PUBLIC VOWS

A HISTORY OF MARRIAGE AND THE NATION

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MARRIAGE REVISED AND REVIVED

A phenomenon such as President William Jefferson Clinton—a leader who remained popular and in office despite public knowledge of his sexual strayings outside marriage—had never been seen in American politics before the 1990s. Public faithfulness to lifelong monogamy had previously been the rule. As recently as the 1960s, the fact of having been divorced kept Nelson Rockefeller from the Republican presidential nomination. Certainly, earlier presidents had been rumored to have had affairs and even to have fathered children out of wedlock, but the details remained covert and the accusations remained unproved. President Clinton's plural affronts to his wife were revealed in public as flamboyant instances of disrespect for the institution of marriage. His behavior was always controversial, and maligned by many long before he was impeached. Yet Clinton was not repudiated by the majority of the sovereign people for his infidelities.

Clinton was able to hang on to political credibility because of the judgment that his sexual transgressions were between him and his wife—a burden on his conscience but not one that affected his capacity to carry on as president. Even the most stalwart prosecutors of Clinton, such as Republican Congressman Henry Hyde of Illinois, maintained that sexual misconduct was not at issue, because "infidelity is a private act"—whereas the president's putting his hand on the Bible and swearing to tell the whole truth but failing to do so was a *public* act that threatened to under-

mine the rule of law. An implicit question shadowed the proceedings nonetheless: could a president untrue to his marriage vows keep his other vows to the public? The impeachment imbroglio could not have begun had not Clinton's unfaithfulness signaled an alarm to the nation. If monogamous fidelity is nowhere prescribed as a presidential duty, everyone knew, despite Hyde's demurral, that Clinton's sexual misconduct was inextricable from the prosecution's case. His insults to the institution of marriage flew in the face of long-held national values. His lying testified to his own presumption that such behavior in a president was inadmissible.

As compared to President Thomas Jefferson's, or Franklin Roosevelt's, or John Kennedy's rumored infidelities, however, Clinton's did become a matter of public record without toppling him because of the way the majority of the people understood marriage at the end of the twentieth century. Clinton attracted frequent condemnation for his moral failings and embarrassing lack of self-restraint. He escaped rejection, however, because the majority generously (or cynically) tolerated a wide range of behavior in couples, seeing husbands and wives as accountable principally to each other for their marital performance. The debacle of the impeachment forced explicit public cognizance of marital conduct as private and of marital infidelity as too common a failing to prompt civic excommunication.

The public forgiveness of Clinton's sexual misadventures can only be understood against the background of a generation's seismic shift in marriage practices. Drastic eruptions and reorientations began in the 1960s, with a sexual revolution that deserved that name. As much as 1950s tremors had given some hints, emancipatory claims based on sex burst out from the nourishment given by 1960s political movements. The New Left, the antiwar movement, black power, women's liberation, and gay liberation—along with the hippies and flower children who constituted themselves the counterculture—all fused dissident politics with purposeful cultural disobedience and devil-may-care hijinks centering on defiance of sexual norms.

Making sexual nonconformity a political statement, this younger generation enacted the bold propositions of their predecessors of the

1910s and 1920s, welcoming sexual initiatives from women as well as from men, demolishing sanctions on premarital relationships and attempting to do the same for extramarital and cross-racial sex. The mass marketing of the birth control pill enabled sex to be more decisively separated from pregnancy than ever before, severing a link in the chain between sex and marriage. Once dissidents opened the way, advertisers, merchandisers, and entertainers extended the sensational commercial possibilities for sex to the mass public. Sexual allusions, acts, and fantasies became ever more clearly exploitable commodities. Sexual behavior was transported into the civil sphere. Youth culture in the 1960s linked sexual disclosure with authenticity and brought into full light the equation between personal freedom and sexual freedom that had rumbled and murmured among "free lovers" and bohemians for at least a century. Same-sex love came "out" with this new exposure. Within a decade, sex between the unmarried no longer caused expressions of shock or dismay. Love became sufficient justification, and, increasingly, the search for personal fulfillment or pleasure sufficed to explain sexual indulgence.

The sexual revolution was not unique to the United States. Extraordinary shifts in sexual and marital practices and in the shape of households were taking place all over the industrialized world. A French demographer named Louis Roussel, looking at trends across North America, Europe, Japan, Australia, and the Soviet Union in the late 1980s, identified 1965 as a rare axis of change. In the subsequent fifteen years, a whole set of demographic indicators was reshuffled. Among the billion people encompassed in these nations, rates of formal marriages and of births tumbled; divorces and the proportion of births outside formal wedlock both shot up. The increases and decreases were substantial and even spectacular, often 50 percent or more. In Roussel's view, this quick and shared change in behavior marked a profound cultural transformation, which he called the "banalization" of previously condemned behavior.[1] His awkward neologism captured something. A person had formerly been cast outside the pale of ordinary respectability by living coupled but unmarried or by having children outside of marriage. Even divorce had cast a blight on personal character. But now

these behaviors were so common as to arouse no negative comment—or any comment at all.

In the United States, the number of unmarried-couple households recorded by the Census Bureau multiplied almost ten times from 1960 to 1998. It grew more than five times as fast as the number of households overall. The General Social Survey, conducted every year since 1972 by sociologists of the National Opinion Research Center at the University of Chicago, reported in 1999 that cohabitation had become the "norm" for men and women as their first form of heterosexual living (as well as for post-divorce unions). Almost two thirds of those born between 1963 and 1974 first cohabited, without marrying.[2]

At the twentieth century's close, marriage could no longer be considered the predictable venture it once had been. People living alone composed a quarter of all households in 1998. This reflected growth in the elderly population who were widows and widowers, but it also showed marriage itself losing ground. The proportion of adults who declined to marry at all rose substantially between 1972 and 1998, from 15 percent to 23 percent. The divorce rate rose more furiously, to equal more than half the marriage rate, portending that at least one in two marriages would end in divorce. In the Pacific states, which have tended to lead the nation, the ratio between divorces and marriages in the mid-1990s was closer to 7 to 10. Only 56 percent of all adults were currently married in the late 1990s, down from three quarters in the early 1970s. This general percentage, skewed by the majority white population, masked the markedly lower rate of current marriage among African American adults (about 40 percent). Yet men and women broke taboos in the way they married as well by not marrying—crossing the color line to choose each other. In the three decades after the *Loving v. Virginia* decision, mixed couples tripled from 2 percent to 6 percent of all marriages. Most of these had one black and one white partner, but the fastest growing type of mixed marriage was between an African American and another nonwhite partner.[3]

Along with the decline in marriage overall, the birth rate dropped, from more than 3.5 births per woman in 1960 to about 2 births per woman in the mid-1990s. The household without children, rather than

with children, was the norm (62 percent) in the United States. What had been typical adult status in the long past—married, with minor children—described barely more than one quarter of adults in 1999, the General Social Survey found. Children's parents were unmarried far more often than in the past; unmarried mothers accounted for almost one third of births in 1998, compared to about 5 percent in 1960. White women's rate of unmarried childbearing more than doubled after 1980. Black women's rate moved up only 2 percent during the same years, so that where their rate had been 4 or 5 times that of whites in 1960, in the late 1990s it was only about twice as high. As a result of both nonmarriage and divorce among women with children, one fifth of family-based households of whites were female-headed in the 1990s, as were almost three fifths of black families and almost one third of Hispanic families.

Women workers were edging toward being half of all workers at the end of the twentieth century. Not depending on men to provide their economic support, three quarters of all women were in the labor force, including more than 60 percent of married mothers of children under the age of six. The instability of marriages and marriage rates only partly explained this development. Vivid activists for women's rights burst onto the scene in the 1960s, and their efforts cascaded through the decades, deeply inflecting the trends in work and family life. Theorists of women's liberation in the 1960s and 1970s resurrected overt public critique of marriage while demanding equal rights and equal access in the public sphere. Feminists deepened public awareness of sex discrimination by inventing the concept of "sexism." Kate Millett's phrase "sexual politics" expressed the new sensitivity to power asymmetries between men and women, husbands and wives.[4]

Claiming that "the personal is political," feminist consciousness-raising groups transformed women's daily-life perceptions of the reason for their subordination from individual failings to systematic sexual inequality. The statement also intended to disrupt the assumption that "private" and "public" were really separate realms, because the association of women with private life reflected and helped to maintain inequality by making women marginal to the public arena, where recognized

achievement took place. Some feminists reappraised the public interest and public welfare involved in women's work of household care and childrearing, intending to make these visible and valued. Others revived the previous century's metaphor of the wife as implicit slave. They made a public issue of the social devaluation of unpaid household work, while also protesting against demeaning women by confining their talents to housekeeping, childminding, and personal services to men.[5]

Remaining legal constraints on wives in the business world unraveled. Because the 1964 Civil Rights Act included "sex" as an unwarranted basis for discrimination, and because judges were subsequently persuaded to reinterpret the fourteenth amendment's guarantees of "due process of law" and "equal protection of the laws" to apply to gender, feminist-instigated suits in the 1970s were able to dismantle the battery of sex distinctions in employment and education and—finally—jury service.[6] Social Security and military benefits became gender-neutral, so that they still gave special privilege to married couples, but made either spouse equally able to gain benefits for his or her partner. Sex difference was not wholly unseated as a valid legal category, however. Supreme Court decisions did not make the constitutional standard for scrutinizing sex classifications as strict as the standard for examining race, which was considered a "suspect" classification not to be employed without compelling reasons. Women's reproductive and childrearing roles counted heavily in keeping sex differentiation alive in the law—as well as in feminists' losing the battle to add an equal rights amendment to the Constitution.

State legislatures, too, contributed to the moral and legal reframing of marriage, by reforming divorce law. In less than two decades, beginning in the mid-1960s, the adversary principle in divorce was virtually eliminated. California first adopted "no-fault" divorce in 1969 and within four years at least thirty-six states had made it an option. By 1985 every state had fallen into step, not always under the rubric of "no-fault" but offering essentially the same thing, that a couple who had proven incompatible could end their marriage. By and large, these reforms were seen as procedural—along the lines of the American Bar Association

observations and recommendations much earlier to make law congruent with practice. They were not pushed by any particular social movement. Yet the innovation of no-fault divorce, or divorce on the ground of "irretrievable breakdown" of the marriage as defined by the spouses, indicated a major shift.[7] Earlier, the petitioner for divorce had to show that the other spouse failed to uphold state-defined obligations by committing adultery or desertion or another legislatively set deviation from marriage. No-fault divorce implied instead that the state should refrain from passing judgment on performance in an ongoing marriage and allow the partners to decide whether their behavior matched their own expectations; if it did not, the marriage could be legally dissolved.

Feminist activists did not speak for the no-fault principle but did press for subsequent reforms treating post-divorce arrangements such as child custody, child support, alimony. and the division of marital assets.[8] Custom if not legal doctrine for the preceding century had typically awarded custody of children of "tender years" to the mother, and expected child support from the father. Divorce reforms intended to see the roles of both husband and wife more gender-neutrally, with both able to be earners and caring parents. Most states revised their law and practice to make joint custody and child support from both parents the standard, to be tailored to each situation. Alimony was made gender-neutral as a result of a U.S. Supreme Court decision of 1979. In corollary, virtually every state took up the principle that the material assets belonging to either spouse should be seen as belonging to both when a marriage ended. Dividing marital property "equitably" between husband and wife upon divorce was meant to credit the unpaid work that the typical non-employed homemaker put into the partnership, and it also benefited ex-husbands who had been supported by their wives' earnings or assets.

These divorce reforms not only intended to treat men and women equally but also addressed the state's interest in securing adequate support after divorce for all family members. While state authorities were giving the initiative back to couples to say that their marriage was over, they did not opt out of the post-divorce provision arrangements. A judge had to approve the terms of economic support and care for children before a divorce could be made final. The reform of custody and support arrangements reiterated that the government's stake in marriage and divorce in the late twentieth century was economic far more than it was moral. Knowing the extent of women's wage-earning and hearing feminist demands for sex equity, legislatures and courts made post-divorce support obligations for children, which had earlier rested on the man of the family, reciprocal and formally gender-neutral. Amidst finger-pointing at the federal dollars expended on "welfare" (public assistance through the Aid to Families with Dependent Children program of the Social Security Act), Congress by 1971 designed new methods to get support from delinquent fathers when children were in their mothers' custody and receiving public assistance, and instituted incentives for welfare mothers themselves to earn wages. By 1988, welfare reforms placed responsibility for children's support on both parents.[9]

The state's interest in post-divorce support obligations converged with the phenomenon of unmarried cohabitation to produce a signal case in California in 1976, from which the term "palimony" was born. When the actor Lee Marvin and the former singer with whom he had been living for seven years broke up, she sued for support, averring that the couple had an oral agreement that entitled her to rely on his continued support. The trial court rejected her suit because their cohabitation included sex, and there was an older California precedent calling a contract for sexual services invalid—against public policy because it amounted to prostitution. On appeal, however, the California high court cited "the prevalence of nonmarital relationships in modern society and the social acceptance of them" as reason to move beyond the assumption that a cohabiting relationship including sex had to be "meretricious," meaning as unworthy as prostitution. Recognizing an implied economic contract between the pair (Marvin had agreed to support her, she to give up her career to keep house) and considering it actionable in court, the court therefore remanded the case for rehearing.

This case was rightly seen as a landmark, because it overcame the moral disapproval of extramarital sex enshrined in the earlier precedent and allowed the economic aspect of a cohabiting relationship to be

recognized legally. But the court carefully minimized its innovation. The opinion anticipated and deflected criticism, by denying that its approach would discourage marriage and by refusing to qualify the Marvins' arrangement as a common-law marriage (abolished in California in 1895). It explicitly did not grant to cohabitors any of the privileges of legal spouses under California's Family Law Act, and instead likened the implied contract between the Marvins to an agreement between business partners or joint venturers—whose economic arrangements had resort to the courts.

Michele Marvin (she used his name as if they were married) won a right but not much recompense, as it turned out. Upon rehearing, she won only $104,000 from the millionaire actor and when he appealed, her award was overturned. None of the divorce reforms of the 1970s and 1980s closed the gap that could yawn between equitable principle and the outcome of a given case, where the partner advantaged by money and power had every likelihood of getting the better deal. The Marvin case also predicted that in the courts, unmarried partners would be held accountable for the economic obligations without reaping the larger legal privileges of husband and wife.[10]

The idea that couples could redefine marriage on their own terms resounded appealingly through the 1970s nonetheless. To reinvent marriage, why not make it a malleable arrangement—extend its founding principle of consent between the couple to all the terms of the relationship, allowing the contractual side of the hybrid institution to bloom. This orientation could be seen in new toleration of extramarital sex in the 1970s. As unmarried cohabitation became more acceptable and lesbians and gay men defied "compulsory heterosexuality" (in Adrienne Rich's phrase), adultery also came out of the shadows. Earnest inquirers and hedonists assailed the hypocrisy of minimizing the commonness of adultery. Amidst handwringing over the meaning of sexual fidelity in mutual commitment, a rash of books burst out, bearing titles such as *Beyond Monogamy; Couplings and Groupings; The Extramarital Sex Contract; The Fragile Bond: Marriage Now; Marriage and Its Alternatives; Beyond Open Marriage; Loving Free;* and *The Love Contract: Handbook for a Lib-*

erated Marriage. If conventional respectability said that monogamou
fidelity was required by church and state as well as by love of one
spouse, many in the 1970s came to think that only the spouse really ma
tered. Neither "open marriage" nor "swinging" made much headwa
but the view that partners themselves were the judge of sexual fidelity i
their marriage became much more widespread.

A contractual emphasis in marriage appealed to feminists as the mai
hope for restructuring the institution to shed its history of inequalit
Some feminists recommended that couples devise their own private cor
tracts to substitute for the state's prescription of marital obligations. Ur
like earlier centuries' prenuptial contracts, which were intended t
stabilize the descent of rich couples' assets, feminist contracts in th
1970s set out the obligations and rewards of the ongoing marriage—wh
husband and wife would owe each other in financial support, housewor
childcare, sex, and so on. The content of "model" contracts testified t
concern that the heavy weight of marital convention would drag any mar
riage down the old path, regardless of the couple's initial good intention
This contractual approach reaccentuated the element of consent i
monogamy, which had always been central to its prominence as a publ
institution. Like the Supreme Court's finding (in *Griswold v. Connecticu*
that constitutional protection of "liberty" freed birth control from sta
interference, this reinvention of marriage employed a longstanding prir
ciple to new effect.

The courts responded by taking couples' prenuptial contracts ser
ously, and also those composed once the couple was married. The prir
ciple that courts would assess spousal contracts dealing with post-divorc
arrangements for fairness, and would enforce them, was well establishe
by the 1990s—but there were limits. A court would not allow a wife t
contract away her marital obligation to serve her husband's needs, nor
husband his obligation to support the wife. In 1993 a California appea
court refused to support a wife's claim to collect assets from her hus
band's estate as compensation for taking care of him at home as he ha
begged, after he suffered a stroke, rather than placing him in a nursin
home (as she preferred to do). He had agreed to increase his bequest t

her if she cared for him at home, but his will did not follow through. The court, finding "sickbed bargaining" offensive and "antithetical to the institution of marriage as the Legislature has defined it," would not award the wife the compensation she sought. Citing precedents from 1937 and 1941, the majority opinion emphasized that the wife's care for her husband was simply part of her "marital duty of support"—even in the face of a dissenting colleague's objection that this "smack[ed] of the common law doctrine of coverture." Thus the traditional marriage bargain survived in skeleton form to the end of the twentieth century.[11]

The contractual emphasis moved understandings of marriage toward the private side, and there was another strong reason for feminists to see intimate relationships as private. The legal argument for women to exercise freedom of choice over childbearing, or "reproductive rights," rested on privacy. The decisions in *Griswold* and *Eisenstadt* had used reasoning about privacy to remove state constraints on birth control, but abortion remained criminal. Feminist efforts to change that led to *Roe v. Wade,* the U.S. Supreme Court decision of 1973 that freed abortion (for the first trimester of pregnancy) from state restrictions. The opinion rested on a woman's right to consider privately, with her doctor, whether she would bear a child.[12]

Feminist legal strategies had to work both sides of the private/public divide that marriage inhabited, however. To defend reproductive choice, as in *Roe,* or to try to secure equalitarian marriages, it was necessary to see intimate decisions taking place in a sheltered private realm. But in order to protect wives and daughters from being overpowered physically by the men in their households, feminists wanted to bring public authority into the private domestic sanctum. The doctrine of domestic privacy, allowing the home to be curtained off from public scrutiny, could work just like the old assumption of marital unity to maintain superior power in the hands of an abusive husband. If domestic violence was going to be prosecuted and if a husband's exemption from rape charges for coercing his wife into sex was going to be eliminated, then the zone of domestic privacy had to be opened up and the notion that "a man's home is his castle" unseated.[13]

Both of those intentions have been substantially accomplished in the law since the 1970s. Almost everywhere, legislation and police directives allow public authorities to breach the "sacred precincts" in order to arrest violent men. The effectiveness of these provisions is far less certain. Habitual legacies of inequalities between wives and husbands hang on after laws are changed, and these legacies are enacted not only in the "bonds of love" between couples but also in police responses and jury attitudes. Yet the stance of public authorities affects these habits. For example, a Los Angeles Police Department officer who dealt with domestic violence said of wife-batterers: "when two big guys come to their houses, handcuff 'em and take them down to the station for the night, they start to wonder whether or not it's really OK to hit their wives."[14]

The downfall of the marital rape exemption has to be seen as a very significant emblem of change. Of all the legal features of coverture, this right of the husband to his wife's body was the longest lasting. Through the 1970s sweep of legal sex discriminations from the law, it was not moved. Not until 1984, after at least a decade of feminist arguments, did a New York appellate court overturn that state's marital rape exemption—then other states followed. As in the *Eisenstadt* case allowing birth control to single persons, the force of an equal protection argument turned the tide: if the man in an *un*married cohabiting couple could be prosecuted for rape but a husband could not, the two couples were not experiencing equal protection of the laws.[15]

Dissolving the husband's privilege, this decision eliminated a historically central feature of marriage in the law, and subsequent developments showed that states were putting their public force behind the denial of marital unity. The law of marriage no longer gave bodily possession of the wife to her husband. This change announced a new norm of the wife's self-possession, with the potential to reframe the roles of both marriage partners. Marital rape was not altogether blended in to the category of rape, however. While all states criminalized it, at least a third of them distinguished marital rape from other forms. The police, lawyers, judges, and juries involved in prosecuting marital rape tend to make assumptions that exonerate the husband. Still, no state of the

United States any longer puts a husband's right to coerce his wife into sex in the definition of marriage.[16]

It could be contended, then, that by the 1980s the states and the nation had let go their grip on the institution of marriage along with their previous understanding of it. States' willingness to prosecute marital rape and wife abuse formed the most recent items in a trail of evidence, including the unchaining of morality from formal monogamy, the demise of the fiction of marital unity, and the institution of no-fault divorce. State legislatures and courts had moderated their former definitional role and resuscitated their much earlier willingness to treat couples "living together" as if they were married, at least in economic terms. The families of unmarried couples are treated as families in court. Parents' rights over children do not diminish—nor do their enforceable responsibilities for support—just because of birth out of wedlock. This public willingness to see marriage-like relationships *as* marriage is driven by the aim of guaranteeing economic support by family members, thereby minimizing demands on public assistance, but it also diversifies social views of family relationships.

This alteration in the relation between marriage and the state might be called "disestablishment," if the term can be borrowed from the history of religion. A national church supported by church taxes or tithes in the past was called the "established" religion or religious "establishment," and the ending of that special status for one religion was called disestablishment. Disestablishment did not mean that piety or religious institutions disappeared. On the contrary, the consequence more often was that religious sects proliferated, while no single model was, any longer, supported and enforced by the state. By analogy one could argue that the particular model of marriage which was for so long the officially supported one has been disestablished.[17] Continuing the analogy to religious disestablishment, one could say that with the weight of the one supported faith lifted, plural acceptable sexual behaviors and marriage types have bloomed. The situation today bears some similarity to eighteenth- and early nineteenth-century America, before a strong national standard descended, when laws regulating marriage were on

the books everywhere but the more effective validation of marriage came from local communities.

Community then was geographical, whereas now it may be more cultural or ideological, ethnic or occupational. Couples who are not following the conventional model look for endorsement from like-minded communities, and expect to be left alone by others whom they are not harming, since marriage is understood as a private choice. This stance has allowed hundreds and perhaps thousands of fundamentalist Mormons in Utah and Arizona to revive polygamy.[18] The open practice of polygamy—unprosecuted although it is illegal as well as officially disapproved by the Church of the Latter-Day Saints—signals not only disestablishment but also the evaporation of the political role of marriage as ballast for the form of governance. Courts, the legal arm of the state, are interested in economic support functions. The formality and conformity of marriage-like arrangements matter far less in the law now than in the past, because support can be traced through cohabitation and biological parenthood. And no state needs to work through household heads to locate or govern family members: the interweaving or intrusion of government presence in the lives of individuals through their employment, schooling, immigration, taxation, social welfare, travel, and so on, has advanced so far that all are already in the state's grasp.

These remarkable and probably irrevocable transformations in the marital landscape have not been uncontested. Political and ideological backlash has been in the mix since the mid-1970s. The emergence in American politics of a New Right, strongly allied with Protestant fundamentalism and centered simultaneously on "family values" and embrace of the free market, responded in part to the apparent disestablishment of traditional marriage. This reactionary movement was successful in blocking ratification of the equal rights amendment and in cutting back on reproductive rights and denying government funding to abortion for Medicaid clients. One major way the New Right mobilized its numbers was by heightening alarms that conventional gender differences were facing destruction and possible homosexual takeover. This vocal minority, effective beyond its numbers in electoral politics in the 1980s and

1990s, still made a vivid connection between the stability of conventional Christian-model monogamy and the health of the nation-state. Alarms about the degradation of family life in the United States have sounded from many political angles, but only partisans of the New Right (and not all of them) openly voice the desire to reinstate a patriarchal model of marriage with the husband/father as the provider *and* the primary authority figure.

The conservative family politics of this backlash conflicts with its economics, ironically. The economic values championed by the right—the free market, individual accumulation of property, and a higher and higher standard of consumption—have been instrumental in undermining the marriage model in which the husband/father earns the family income and his wife and children are his dependents. The late-twentieth-century free market ethic inspired higher consumption than the old-style one-earner family could typically achieve. Ever-expanding desire to be able to buy urged wives and mothers into the labor force and multiplied two-earner families. Even with unemployment very low in the late 1990s, the rising standard of living (or of longing) cultivated by advertisements and the absence of publicly provided services such as health care vaporized the illusion of a single "family wage" except for the families of the uppermost male earners. The national government was no longer willing to mimic the family wage in assisting the poor, as the original Social Security Act once did. The Aid to Families with Dependent Children program once offered father-like assistance to poor children whose mothers were not gainfully employed, but the reorientation from "welfare" to "workfare" definitively discontinued that practice. Offered incentives in 1967 and 1971 to pursue employment or job training, welfare mothers since 1994 have been required to do so, in order to continue receiving aid for their children. As much as this shift reflected a punitive social outcry against welfare recipients' drain on the public purse, it also indicated that the family wage concept had lost credibility.[19]

Despite the extensive gains made by the New Right both culturally and politically, it seems dubious that conventional legal marriage can recover the primacy it once had. Economic reasons for two-earner families and feminist transformations of self-understanding make that unlikely. Houses hold unrelated groups, cohabiting couples, multigenerational rather than couple-based households, single-person households, and single adults raising children. Government entities have been able to look past the formalization of marriage because support obligations can be enforced without it. Besides, since transgressive forms of sexuality have been allowed into the open, they will not be tucked back behind the curtains—not without a nationwide religious revival. Free expression and commercial exploitation of adolescent sexuality, nonmarital cohabitation, and extramarital affairs have become, if anything, more and more banal, as the majority reaction to President Clinton's dalliance with Monica Lewinsky ineffably demonstrated. The boundaries of acceptable heterosexual behavior generally follow lines of consent rather than marriage—with adultery a partial exception. Though acknowledged to occur, and even shrugged at, marital infidelity was pronounced to be always wrong by about 80 percent of adults at the end of the century, a figure rising back from a low of about 70 percent in the combative 1970s.[20]

Bring same-sex marriage into view, however, and the suitability of the disestablishment parallel fails. If disestablishment of formal and legal Christian-model monogamy were real, public authorities would grant the same imprimatur to every kind of couple's marriage. That has not happened. Opponents of same-sex marriage have drawn a line in the moving sand of disestablishment. Marriages between two women or two men can be validated *only* by like-minded communities, not by formal public authorities. (Clergy members, including Unitarian-Universalists, reform Jews, and various Protestants, have stepped increasingly into the breach to perform religious ceremonies of marriage—without legal standing—for same-sex couples.)[21] The morality that the law has dropped or soft-pedaled with respect to consensual heterosexual acts still lives in the law's prosecution of homosexual behavior. As late as 1986, the U.S. Supreme Court upheld a Georgia law under which two consenting male homosexuals were arrested for what they did in private and at home. In 1996, Supreme Court Justice Antonin Scalia grouped murder, polygamy, and homosexuality together as kinds of inherently reprehensible conduct

against which he assumed laws could constitutionally "exhibit 'animus.'"[22] Both prosecution of homosexual behavior and resistance to same-sex marriage show that the profound transformation of disestablishment has *not* taken place.

Lesbians and gay men seek legal marriage for some of the same reasons ex-slaves did so after the Civil War, to show that they have access to basic civil rights. The exclusion of same-sex partners from free choice in marriage stigmatizes their relationship, and reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy. Tailoring their legal arguments to current constitutional doctrine, same-sex couples have underlined the association of marriage with consent and with privacy rights. A 1998 superior court ruling in Alaska accentuated that interpretation, setting off sirens in some camps and cheers in others. The Alaska state constitution explicitly guarantees the right to privacy as well as equal protection of the laws. Two gay men who were denied a marriage license sued the state, asserting that its disallowance of same-sex marriage violated their constitutionally assured rights.

The judge in the Alaska case called the "right to choose one's life partner" constitutionally "fundamental," a privacy right that ought to receive protection whatever its outcome (even a partner of the same sex). "Government intrusion into the choice of a life partner encroaches on the intimate personal decisions of the individual," Judge Peter Michalski wrote. "The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right"—the focus of earlier judicial inquiry—"but whether the *freedom to choose* one's own life partner is so rooted in our traditions." The judge's reasoning here followed directly from the long tradition of mutual consent as basic to marriage and, more immediately, from the logic of the *Griswold* and the *Eisenstadt* cases on birth control. Although opponents of same-sex marriage had claimed that its exclusion was not a sex discrimination because members of both sexes were equally prevented (an argument paralleling earlier justifications of bans on black-white marriage as symmetrical for both races), Judge Michalski thought it obvious that prohibition of same-

sex marriage *was* a "sex-based classification," subject to close scrutiny for discriminatory intent or impact. "If twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements," he said, "only gender prevents the twin sister from marrying." He did not make a definitive ruling but ordered further hearings in order to see whether the state had a "compelling" interest in preventing same-sex marriage.[23]

This Alaska case came in the wake of a Hawaii Supreme Court ruling in 1993 that showed even more starkly the distance traveled since Joel Bishop's mid-nineteenth-century certainty that marriage involved "one man and one woman united in law for life" in a civil status whose source was "the law of nature."[24] The Hawaii opinion characterized marriage as a "state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation." This description—also emphasizing "the state's role as the exclusive progenitor of the marital partnership"—cut the institution loose from Christianity and nature and instead put its birth in the legislature.[25]

The Hawaii approach reduced conventional heterosexual marriage to just one of many possible state-conferred forms. Although this opinion, like the one in Alaska, dwelt much on the privacy rights of individuals in marriage choice, its emphasis on the "state-conferred" character of the institution of marriage had the more radical potential. Hawaii's action sparked opponents of same-sex marriage to organize politically. In 1996 and 1997, twenty-four states passed legislation banning recognition in their territory of same-sex marriages (even if validated elsewhere). To prevent the transformation looming in Alaska and Hawaii, advocacy groups worked to amend those states' constitutions to declare marriage legal only between a man and a woman, and through referenda in 1998, mobilized voters in both states to trump the courts' opening to same-sex marriage.

By the spring of 2000, a total of thirty-five of the fifty states had legislated their unwillingness to recognize same-sex marriage. Despite the Golden State's reputation for sexual liberalism, more than three fifths of

voters there endorsed the resolution that "only marriage between a man and a woman is valid and recognized in California." Yet simultaneously Vermont created a legal status called "civil union" for same-sex couples. The state high court, using reasoning about equal protection of the laws, declared in December 1999 that same-sex couples deserved access to the benefits that heterosexual couples gain from marrying. Even though Catholic, Mormon, and conservative groups mobilized in opposition, in April 2000 Vermont enacted a historic law, reserving "marriage" to one man and one woman but allowing a same-sex couple in the state the identical rights and protections in "civil union."[26]

Conservative advocacy groups, intending to preempt validation of same-sex marriage by state referenda and constitutional amendments, were fashioning symbolic statements as much as pragmatic instruments. So were the large majorities in both houses of Congress who had ushered through a "defense of marriage act" with very unusual speed in 1996. The Defense of Marriage Act was not a complex piece of legislation. It was a "modest proposal" based on "common sense," according to one Senate sponsor. The act did two things. First, it explicitly defined the words "marriage" and "spouse" in federal law as involving one man and one woman. Second—and far more questionable constitutionally—it provided that no state would be required to give effect to a same-sex marriage contracted in another state, despite the constitutional rule that each state should give "full faith and credit" to the public acts of others. Advocates of the bill saw the threat looming from Hawaii the way that opponents of divorce had seen the threat of Indiana's liberality in the 1850s: if any same-sex couple could go to Hawaii to be married, and return to their home state to live, then Hawaii was strong-arming the other states, setting marriage policy for the nation. The Defense of Marriage Act struck preemptively against that possibility. Advocates contended that Congress had the power to do so, because it could prescribe how "full faith and credit" should be effected.[27]

Congressional rhetoric on behalf of the Defense of Marriage Act, relying more on pronouncement than on reasoning, undercut the idea that disestablishment of the traditional institution of marriage was well under way. The bill's supporters announced that traditional heterosexual marriage was "the fundamental building block of our society"; that nature and the Judeo-Christian moral tradition commanded or comported with it; that it was the basis of "civilization." One or two said homosexuality was immoral, a perversion, based on lust; more often the fear was expressed that licensing same-sex marriage would start the descent down a slippery slope to licensing polygamy, incest, even marriage to animals. The most fervent urged that the disparity between homosexual and heterosexual relationships could not become a matter of moral indifference. To treat the two as moral equivalents was to "completely erase whatever boundaries that currently exist on the definition of marriage and say it is a free-for-all, anything goes."[28]

These expressions of anxiety may have resulted from pondering the unsentimental (yet undeniable) words of the Hawaii ruling. Congressman James M. Talent of Missouri summed up a predominant viewpoint among the bill's supporters when he declared, "it is an act of hubris to believe that marriage can be infinitely malleable, that it can be pushed and pulled around like silly-putty without destroying its essential stability and what it means to our society, and if marriage goes, then the family goes, and if the family goes, we have none of the decency or ordered liberty which Americans have been brought up to enjoy and to appreciate."[29] He voiced a tension that had been present ever since legislators began altering the terms of marriage in the 1840s with married women's property acts and new grounds for divorce. Legislators had jealously guarded their power, yet hardly wanted to admit that marriage was "state-conferred"—that they themselves, rather than nature or God, defined its outlines. They tried to have it both ways with marriage in political discourse—picturing it as a rock of needed stability amidst eddies of change, while also acting to define and redefine marital obligations.

In the 1996 debate as in the past, observance of Christian-model monogamy was made to stand for customary boundaries in society, morality, and civilization; the nation's public backing of conventional marriage became a synecdoche for everything valued in the American way of life. One of the co-sponsors of the bill preferred the language of

the 1885 Supreme Court to the Hawaii approach, saying it was "vital" to protect "our Nation's traditional understanding of marriage" as the "union for life of one man and one woman in the holy estate of matrimony."[30] Those who opposed the Defense of Marriage Act also had American values to marshal on their side, however. They reasoned that marriage was a basic right that should not discriminate on the basis of gender, that the American values of liberty and the pursuit of happiness should apply to couples of the same sex. They invoked the social value of love between partners who chose each other and contended that Congress should not step into the making of private relationships. Citing the extensive changes in sexual and familial practice that had transpired (harmlessly, they thought) during the past century, opponents of the bill saw no threat to other families in allowing two adults of the same sex to make a legal commitment to each other. They championed the diversity of households flowering in the United States and condemned the Defense of Marriage Act as a measure of Republican partisanship, an appeal to fear and bigotry and intolerance. Congressman Patrick Kennedy of Rhode Island said, for instance, that the bill was "not about defending marriage. It is about finding an enemy. It is not about marital union. It is about disunion, about dividing one group of Americans against another." Opponents drew analogies between the civil rights deprivations suffered in the past by African Americans and those currently imposed on homosexuals, and specifically between earlier bans on cross-race marriage and the continuing illegality of same-sex unions.[31]

Bypassing opponents' reasoning, partisans of the bill argued unstintingly that because marriage had been heterosexual since "time immemorial" the Congress had to assure its remaining so. Where public authorities a century earlier had been primed to defend Christian-model monogamy from free love, interracial coupling, polygamy, self-divorce, and commercial sex, now the Congress found heterosexuality the crucial boundary to maintain. The bill passed the House by a vote of 342 to 67 (with 22 not voting and 2 "present") and the Senate by 85 to 14.[32] As had often been the case in previous legislative contentions over marriage forms, the debate on the Defense of Marriage Act revealed a cultural

contest being waged between the majority and a nonconforming minority. Senator Jesse Helms's speech epitomized the strongly ideological stance of the bill's supporters, condemning "homosexual extremists" for eviscerating the nation's "moral stamina." Calling marriage "sacred," Helms proclaimed that "the moral and spiritual survival of this Nation" was at stake in the measure and that the vote would decide "whither goeth America."[33]

Putting the nation's imprimatur on one man and one woman in sacred union, Congress signified its concern for more than heterosexuality alone. Further assumptions wrapped in the word "marriage" reverberated loudly in the contemporaneous welfare reform law. The federal act that fulfilled President Clinton's promise to "end welfare as we know it" was called the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (formally a set of revisions in public assistance under the Social Security Act). It answered years of polemics against welfare clients for purportedly taking unfair advantage of an overgenerous system. The act replaced "welfare" with "workfare," by putting federal public assistance to needy mothers and fathers in the form of block grants to states, contingent on the states' providing the recipients (in the words of the act) "with job preparation, work, and support services to enable them to leave the program and become self-sufficient."[34]

This reform responded to the rise in caseloads under the Aid to Families with Dependent Children. An average of 3.3 million children received AFDC benefits monthly in 1965, and 9.3 million in 1992. Not a simple issue of public expenditures, however, the case against "welfare as we know it" made economic concerns inseparable from racial, gender, household, and marital questions. Almost two decades of white conservatives' fingerpointing at black single mothers—especially teenagers—fueled the principal arguments for workfare, despite the fact that most mothers receiving assistance were white.

The Personal Responsibility and Work Opportunity Act (PRWO) zeroed in on marriage as a solution to the ballooning welfare caseload. While the main lineaments of the bill mandated work requirements and the means to chase down deadbeat dads, the bill opened with the

normative claims "(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children." According to the social science analysis incorporated in the act, the availability of public assistance for poor and unemployed single mothers had allowed the men who fathered children to forget about marrying the women they made pregnant, and to shirk financial responsibility for their children. In this view, "welfare" encouraged shiftless women to get pregnant in order to be supported by the public purse in female-headed households. Their children, lacking responsible employed fathers as worthwhile role models, were doomed to making this cycle of nonmarriage and illegitimacy and consequent poverty and dependence on public assistance repeat itself.

Proponents of welfare reform brought together social facts—the increases in welfare caseloads, births out of wedlock, and female-headed households in poverty—and, by linking these to male irresponsibility, female profligacy, and marital failure, considered them all consequences of the welfare system. Female-headed households with children are far poorer, on average, than married-couple households, but proponents of the Personal Responsibility act spoke as though the marriage ceremony itself magically solved the problem of poverty. Proponents assumed rather than probed what were the reasons behind the correlation between marriage and greater economic stability. They did not give equal attention to highly relevant and complex issues of sex segregation and racial stratification in the labor market; they did not question how far the rise in illegitimacy and female-headed households, and the decline in marriage, were larger phenomena not caused by welfare. They said "get a job!" and "get married!" The Personal Responsibility and Work Opportunity Act offered substantial incentives to states to reduce out-of-wedlock pregnancies (especially among teenagers) while lowering abortion rates—as if wedded parents would always be adequate parents, and would not split up or fall into poverty.

The tenor of the Personal Responsibility and Work Opportunity Act (and even its title) faintly echoed the tenets of the Freedmen's Bureau, in linking legal marriage to the requisite ethic of hard work and reinforcing

normatively the husband's and father's responsibility to support his dependents. Just as the model of marriage in which the husband is the provider and the wife his dependent lingered in federal veterans' and Social Security benefits and income tax provisions, it hovered behind the PRWO's emphasis on the desirability of marriage, despite the requirement for mothers to seek employment. The mother no less than the father was addressed as someone who must take "personal responsibility" for supporting herself and her children. This approach made paid work a requirement and an emblem of full citizenship for both women and men. Nonetheless, the attention given to marriage upheld the vision that a woman *could* be a full-time mother at home, by marrying a man able and willing to make her and the children his dependents. In pursuit of its aim to reduce welfare caseloads through private support, the Personal Responsibility and Work Opportunity Act echoed centuries of enforcement of the husband's obligation to provide. Like the Defense of Marriage Act, it sought to impose majority norms of marriage on a minority, for the ostensible benefit of the nation. Yet there was a catch. The methods of implementing the Personal Responsibility and Work Opportunity Act—like those used to enforce federal welfare provisions since Civil War pensions were instituted—brought public oversight into the personal lives of the poor. The national value placed on marital and familial privacy did not extend to families in need of help. Welfare mothers and fathers could not enjoy a "private realm of family life where the state cannot enter."[35]

These two major acts of Congress in the late 1990s, along with the myriad marital obligations and benefits in the federal legal apparatus, illustrated the national government's continuing investment in traditional marriage. If the federal battery of veterans' benefits, immigration preferences, Social Security, taxation policies, and so on gave principally financial boons, perhaps that was more meaningful than anything else in a dollar-driven culture. One tax privilege for married couples became problematic, however, as two-earner couples increased and wives' incomes grew closer to husbands'. The married-filing-jointly option for federal income tax, revised in the 1960s to eliminate its original "singles' penalty," continued to benefit married couples with one earner and those

couples whose two incomes were quite disparate—because it was designed with provider/dependent couples like that in mind. As couples' earnings approached equivalency, though, joint filing disadvantaged them–they owed more tax than they would if they were unmarried and filed two individual tax returns. This "marriage penalty" ignited a great deal of criticism for being unfair and for contradicting public policy by discouraging marriage. Less noticed has been its especially negative impact on African Americans. In a higher proportion of African American married couples than of white couples both husband and wife earned incomes, and a higher proportion of black couples than white couples were near-equal earners.[36] While federal "workfare" proponents were castigating black teenage mothers for not marrying, federal tax policy was attaching a particular disincentive to marriage in the African American community.

Contested and contradictory as they were, the marriage bonus and penalty persisting in tax law illustrated the economic framework for marriage that public authority had long been fostering. Equal-earning spouses griped about the marriage penalty, giving rise to stories of couples who divorced on December 31 to qualify for single-earner status for the year and remarried on January 1—but the penalty was outweighed by the many other legal advantages of marriage. Legal marriage remains a privileged public status, buttressed by government policies that allow and inspire people to have confidence in it. It *does* bring with it—for better or worse—all the presumptions that a cohabiting arrangement has to prove, in court or out.

Despite sweeping reformulations in intimate relationships in the past quarter century, one can doubt whether most Americans' "common sense" about marriage has vastly changed. So flayed and scorned in the 1960s and 1970s, conventional and legal marriage like the phoenix has arisen from its ashes, even alongside innovations and deviations. It is the main theme around which the variations take place. Even with no-fault divorce common, marriage commands greater respect from popular opinion and implies a greater commitment than "living together." The position of legal marriage above comparable relationships resists top-

pling. Contestation over same-sex marriage has, ironically, clothed the formal institution with renewed honor. Not all lesbian and gay rights activists aim for same-sex marriages, since many—lesbians, especially—see the institution as too mired in inequality to be desirable, but those who do advocate marriage have brought its civil rights and rewards back into public discourse and have portrayed its promise of stable mutual commitment as a benefit to society as well as to the couple. Their opponents, who cannot imagine extending the license to marry to same-sex couples, nonetheless employ the same rhetorical strategies in lauding the institution itself.[37]

The resiliency of belief in legal marriage as the destination of a love match and as a safe haven begs for explanation, even when hyperbole about love seems to demand none. Love is exalted in our society—it is the food and drink of our imaginations. Sexual love has even more of a halo, because we assume that an individual's full subjectivity blossoms in the circle of its intimacy. But where does marriage stand, when there is widespread awareness that half of all marriages end in divorce? Alarmists declare certainly that marriage is withering, but its firm grip is more of an enigma. Even with failed marriages staring them in the face, individuals still hope to beat the odds. The belief persists that a couple have achieved the ultimate reward, the happy ending, by adding the imprimatur of public authority and making their relationship formal and legal. Dating services certainly advertise it this way, promising to introduce "Mr. Right" and "Ms. Right" to each other. Splendid, elaborately detailed weddings have swelled in popularity, as though the money spent on a wedding is ballast destined to keep the marriage afloat.[38]

The preeminent stature of marriage in public opinion is not unwarranted because it still *is* a public institution, building in material rewards along with obligations. History and tradition cement the hold of marriage on individual desires and social ideals. Marriage also continues to appeal subjectively, despite the alternatives visible, because of the relief it seems to offer from the ineffable coercions and insistent publicity of the postmodern world. At the opening of the twenty-first century, individuals face overwhelming techniques of surveillance, record-keeping, and

publicity wielded by government, medical authorities, marketing firms, and telecommunications media. Government agencies, directives, incentives, and regulations intersect with private enterprise and ubiquitous advertising; daily headlines and talk show hosts blare out the secret sexual and medical grotesqueries of public figures; formerly hidden bodily orifices become the subject of performance art; and outerwear looks like underwear. In an era of aggrandizement by both nation-states and global corporations and of instant access via the World Wide Web, personal well-being seems to require marking off a boundary of privacy from the welter of public compulsions.

Marriage can be imagined as setting this boundary and providing private liberty inside it. When freedom is understood to reign mainly in private choices, marriage becomes reconfigured, enhanced. Traditionally a "yoke," marriage more recently and paradoxically signifies freedom in a chosen space—a zone marked off from the rest of the world. While it promises to defend against the sense of estrangement haunting our cosmopolitan world, marriage can now also symbolize freedom. Constitutional doctrine since the 1940s has predicted this outcome, allying privacy with personal liberty and putting public authority behind that alliance. Consent in marriage—less critical than it once was as a analogy for government in the United States—has greater resonance in the private domain.

If marriage harmonizes the seeming opposites of choice and dependability—the promise of an arena of freedom along with security of a very loving and personal kind—then that is a key to its hold on the imagination. Yet—hasn't the record shown that public authorities thoroughly shape the institution, infusing it with aims not personal at all? Is the liberty associated with marriage an illusion? That will depend not only on luck and love but also on the character of public directives. Marriage remains inextricably public *and* private, both faces of the institution as paired as the couple is. The patchworked emotions and practices with which individuals endow their unions color the evolving institution, and the values and requirements incorporated into it by official policy furnish citizens' imaginations as well as setting them to their marital tasks. If public authorities arrayed various marriage definitions—and if private intimacy would also nurture generous attention to the public interest—then the institution might be replenished. The ideal of a reciprocal commitment between two people that unites public honor with private meanings of freedom might be revivified.

concurrence). See Thomas C. Grey, "Eros, Civilization, and the Burger Court," *Law and Contemporary Problems,* 43:3 (1979–80), 83–100; Martha Minow, "We, the Family: Constitutional Rights and American Families," *JAH,* 74:3 (Dec. 1987), 959–83.

31. *Loving v. Virginia,* 388 U.S. 1 (1967). In *Meyer v. Nebraska,* 262 U.S. 390 at 399 (1923), the court had first called the right to marry fundamental. The 1955 opportunity left aside was *Naim v. Naim,* 197 Va. 80, 87 S.E. 2d 749; the 1964 case, *McLaughlin v. Florida,* 379 U.S. 184, which overruled *Pace v. Alabama.* The opinion in *Loving* notes, p. 6, n. 5, that sixteen states still prohibit and punish marriage on the basis of racial classification: Ala., Ark., Del., Fla., Ga., Ky., La., Miss., Mo., N.C., Okla., S.C., Tenn., Tex., Va., and W. Va. Maryland repealed its law after the *Loving* case was initiated. See Peter Wallenstein, "Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860–1960s," *Chicago-Kent LR,* 70:2 (1994), 371–437, on the background to *Loving.*

32. *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972).

33. See Alice Kessler-Harris, *Securing Equity: Women, Men, and the Pursuit of Economic Citizenship,* forthcoming from Oxford UP.

9. *Marriage Revised and Revived*

1. On Roussel's findings, see 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), 144–45.

2. The figures here and in following paragraphs come from the *Statistical Abstract of the United States,* 1995; Robert Joseph Taylor, James S. Jackson, and Linda M. Chatters, ed., *Family Life in Black America* (Thousand Oaks, Calif., Sage, 1997), 39–42, 47–50; "Single Motherhood: Stereotypes vs. Statistics," *New York Times,* Feb. 11, 1996; "Women and Work," *The Economist,* July 18, 1998; Frank Furstenberg, "Family Change and Family Diversity," in *Diversity and Its Discontents,* ed. Neil J. Smelser and Jeffrey C. Alexander (Princeton, Princeton UP, 1999), 152; and Peter Kilborn, "Shifts in Families Reach a Plateau, Study Says," *New York Times,* Nov. 27, 1996. Unmarried-couple figures for 1998 come from the U.S. Bureau of the Census "Current Population Survey," Internet version, release date Jan. 7, 1999; and the most recent proportions for unmarried couples and not-marrieds come from Tom W. Smith, "The Emerging Twenty-first Century American Family," General Social Survey Social Change Report no. 42, National Opinion Research Center, University of Chicago, released Nov. 24, 1999.

3. In 1993, 61 percent of black women and 58 percent of black men were not married, and so were 41 percent of white women and 38 percent of white men. Preliminary national figures for 1993 show 9 marriages and 4.6 divorces per 1,000 people; Pacific states show 7.1 marriages and 5.1 divorces per 1,000. Since California, Indiana, and Lousiana figures are lacking, both the national and the Pacific divorce ratios are probably understated. (In 1980, California's marriage rate was 8.9, its divorce rate 5.6; Indiana's marriage rate was 10.5, its divorce rate 7.3; Louisiana's marriage rate was 10.5, its divorce rate 4.3.) In preliminary figures for the first half of 1997 released by the Centers for Disease Control and Prevention, the ratio of the divorce rate to the marriage rate is 1 to 2 only in the mid-Atlantic and the east south central regions; elsewhere it is higher.

4. Kate Millett, *Sexual Politics* (Garden City, N.Y., Doubleday, 1970).

5. See, e.g., Robin Morgan, ed., *Sisterhood is Powerful* (New York, Vintage, 1970).

6. See Barbara Babcock et al., *Sex Discrimination and the Law: History, Practice, and Theory,* 2d ed. (Boston, Little Brown, 1996).

7. On divorce reforms noted in this and the following paragraph I have relied on Stephen D. Sugarman and Herma Hill Kay, ed., *Divorce Reform at the Crossroads* (New Haven, Yale UP, 1990); Milton C. Regan, Jr., *Family Law and the Pursuit of Intimacy* (New York, New York UP, 1993); Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (Cambridge, Harvard UP, 1987). Glendon points out, 66–67, that virtually every country of western Europe moved to allow divorce by mutual consent between 1969 and 1985.

8. Herbert Jacob, "Women and Divorce Reform," in *Women, Politics, and Change,* ed. Louise A. Tilly and Patricia Gurin (New York, Russell Sage Foundation, 1990), 482–503.

9. On incentives and requirements for welfare mothers to earn, see Joanne L. Goodwin, "'Employable Mothers' and 'Suitable Work': A Re-evaluation of Welfare and Wage-earning for Women in the Twentieth-Century United States," *Journal of Social History,* 29:2 (Winter 1995), esp. 262–70.

10. *Marvin v. Marvin,* 134 Cal. Rptr. 815, 557 P.2d 106 (Cal. 1976); Judith Areen, *Family Law: Cases and Materials,* 3d ed. (Westbury, N.Y., Foundation P, 1992), 900–08; see Grace Blumberg, "Cohabitation without Marriage: A Different Perspective," *UCLA LR,* 28 (1981), 1125–39.

11. *Borelli v. Brusseau,* 12 Cal. App. 4th 667, 16 Cal. Rptr. 2d 16 (1993), excerpt reprinted and discussed in *Family Law,* ed. Leslie Harris, Lee Teitelbaum, and Carol Weisbrod (Boston, Little Brown, 1996), 70–75; additional thanks to Carol Weisbrod.

12. *Roe v. Wade,* 410 U.S. 113 (1973). The decision conceded the state's interest in regulating abortion after the first trimester, for health reasons.

13. See Elizabeth Schneider, "The Violence of Privacy," *Connecticut LR,* 23 (Summer 1991), 973–99. In raising awareness of domestic battery and marital rape, Susan Schechter, *Women and Male Violence* (Boston, South End P, 1982), and Diana E. H. Russell, *Rape in Marriage* (New York, Macmillan, 1982), were important public clarions.

14. Quoted in Rebecca Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption," *Law and Social Inquiry,* 20:4 (1995), 996, n. 215.

15. *People v. Liberta,* 474 N.Y.2d 567 (1984), cited in Ryan, "The Sex Right."

16. Ryan, "The Sex Right"; Lisa Eskow, "The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing Its Prosecution," *Stanford LR,* 48 (1996), 677–708; see also Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape," *California LR,* 88 (Oct. 2000).

17. Words such as dejuridification, delegalization, deregulation, and privatization are used for the same phenomena in Glendon, *Transformation,* and "Marriage and the State: The Withering Away of Marriage," *Virginia LR,* 62 (May 1976), 663–720; Stephen Parker, *Informal Marriage, Cohabitation, and the Law, 1750–1989* (New York, St. Martin's, 1990); and Milton C. Regan, *Family Law and the Pursuit of Intimacy* (New York, New York UP, 1993).

18. See Timothy Egan, "The Persistence of Polygamy," *New York Times Magazine,* Feb. 28, 1999, 51–55.

19. See Goodwin, "'Employable Mothers' and 'Suitable Work,'" 264–78, on the trend since the 1960s toward urging employment and job training on mothers receiving welfare (as well as unemployed fathers, who were added to AFDC in 1962).

20. Smith, "The Emerging Twenty-first Century American Family."

21. "More Clergy Members Giving Blessing to Ceremonies Uniting Gay Couples," *New York Times,* April 17, 1998, A1, A20.

22. *Bowers v. Hardwick,* 478 U.S. 186 (1986); see Scalia's dissent in *Romer v. Evans,* 517 U.S. 620 (1996), in which the majority prevented Colorado from nullifying civil rights protections for homosexuals.

23. *Jay Brause and Gene Dugan v. Bureau of Vital Statistics, Alaska . . .,* Peter Michalski, Judge of Superior Court for the State of Alaska, 3d Jud District, Feb. 27, 1998 [1998 WL 88743, Alaska Super.], case 3AN-95-6562 CI. My thanks to Sarah Hammond for giving me an early copy of this decision.

24. Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce,* 4th ed. (Boston, Little Brown, 1864), 1:2.

25. *Baehr v. Lewin,* 852 P 2d 44, 58 (1993).

26. Lambda Legal Defense and Education Fund, "2000 Anti-Marriage Bills Status Report," online at <www.lambdalegal.org>; "Ballot Test for Gay Marriage in Alaska, Hawaii," *San Francisco Chronicle,* Oct. 26, 1998, 1, 9; "Hawaii's High Court Rules Gay Marriage Issue Closed," *Los Angeles Times,* Dec. 11, 1999, 17; "Vermont High Court Backs Rights of Same-Sex Couples," *New York Times,* Dec. 21, 1999, 1; *Stan Baker et al. v. State of Vermont et al.*, filed Dec. 20, 1999, Supreme Court of Vermont, Lexis 406; "Vermont's House Backs Wide Rights for Gay Couples," *New York Times,* March 17, 2000, 1; "California Votes to Ban Recognition of Gay Marriages," *Washington Post,* March 8, 2000, 21; "Vermont Gives Final Approval to Same-Sex Unions," *New York Times,* April 26, 2000, A14.

27. The most extensive debates on the Defense of Marriage Act (Public Law 104–199, Sept. 21, 1996) are in *CR* 104/2, vol. 142 no. 63, May 8, 1996; vol. 142, no. 102, July 11, 1996; vol. 142, no. 103, July 12, 1996; vol. 142, no. 122, Sept. 9, 1996.

28. Speakers are Y. Tim Hutchinson of Ark., Bob Barr of Ga., Tom Coburn of Okla., Charles Canaday of Fla., and Steve Largent of Okla., *CR* 104/2, vol. 142, no. 102, July 11, 1996, 7441–47.

29. James M. Talent of Mo., *CR* 104/2, vol. 142, no. 102, July 11, 1996, 7446.

30. Dave Weldon of Florida, *CR* 104/2, vol. 142, July 12, 1996, 7493.

31. E.g., Patrick Kennedy of R.I., Barney Frank of Mass., Sheila Jackson-Lee of Texas, Sam Farr of Calif., John Lewis of Ga., *CR* 104/2, vol. 142, no. 102, July 11, 1996, 7441–47; Barbara Boxer of Calif., vol. 142, no. 122, Sept. 9, 1996, 10065.

32. H.R., July 12, 1996; Sen., Sept. 10, 1996.

33. *CR* 104/2, vol. 142, no. 63, May 8, 1996.

34. Public Law 104–193, Aug. 21, 1996.

35. Quotation from *Prince v. Mass,* 321 U.S. 158, 166 (1944); see Martha A. Fineman, "Intimacy outside of the Natural Family: The Limits of Privacy," *Connecticut LR,* 23 (Summer 1991), 955–72.

36. Dorothy A. Brown, "The Marriage Bonus/Penalty in Black and White," in *Taxing America,* ed. Karen B. Brown and Mary Louise Fellows (New York, New York UP, 1996), 45–57. See also Anne L. Alstott, "Tax Policy and Feminism: Competing Goals and Institutional Choices," *Columbia LR,* 96 (Dec. 1996), 2001–2082.

37. See opinions on all sides in Andrew Sullivan, ed., *Same-Sex Marriage: Pro and Con* (New York, Vintage, 1997).

38. See "The Wedding Dress That Ate Hollywood," *New York Times,* Aug. 30, 1998, sect. 9, 1–2.