous consequences for men's and women's citizenship as well as for their private lives. Men and women take up the public roles of husbands and wives along with the private joys and duties. These roles have been powerful, historically, in shaping both male and female citizens' entitlements and obligations. Molding individuals' self-understanding, opportunities, and constraints, marriage uniquely and powerfully influences the way differences between the sexes are conveyed and symbolized. So far as it is a public institution, it is the vehicle through which the apparatus of state can shape the gender order.

The whole system of attribution and meaning that we call *gender* relies on and to a great extent derives from the structuring provided by marriage. Turning men and women into husbands and wives, marriage has designated the ways both sexes act in the world and the reciprocal relation between them. It has done so probably more emphatically than any other single institution or social force. The unmarried as well as the married bear the ideological, ethical, and practical impress of the marital institution, which is difficult or impossible to escape. Karl Llewellyn, a legal theorist of the mid-twentieth century, was referring to marriage when he observed, "The curious feature of institutions is that to society at large they are a static factor, whereas to the individual they are in first instance dynamic. Society they hold steady: they are the received pattern of its organization and its functioning. The individual . . . is moulded

dynamically by and into them." Llewellyn emphasized that the institution of marriage was "a device for *creating* marital going concerns."[4]

Whether or not marriage is as natural as is often claimed, entry to the institution is bound up with civil rights. Marriage is allowed or disallowed by legislators' and judges' decisions. The separate states from Maine to California, which have the power to regulate marital institutions as part of their authority over the local health, safety, and welfare, determine who gains admittance. Consequently, marriage has also been instrumental in articulating and structuring distinctions grouped under the name of "race." In slaveholding states before the Civil War, slaves had no access to legal marriage, just as they had no other civil right; this deprivation was one of the things that made them "racially" different. Long after the era of slavery, a white person and an African American did not have the civil right to marry each other in the majority of states (not only in southern states). A white and an Asian wishing to marry in many western states found themselves similarly tabooed. Marriage law thus constructed racial difference and punished (or in some instances, more simply refused to legitimize) "race mixture." Sixteen states still considered marriage across the color line void or criminal as recently as 1967, when the U.S. Supreme Court overruled them.[5] It is striking, too, as the history in the following chapters will unfold, that the marital nonconformists most hounded or punished by the federal government were deemed "racially" different from the white majority. They were Indians, freed slaves, polygamous Mormons (metaphorically nonwhite), and Asians. Prohibiting divergent marriages has been as important in public policy as sustaining the chosen model.

By incriminating some marriages and encouraging others, marital regulations have drawn lines among the citizenry and defined what kinds of sexual relations and which families will be legitimate. On the contemporary scene, same-sex couples have made their exclusion conspicuous. By contesting their deprivation, they have thrown a spotlight on marriage as a matter of civil rights and public sanction. Excluded or policed groups such as same-sex couples (or, in the past, slaves, or Asians who believed "proxy" marriages valid, or native Americans who had non-Christian traditions) have readily understood that they, as minorities, may

have to struggle for equal status on the terrain of marital regulation. The majority, meanwhile, can parade the field, taking public affirmation for granted. Aspiring minority groups (ex-slaves during Reconstruction are a good example) have often tried to improve their social and civil leverage with conventional marriage behavior, recognizing that the majority has an investment in the sanctity of marital roles, whoever holds them.[6]

No modern nation-state can ignore marriage forms, because of their direct impact on reproducing and composing the population. The laws of marriage must play a large part in forming "the people." They sculpt the body politic. In a hybrid nation such as the United States, formed of immigrant groups, marriage becomes all the more important politically. Where citizenship comes along with being born on the nation's soil as it does here, marriage policy underlies national belonging and the cohesion of the whole. Therefore the federal government has incorporated particular expectations for marriage in many initiatives, and especially in citizenship policies, even though there is no federal power to regulate marriage directly (except in federal territories). At least three levels of public authority shape the institution of marriage. The immediate community of kin, friends, and neighbors exercises the approval or disapproval a couple feels most intensely; state legislators and judges set the terms of marriage and divorce; and federal laws, policies, and values attach influential incentives and disincentives to marriage forms and practices.[7] The United States has shown through its national history a commitment to exclusive and faithful monogamy, preferably intraracial. In the name of the public interest and public order, it has furthered this model as a unifying moral standard.

Secular rather than religious authorization of marriage has been a consistent tradition in the United States. This was not inevitable, but rather a latter-day outcome of a specific history of church-state conflict in Christian Europe. Following upon the birth of Christianity, the Catholic Church had to endeavor for far more than a millennium to put the norm of faithful, lifelong monogamy in place and to bring its adherents' marital behavior under ecclesiastical administration; then European monarchs succeeded for the most part in wresting this regulatory control from the Church.[8] Kings of would-be nations in England and Europe

sparred with the Church for three centuries for control over marriage because they saw this power as decisive for the social order. Typically, founders of new political societies in the Western tradition have inaugurated their regimes with marriage regulations, to foster households conducive to their aims and to symbolize a new era—whether in colonial Virginia, revolutionary France, the breakaway republic of Texas, or the unprecedented Bolshevik system in the Soviet Union.[9] Modern sovereigns generally want to prescribe marriage rules to stabilize the essential activities of sex and labor and their consequences, children and property.

Because the United States established no national church, but said it would separate church and state and observe religious tolerance, state control flourished. The author of the preeminent nineteenth-century legal treatise on marriage and divorce showed his commitment to state authorization by calling marriage a "civil status"; he dismissed as "too absurd to require a word of refutation . . . the idea that any government could, consistently with the general well-being, permit this institution to become merely a thing of bargain between men and women, and not regulate it." The Christian religious background of marriage was unquestionably present and prominent. It was adopted in and filtered through legislation.[10] For Americans who envisioned marriage as a religious ceremony and commitment, the institution was no less politically formed and freighted; yet they were unlikely to object to secular oversight when both the national and the state governments aligned marriage policies with Christian tenets. Echoing and reinforcing the religious dictates of "Christian civilization" in the United States, public rules on marriage have had an especially large potential to influence citizens' views. At the same time, civic decision-making has remained paramount. State legislators altering the terms of marriage have often found cover in divine mandate or the law of nature—when nullifying marriages that crossed the color line, or creating unequal statuses for husbands and wives, for example—yet they have not hesitated to exercise their own jurisdiction.

Not only Christian doctrine but also the ancient common law of England deeply inflected the legal features of marriage in the United States. "Domestic relations" in the common law included the relative privileges

and duties of husbands and wives, employers and employees, and masters and slaves. Political ordering began in the household and influenced all governance and representation inside the household and out. Marriage itself served as a form of governance. In the longer Western political tradition on which the common law drew, a man's full civil and political status consisted of his being a husband and father and head of a household unit, representing himself and his dependents in the civic world. Wives and children did not represent themselves but looked to the male head of household to represent and support them, in return for which they owed their obedience and service. A man's headship of a family, his taking the responsibility for dependent wife and children, qualified him to be a participating member of a state.[11] The political tradition thus built on monogamous marriage; the two complemented each other.

Under the common law, a woman was absorbed into her husband's legal and economic persona upon marrying, and her husband gained the civic presence she lost. Marriage decisively differentiated the positions of husband and wife. The wife's marital dependency so compromised her ability to act for herself in public that single women, too, being potential wives, were often treated as lacking civic independence. Even though most American states supplanted the common law with their own legal codes by the early 1800s—and the social hierarchies represented in the common law were contested at every subsequent point—central assumptions about marriage, such as the essential unity of the married pair, continued to orient the minds of lawyers and statesmen and to flow into legal decisions and the culture at large. In the 1850s it was not surprising for an essayist to observe: "The husband acquires from the union increased capacity and power. He represents the wife in the political and the civil order." So many generations of statesmen regarded this model of marriage as a foundation of the American way of life that the influence of the common law extended into the mid-twentieth century. As recently as 1996, congressional debate on the Defense of Marriage Act reiterated long-lived official insistence on traditional marriage as a necessary pillar of the nation.[12]

The public face of marriage can be sought in the legal record, which reveals more than the letter of the law. The legal apparatus in the United

States, encompassing elections of legislators and judges, production and interpretation of legislation, methods of enforcement, achievement or failure of consensus about law's justice, and resort to the Constitution, has always strongly colored the political culture and social expectations.[13] Reading the legal record for cultural and social insights need not conflict with awareness that the law represents coercive power: quite the opposite. In shaping an institution like marriage, public authorities work by defining the realm of cognitive possibility for individuals as much as through external policing. Law and society stand in a circular relation: social demands put pressure on legal practices, while at the same time the law's public authority frames what people can envision for themselves and can conceivably demand.[14] Reflecting the majority consensus, legislators, judges, and most other public spokesmen in the history of the United States have shown remarkable concurrence on the basic outline of marriage as a public institution. Judges have reviewed but only very rarely have struck down legislators' enactments. When there has been conflict, the issue has usually been competition between federal and state-level authorities, not the elevated status of lifelong monogamy.

Yet challenges and disruptions have occurred. In recent decades they have proliferated. Marital behavior always varies more than the law predicts. Men and women inhabit their marital roles in their own ways, not always bending fully inside the circle of civil definitions, but bringing new understandings into the categories of "husband" and "wife." Unless the legal order is deeply hypocritical, however, the majority of the people conform more than they resist. By definition, in a representative government the majority do not feel coerced as they follow the marital model instigated by public authority. Dissidents or minority groupings *are* likely to feel the force of the law, while the majority absorb and mirror the force of moral regulation silently exerted by public symbols and governmental routines. The more that marriage is figured as a free and individual choice—as it is today in the United States—the less the majority can see compulsion to be involved at all. Like the sphinx with its riddles, the institution of marriage, shadowing the public landscape with its monumental bulk, confounds as much as it shows.

ABBREVIATIONS USED IN THE NOTES

AAG	Assistant Adjutant General
AAAG	Acting Assistant Adjutant General
AHR	*American Historical Review*
AQ	*American Quarterly*
BRFAL	Bureau of Refugees, Freedmen, and Abandoned Lands
CG	*Congressional Globe*
CR	*Congressional Record*
Exec. Docs.	*Executive Documents*
FS	*Feminist Studies*
H.R.	House of Representatives
JAH	*Journal of American History*
LJ	*Law Journal*
LR	*Law Review*
P	Press
Sen.	Senate, Senator
U	University
USCT	U.S. Colored Troops
WMQ	*William and Mary Quarterly,* 3d ser.

In citations of congressional materials the number of the Congress and the session is in the form 38/2, meaning 38th Cong., 2d sess.

NOTES

Introduction

1. *Prince v. Massachusetts,* 321 U.S. 158, at 166 (1944).

2. See Maura Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage," *North Carolina LR,* 75 (1997), esp. 1571–75, on Hegel's view of the ethical bond between the marrying couple and the public.

3. Report to the Honorable Henry J. Hyde, chairman, Committee on the Judiciary, House of Representatives, "The Defense of Marriage Act," dated Jan. 31, 1997, Federal Document Clearing House, General Accounting Office, GAO/OCG 97–16, 1997 WL 67783. Most of the myriad references stem from sections on Social Security, federal income tax and estate and gift taxes, and veterans's benefits.

4. Karl M. Llewellyn, "Behind the Law of Divorce," part 2, *Columbia LR,* 33 (1933), 277.

5. *Loving v. Virginia,* 388 U.S. 1 (1967), 6, n. 5.

6. Martha Minow, "We, the Family: Constitutional Rights and American Families," *JAH,* 74:3 (Dec. 1987), 959–83; see also Lee Teitlebaum, "Family History and Family Law," 1985 *Wisconsin LR,* 1135–48; Nayan Shah, "Paradoxes of Inclusion and Exclusion in American Modernity: Formations of the Modern Self, Domicile, and Domesticity," paper prepared for the OAH-NYU conference Internationalizing the Study of American History, sponsored by the Organization of American Historians and New York University, July 4–7, 1999, Florence, Italy.

7. On state-level marital policies during the nineteenth century, Michael Grossberg's *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, U of North Carolina P, 1985) is indispensable; Jill Elaine Hasday, "Federalism and the Family Reconstructed," *UCLA LR,* 45:5 (June 1998), 1297–1400, confirms the federal role from a contemporary standpoint.

8. See Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge and New York, Cambridge UP, 1988), 25–27, 34–35, 194–206; John R. Gillis, *For Better, For Worse: British Marriages, 1600 to the Present* (New York and London, Oxford UP, 1985), 139–41; Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (Chicago, U of Chicago P, 1989), 15–27.

9. George Elliot Howard, *A History of Matrimonial Institutions,* 3 vols. (New York, Humanities P, 1964: orig. 1904), summarizes the founding marital regulations of all the colonies and states. See, on Virginia, Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs* (Chapel Hill, U of North Carolina P, 1996), 91–93; on Texas, Hans W. Baade, "The Form of Marriage in Spanish North America," *Cornell LR,* 61 (Nov. 1975), 9–12; on the French and the Bolshevik revolutions, Phillips, *Putting Asunder,* 208–09, 535–36.

10. Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce,* vol. 1, 4th ed. (Boston, Little Brown, 1864), 2. See Carol Weisbrod, "Family, Church, and State: An Essay on Constitutionalism and Religious Authority," *Journal of Family Law,* 26:4 (1987–88), 741–70; Phillips, *Putting Asunder,* 134–35, 159; Howard, *Matrimonial Institutions,* 2:129; Grossberg, *Governing the Hearth,* 66.

11. See Susan Moller Okin, *Women in Western Political Thought* (Princeton, Princeton UP, 1979); Carole Pateman, *Sexual Contract* (Stanford, Stanford UP, 1988); Brown, *Good Wives,* 126–27; Toby L. Ditz, "Ownership and Obligation: Inheritance and Patriarchal Households in Connecticut, 1750–1820," *WMQ,* 47:2 (April 1990), 235–65.

12. Quotation from "Marriage and Divorce," *Southern Quarterly Review,* 26 (1854), 351. On continuities see Norma Basch, "Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America," *FS,* 5:2 (Summer 1979), 346–66; Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown LJ,* 82:7 (Sept. 1994), 2127–2211; Christopher Tomlins, "Subordination, Authority, Law: Subjects in Labor History," *International Labor and Working-Class History,* 47 (Spring 1995), 56–90; Defense of Marriage Act debate in *CR* 104/2, vol. 142, no. 102, July 11, 1996.

13. See Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, Harvard UP, 1984); Michael Grossberg, "Institutionalizing Masculinity: The Law as a Masculine Profession," in *Meanings for Manhood,* ed. Mark C. Carnes and Clyde Griffen (Chicago, U of Chicago P, 1990), 133–51.

14. I am indebted to Philip Corrigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (London, Basil Blackwell, 1985), e.g., 4–5, 198–200, for their analysis of public authorities' shaping of a moral order; see also William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, U of North Carolina P, 1996), esp. 152–56, 216. On the relation between law and society, see Robert Gordon, "Critical Legal Histories," *Stanford LR,* 57 (1984); Hendrik Hartog, "Pigs and Positivism," *Wisconsin LR,* 4 (July 1985), esp. 932–34; Tomlins, "Subordination."