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.

1

AN ARCHAEOLOGY OF AMERICAN MONOGAMY

In the beginning of the United States, the founders had a political theory of marriage. So deeply embedded in political assumptions that it was rarely voiced as a theory, it was all the more important. It occupied the place where political theory overlapped with common sense. Rather than being "untutored," or "what the mind cleared of cant spontaneously apprehends," Clifford Geertz has pointed out, common sense is "what the mind filled with presuppositions . . . concludes." Kinship organization, property arrangements, cosmological and spiritual beliefs give rise to common sense, so that it varies from culture to culture.[1] The common sense of British colonials at the time of the American Revolution was Christian; Christian common sense took for granted the rightness of monogamous marriage. Moral and political philosophy (the antecedent of social science) incorporated and purveyed monogamous morality no less than religion did.[2] Learned knowledge deemed monogamy a God-given but also a civilized practice, a natural right that stemmed from a subterranean basis in natural law.

Yet at that time, Christian monogamists composed a minority in the world. The predominance of monogamy was by no means a foregone conclusion. Most of the peoples and cultures around the globe (so recently investigated and colonized by Europeans) held no brief for strict monogamy. The belief systems of Asia, Africa, and Australia, of the Moslems around the Mediterranean, and the natives of North and South

America all countenanced polygamy and other complex marriage practices, which British and European travel writings on exotic lands recounted with fascination. Anglo-America itself was set down in the midst of polygamist and often matrilineal and matrilocal cultures. No doubt Christians in Britain, Europe, and America at the time thought monogamy was a superior system, but it had yet to triumph.

As a result, while no one involved in founding the new nation would have disputed that Christian marriage should underpin the society, political thinkers and moral philosophers at the time were conscious of monogamy as a system to be justified and advocated. European political theorizing had long noted that legal monogamy benefited social order, by harnessing the vagaries of sexual desire and by supplying predictable care and support for the young and the dependent. The republican theory of the new United States assumed this kind of utilitarian reasoning and went beyond it, to give marriage a political reason for being. From the French Enlightenment author the Baron de Montesquieu, whose *Spirit of the Laws* influenced central tenets of American republicanism, the founders learned to think of marriage and the form of government as mirroring each other.[3] They aimed to establish a republic enshrining popular sovereignty, ruled by a government of laws, and characterized by moderation. Their Montesquieuan thinking tied the institution of Christian-modeled monogamy to the kind of polity they envisioned; as a voluntary union based on consent, marriage paralleled the new government. This thinking propelled the analogy between the two forms of consensual union into the republican nation's self-understanding and identity.

Although the details of marital practice varied widely among Revolutionary-era Americans, there was a broadly shared understanding of the essentials of the institution. The most important was the unity of husband and wife. The "sublime and refined . . . principle of union" joining the two was the "most important consequence of marriage," according to James Wilson, a preeminent statesman and legal philosopher. The consent of both was also essential. "The agreement of the parties, the essence of every rational contract, is indispensably required," Wilson said in lectures delivered in 1792. He saw mutual consent as the hallmark

of marriage—more basic than cohabitation. Everyone spoke of the marriage *contract*. Yet as a contract it was unique, for the parties did not set their own terms. The man and woman consented to marry, but public authorities set the terms of the marriage, so that it brought predictable rewards and duties. Once the union was formed, its obligations were fixed in common law. Husband and wife each assumed a new legal status as well as a new status in their community. That meant neither could break the terms set without offending the larger community, the law, and the state, as much as offending the partner.[4]

Both the emphasis on consent and the principle of union seamlessly adapted Christian doctrine to Anglo-American law. Even before the Protestant Reformation, the Church had made consent more important than consummation in validating marriage. The legal oneness of husband and wife derived from common law but it matched the Christian doctrine that "the twain shall be one flesh," having exclusive rights to each others' bodies. James Wilson noted this congeniality. Christian doctrine expected heterosexual desire to be satisfied exclusively within marriage and so demanded sexual fidelity of both partners. The Bible also made the husband the "head" of his wife—his wife's superior—as Christ was head of the church. In the spiritual domain of immortality of the soul, however, Christianity equalized wives and husbands; that did not end marital hierarchy, but it required respect for the wife's position. Anywhere on the wide and shifting spectrum of Protestantism in the early republic, from deism to Anglicanism, these basic Christian beliefs about marriage were in place.

As Wilson emphasized, the common law turned the married pair legally into one person—the husband. The husband was enlarged, so to speak, by marriage, while the wife's giving up her own name and being called by his symbolized her relinquishing her identity. This legal doctrine of marital unity was called *coverture* and the wife was called a *feme covert* (both terms rendered in the old French still used in parts of English law). Coverture in its strictest sense meant that a wife could not use legal avenues such as suits or contracts, own assets, or execute legal documents without her husband's collaboration. Nor was she legally

responsible for herself in criminal or civil law—he was. And the husband became the political as well as the legal representative of his wife, disenfranchising her. He became the one *full* citizen in the household, his authority over and responsibility for his dependents contributing to his citizenship capacity.

The legal meaning of coverture pervaded the economic realm as well. Upon marriage a woman's assets became her husband's property and so did her labor and future earnings. Because her legal personality was absorbed into his, her economic freedom of action was correspondingly curtailed. This was basic to the economic bargain of marriage, essential to marital unity, and preeminent in daily community life. The husband gained his wife's property and earning power because he was legally responsible to provide for her (as well as for himself and their progeny). The wife in turn was obligated to give all her service and labor to her husband. By consenting to marry, the husband pledged to protect and support his wife, the wife to serve and obey her husband. The body of marriage was understood to rest on this economic skeleton as much as on sexual fidelity.

Because marriage and the state both were understood to be forms of governance—of the husband over the wife, the ruler over the people—in the sixteenth and seventeenth centuries it was easy to think of them analogously. Shakespeare drew on this accepted rhetoric in *The Taming of the Shrew*. Kate, the title character, not only became chastened and reformed by the end of the play, but also advised other recalcitrant wives to obey their husbands:

> Such duty as the subject owes the prince
> Even such a woman oweth her husband,
> And when she is forward, peevish, sullen, sour
> And not obedient to his honest will,
> What is she but a foul contending rebel
> And graceless traitor to her loving lord?[5]

Kate justified wifely obedience by reciting the many benefits and protections a husband was obliged to give to his wife, including laboring to support her. Marriage governed the wife, but it also governed the husband. Like a good prince, a husband had to behave in certain ways to deserve his name and was not an unconstrained wielder of power.

John Winthrop, the leader of the Massachusetts Bay colony, similarly used an analogy between marriage and secular government when he wanted to defend the power of the ruling magistrates over the restive colonial populace in the 1630s. He maintained that in both marriage and government, freedom of choice coexisted with a corollary necessity to obey once the choice was made. "The woman's own choice" in marriage, he said, "makes such a man her husband; yet being so chosen, he is her lord, and she is to be subject to him, yet in a way of liberty, not of bondage." The freemen of the colony had likewise exercised choice in establishing the political order, by electing the magistrates—"it is yourselves who have called us to this office, and being called by you, we have an authority from God," he emphasized. Consequently, the freemen were obliged to bow to the magistrates' authority.[6]

At the time Massachusetts Bay was founded, European monarchs liked to claim that royal power over subjects was authorized by God, as much as the power of fathers and husbands over their families was.[7] Winthrop's emphasis on the freemen's consent showed him to be somewhat more liberal. Like monarchists, however, he saw marital governance and political governance as linked along the same continuum; they occupied the same spectrum and each contributed to the other's stability. The Puritan leaders of Massachusetts Bay so seriously expected family, church, and state authority structures to be interlocking that they made infractions against the Fifth Commandment, "Honor Thy Father and Thy Mother," part of their criminal law. They interpreted the commandment as a directive not only to children but also to wives to respect and obey their husbands, to congregants to respect and obey their ministers, and to subjects to respect and obey their king and magistrates. An unruly wife, congregant, or child threatened *all* lines of authority in church and state; one convicted of disrespect would suffer public punishment, being made to stand in the stocks wearing an identifying sign and reciting the Fifth Commandment.[8]