

Legal Regulation of Marriage: Tradition and Change

A PROPOSAL FOR INDIVIDUAL CONTRACTS AND CONTRACTS IN LIEU OF MARRIAGE

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The marriage contract is unlike most contracts: its provisions are unwritten, its penalties are unspecified, and the terms of the contract are typically unknown to the "contracting" parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms.¹ In fact, one wonders how many men and women would agree to the marriage contract if they were given the opportunity to read it and to consider the rights and obligations to which they were committing themselves.

The unusual contract restrictions found in the marriage contract have been justified by a paramount state interest in the continuation of the traditional family.² However, our society has undergone profound transformations in the past century, and the long-standing legal structure of marriage may now be anachronistic. The state's interest in preserving the traditional family may not be important enough to offset new societal and individual needs which require more flexibility and choice in family forms. Furthermore, recent constitutional interpretations challenge the traditional legal conception of marriage. In the recent United States Supreme Court decisions of *Griswold v. Connecticut*³ and *Loving v. Virginia*,⁴ "[T]raditional state control of the marital status has [had] to give way to current notions of individual liberty and the right of privacy."⁵ If, as *Loving* says, marriage is "a basic civil right of man,"⁶ limitations on the exercise of this right must be carefully scrutinized. "No longer may it be assumed that states have autonomy over rules and law governing marital status."⁷ The

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1. This point is further elaborated in M. PLOSCOWE, H. FOSTER & D. FREED, *FAMILY LAW CASES AND MATERIALS* (1972). They note:

[T]ermination or rescission of marriage may not be a matter of simple mutual agreement, the parties are not free to prescribe any terms they choose to, as such there is no breach of contract remedy nor specific performance, the constitutional provision regarding the impairment of obligations of contracts is inapplicable, there are additional factors (such as consanguinity) relating to capacity, and the intervention of an act of God is no excuse for nonperformance.

Id. at 11.

2. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

3. 381 U.S. 479 (1965).

4. 388 U.S. 1 (1967).

5. Foster, *Marriage: A "Basic Civil Right of Man,"* 37 *FORD. L. REV.* 51 (1968).

6. 388 U.S. at 12.

7. Foster, *supra* note 5, at 51. For discussion of constitutional issues, see text accompanying notes 324-94 *infra*.

time has come to reevaluate state definitions of the traditional marriage contract in light of this new constitutional standard.

The purpose of this Article is to analyze the terms of the present marriage contract and to suggest an alternative form for the legal structure of personal relations—contracts in lieu of traditional legal marriage. In analyzing the present laws governing marriage, two approaches will be used. First, the legally imposed terms of the marriage contract will be examined in order to explore the ways present laws assign certain roles to and place certain obligations upon each spouse, and in so doing discriminate against, or unfairly burden, the married woman. Second, a number of sociological assumptions underlying present marriage laws will be reviewed and shown to be subject to increasing questionability in light of current sociological data on the institutions of marriage and the family. Thus the first half of this Article will show that the present laws not only unfairly burden married women, but are also founded in large part on sociological assumptions which are anachronistic and inappropriate in modern society.

The second half of this Article examines legal challenges and alternatives. One possible remedy would be a comprehensive revision of various state statutes coupled with court tests of outdated common law rules. The Equal Rights Amendment (E.R.A.) might effectuate many of the needed changes more simply; however, its passage is not assured at the present time.⁸ In addition, there are a number of statutes and doctrines in need of change which would remain unaffected by even the most expansive reading of the E.R.A.⁹ Thus, with or without passage of the E.R.A., meaningful reform in this area would seem to involve a sizeable effort which might take years or decades and achieve only an incomplete patchwork solution.

A second solution, proposed in the final section of this Article, is to allow individuals to establish and regulate their relationships with one another by contracts in lieu of and independent of legal marriage and its concomitant shortcomings. Contracts formed for this purpose would not include state-imposed roles and obligations for each spouse and would not be bound by rules of law based on the traditional stereotypes of marriage. The new proposal would allow individuals to choose the nature and extent of their relationship and to commit themselves with full awareness of both their rights and obligations.

8. As of May 28, 1974, 33 of the necessary 38 states had ratified the Equal Rights Amendment.

9. See text accompanying notes 366-94 *infra*.

I

TERMS OF THE TRADITIONAL LEGAL MARRIAGE CONTRACT

As Blackstone noted, in the common law of England the husband and wife merged into a single legal identity, that of the husband:

By marriage, the husband and wife are one person in law
[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything.¹⁰

Under this doctrine of coverture, a married woman lost control of her real property as well as ownership of her chattels. She could not make a contract in her own name, either with her husband or with third parties, and she could neither sue nor be sued in her own name.¹¹ If she worked, her husband was entitled to her wages, and if she and her husband were to separate, her husband invariably would gain custody of the children. The concept of the unity of the husband and wife as a single person even prevented her from full criminal responsibility for her own conduct: criminal acts done by a woman in her husband's presence were assumed to be committed under her husband's command, and he was held responsible for them.¹² The assumed single identity of the husband and wife precluded any contract between them in the course of their marriage.¹³

With the passage of Married Women's Property Acts¹⁴ most of the legal restraints imposed upon married women were gradually removed, and conscious efforts were made to redress the balance and erase the disabilities of married women. As Professor Kanowitz notes:

[T]hese laws generally granted married women the right to contract, to sue and be sued without joining their husbands, to manage and control the property they brought with them to the marriage, to engage in gainful employment without their husbands' permission, and to retain the earnings derived from their employment.¹⁵

Although these acts redefined the property rights of married women, today—one hundred years later—many of the basic legal ob-

10. 1 W. BLACKSTONE, COMMENTARIES *442.

11. Radin, *The Common Law of the Family*, in 6 NATIONAL LAW LIBRARY, LEGAL RELATIONS 79, 175 (1939).

12. H. CLARK, THE LAW OF DOMESTIC RELATIONS 229 (1968).

13. *Id.* at 226.

14. First enacted in Mississippi in 1839, some form of the Married Women's Act or—as it was often called—the Married Women's Property Act was soon adopted by all American jurisdictions. By 1882 it had also become law in England—the nation that had bestowed upon the United States the complex of rules establishing the married woman's inferior legal position.

L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 40 (1969) (footnotes omitted).

15. *Id.* at 40.

ligations between husbands and wives remain fundamentally the same as in early English common law. Private practices within marriage may not always conform to this traditional "contract," but it is clear that present statutory and case law continue to uphold these traditional obligations of husbands and wives.

The essential provisions of this traditional marriage contract recognize the husband as head of the household, hold the husband responsible for support, and hold the wife responsible for domestic and child-care services. Each of these provisions is rooted in common law, and each remains alive and well in 1974.¹⁶ It will be argued, however, that their endurance is anachronistic, their burdens unconstitutional. The weight of these burdens falls most heavily on women, and each should and will face an increasing number of challenges in the near future.

A. *The Husband Is Head of the Family*

The common law doctrine of coverture established the fiction that husband and wife had a single identity—that of the husband. At common law a married woman was a *feme covert*, a legal nonperson. Today when a woman marries, she still partially loses her independent legal and social identity:¹⁷ she assumes her husband's name and domicile as well as his social and economic status.

The married woman's loss of an independent identity is most aptly symbolized by the loss of her name. Although many women may want to assume their husband's surname when they marry, "a coerced change of name," as Professor Kay has noted, "is resented by the

16. It is clear that recent years have brought the seeds of change. The most significant changes are in the area of the grounds and availability of divorce—all of which have occurred in the last five years. When California, the first state to adopt a no-fault divorce law, passed the new Family Law Act in 1969, the change was heralded as the beginning of a new era in family law. The new law abolished the traditional grounds for divorce, and allowed dissolution of the marriage if there were "irreconcilable differences which have caused the irremediable breakdown of the marriage." CAL. CIV. CODE § 4506 (West 1970). By thus substituting the standard of marital breakdown for the old fault-linked grounds for divorce, the California law permitted the individuals to decide for themselves when they wanted to dissolve their marriage. But despite this major change in divorce law, there has been no comparable move to allow individuals to decide for themselves how they want to structure their marriage. If this is truly the beginning of a new era in family law, it is possible that a comparable liberalization of the laws governing marriage would now be welcomed.

17. See Text Note: *The Married Woman's Loss of Identity*, in K. DAVIDSON, R. GINSBURG & H. KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION, 117-30 (1974). Also published separately as H. KAY, SEX-BASED DISCRIMINATION IN FAMILY LAW 117-30 (1974) [hereinafter cited as KAY].

As Inger Margrete Pedersen has pointed out, typically the legal restraints on unmarried women have been removed before those on married women. See Pedersen, *Status of Women in Private Law*, 375 ANNALS 44-51 (1968).

women who wishes to retain her birth name in order to establish a continuity of identity throughout her life."¹⁸ A woman in public or professional life may suffer a real loss of recognition if she alters her name upon marriage, particularly if she marries more than once.¹⁹ Such a result seems increasingly inappropriate in a society that is trying to encourage the fullest participation of women.

Yet retaining a birth name may be difficult and cause unforeseen problems. A woman who tries to use her maiden name may have difficulty voting, obtaining a driver's license, running for office, and securing credit.²⁰ She may be unable to recover for injuries suffered in an automobile accident if her car is registered in her maiden name,²¹ or to become a naturalized citizen using her maiden name.²² In some states a woman with children is forced to retain her husband's name even after they divorce.²³

There is considerable controversy over whether this rule is merely an "immemorial custom"²⁴ or has acquired the force of law.²⁵ State courts in Ohio²⁶ and Maryland²⁷ have recently held that their state common laws do not require a woman to assume her husband's name even though such a custom might be followed by the majority of married women. Both courts relied heavily upon the common law rule that a person may adopt and use any name he or she wishes providing that the change is not made for fraudulent purposes.²⁸ Although not discussed in these two cases, any state claim of an interest in administrative convenience is questionable as it would seem that record-keeping would be facilitated if women retained rather than changed their birth names. Administrative convenience and the cost of a change in the state's licensing process were, however, given heavy weight by a federal district court in *Forbush v. Wallace*,²⁹ where the court held

18. KAY, *supra* note 17, at 125.

19. *Id.*

20. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 940 (1971).

21. *See, e.g.,* Bacon v. Boston Elevated Ry., 256 Mass. 30, 31, 152 N.E. 35, 36 (1926).

22. *See, e.g.,* *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934).

23. *See, e.g.,* MICH. STAT. ANN. § 25.181 (1970).

24. 57 AM. JUR. 2D *Name* § 9 (1971).

25. L. KANOWITZ, *supra* note 14, at 42.

26. *State ex rel. Krupa v. Green*, 114 Ohio App. 497, 177 N.E.2d 616 (1961).

27. *Stuart v. Bd. of Supervisors of Elections*, 226 Md. 440, 295 A.2d 223 (1972).

28. 65 C.J.S. *Names* § 11(1) (1966); 57 AM. JUR. 2D *Name* § 10 (1971).

29. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972).

The decision was premised on the common law of Alabama which requires that "upon marriage the wife by operation of law takes the husband's surname." *Id.* at 221. The court therefore gave effect to the state's interpretation of a regulation which requires a driver to obtain a license in one's "legal name" as requiring that every married woman use her husband's surname on her driver's license, even if she were not known by that name in her everyday affairs.

that it was constitutional for the Alabama Supreme Court to adopt "the common law rule which requires a woman upon marriage to take her husband's surname."³⁰ This decision was subsequently affirmed by the United States Supreme Court.³¹

While the law in this area seems to be changing,³² the change is hardly complete and decisions like *Forbush* tend to impede the transition. In the meantime a married woman who does not want to assume her husband's surname may have to contend with written law, administrative regulations, and social pressures which reinforce this coverture-inspired custom.³³

The second respect in which a married woman traditionally assumes her husband's identity is in her domicile; upon marriage she automatically takes her husband's.³⁴ This common law rule has two effects. First, the husband has the right to decide where the family will live and the wife has a duty to follow if the choice is a reasonable one. Second, the wife's eligibility for a range of government benefits and responsibilities is dependent on her domicile and she may be adversely affected by a forced change.

The husband's legal right to establish the marital domicile is so clear that if a woman refuses to accept her husband's choice, she is considered to have deserted him. This desertion is not only grounds for divorce, but in the great majority of states which still use grounds

30. *Id.* at 222.

31. 405 U.S. 970 (1972).

32. See generally Bysiewicz & MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598 (1973); Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552 (1971); MacDougall, *Married Women's Common Law Right to Their Own Surnames*, 1 WOMEN'S RIGHTS L. REP. No. 3, 2 (Fall/Winter 1972-73).

It should be noted here that only Hawaii has an explicit statute directing that "every married woman shall adopt her husband's name as a family name." HAWAII REV. STAT. § 574-1 (1968). California has no such law, *Female Surnames and California Law*, 6 U.C.D.L. REV. 405 (1973). Nor does Wisconsin, MacDougall, *supra*; Missouri, Krauskopf, *Sex Discrimination*, 37 MO. L. REV. 377 (1972); Pennsylvania, Office of the Attorney General, Official Opinion No. 62 (1973); or Michigan, MICH. ATT'Y GEN. BIENNIAL REP. 824 (1973).

Any name change by the woman upon marriage today in England is at her choosing and not as a matter of law or legal tradition. 19 HALSBURY'S LAWS OF ENGLAND 829 § 1350 (3rd ed. 1957) Similarly "[t]here is no statute law which regulates the right of any person . . . to change his surname. . . ." 22 HALSBURY'S STATUTES OF ENGLAND 1211 (3d ed. 1970).

33. The anxiety experienced by certain segments of our society when faced with the assertion that a married woman's surname should not be dictated by that of her husband can be seen in Senator Ervin's dissent to the passage of the Equal Rights Amendment, which focused on this issue. See S. REP. No. 92-689, 92d Cong., 2d Sess. 50-52 (1972).

For a survey of other countries' approaches to female surnames, see Symposium, *The Status of Women*, 20 AM. J. COMP. L. 585 (1972).

34. H. CLARK, *supra* note 12, at 149-51; L. KANOWITZ, *supra* note 14, at 46-52.

for divorce, a woman found guilty of desertion would be "at fault" in the divorce action³⁵ and could be deprived of her right to seek alimony. This rule that the husband "may choose any reasonable place or mode of living and the wife must conform thereto"³⁶ appears to be based on the assumption that the husband is solely responsible for the support of the family. As the court found in *Carlson v. Carlson*:³⁷

The general rule by the great weight of authority is that the wife *must* adopt the residence of the husband and that she cannot without just cause maintain a separate domicile. There are sound reasons for this rule. The law imposes upon the husband the burden and obligation of support, maintenance and care of the family and almost of necessity he must have the right of choice of the situs of the home. There can be no decision by majority rule as to where the family home shall be maintained. . . . [O]ne domicile for the family home is still an essential in our way of life.³⁸

However, it is no longer realistic to assume that men are solely responsible for family support or that the location of the homestead is determined by the husband's work. In the living reality of most marriages, decisions are not based on legal rights, and the decision of when and where to move is not made by the husband alone, nor is it based solely on his job.³⁹ Yet the law continues to ignore the wife's equal interest in the location of the marital domicile.

The second aspect of the domicile rule is that the wife's legal or technical domicile becomes that of her husband upon marriage. The location of a person's domicile affects a broad range of legal rights and duties, including the place where he or she may vote, run for public office, serve on juries, receive free or lowered tuition at a state school, be liable for taxes, sue for divorce, register a car, and have his or her estate administered.⁴⁰ Although the privilege of choosing one's own legal domicile is accorded to all other adults, the married woman may find herself severely disadvantaged because she has no choice in the matter. For example, a woman who is, and always has been, a state resident and therefore receives free tuition at the state university may suddenly be charged out-of-state tuition if she marries a male student

35. See, e.g., *Thomas v. Thomas*, 320 S.W.2d 803 (Ky. Ct. App. 1958).

36. This is the wording of the Ohio Code, which is typical. OHIO REV. CODE § 3103.02 (1972).

37. 75 Ariz. 308, 256 P.2d 249 (1953).

38. *Id.* at 310, 256 P.2d at 250 (emphasis added).

39. See Berkwitz, *Corporate Wives: The Third Party*, DUN'S REVIEW, Aug. 1972, at 61-62, reporting that wives of business executives now often refuse to leave their own jobs and interests to follow their husbands to new locations, with the result that the husbands do not relocate. See generally A. JACOB & R. ANGELL, A RESEARCH IN FAMILY LAW 469 (1930).

40. See Brown, Emerson, Falk & Freedman, *supra* note 20, at 941.

whose legal domicile is in another state.⁴¹ Although this automatic merging of the wife's domicile into the husband's has been modified by some states, there are still many states in which married women are prevented from retaining their own domiciles for purposes of voting, running for office, and paying taxes.⁴² As of 1971, only three states in the United States—Alaska, Arkansas, and Wisconsin—permitted a woman to have a separate domicile from her husband for all legal purposes.⁴³ As Professor Kanowitz has noted, the practical effect of the domicile rule is to “deprive wives of certain governmental benefits they would otherwise have.”⁴⁴ Further, for the increasing minority of two-career families, the domicile rules may raise tax, employment, and other legal problems for the woman who commutes to a job in another state or who lives apart from her husband for substantial periods of time.⁴⁵ It is difficult to imagine what state interest could justify this unequal burden.

In addition to domicile and surname, there are other areas in which the law still recognizes the husband as head of the household with his wife's identity subordinate to his. Administrative regulations regarding unemployment insurance, social security benefits, federal survivors and disability insurance, and public assistance⁴⁶ will be noted

41. This was the rule in California until May 1, 1973, CAL. EDUC. CODE § 23054 (West 1969) (repealed by Ch. 1100 §§ 3 to 8, [1972] Cal. Stat. 2102) and CAL. GOV'T CODE § 244 (West 1966) (amended by Ch. 1071, § 2, [1972] Cal. Stat. 2007). The new residency rules for students provide that any man or woman may establish his or her own residency. CAL. EDUC. CODE § 22847 (West Supp. 1974).

42. KAY, *supra* note 17, at 127.

43. Brown, Emerson, Falk & Freedman, *supra* note 20, at 941. ALAS. STAT. ANN. § 25.15.110 (1965); ARK. STAT. ANN. §§ 34-1307 to 1309 (1962); WIS. STAT. ANN. § 246.15 (Supp. 1974). See also CAL. CIV. CODE § 5101 (West Supp. 1974) which prior to the 1972 amendment read as follows: “The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.” In 1972 it was amended to delete the phrase “and the wife must conform thereto.” In 1973, effective January 1, 1975, it was repealed altogether.

44. L. KANOWITZ, *supra* note 14, at 52. In discussing the wife's difficulties with unemployment insurance benefits, Colquitt Walker observes that if a wife leaves her job to move with her husband, she may be disqualified from receiving unemployment benefits. Walker, *Sex Discrimination in Government Benefit Programs*, 23 HASTINGS L.J. 277, 281-82 (1971).

45. See Kleinesrud, *Marriages in Academe Reflect the Changing Status of Women*, N.Y. Times, Nov. 13, 1972, at 42, col. 1.

In a study of two-career families Holmstrom found that in twelve of the fifteen families studied the wife's career significantly influenced the family's domicile. Holmstrom notes a new pattern of alternating priorities given to each person's career. If the first decision is based on the wife's career, then the second may be based on the husband's. L. HOLMSTROM, *THE TWO-CAREER FAMILY* 30-34 (1972).

See also R. RAPOPORT & R. RAPOPORT, *DUAL-CAREER FAMILIES* (1971); R. Rapoport & R. Rapoport, *The Dual-Career Family: A Variant Pattern and Social Change*, in *INTIMACY, FAMILY, AND SOCIETY* 530 (A. Skolnick & J. Skolnick eds. 1974).

46. See generally Walker, *supra* note 44.

later. Other regulations, such as those governing consumer credit, fall into that grey area where custom is derived from legal principles but then acquires an authority of its own. For example, the restrictions that a married woman faces in the credit arena are a direct outgrowth of the traditional marriage contract. At common law, the husband gained control of his wife's property upon marriage, and therefore assumed responsibility for her debts as well as her support.⁴⁷ Today, however, despite the fact that married women earn money, hold property, and acquire debts in their own names, in many cases they are still required to apply for and obtain credit in their husbands' names—and need their husbands' explicit permission to do so.⁴⁸ A married woman's independent right to seek bank loans, home mortgages, federal housing loans, department store charge accounts, and credit cards in her own name is thus severely circumscribed by the prevailing assumption that her husband is the head of the household.⁴⁹ The result in this area, as in many others, is a series of social customs and regulations which surround and enlarge the husband's

47. Upon her marriage the wife's personal property and possession became the property of her husband, and on his death passed to his personal representatives. The same was true of personal property which she acquired during marriage. Even her paraphernalia, clothing and jewelry, belonged to him, but this sort of property did come back to her on her husband's death. . . .

The rules were different with respect to the married woman's real property, but no more favorable to her interests. The use of her estates of inheritance in land belonged to her husband during the marriage, and for that time he was entitled to the rents and profits of the land. If the marriage produced a child born alive, the husband became a tenant by the curtesy, as a result of which he was entitled to the rents and profits of the land during his life. The estate of inheritance remained the wife's property, but the husband could convey his interest, and the wife could not convey hers without his consent, nor could any conveyance be made between husband and wife. On his death the property passed to the wife or her heirs.

H. CLARK, *supra* note 12, at 219-20 (footnotes omitted).

48. THE NATIONAL ORGANIZATION FOR WOMEN, *WOMEN AND CREDIT* 1 (1973).

49. Brown, *The Discredited American Woman: Sex Discrimination in Consumer Credit*, 6 U.C.D.L. REV. 61, 62-67 (1973). Results of two recent studies (conducted by the Washington, D.C. Commission on the Status of Women) surveying the extent of sex discrimination in the granting of residential mortgage loans and department store charge accounts were summarized as documenting the widespread difficulty encountered by women with reliable incomes in their attempts to obtain credit.

Only 27 of the 40 mortgage lenders responding count fully the salary of a working wife who is a "professional" in determining a married couple's eligibility for a loan, and the salaries of "nonprofessional" working wives are counted fully by only 13 of the 40 respondents. Alimony and child support are often discounted regardless of their reliability. When a married couple applies for a department store account, it is assumed or required by half of the ten responding stores that the primary applicant be the husband. Similarly, only five of the ten responding stores expressed a willingness automatically to issue a new card to a woman who notifies them of a name change due to marriage, simply changing the last name on the account; others might ask her to reapply, providing information about her husband. Both reports indicate that the findings may underestimate the extent of the problem because of the failure of al-

strictly legal rights as head of the household and consequently further diminish those of his wife.

Regulations which support the husband's assumed dominance in the family are outmoded in a society where power and decisionmaking in most families are either shared, divided, or functionally specific.⁵⁰ In 1974 it is rarely assumed that the husband does or should make all decisions for his wife and family.⁵¹ Further, recent years have shown a dramatic increase in the number of female-headed households; currently, approximately 34 percent of all nonwhite households and 20 percent of white households have a female head.⁵²

Obviously the husband's dominance and the wife's subordination in the traditional marriage could be challenged on a constitutional basis. Even if a majority of women freely chose traditional roles, it would not justify sex-stereotyping and discrimination against all women as a class. Whatever the social reality, a preference on the basis of sex, whether for men or women, is highly questionable in light of re-

most half of the creditors contacted to participate and a possible desire on the part of respondents to create a favorable impression.

3 WOMEN TODAY No. 22, 3 (Oct. 29, 1973). See also *Proceedings of the Public Hearings on the Availability of Credit to Women*, National Commission on Consumer Finance, May 22-23, 1972, Washington, D.C.; Bender, *Women Equality Groups Fighting Credit Barriers*, N.Y. Times, Mar. 25, 1973, at 1, col. 2, and at 35, col. 1.

50. See generally R. BLOOD & D. WOLFE, *HUSBANDS AND WIVES* (1960).

51. In general, sociologists have found a strong egalitarian ethic in most middle-class families, whereas working-class families show more sex-stereotyping and a sharper division of family decisionmaking along sex lines. However, even in working-class families, Professor Komarovsky found husbands to be dominant in 45 percent of the blue-collar marriages, leaving more than half of the marriages in which the wives enjoy as powerful a position as their husbands. M. KOMAROVSKY, *BLUE-COLLAR MARRIAGE* 223 (1964).

Although Komarovsky's work with blue-collar families is considered the best in the field, it is based primarily on interviews. Sociologist William Goode has noted that the discrepancy between interview claims and reality may also differ by social class. He explains that there is an apparent paradox in the correlation between class position and the authority of the male.

Toward the lower strata, the husband is more likely to claim authority simply because he is a male, but actually has to concede more authority to his wife. Toward the upper strata, men are less likely to assert the values of patriarchal authority, but in action manage to have more power anyway. On a common-sense basis, it can be seen that these men have more resources by which to have their way. Their wives are less likely to work, and even if they do work, they contribute a smaller percentage of the total family income than would be true in the lower social strata. . . . Thus the husband's position in role bargaining is stronger.

W. GOODE, *THE FAMILY* 74-75 (1964).

52. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* (1972). We should note that the census terminology is itself sex-biased because it is typically assumed that the male is the head of the household—unless proven otherwise. See also Stein, *The Economic Status of Families Headed by Women*, 93 MONTHLY LABOR REV. 3, 4 (Dec. 1970).

cent developments in the law of equal protection.⁵³ Furthermore, if the proposed Equal Rights Amendment is ratified by the states, all laws which discriminate on the basis of sex will be prohibited.⁵⁴ Yet even if the courts ultimately invalidate all sex-based distinctions, the change might take many years if done on a case by case basis, and thus it is likely that the effects of these laws will continue to plague married women for some time. What is needed is an immediate way for women to avoid these vestiges in the traditional marriage contract by writing their own contracts or by drastically changing the institution of legal marriage.⁵⁵

B. *The Husband Is Responsible for Support*

The traditional, state-imposed marriage contract assumes a strict division of labor within the family. The financial aspects of family life are delegated to the husband; he is responsible for support. Professor Clark, who characterizes the laws on spousal obligations as extraordinarily conservative, summarizes them as follows:

Specifically, the courts say that the husband has a duty to support his wife, that she has a duty to render services in the home, and that these duties are reciprocal

. . . The husband is to provide the family with food, clothing, shelter and as many of the amenities of life as he can manage, either (in earlier days) by the management of his estates or (more recently) by working for wages or a salary. The wife is to be mistress of the household, maintaining the home with the resources furnished by the husband, and caring for the children. A reading of contemporary judicial opinions leaves the impression that these roles have not changed over the last two hundred years⁵⁶

All states, even those with community property systems, place the primary obligation of family support upon the husband: he is to provide necessities for both his wife and his children.⁵⁷ In contrast, a wife is rarely responsible for the support of her husband:⁵⁸ in the minority of states in which she is responsible, her obligation is limited to situations in which her husband has become incapacitated or a public charge.⁵⁹ The wife's obligation for the support of her children is similarly circumscribed, requiring her to contribute to child support only if

53. See discussion accompanying notes 324-65 *infra* on constitutional challenges to the traditional marriage contract.

54. See discussion in text accompanying notes 366-94 *infra* on the E.R.A.

55. See discussion in text accompanying notes 395-484 *infra* on the alternatives of contracts in lieu of marriage and contracts within marriage.

56. H. CLARK, *supra* note 12, at 181 (footnote omitted).

57. KAY, *supra* note 17, at 133.

58. *Id.* at 139.

59. *Id.* See also H. CLARK, *supra* note 12, at 186.

her husband is unwilling or unable to do so.⁶⁰ Because the husband's obligation of support has been considered one of the unalterable marital obligations, courts traditionally have not allowed husbands and wives to make private contracts that limit this obligation.⁶¹ Even in cases where the woman had independent wealth and the parties married on the condition that the husband should not be obligated for support, the courts have nevertheless reaffirmed the unalterability of the husband's obligation and held him liable for his wife's support.⁶²

The rule that a husband shall always be responsible for support of the family is based on outdated assumptions about the sexual division of labor in marriage. Married women now constitute 60 percent of the female labor force,⁶³ and the over 20 million married women who work contribute to the basic support of their families.⁶⁴ At a later point in this Article additional sociological data will be presented on the importance of married women's wages⁶⁵ and the inaccuracy of the legal assumption of a strict division of labor within the family.⁶⁶ The present discussion will focus on the implications of this legal rule and then explore two ways in which women who rely on the law's promise of spousal support are likely to find their expectations thwarted.

When the law assigns the husband sole responsibility for family support it assumes an economic incapacity of the wife. As Professor Kay has recently written:

[T]he support laws embody the legal view that a married woman is an economically nonproductive person dependent upon others for the necessities of life. . . . [T]he married woman continues to be treated as a legal dependent, like the children and insane persons with whom the law formerly classified her.⁶⁷

60. H. CLARK, *supra* note 12, at 187-88.

61. H. CLARK, *supra* note 12, at 28, 227. Isabella H. Grant has summarized the status of support agreements between husbands and wives as follows: "A prospective husband may not be absolved from his duty to support his wife nor can this duty be qualified or limited. The husband's duty as a matter of policy is an obligation imposed by law and cannot be contracted away." Grant, *Marital Contracts Before and During Marriage*, THE CAL. FAMILY LAW, 160 (Continuing Education of the Bar 1962). See text accompanying notes 419-22 *infra* for further discussion of the legality of contracts between husband and wife to alter the husband's duty to support.

62. See, e.g., *Kershner v. Kershner*, 244 App. Div. 34, 278 N.Y.S. 501 (1935), *aff'd*, 269 N.Y. 655, 200 N.E. 43 (1936), which held that a wife's waiver of support would not be enforced. In addition, her agreement to support her husband would not be enforced.

63. WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMIN., U.S. DEP'T OF LABOR, *WOMEN WORKERS TODAY* 2 (1971).

64. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *THE AMERICAN ALMANAC: THE STATISTIC ABSTRACT OF THE U.S.*, 222-23 (1974).

65. See text accompanying notes 237-41 *infra*.

66. *Id.*

67. KAY, *supra* note 17, at 140-41.

The effect of placing the primary support obligation on the husband is to reinforce further the husband's position as head of the household, and more specifically his authority over family finances. Indeed most of his financial power and responsibility stem directly from the support obligations placed upon him. For example, in most states, because the husband has the primary responsibility for family support, he has the power to manage and control family income and property.⁶⁸ In some states, again because of his support obligation, his permission is necessary before his wife can open a business,⁶⁹ trade in commodities,⁷⁰ or apply for credit.⁷¹ With the growing complexity of family financial concerns, the penumbra of financial powers that emanate from the husband's assumed position as master of the family treasury now includes such areas as pensions, insurance, social security, and dependency allowances as well as the more traditional ones of income and real property. This increase in the husband's financial authority has the effect of perpetuating the wife's reliance on the husband's financial skills. Thus if married women were not less financially competent than their husbands initially,⁷² the financial restrictions imposed on

68. In half of the community property states he is given this power by law. In common law property states it is de facto power because the husband's income, which he controls, is the major financial resource of most families. The past two years have shown a major change in the laws governing the management and control of property in the community property states. Between 1971 and 1973 five states—Texas, Washington, California, Arizona, and New Mexico—have enlarged the wife's role in managing the community property. KAY, *supra* note 17, at 165.

69. Kanowitz cites five states that still have "free dealer" or "sole trader" statutes. These typically require a married woman to set forth her character, habits, education, and mental capacity for business, and to explain why she should be exempted from the disabilities of other married women and should be allowed to open a business of her own. Further, they typically require her to serve her husband with a copy of the petition or to obtain his signed consent. L. KANOWITZ, *supra* note 14, at 57.

70. "Several Wall Street firms have long-standing policies aimed at discouraging women from trading in the volatile commodity market. The brokers apparently believe women are too emotional to keep pace with the frequent changes in commodities markets." *Woman Wins Round in Her Bias Action Against Walston & Co.*, The Wall Street Journal, Feb. 8, 1972, at 38, col. 5 (complaint of a female attorney and orange grove owner who was restricted from trading in juice concentrate commodities futures because she would not sign a "Women's Commodity Account Agreement" that released the firm from any losses which might be incurred, *id.* at 38, col. 4).

71. See notes 48, 49 *supra*.

During the 1973-74 legislative session the California Legislature enacted AB 312 (Chapter 999 of the laws of 1973 (effective Jan. 1, 1974)) which prohibits creditors from discriminating against single and married women with separate property or separate earnings.

72. This is not to imply that women's "trained incapacity" in financial matters is limited to the legal system. Sex role socialization begins at an early age and is reinforced throughout the social system. Elementary school textbooks portray math and science as strictly masculine endeavors, giving girls the impression that these skills are (and should be) restricted to boys. L. Weitzman and D. Rizzo, Image of Males and Females in Elementary School Textbooks, slide-tape research report, Nat'l Educ. Ass'n, Washing-

them would certainly have the effect of making them so, for it is more difficult for a married woman to develop financial competence when social and legal restrictions serve to keep her financially dependent on men—and limit her from gaining the very experience she needs.⁷³

ton, D.C., 1974; a summary of the research is contained in Weitzman, *Sex Role Socialization*, in *WOMEN: A FEMINIST PERSPECTIVE* (J. Freeman ed. 1974). By the time girls enter college they are severely handicapped by their lack of mathematical training. "In a systematic random sample of Freshmen admitted to the University of California at Berkeley in Fall, 1972, 57% of the boys had taken four full years of mathematics, including the trigonometry solid geometry sequence, compared with 8% of the girls. The four year mathematics sequence is required for majoring in every field at the University *except* the traditionally female, and hence lower paying, fields of humanities, social sciences, librarianship, social welfare, and education." L. Sells, *Fact Sheet on Women in Higher Education* 1, Dec. 15, 1973 (unpublished paper, Dep't of Sociology, Univ. of Cal., Berkeley).

73. The interplay of social and legal financial restrictions on married women may be illustrated by the practices surrounding testamentary trusts. The marital deduction associated with such a trust allows a man to leave approximately half of his property to his wife free of estate taxation. S. Plover, *Trusts and the Mistrusted Widow*, May 24, 1971 (unpublished student paper, George Washington University Law School). These tax advantages and the younger mortality rates for men would lead a wise family to consider a testamentary trust. (At ages 65-69 only 8.8 percent of males are widowed. In the same age group 36.5 percent of women are widowed. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *MARITAL STATUS*, 1-5 (1970)).

However, the typical structure of a testamentary trust seems to assume a woman would be incapable of wisely managing property left to her by her husband in the form of a life estate and, consequently, the trust restricts her control over the property. As an expert has suggested:

Is it wise to thrust upon a widow (especially when there are young children) who has never had any business experience or handled sums much larger than the monthly household budget, the responsibility of managing a capital fund of \$50,000 or \$100,000?

J. TRACHTMAN, *ESTATE PLANNING*, 149-50 (1968). Plover, *supra*, at 12, quotes a more recent text that cautions against leaving money to widows because of their inability to refuse relatives with hard luck stories or their tendency to bury the money in a little tin box. Thus legal advisors ensure that wives are seldom given the opportunity to manage their own money, and this itself further reinforces their inability to do so. The result is not only a serious deprivation of the widow's control over her own money, but financial losses may also result from the unnecessary restrictions placed on the administration of the trust.

Having someone else administer her husband's estate has two negative consequences from the widow's point of view. First, there is a fee for the service of estate administration, and this fee is deducted from her share of the estate. She is thus deprived of some of her money without her consent. Second, the appointment of an administrator deprives the widow of the right to decide what to do with her money. She does not choose the person who will administer the estate, and her preferences may be ignored in management and investment. In fact, unless she can prove gross incompetence of the administrator, her wishes are irrelevant. This loss of control is especially significant. Most men with comparable amounts of money (trusts being almost exclusively for the wealthy) do not manage their own financial affairs. They have lawyers, accountants, bankers, and stockbrokers whose advice they rely on. But they may manage it if they choose to, and they certainly are free to choose their own advisors. Trusts assume that the widow is incapable of availing herself of the advice of these same persons or that she will be taken advantage of if she is allowed the prerogative of seeking

For a wife, however, the real unfairness of the rule that the husband shall be responsible for her support is that a married woman is often unable to obtain what the law promises her. In practice, the spousal support obligations of the husband are rarely enforced in an ongoing marriage because the courts are reluctant to interfere with the internal marriage relationship. In the leading case in this area, *McGuire v. McGuire*,⁷⁴ the wife complained that her husband had not given her any money or provided her with any clothes for the past three years. She alleged that although he was a man of substantial means, he had also refused to purchase furniture and other household necessities, beyond the groceries which he had paid for by check. The court refused to consider the wife's complaint, however, because the parties were still living together and it did not want to intrude on the marital relationship. In the language of the court:

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. Public policy requires such a holding.⁷⁵

If a wife cannot get the court's assistance in obtaining support during her marriage, it becomes meaningless to speak of the husband's legal obligation to support his wife. The Citizens' Advisory Council on the Status of Women aptly describes the present situation: "A married woman living with her husband can, in practice, get only what he chooses to give her."⁷⁶ Thus the law's promise of support is a hollow guarantee, one that affords a married woman no more protection than her husband will willingly grant.

Although the husband's responsibility for support theoretically continues after divorce as an obligation to provide alimony for his

out her own advisors. Thus, women are considered not only financially incompetent—but so generally unintelligent that they must be deprived of independent control of major decisions.

Under most widow's trusts, the property being administered cannot be sold. In theory, this is because the property is being held for her children who will also avoid an estate tax through the marital deduction. In practice, however, the forced retention of all property may prohibit even the wisest estate administrator from managing the property most profitably, and may thus further dissipate the widow's share of the estate.

74. 157 Neb. 226, 59 N.W.2d 336 (1953).

75. *Id.* at 238, 59 N.W.2d at 342.

76. CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, THE EQUAL RIGHTS AMENDMENT AND ALIMONY AND CHILD SUPPORT LAWS 38 (1972) [hereinafter cited as ALIMONY AND CHILD SUPPORT].

former wife,⁷⁷ women fare just as poorly, if not more so, in enforcing this obligation after separation or divorce as they do during the ongoing marriage. Alimony was originally awarded by the English ecclesiastical courts which granted only divorce *a mensa et thoro* [from "bed and board"]. The husband and wife were authorized to live apart but the marital obligations remained.⁷⁸ Alimony then constituted a recognition and an enforcement of the husband's continuing duty to support his wife necessitated by the husband's retention of control over his wife's property⁷⁹ and the lack of employment opportunities for women.⁸⁰

Today alimony continues to reflect an assumed dependence of the wife on her husband's earnings. Because the law encourages a woman to give up her independent earning potential in favor of her marriage, it promises her support or alimony so that she will not have to rely on her own earning ability. Thus alimony is still intended as a form of legal insurance or protection for the woman who has devoted her life to her husband and children instead of developing marketable skills.⁸¹ The survival of alimony today, despite the recent changes in the labor force participation of married women, may reflect a recognition of the relatively low employment value of a middle-aged woman who has devoted her productive years to full-time housework and child care, and of the continued employment discrimination she is likely to face. It might be argued that monetary compensation is owed to the housewife for her contribution to the family asset of "earning power," an important marital property, which her husband retains upon dissolution.⁸² Al-

77. All American states except Texas, Delaware, North Carolina, and Pennsylvania now have alimony or spousal support statutes. See H. CLARK, *supra* note 12, at 420-21.

78. For an historical discussion of alimony, see Vernier and Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 L. & CONTEMP. PROB. 197 (1939).

79. H. CLARK, *supra* note 12, at 420.

80. *Id.*

81. For a more thorough treatment of the impact of alimony see Peele, *Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses*, 6 L. & CONTEMP. PROB. 238 (1939); Hofstadter & Levittan, *Alimony—A Reformulation*, 7 J. FAM. L. 51 (1967).

82. Thus it could be argued that many wives have a right to alimony—or to some monetary reimbursement after divorce—irrespective of their financial needs. If a wife has contributed to her husband's employability and helped to advance his career, as most married women have, she should be considered his economic partner, with a financial investment in his earnings. Traditionally the law has assumed that family property is limited to items of real and personal property. However, in a mobile urban society the spouses' earning power have become the major assets of most families. Thus a modern conception of marital property might well be broadened to include the "earning power" of the marital partners. The recognition of earning power as marital property would legitimately compensate a non-income earning spouse for contributing to the other's education, employability and job success. In cases of a single income family, the single

though most states theoretically continue to hold all husbands liable for alimony⁸³ no matter what their wives' independent earnings,⁸⁴ alimony is actually awarded in less than 10 percent of the divorce cases.⁸⁵ Since tax considerations encourage a man to label his "child support" as "alimony,"⁸⁶ true alimony may be given in even fewer cases.⁸⁷ Widespread noncompliance with alimony awards coupled with minimal enforcement efforts probably reduce even further the percentage of women who actually receive alimony.⁸⁸ Thus although the myth of alimony and

career should be conceptualized as a "two-person-career" or the product of a cooperative effort by the partnership, and both partners have a future share in it.

The term "two-person-career" comes from Hanna Papanek who defines the "two-person-single-career" as a "[s]pecial combination of roles whereby wives are inducted by the institutions employing their husbands into a pattern of vicarious achievement." According to Papanek this pattern serves as a social control mechanism which derails the occupational aspirations of highly educated women into a subsidiary role determined by her husband's career. Papanek shows how the husband's career suffers if the wife does not cooperate—and vice versa. Papanek, *Men, Women and Work: Reflections on the Two-Person Career*, 78 AM. J. SOC., 852 (1973).

Two legal questions follow from this expansion of the traditional conception of marital property to include earning power. What standards are appropriate in determining the extent of the second spouse's interest in the new property? What is the duration of the second spouse's future share? Appropriate standards, such as those based on the length of the marriage and the extent of the contribution, would have to be drafted. For example, a formula for spousal support now used by the Superior Court in Marin County, California, allows a spouse payment for the number of years equal to one-half the duration of the marriage for marriages of less than twenty years. For marriages over twenty years the support continues indefinitely. Interview with Ann Diamond, Esq., drafter of this provision, in San Rafael, Cal., May 19, 1974, on file with California Divorce Law Research Project, Institute of Gov't Affairs, Univ. of Cal., Davis.

The wife's contribution to her husband's earning power seems to be implicitly recognized by recent decisions of the California courts which recognize the goodwill value of a professional practice as part of the community property to be divided upon divorce. See, e.g., *Golden v. Golden*, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (2d Dist. 1969); and *In re the Marriage of Lee A. and Edith M. Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (3d Dist. 1974).

83. Many of those states that still have grounds for divorce do limit the right of "guilty" wives to receive alimony. Freed & Foster, *Economic Effects of Divorce*, 7 FAM. L.Q. 275 (1973).

84. Clark criticizes courts which mechanically award support to a married woman whether or not she has property or earnings of her own. H. CLARK, *supra* note 12, at 184. See also Freed & Foster, *Economic Effects of Divorce*, 7 FAM. L.Q. 275 (1973) (outlining each state's particular rules for the awarding of alimony).

85. Nagel & Weitzman, *Women as Litigants*, 23 HASTINGS L.J. 189-91 (1971). See also M. VIRTUE, *FAMILY CASES IN COURT* 92 (1956). In 1922, which is the last year the Census Bureau kept national alimony data, alimony was decreed in 15 percent of a nationwide sample of decrees. P. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 126 (1959). However, Jacobson states that the percentage is likely to be lower today because women are now less dependent on their husbands than they were in the 1920's.

86. Alimony is deductible by the husband, and taxable as income to the wife. INT. REV. CODE OF 1954, §§ 71, 215. Child support payments are not usually deductible by the husband. *Id.* § 71(b). See, e.g., *Ashe v. C.I.R.*, 288 F.2d 345 (6th Cir. 1961).

87. ALIMONY AND CHILD SUPPORT, *supra* note 76.

88. Nagel & Weitzman, *supra* note 85, at 190.

alimony drones persists, for over 90 percent of the divorced women in the United States, alimony is just that—a myth.⁸⁹

*C. The Wife Is Responsible for Domestic
and Child-Care Services*

As noted earlier, specific roles are assigned to the husband and wife in the traditional legal marriage contract. The man exchanges financial support for his wife's services as a companion, housewife, and mother. The services a man legally can expect from his wife were enumerated by the court in *Rucci v. Rucci*: she has a duty "to be his helpmeet, to love and care for him in such a role, to afford him her society and her person, to protect and care for him in sickness, and to labor faithfully to advance his interests." Likewise, she must perform "her household and domestic duties, . . . without compensation therefor. A husband is entitled to the benefit of his wife's industry and economy."⁹⁰

Until recently courts have generally deferred to this traditional role allocation and upheld laws which openly discriminated against women on the basis of sex. In fact, the woman's obligations as wife, housewife, and mother are so basic to the legal conception of family roles that one can view a wide range of case law which supposedly deals with other issues as merely a vehicle for ensuring that women are not sidetracked from their domestic duties. For example, the past century of Supreme Court decisions which have dealt with women's roles indicate a remarkably consistent pattern of deference to a woman's domestic obligations above all else.

Beginning in 1872,⁹¹ in *Bradwell v. Illinois*, the Supreme Court upheld an Illinois state court decision denying a married woman the

89. There is some feeling that women who have not "succeeded" at marriage do not "deserve" alimony. As the Citizens' Advisory Council has noted:

The legal structure in the United States is based on a generally held societal assumption that a woman should secure an adequate standard of living through pleasing her husband and through womanly wiles. If the marriage fails, fault may be ascribed to her lack of femininity or skills in being a good wife and mother regardless of the circumstances.

CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, RECOGNITION OF ECONOMIC CONTRIBUTION OF HOMEMAKERS AND PROTECTION OF CHILDREN IN DIVORCE LAW AND PRACTICE 6 (1974) [hereinafter cited as ECONOMIC CONTRIBUTION OF HOMEMAKERS]. Stuart Walzer quotes one judge as saying, "Marriage is a woman's business. When the marriage is bankrupt, the woman is bankrupt." Walzer, *Divorce and the Professional Man*, 4 FAM. L.Q. 364 (1970). The National Organization for Women has proposed a marriage insurance plan which would provide divorce benefits for a spouse not previously employed. New York Marriage and the Family Committee, N.O.W., Draft Proposal for a Marriage Insurance Plan (E. B. Berry Coordinator Nov. 1970).

90. *Rucci v. Rucci*, 23 Conn. Supp. 221, 224, 181 A.2d 125, 127 (Super. Ct. 1962) (citations omitted).

91. In 1853, almost 20 years before this question was raised in court, Eliza-

right to practice law. Writing of the paramount destiny of women to be wives and mothers, Justice Bradley's concurring opinion states:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . .

. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.⁹²

Later Supreme Court justifications for women's domestic roles became more sophisticated, shifting from a reliance on the "law of the creator" to that of "sociological truth." In *Muller v. Oregon*,⁹³ the Brandeis brief⁹⁴ introduced a vast amount of sociological data to support differential treatment of women because of their roles as wives and mothers. The Court, ruling in his favor, also based their opinion on these sociological "givens":

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

. . . The two sexes differ in structure of body, [and] in the functions to be performed by each . . .⁹⁵

This same rationale has been used by the courts to justify special legislation for women and to uphold the exclusion of women from specific occupations, such as bartending;⁹⁶ job classifications, such as restricting jobs requiring weight lifting⁹⁷ and overtime work;⁹⁸ periods of employment, such as the regulation of women's work just before and just

beth Cady Stanton wrote to Susan B. Anthony: "I feel, as never before, that this whole question of women's rights turns on the pivot of the marriage relation, and, mark my word, sooner or later, it will be the topic for discussion." A. ROSSI, *THE FEMINIST PAPERS: FROM ADAMS TO DE BEAUVOIR* 392 (1973).

92. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873).

93. 208 U.S. 412 (1908).

94. Much of his brief was actually written by Josephine Goldmark.

95. *Muller v. Oregon*, 208 U.S. 412, 421, 422 (1908).

96. *Goesart v. Cleary*, 335 U.S. 464 (1948). *Contra*, *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *Paterson Tavern & Grill Owners' Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970).

97. See L. KANOWITZ, *SEX ROLES IN LAW AND SOCIETY* 364-81 (1973), for a discussion of the legality of protective state laws regarding hours and weight-lifting restrictions for women in the light of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e.

98. See *Radice v. New York*, 264 U.S. 292 (1923); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Muller v. Oregon*, 208 U.S. 412 (1908).

after childbirth,⁹⁹ and from compulsory jury duty.¹⁰⁰

There is, of course, a growing constitutional challenge to such laws, both in the present attempt to obtain ratification of the E.R.A. and in the use of equal protection rules under which sex may be declared a "suspect category."¹⁰¹ This challenge to the assertion that state interests can justify legislative differentiation on the basis of sex will be discussed later in this Article.¹⁰² The present discussion will examine the effects of the traditional state-imposed responsibility for domestic and child-care services on the wife. One effect is the present failure of the law to recognize the importance of the wife's services as contributions to the family wealth and property, both during the marriage and at the time of its dissolution. A second is the imposition on the wife of almost total responsibility for child care and child support after termination of the marriage.

Because a wife is obligated to provide domestic services for her husband, the courts have refused to enforce contracts under which she was to receive compensation for her labor.¹⁰³ The courts have reasoned that if a wife already owes these services to her husband, a contract in which she is to be paid for them is void for lack of consideration.¹⁰⁴ The courts thus have refused to honor contracts in which the husband agreed to pay his wife for housekeeping, entertaining, child care, or other "wifely tasks."¹⁰⁵ Even when the husband and wife have agreed that the services the wife would perform were "extras" like working in the husband's business or doing farm labor, courts have voided the contract which obligated the husband to pay her for them.¹⁰⁶

99. See *Cleveland Bd. of Education v. La Fleur*, 414 U.S. 632 (1974). See generally *T. HAYDEN & A.C.L.U., PUNISHING PREGNANCY* (1974).

100. *Hoyt v. Florida*, 368 U.S. 57 (1961). See also *Alexander v. Louisiana*, 405 U.S. 625 (1972) (dicta); Nagel & Weitzman, *Sex and the Unbiased Jury*, 55 JUDICATURE 108 (1972).

101. See text accompanying notes 341-65 *infra*.

102. See text accompanying notes 357-65 *infra*.

103. See *H. CLARK, supra*, note 12, at 227. See generally *Youngberg v. Holstrom*, 252 Iowa 815, 108 N.W.2d 498 (1961); *Miller v. Miller*, 78 Iowa 177, 35 N.W. 464, 42 N.W. 641 (1889); *Ritchie v. White*, 255 N.C. 450, 35 S.E.2d 414 (1945); *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931); *Oates v. Oates*, 127 W. Va. 469, 33 S.E. 2d 457 (1945).

104. *Id.*

105. *H. CLARK, supra*, note 12, at 227. See text accompanying notes 422-25 *infra*. An agreement in contemplation of marriage that the husband is to pay the wife monthly sums for her services as a nurse and housekeeper is void. Moreover, the husband may recover any amounts paid under the agreement. *Brooks v. Brooks*, 48 Cal. App. 2d 347, 351, 119 P.2d 970, 973 (1941). An agreement for personal services made while the parties are unmarried is terminated by the marriage of the parties since one of the implied terms of the contract of marriage is that the services will be performed without compensation. *In re Estate of Sonnicksen*, 23 Cal. App. 2d 475, 73 P.2d 643 (1st Dist. 1937).

106. In *Youngberg v. Holstrom*, 252 Iowa 815, 108 N.W.2d 498 (1961), and *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931), the evidence indicated that the wives

When a woman's labor is "seen as a service she owes her husband rather than as a job deserving the dignity of economic return,"¹⁰⁷ the contribution and value of the housewife is greatly underestimated. Although there is "much rhetoric about the value of homemaking and child rearing," the law does little to ensure that these tasks are accorded "status, dignity, and security."¹⁰⁸ The National Organization for Women has urged that housework be treated as a bona fide occupation, with compensation and fringe benefits.¹⁰⁹ Using estimates of the value of housework (such as the computation used by Galbraith that the average housewife's yearly services are worth \$13,364),¹¹⁰ feminists have suggested paying the housewife for her work to lessen her dependency status.¹¹¹

The current dependency of housewives and the undervaluation of housework could also be reduced if women were covered as independent workers under social security. Current social security regulations seem to regard housewives as idle appendages to their husbands and ignore the housewife's work and contribution to family support. Since the housewife does not receive monetary compensation for her work at home she is not entitled to independent social security coverage and she therefore cannot provide for her retirement or old age as an independent person. Instead her social security benefits are completely dependent on her husband, and if they divorce she is not allowed benefits as his wife unless she was married to him for 20 years.¹¹² If in con-

worked extensively on their husband's farms. In *Youngberg* the wife raised poultry and hogs, and cared for a large garden. In *Frame* she kept the accounts, cooked for the hired hands, collected rent from the tenants, helped supervise the farm work, and went to town to sell the farm products. In neither case was the wife able to recover for these services. In *Ladden v. Ladden*, 59 N.J. Super. 502, 158 A.2d 189 (1960), and *Dorsett v. Dorsett*, 183 N.C. 354, 111 S.E. 541 (1922), the wives worked in their husbands' businesses. In none of the above-listed cases were they able to recover pay for this work.

107. *KAY supra* note 17, at 142.

108. *ECONOMIC CONTRIBUTION OF HOMEMAKERS, supra* note 89, at 6.

109. Marriage and Family Comm. of N.O.W., *Suggested Guidelines in Studying and Comments on the Uniform Marriage and Divorce Act*, 2 (April 11, 1971).

110. Galbraith, *The Economics of the American Housewife*, ATLANTIC 78, 79 (Aug. 1973). See also Walker & Gauger, *The Dollar Value of Household Work* (N.Y. State College of Human Ecology, Ithaca, N.Y., Consumer Economics and Public Policy No. 5 Information Bulletin 60, 1973). Professor Walker found that even when employed, wives spend 66 to 75 hours per week in job time, household work time and volunteer work time in contrast to employed husbands who spend 57 to 71 hours at comparable tasks. (The figures vary depending on how many children are living at home and how old they are.) 3 *WOMEN TODAY* No. 18, 4-5 (Sept. 3, 1973).

111. Marriage and Family Comm. of N.O.W., *supra* note 109.

112. As Rita Brettschneider has explained:

[I]f a woman has been married for less than twenty years and the marriage terminates in divorce, she is not entitled to any benefits which would ordinarily come to her in the event of her husband's retirement or death. This penalty is especially harsh, since it applies against the woman no matter what the ground of divorce and no matter what marital party is named as defendant.

trast, a housewife were covered as an independent worker, her benefits would no longer be dependent on her marital status and the length of her marriage.

The social security system also places a double burden on the married woman who works outside the home. She is forced to pay a full social security tax, but the benefits she receives as an independent worker are not added to those she would be entitled to as a spouse. The family thus pays a double tax when she works, but she collects for only a single worker.¹¹³

Recognition of the housewife's contribution to the marriage may be even more important at the time of divorce. In many states, the woman's role in building family wealth and property is ignored upon dissolution. Although marriage is considered a partnership in theory, when the partnership profits are divided the woman's contribution is devalued in all but the eight community property states.¹¹⁴ The Citi-

This result must be found both ironic and unjust, when one recognizes that Social Security is a public welfare program presumably designed to protect not only the party who earned the money, but dependents as well. Although a wife contributes years of energy to building future familial security and welfare, as a consequence of divorce she is abandoned by the government and set adrift. The harshness of this result is certainly not ameliorated when, after nineteen years of marriage, she learns that [her husband's] second wife falls heiress to all the Social Security benefits in the event of [his] death after but one year of remarriage.

Brettschneider, *Eve Before the Bar, Some Inequities in Matrimonial Litigation*, THE NASSAU LAW. 2 (Nov. 1973).

Bella Abzug has introduced a bill, H.R. 253, 93d Cong., 1st Sess. (1973), to reduce from 20 to five years the length of time a divorced woman's marriage to an insured individual must have lasted in order for her to qualify for wife's or widow's benefits on his wage record. Abzug also introduced H.R. 252, 93d Cong., 1st Sess. (1973), a bill to ensure social security for homemakers in their own names. It would "amend title II of the Social Security Act to provide that an individual who resides with and maintains a household for another person (while such person or any of such persons is employed or self-employed) shall be considered as performing covered services in maintaining such household and shall be credited accordingly for benefit purposes." *Id.*

113. Cooper, *Working Women and Discrimination in Income Tax Laws*, in *WOMEN'S ROLE IN CONTEMPORARY SOCIETY* 379 (1972). Elizabeth Holtzman of New York has recently introduced H.R. 11999, 93d Cong., 1st Sess. (1973), which would permit

. . . widows who have worked during their lives to collect their own old-age benefits in addition to any benefits they might be entitled to as surviving spouses. Present Social Security laws prohibit the collection of more than one benefit. Emphasizing the inequities in the Social Security laws, Rep. Holtzman stated in her remarks prepared for delivery on the floor of the House: "Most working widows collect exactly the same benefits as widows who have never worked. The unfairness in the law is clear: not only does the working widow collect no more than the woman who did not work, but she also loses everything she has contributed to the Social Security Trust Fund over the years.

4 *WOMEN TODAY* No. 3, 1 (Feb. 4, 1974).

114. Although community property states give both spouses the theoretical right to share equally in property acquired by their joint efforts, the potential benefit to wives is greatly weakened by the usual practice of granting the husband the exclusive right to

zens' Advisory Council on the Status of Women has recently urged a careful evaluation of the economic effects of divorce laws to ensure that the homemaker's contribution to the marital property is recognized.¹¹⁵ The "shocking unfairness" of the "obsolete and archaic" marital property laws¹¹⁶ of many states is illustrated by the New York case of *Wirth v. Wirth*,¹¹⁷ which Professors Foster and Freed summarized as follows:

[B]oth husband and wife were employed and for 22 years of their marriage their earnings were pooled. She also raised two children. In 1956 it was agreed between them that the husband would start a "crash" savings program and that family expenses would be met out of her income and his would be used for investments. According to the wife, the husband said that the program was "for our latter days" and "for the two of us." All of the investments were taken in the husband's name and none were held by joint ownership. Upon divorce it was held that she had no interest whatsoever in the assets they had accumulated as a nest egg for both of them, and that although she might be entitled to alimony (after some forty years of marriage), he got to keep all of the investments.¹¹⁸

Thus, the separate property system disregards the wife's contribution to the family property. The woman who has contributed to the growth of her husband's business, career, property, or income during the marriage generally finds that her contribution to the partnership is unrecognized in law. Upon dissolution the partnership is treated as a one-man business, and she is cheated out of a fair share for her half of the effort.

It is ironic that the law seems to punish a woman who has devoted herself to being a mother and wife at the same time that the law

manage and control the community property. California, however, has recently enacted a statute, effective in 1975, which gives both spouses equal rights to manage and control all of the community property.

Despite their theoretical equal share, women in community property states may nevertheless have difficulties obtaining an equal share of property upon divorce. See Note, *Retirement Pay: A Divorce in Time Saved Mine*, 24 HASTINGS L.J. 347 (1973). See generally Bodenheimer, *The Community Without Community Property: The Need for Legislative Attention to Separate-Property Marriages Under Community Property Laws*, 8 CALIF. W.L. REV. 381 (1972).

115. ECONOMIC CONTRIBUTION OF HOMEMAKERS, *supra* note 89, at 6. They have specifically urged that states adopting no-fault divorce laws change their laws on the division of property, alimony, child support and enforcement so that the law explicitly recognizes the contribution of the homemaker.

116. *Id.* According to Foster and Freed, there are currently fifteen common law jurisdictions that do not subject separate property to equitable distribution upon divorce. However, the woman is not guaranteed half of the property even in the remaining 29 common law jurisdictions. Separate property may be distributed as "justice and equity require." Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169, 170 (1974).

117. 38 App. Div. 2d 611, 326 N.Y.S.2d 308 (1971).

118. Foster & Freed, *supra* note 11, at 174-75.

encourages a woman to be a housewife. The law thus puts women in a double bind: at the same time that the legal structure of marriage seems to provide incentives and rewards for women to remain in domestic roles, it also penalizes the woman who has done just that if and when her marriage dissolves. Since a woman can rarely ensure the survival of her marriage,¹¹⁹ the marriage may be dissolved and she may be punished through no fault or intention of her own. The double bind is such that whatever a woman chooses she stands to lose: if she follows the legal and cultural mandate and chooses marriage above all else, she will sacrifice her earning potential for her family, and she may suffer upon divorce. On the other hand, if a woman chooses to combine marriage and a career she (and her family) may also suffer because of the great force of legal priorities given to families with a single earning partner and a housewife.¹²⁰

The second area in which the state-imposed contract unduly burdens women is in the assignment of responsibility for child care.¹²¹ The woman's role as mother remains at the very core of our legal conceptions of her place in society, and it is likely to meet the most resistance to change.¹²² This traditional legal conception of the woman as

119. Goode found that it was more often the husband than the wife who first wanted to break up the marriage—and that most of the wives felt “sinned against.” However, in the strategy of divorce conflict he found that once the husband wanted a divorce he typically adopted a line of behavior (whether consciously or not) that forced the wife to suggest a divorce as the appropriate solution. Thus although women are more likely to “suggest divorce” and to file for the divorce one may not infer that they want the marriage to dissolve. W. GOODE, *WOMEN IN DIVORCE* 133 (1965).

120. The woman's double bind is also illustrated by the contradictory structure of incentives and punishments in tax law. While the tax system benefits the family in which the wife devotes herself to her home and children and discourages the two wage earner family, it fails to recognize the value of housework and to treat it as “real work.” For a more detailed analysis of the effects of tax laws see Statement of Grace Gáznz Blumberg, *Features of Federal Income Tax Law Which Have a Disparate Impact on Women and Working Couples*, *Hearings on Economic Problems of Women Before the Joint Economic Comm.*, 93d Cong., 1st Sess., pt. 2, at 228 (1973); Statement of Hon. Edward I. Koch, *Hearings on Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working Before the House Ways and Means Comm.*, 92d Cong., 2d Sess., at 96 (1972); Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFFALO L. REV.* 49 (1971); Cooper, *supra* note 113, at 379.

121. As Evelyne Sullerot has declared, throughout the history of patriarchal society “the reproductive function of women has appeared at the same time both as their justification in the world and the reason for their subordination. From this follow all the other features of woman's position. . . .” E. SULLEROT, *WOMEN, SOCIETY AND CHANGE* 20 (1971).

122. “The centrality of the childbearing function to society's view of women's proper role and place contributes to . . . make this unique physical characteristic perhaps the most fertile ground for stereotype and misunderstanding and the last, most stubborn and intractable bastion of discrimination.” Brief for Appellees at 41, *Geduldig v. Aiello*, 94 S. Ct. 2485 (1974).

the natural and proper caretaker of the young is most clearly reflected in child custody dispositions.¹²³ Women continue to be awarded custody of their children in the overwhelming majority of cases. Christensen and Meissner found this to be true in 74 percent of their cases;¹²⁴ the State of Maine showed maternal custody in 87 percent of the cases in their study sample;¹²⁵ Lawrence places the percentage at 90 percent;¹²⁶ and Goode's statistical analysis indicates an even higher percentage of custody awards to the mother.¹²⁷ This deference for the mother may have the social effect of further reinforcing her social roles as housewife and mother and—in many cases—her dependency on her husband for support.

The practice of automatically giving the mother custody of the children can have two other detrimental effects. First, it may not take sufficient, if any, account of the needs of the children and the qualifications of the parents involved. Second, in practice, it has the ultimate effect of causing the mother to bear the greater, if not the total, financial burden of child support.

The current preference for the mother in custody cases, based on the hard to overcome presumption of her fitness, is so pronounced that it may deny fathers equal protection.¹²⁸ Fathers who would like to have custody and who might make better custodians face such an uphill battle that many are discouraged from trying. In addition, children may suffer when the real "best interests of the child"¹²⁹ are ignored or undermined by this automatic preference for the mother.

123. There has been an increase in the proportion of divorces in which children are involved. In 1948, 42 percent of the divorcing couples had children, whereas in 1966 the percentage increased to 62 percent. The number of children per divorcing couple is also increasing. In 1966 there were 1.34 children per divorcing couple; as recently as 1953 there had been only .85. Bernard, *No News, But New Ideas*, in *DIVORCE AND AFTER* 3, 6 (P. Bohannan ed. 1970).

124. Christensen & Meissner, *An Analysis of Divorce in Tippecanoe County, Indiana*, 40 *Soc. & Soc. RESEARCH* 247, 248 (1956).

125. MAINE DEP'T HEALTH & WELFARE, *SOCIAL CASEWORK SERVICES IN A DIVORCE COURT* (1960).

126. Note, *Divided Custody of Children After Their Parents' Divorce*, 8 *J. FAM. L.* 58 (1968).

127. W. GOODE, *WOMEN IN DIVORCE* 29 (1965). Goode indicates that the divorcée's prime social role may be that of a mother. *Id.* at 209. If a divorcée does not let social acquaintances know that she is a mother, they are more surprised (and she is considered more peculiar) than if she does not tell them about her divorced status or her occupation. *Id.* at 210.

128. See pamphlet published by Equal Rights for Fathers, P.O. Box 6367, Albany, Cal. 94706. See also *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that an unwed father is an unfit parent held to be unconstitutional as a denial of both due process and equal protection).

129. See generally Robbins, *Legal Standards for Determining "Best Interests of the Child,"* 23 *FAMILY COORDINATOR* 87 (1974). See also J. GOLDSTEIN, A. FREUD & J. SOLNET, *BEYOND THE BEST INTEREST OF THE CHILD* (1973). Goldstein, Freud, and

It is also possible that the mother will be hurt instead of benefited by the presumption in her favor. Because it is assumed that all mothers will want custody of their children, there are strong social pressures for women to assume this role without thinking about it—and its consequences. Further, since custody awards to the mother are so routine, the woman who admits that she would prefer not to have custody of her children is viewed suspiciously and made to feel deviant and guilty. She may thus be coerced into a role which is harmful to both her and her children. Certainly public policy would be better served by eliminating these rigid role prescriptions and increasing the options available to both sexes.

When the mother is awarded custody, she is expected to perform child-care services without pay; the father's obligation is limited to direct support for the child. Even the Uniform Marriage and Divorce Act, which represents the enlightened vanguard in family law, makes no provision for the custodial parent to be compensated for time and labor in taking care of the children.¹³⁰

The father, as the noncustodial parent, typically is ordered to pay child support. However, most fathers do not support their children as ordered.¹³¹ As the table below indicates, 62 percent fail to comply fully with the court ordered payments in the first year after the order, and 42 percent do not make even a single payment. By the tenth year, 79 percent are in total noncompliance.

The Probability of a Divorced Woman Collecting Any Child Support Money¹³²
(by years since the court order)

Years since court order	Number of open cases	Full compliance	Partial compliance	No compliance	Non-Paying fathers against whom legal action was taken
One	163	38%	20%	42%	19%
Two	163	28	20	52	32
Three	161	26	14	60	21
Four	161	22	11	67	18
Five	160	19	14	67	9
Six	158	17	12	71	6
Seven	157	17	12	71	4
Eight	155	17	8	75	2
Nine	155	17	8	75	0
Ten	149	13	8	79	1

Based on data from Eckhardt, *Deviance, Visibility, and Legal Action: The Duty to Support*, 15 SOCIAL PROBLEMS 470, 473-74 (1968).

Solnet argued that it would be best for the child to have a single, permanent, custodial parent who would determine visitation and the extent of the child's relationship with the other parent. They further propose eliminating the court's continuing jurisdiction over visitation and custody. If this view were more widely adopted, fathers might have even less contact with their children after divorce than they now do.

130. UNIFORM MARRIAGE AND DIVORCE ACT.

131. Nagel and Weitzman, *supra* note 85, at 190.

132. Based on data from Eckhardt, *Deviance, Visibility and Legal Action: The Duty to Support*, 15 Soc. PROB. 470, 473-74 (1968).

Despite this alarmingly high rate of noncompliance, the last column in the table shows that legal action against nonpaying fathers is seldom taken.¹³³

These data indicate that the practical effect of making the mother the custodian of the children is to make her primarily responsible for her children's support.¹³⁴ For when her former husband refuses to support his children, she, as their custodian, is left to bear the responsibility alone.

In sum, the third provision of the marriage contract, that making the wife responsible for domestic and child-care services, is given widespread support in legislation, case law, and administrative regulations that extend far beyond what one would normally consider family law. The total effect is to allow, encourage, and sometimes compel the primacy of women's domestic roles. However, women rarely receive adequate compensation for their housework either during marriage or upon dissolution, and the housewife's contribution to the family income and property is often unrecognized in awarding each partner a fair share of the marital property upon divorce. Further, for the many married women in the labor force, the delegation of domestic responsibilities to her means, in practice, that the woman must perform two jobs—one outside the home and one inside the home—in contrast to her husband's single job.

133. Eckhardt indicates that enforcement proceedings are most likely to be brought against lower class fathers (who have the least ability to pay) because of the state's interest in keeping their children (and wives) off AFDC. Eckhardt, *Deviance, Visibility, and Legal Action: The Duty to Support*, 15 Soc. PROB. 470 (1968).

134. In 1971 alone New York State had 36,200 families receiving AFDC because of the father's absence from the home due to divorce or legal separation. Testimony of B. Berry, Chairone of National Task Force on Marriage, Divorce, and Family Relations, N.O.W., *Hearings on S. 1842, S. 2081, and Other Matters Relating to Child Support and the Work Bonus Before the Senate Finance Comm.*, 93d Cong., 1st Sess., at 204 (Sept. 25, 1973).

On the difficulties women experience collecting support in the New York family court, see Tomasson, *Women as Property*, 163 NEW REPUBLIC No. 12, 15 (Sept. 19, 1970). A 1971-72 survey of Connecticut court calendars found that "for every divorce granted in Connecticut in 1971-72, there were 7 enforcement matters already in the courts; that only 1 out of 8 enforcement matters was successfully collected; and that there was a backlog of over 12,000 uncollected enforcement cases in Connecticut at the beginning of that court year." B. Spaulding, National Task Force—Marriage, Divorce, and Family Relations, N.O.W., No. 2, at 1, Aug. 1973.

As Brettschneider notes: "[E]nforcement proceedings are much too lengthy, much too costly, and generally unsatisfactory in result to all concerned." Brettschneider, *supra* note 112, at 3. "Attorneys are reluctant to take the cases because there is little likelihood of counsel fees . . ." *Id.* Brettschneider suggests a routine payroll deduction, like income tax withholding, for child support orders. A bill to accomplish this, A.B. 1946, has recently been introduced in the California State Legislature by Assemblyman McAllister. California Commission on the Status of Women, Newsletter 4, col. 2, May 1974.

The legal rules we, as a society, have developed for regulating alimony, custody, and child support thus give priority to and reinforce women's domesticity and dependency. We have offered the young woman support and alimony—a legal guarantee of financial security if she gets married and performs her marital role well. We have told her that she need not develop her individual capacity, for her economic security will be dependent on her husband's (not her own) earning ability. Thus our society encourages girls to sacrifice their own education and training to further their husbands' careers. Both the middle-class college graduate who foregoes graduate school to put her husband through medical school, and the high school graduate who foregoes college to build a family, are doing what we, through the law, have encouraged them to do. Of course, as already shown, the law's guarantees are illusory. In reality, a woman's "right" to support and security for her family depends on the goodwill of her husband (in both marriage and divorce). But by the time the woman discovers that the law's guarantees are hollow, it is too late; she has typically passed the point where she could easily choose a different course.¹³⁵

II

SOCIOLOGICAL CHALLENGES

The legal assignment and regulation of marital roles explored above are based on anachronistic assumptions about the nature of contemporary marriage. This section of the Article will explore six assumptions which underlie the legal regulation of marriage, briefly outline the sociological data which refute the continuing validity of each, and point out how the legal relationship of marriage could be changed to reflect contemporary social reality more accurately. Each assumption buttressing the state's current formulation of the marriage relationship will be challenged on the basis of two sociological standards. First, does it comport with sociological reality? Second, even if it does, is it contrary to the strongly valued and politically protected heterogeneity and diversity of our society?

To assert the first sociological challenge to legal marriage, that legal norms should conform to sociological reality,¹³⁶ is not to suggest

135. Betty Friedan aptly described the woman's disillusionment with the traditional marriage contract at the recent N.O.W. Conference on Marriage and Divorce: "If there is anything that makes a feminist, it is growing up and believing that love and marriage will take care of everything, and then one day waking up at 30, or 40, or 50, and facing the world alone and facing the responsibility of caring for children alone. . . . [It is] the obsolete sex roles on which our marriages were based [which are to blame]." *N.Y. Times*, Jan. 21, 1974, at 32, cols. 7-8.

136. As Richard Abel has commented, it is of course a choice of values when we "characterize the difference between law and behavior as a gap, and . . . see that gap

that the legal system should respond to rapid fluctuations in superficial social patterns. The sociological changes which form a basis for the present challenge are part of complex, long developing societal alterations. In the past century there have been profound transformations in our society which have impelled corresponding changes in the nature and functions of the family. The increasing industrialization and urbanization of our society have been accompanied by a shift from the extended family to the smaller nuclear or conjugal family unit,¹³⁷ and by a decline of the family as the basic productive and economic unit of our society.¹³⁸ At the same time, however, the family's role

as a problem. . . ." He goes on to ask: "Why should we expect harmony between law and behavior rather than some other relationship—dissonance, for instance, or a purely accidental conjunction?" Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175, 185 (1973).

137. Between 1850 and 1950 the average size of the U.S. household has decreased from 5.5 persons to 3.5 persons, W. GOODE, *THE FAMILY* 108 (1964), indicating a shift from the extended family to the smaller nuclear (or conjugal) family unit.

In his award winning book on the wide transformation of family patterns, the noted sociologist William J. Goode points to the unique fit between the smaller family unit and industrialization. He first discusses the demands of industrialization:

The prime social characteristic of modern industrial enterprise is that the individual is ideally given a job on the basis of his ability to fulfill its demands

Being achievement-based, an industrial society . . . requir[es] both geographical and social mobility. Men must be permitted to rise or fall depending on their performance . . . [and be] free to move about in the labor market.

W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 11-12 (1963).

Goode explains that when extended kin ties are diminished, couples are freer to move to obtain better jobs. Hiring and promotions can be based on merit and less on family connections. The larger kin network and the family elders cannot control the couple's decisions, and the couple's obligation to the extended kin network is weakened. Further, the talents of women are more likely to be utilized by the industrial system because family elders have less control over them and their work. Finally, the smaller intimate family unit is well suited to providing the emotional support and personal reassurance needed in an increasingly bureaucratic society. *Id.* at 6-17.

138. When this country was founded, the family was the basic social and economic unit of an agrarian society. Ogburn's classical statement of the seven functions of the family included production, prestige and status conferral, education, protection, religion, recreation, and affection-procreation. The economic function was foremost, as the family was the factory of the time: a self-sufficient unit in which each family consumed what it produced. Most families stayed on the same piece of land or in one community and hence had an opportunity to establish reputations: the family thus conferred prestige and status on its members. The family was also a center of education, not only for the infant or preschool child, but for the vocational education of its youth. Girls were taught domestic skills by their mothers; boys were taught their fathers' vocation. Higher education, if any, was often obtained by employing a tutor who lived with the family. The protective functions of the family included physical protection of family members and the assurance of care for the sick and elderly. Both religion and recreation were also home-centered. Finally, the family provided affection and companionship for the spouses and the procreation of children.

According to Ogburn, the modern family has lost many of these functions as a result of the industrial and technological changes in our society. The economic function

as the major source of psychological and emotional support for individuals has increased: "The conjugal family serves as an oasis for the replenishment of the person, providing the individual with stable, diffuse and largely unquestioning support . . ." ¹³⁹ Thus, the legal assumption of a strict division of labor within the family—the husband as breadwinner and the wife as homemaker—may be increasingly dysfunctional in a society which requires sharing, companionship, and emotional solace in the marital bond. Yet, as we will note in more detail in the following pages, despite social changes in our society the sociological assumptions built into the legal structure of marriage have remained stagnant—and the content of the present contract appears as an archaic vestige of a social system long outmoded.

The second sociological challenge to the legal imposition of marital obligations is that it enforces a rigidity and specificity that denies

has gone to the factory, store, office, and restaurant, leaving little economic production to the family of the city apartment. Education has been transferred to the school, and recreation similarly has moved outside the home. Religion, diminished in importance, now centers around the church or synagogue instead of the home. Protection has been transferred to the state, as has responsibility for the handicapped and aged. Family status has been lost as the central prestige-conferring mechanism in an age of mobility and urban anonymity. Today's family remains primarily as the center of affectional-emotional life, procreation, and the rearing of young children. Ogburn's first statement of the transformation of the functions of the family is Ogburn, with the assistance of Tibbitts, *The Family and Its Functions*, 1 RECENT SOCIAL TRENDS 661 (President's Research Committee on Social Trends 1934). The above is paraphrased and summarized from a slightly later version, Ogburn, *The Changing Family*, 19 THE FAMILY 139 (1938).

Goode, in contrast to Ogburn, asserts that the ideology—which urges freedom from old restrictions—has a force of its own and it may precede (and foster) technological and industrial change. According to Goode this ideology supports increased independence for the young, rewards based on merit rather than kin, the increased emancipation of women, and the lessening of elders' control. W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* (1963). Though whether "caused" by industrialization or by the independent impact of an ideology, there can be no doubt that important changes in the nature and functions of the family go along with an industrialized society.

As Rheinstein has aptly stated:

While the processes of industrialization, urbanization and female emancipation are going on, individual families are likely to be uprooted and a marriage concluded under one set of conditions may easily cease to function under different ones. Furthermore, and even more important, in a society of transition ideas of what to expect in and of marriage are likely to be unsettled.

Rheinstein, *Challenge and Response in Family Law*, 17 VAND. L. REV. 239, 251 (1963).

139. Ryder, *The Family in Developed Countries*, 231 SCIENTIFIC AMERICAN 123, 128 (Sept. 1974). Goode's analysis of the evolving functions of the family in industrialized societies points to the unique "fit" between the affectively based conjugal unit and the achievement oriented society. He notes that the conjugal family is uniquely suited to provide the psychological and emotional support individuals need to deal with the industrial system's focus on impersonal individual achievements. Because the conjugal system lays great emphasis on the emotional solace its members give to one another, the family becomes the place where the individual tensions and the emotional imbalance of industrial participation are somewhat redressed. See W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 14 (1963). See also text accompanying notes 276-77 *infra*.

the diversity characteristic of families in a heterogeneous society. Even if a majority of American families conformed to the assumptions and norms underlying legal marriage, there are nevertheless compelling reasons for not enforcing a single, rigid relational structure on those individuals who choose otherwise. For whatever the content of the contract, the conception of a single structure for all marriages is a tyrannical one: it implies that the state can decide what form marriage should have regardless of its citizens' needs and desires. The imposition of a single structure for all marriages, regardless of the parties' ages, life circumstances, or individual wishes would have to be justified by some public policy need important enough to supersede individual rights to privacy and freedom.

In the next section¹⁴⁰ we will examine the state's interest in regulating marriage and argue that as long as there are differences in the needs and values of its citizens, the state should be required to show an overriding interest to justify imposing a single norm on all. In the discussion below we will document some of the change and diversity in contemporary marital patterns. With the ethnic, racial, religious, and normative diversity characteristic of our pluralistic society, it hardly seems necessary to document the diversity of family forms. But the current institutionalization of one set of norms for all marriages indicates that we must be reminded of the extent to which this infringes on and violates the norms of others. A single legal structure for all marriages is simply at odds with this nation's heterogeneous citizenry and the tradition of protecting diversity in individual beliefs and values.

A. *The Marriage Contract Assumes a Lifelong Commitment*

Legal marriage is intended to be permanent; it is a union for life. The religiously based legal conception of marriage derives from the Christian doctrine that marriage is indissoluble, a holy union of a man and woman that is meant to last for the duration of the joint life of the parties: "We take each other to love and to cherish, in sickness and health, for better, for worse, until death do us part."¹⁴¹ Although the absolutist Christian doctrine of the indissolubility of marriage gradually gave way to an allowance of divorce if justified by marital offenses, marriage remained indissoluble in England (except by acts of Parliament) and in the United States until late in our history.¹⁴² These

140. See text accompanying notes 357-66 *infra*.

141. Quoted in M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 3 (1972).

142. Because the Church had jurisdiction over matrimonial causes, it was able to enforce its doctrine of the indissolubility of marriage. Martin Luther originated the idea of divorce within the Christian context by finding in *Matthew* the authority to permit a husband to divorce his wife if she had committed adultery. M. RHEINSTEIN, *supra* note

"marital failures" have always been regarded as an exception to the legal norm and expectation of a lifelong marriage. The continued legal assumption that marriages will endure until death is most clearly expressed by the care that each state takes in ensuring that a surviving spouse will be adequately provided for in the event of the other's death while few states provide adequately for the divorced spouse.¹⁴³ In fact, spouses themselves are prohibited from anticipating divorce and making adequate provisions for it, for in almost all states contracts in contemplation of divorce are against public policy.¹⁴⁴ Thus most states would appear to have partial vision: their laws protect the widowed because they assume marriages endure until death,¹⁴⁵ however, by precluding similar forethought and attention to the needs of those who dissolve their marriages before death, most states appear oblivious to, or unwilling to accept, the increasingly predictable and common experience of divorce.

In contrast to the legal assumption of an enduring marriage, sociological data indicate an increase in the number of divorces each year, and a rapidly diminishing probability that any marriage will last

141, at 22. As the bases for divorce were found in the scripture, the institution of divorce was thus started on the principle of marital offense. *Id.*

In England, beginning in the late seventeenth century, there was a possibility of a parliamentary divorce. "But the proceedings were so cumbersome and expensive that they were available only to the most affluent. The number of parliamentary decrees thus remained low, one to three a year. Under the general law of the land, marriage remained indissoluble Not until 1858 was divorce admitted in the modern sense . . . but even then adultery was to be the only ground." *Id.* at 24.

In the American colonies, before the Revolution, the southern colonies adopted the English doctrine, but divorces were occasionally granted by the legislative assemblies in the north. Beginning in New England, divorces were later granted by regular civil courts and by the time of the Civil War this possibility was found in most states. However, divorce laws were all based on the "idea that divorce was to be a punishment for marital misconduct, especially the arch sin of adultery." *Id.* at 32-34.

In 1787 a New York law under which adultery was the only ground for divorce was enacted. At that time it was "a liberal victory, as it substituted a legal right to divorce for the vagaries of discretionary divorce by the legislature, which seems to have been exercised rarely if at all." *Id.* at 38.

143. See generally H. CLARK, *supra* note 12, at 225-26. See also FOSTER & FREED, *Economic Effects of Divorce*, 7 FAM. L.Q. 275 (1973).

144. See text accompanying notes 428-47 *infra*.

145. In almost every state a wife will receive a greater economic benefit if she loses her spouse by death than if she divorces him. As Doris L. Sassower testified,

What are the wife's legal rights in the property her efforts helped the husband acquire? . . . [T]he shocking answer is that [if they divorce] she has none. Gone also are her rights to inherit from his estate, her right to elect against his will, employment benefits of health and survivor's insurance, as well as retirement benefits which might have been hers were she upon his death his widow rather than his ex-wife.

Testimony Before Joint Hearings of the Matrimonial Law Committees of the New York County Lawyers' Association and the Association of the Bar of the City of New York, at 3, Jan. 14, 1972.

until the death of one of the parties. Since the 1860's there has been a continual upward trend in the rate of divorce, with a dramatic 80 percent increase in the divorce rate in the past 10 years,¹⁴⁶ and a 9 percent increase from 1971 to 1972 alone.¹⁴⁷ It is difficult to state a precise probability of divorce for persons who are now entering marriage because all of the statistical estimates are based on the experiences of past generations and the current increase in the rate of divorce makes all such estimates overly conservative. Statisticians have calculated, however, that 25 percent of women who are currently 35 will have ended their first marriage with divorce by the time they are 50.¹⁴⁸ For women who are now 20 years old, this estimate increases to 29 percent.¹⁴⁹ Both of these estimates provide overly conservative predictions for the population as a whole, not only because they are based on the experiences of past generations, but also because they assume that the risk of divorce ends at age 50. The latter assumption is no longer viable as the number of divorces among persons of middle and older age and among persons with longer marriages appears to be increasing.¹⁵⁰ Although only 4 percent of all divorces filed 30 years ago involved marriages of more than 15 years duration, the current figure is 25 percent, and about 16 percent of those involve couples who have been married 25 years or more.¹⁵¹

146. NATIONAL CENTER FOR HEALTH STATISTICS, 21 MONTHLY VITAL STATISTICS REPORT 3 (March 1, 1973).

147. NATIONAL CENTER FOR HEALTH STATISTICS, 22 MONTHLY VITAL STATISTICS REPORT 2 (Aug. 22, 1973).

148. SOC. & ECON. STAT. ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, MARRIAGE, DIVORCE AND REMARRIAGE BY YEAR OF BIRTH: JUNE 1971, 5 (Sept. 1972).

149. Kirshman, *Divorce Tables for Females in the United States*, 33 J. MARR. & FAM. 318 (1971). For a more lighthearted view of the current probabilities of divorce, see Baker, *Batting .667*, N.Y. Times, July 8, 1973, at 6, col. 1.

150. Payne & Pittard, *Divorce in the Middle Years*, 3 SOCIOLOGICAL SYMPOSIUM 115 (1969). Krishnan and Kayani found that the largest increase in the incidence of divorce in the U.S. from 1960 to 1969 was in the age group between 30 and 50, especially in the five-year period between 35 and 40. Krishnan & Kayani, *Estimates of Age Specific Divorce Rates for Females in the United States, 1960-1969*, 36 J. MARR. & FAM. 72, 73 (table 2) (1974). Sociologists James Bossard and Eleanor Boll suggest significant potential for even greater increases in the divorce rate in this age group. Their research shows that marital unhappiness (among couples currently married and living together) is greatest in the late forties and early fifties for women, and the fifties for men. Bossard & Boll, *Marital Unhappiness in the Life Cycle*, 17 MARR. & FAM. LIVING 10, 14 (1955).

151. Kazickas, *After 25 Years—Divorce: More and More Longtime Marriages End*, Sacramento Bee, May 29, 1973, at B4. Sociologist Jessie Bernard is quoted as explaining the increase as follows:

With their children grown up more women are moving into the labor force and have more options available to them. More and more women are saying, "What's the point of hanging on to a bad marriage?" So many women used to be frightened by divorce, but now they see their friends leaving home and

It is probable that both of the above predictions could be reasonably increased by 10 to 20 percent, resulting in a 35 to 45 percent probability of divorce for women who are now 35 years old. These higher estimates are justified by both the conservative bias noted above and by the increase in three other societal trends which should effect a continued rise in the divorce rate. The first is the lessened social stigma attached to divorce and the growing acceptance of divorce as "normal."¹⁵² The second is the increase in alternatives available to women, especially economic alternatives, which allow the possibility of a viable existence outside their present marriage.¹⁵³ The third societal trend is the rising standard of expectations for happiness in marriage which makes it more difficult for both men and women to justify remaining in an unsatisfactory marriage.¹⁵⁴ Each of these fac-

surviving. Women are finding out that living alone and being free can be great.

A recent empirical study supports Bernard's views of factors influencing middle-aged women. Spence and Lonner report the following factors influence divorce among mothers whose children have reached adulthood: the perception of divorce as an alternative to threatened future unhappiness, successful divorce models, economic self-sufficiency, and health. Spence & Lonner, *Divorce and the Life-Course of Middle-Aged Women* (unpublished paper presented at the meetings of the Am. Sociological Association, Aug. 1971).

Others have explained the upsurge in divorce among middle-aged and older persons from the man's point of view, noting that liberalized divorce laws have, for the first time, given him new opportunity to leave a marriage without bearing a heavy financial burden.

152. "The most striking change in this area of family relations is, of course, the lessened social stigma attached to divorce. . . . At the turn of the century almost everyone who divorced was viewed as having lost respectability to some extent, and from many circles the divorcee was excluded." W. GOODE, *WORLD REVOLUTION IN FAMILY PATTERNS* 81 (1963).

153. One factor in the rise in the divorce rate is the emergence of "new alternatives to the existing marriage. For instance, the wife can now support herself, even if poorly, by her own effort. In addition, since there are many other divorces, both husband and wife can almost certainly remarry." *Id.*

154. Carter and Glick emphasized the latter two factors in their comprehensive study of marriage and divorce rates:

Women who contemplated divorce in 1890 were unlikely to obtain a comfortable livelihood. If they sought employment, their limited education and training made the outlook, other than for unskilled or semiskilled work, anything but bright; if they returned with their children to the home of their parents, they might be placing a heavy responsibility on persons who were approaching retirement age. Remarriage following divorce was made difficult by the widespread disapproval of divorced persons. Thus the unhappy wives of 1890 were often constrained to tolerate conditions that wives of the 1960's would find intolerable. So, also, the unhappy husbands of 1890 were reluctant to seek divorce because of strong community disapproval of such action. And if the husband was a farmer, as so many were, the wife was an indispensable member of the production team; this fact was a strong economic motivation for avoiding a legal ending of the marriage.

A more intangible set of factors in the upward trend of the divorce rate . . . [is] a rising expectation of happiness in marriage and an increasing unwillingness to tolerate an unhappy marriage. Much has been written about the

tors has been closely associated with the rise in the divorce rate over the past century,¹⁵⁵ each is increasing, and each will probably continue to stimulate future rises in the divorce rate. But whether or not the divorce rate rises much, the assumption of lifelong marriages is contrary to the facts of the modern era.

These sociological data point to the need for a legal system which recognizes that individuals may want to make their marriage contract run for a period shorter than a lifetime. If, instead of assuming a permanent commitment, the legal regulation of marriage reflected the present average duration of 10 years for those who divorce,¹⁵⁶ there would be provisions for marriage contracts, term marriages, limited-purpose marriages,¹⁵⁷ and most important, spousal protection both during marriage and upon dissolution, for persons wishing such alternatives. Although recent revisions of divorce laws have increased access to divorce,¹⁵⁸ only a few states have considered or sought a serious reformulation of their marriage and divorce laws along the lines suggested by the Uniform Marriage and Divorce Act.¹⁵⁹ Even fewer have recognized the need for increased flexibility and individual options in both marriage and divorce.¹⁶⁰

B. *The Marriage Contract Assumes a First Marriage*

The assumption that the marriage will last a lifetime is closely linked to the assumption that all marriages are first marriages of the young. The ideal scenario is one of a young couple starting to build their lives together: they share the hard work in their early years and reap the benefits in their later years. The model assumes joint invest-

over-romantic attitude of young people toward marriage, abetted by popular literature and songs with much to say about the blissful state that comes with the perfect marriage. These attitudes deserve at least some of the credit for the frequent development of disillusionment and increasing divorce.

H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY* 55 (1970).

155. *Id.*

156. Monahan, *When Married Couples Part: Statistical Trends and Relationships in Divorce*, 27 AM. SOC. REV. 625 (1962). Monahan examined Wisconsin data from 1867 to 1957 and found that the mean duration of marriage (to divorce decree) was approximately ten years, with a slight decrease in recent years. The mean interval from marriage to separation is around eight years. *Id.* at 629-30. However, separation data indicate that the first year of marriage is most difficult. Most of the legal divorces at three and four years are a result of these first-year separations. *Id.* at 627, 628, 630.

157. See Appendix.

158. Foster and Freed trace the recent revisions in divorce laws in Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 22 CHITTY'S L.J. No. 2, 37 (Feb. 1974).

159. *Id.* Only California and Iowa have eliminated fault from both the grounds and the economic provisions of the divorce. *Id.* at 48. To date only Colorado has adopted the Uniform Act in total.

160. See discussion of recent cases in Nevada, Illinois, Florida, and Oregon in text accompanying notes 448-82 *infra*.

ments of time and energy in a job, a home, and a family. The couple's efforts begin to pay off in middle age, and they are assured happiness and security in their old age together.

The assumption of a first marriage is evident when one considers the omissions from the traditional marital obligations. While there are provisions for the husband's support of his wife and children, there are no provisions balancing these obligations against those he has to a former spouse or the children of a former marriage. Nor is there any consideration of a wife's similar dual obligations to both former and present husbands and children. Also ignored or omitted are provisions for balancing the competing interests of the first and second families with respect to property. In addition, while in most states there is automatic provision by statute or common law for the surviving spouse to inherit a fixed share of his or her mate's estate, there is no recognition that a former spouse may have played a greater role in building the estate and should, therefore, be given a larger proportionate interest in it. Finally, except by antenuptial or postnuptial agreement, or disinheritance in a will, it is impossible for those who have remarried late in life to prevent a spouse of short duration from inheriting a fixed share of their estate. In this regard it is significant that attorneys often advise antenuptial contracts for persons previously married.¹⁶¹ It is because the traditional marriage contract completely ignores their needs by assuming that all marriages are first marriages. Thus the concerns of the rapidly growing number of persons who enter

161. H. CLARK, *supra* note 12, at 27, states:

The typical antenuptial agreement is made by older people who are about to be married, who have been previously married and who have considerable property whose disposition they may wish to control. Of course others may make such agreements, but a surprisingly large proportion of the cases reveal parties in these general circumstances.

In order to determine exactly what group of people most often use the antenuptial contract, Charles W. Gamble tabulated all antenuptial contract cases in volume sixteen of the Seventh Decennial Digest covering the years 1956-1966. He found:

Of the fifty-four cases surveyed, forty-eight (80%) of them involved men who had previously married. Of these forty-eight men, forty-three (90%) had had children from their former marriages. In only twenty-nine (54%) of the fifty-four cases surveyed were the men's ages reported. Among those whose ages were given, the average age at the time of contracting was sixty-three. Ninety-one percent of these twenty-nine men were over fifty years of age. Twenty-five cases revealed no ages for the men. However, the great number who had been previously married and had had children would indicate that even more were of middle age and over.

Of the fifty-four cases surveyed, thirty-eight (70%) involved women who had been previously married. Of these thirty-eight women, thirty-six (94%) had children from their former marriages. In only twenty-six (49%) of the fifty-four cases surveyed were the women's ages given. Among those whose ages were reported, however, the average age, at the time of the antenuptial contract was executed, was forty-nine years. Of these twenty-six women, eighty one percent were over forty years old.

Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 733 (1972).

a second (or third) marriage are likely to be frustrated by traditional legal marriage. Sociological data, discussed below, indicate the growing numerical importance of second marriages and suggest that the legal conception of an appropriate marriage contract should be expanded.

The growing remarriage rate may be directly linked to the divorce rate.¹⁶² Sociologist William J. Goode has found that a high divorce rate will be accompanied by a high remarriage rate in all societies,¹⁶³ and this has clearly been the recent trend in the United States. In the 16 years from 1955 to 1971, the number of women who had married two or more times doubled.¹⁶⁴ While the median age at divorce for today's 50-year-old woman was 29 years,¹⁶⁵ those who divorced at younger ages had a better chance of remarrying. Of the divorced persons under age 25, more than half of the women and one-third of the men had remarried within one year of the divorce.¹⁶⁶ With the current trend toward shorter average duration of marriage and thus a younger age at divorce, the remarriage rate should further increase.

It is difficult to ascertain what number of persons marrying now have been married previously because of the inherent limits of census data.¹⁶⁷ We do know that 22 percent of the presently intact marriages between persons 45 to 54 years old involve a second marriage for at least one of the partners.¹⁶⁸ However, this is a conservative estimate of the total percentage of marriages involving a previously married person for two reasons: first, these data are based solely on persons in an older, and therefore more conservative, age

162. "In most adult age groups in the United States, the chances of eventual marriage are higher for divorcees than for single people of the same age." W. GOODE, *WORLD REVOLUTION IN FAMILY PATTERNS* 81 (1963).

163. Goode, *Pressures to Remarry: Institutionalized Patterns Affecting the Divorced*, in *A MODERN INTRODUCTION TO THE FAMILY* 331 (N. Bell & E. Vogel rev. ed. 1968).

164. SOC. & ECON. STAT. ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *MARRIAGE, DIVORCE AND REMARRIAGE BY YEAR OF BIRTH: JUNE 1971* 6 (Sept. 1972). These data are based on the cohort of women who were 46 to 54 years old in 1971.

165. *Id.*

166. H. CARTER & P. GLICK, *supra* note 154, at 46.

167. Current reports on the characteristics of people marrying in Paris indicate that 25 percent of current marriages involve people who have been married before. If both this rate and the current divorce rate (which is higher for marriages with a previously divorced spouse) continue, it may soon be as likely that a middle-aged couple would involve a previously married person as not. Vallot, *Les Remariages à Paris*, 26 *POPULATION* 955 (1971).

168. SOC. & ECON. STAT. ADMIN., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *MARRIAGE, DIVORCE AND REMARRIAGE BY YEAR OF BIRTH: JUNE 1971* 1 (Sept. 1972).

cohort; second, these data are based on persons who have not yet completed their marriage-divorce-remarriage life cycle. It is probable that some of those still in first marriages at age 50 will subsequently divorce and remarry, and that an additional number of divorced or widowed persons who are "single" at age 50 will remarry, and add to the total number. Adjusting for each of these factors, it could be anticipated that at least one-third of the middle-aged marriages will soon involve a previously married spouse.

There are two consequences of this divorce and remarriage phenomenon which sociologists and legal scholars must consider. One is that persons entering a second marriage are likely to have different concerns from those beginning their first marriage; their concerns need to be recognized by the legal system. Most persons entering a second marriage bring with them some responsibilities and obligations from their first marriage. They are likely to be older, likely to possess more property, and likely to be more concerned with how that property will be distributed at death. In addition, persons entering a second marriage are likely to have children and may want to structure their lives so that they can remain social, economic, and psychological parents to them. A second consequence of the divorce and remarriage phenomenon is a growing pattern of serial monogamy, or serial family formation, in which most people will go through the formative phase of establishing a new family with a new spouse more than once. Recognition of the increasing importance of serial monogamy may well transform our legal and social expectations of a "normal" age-specific family life cycle, and may profoundly alter the role of marriage for individuals and for our society as a whole. Each of these two consequences is further explored below.

In looking at the ways in which persons entering a second marriage are likely to have different concerns from those beginning their first marriage, sociologist Jessie Bernard's classic study of remarriage emphasized the competition and conflict between the former and present marriage and the impact this may have on the various sets of spouses and children.¹⁶⁹ Other research has found the lives of the remarried strained by continuing economic and child-care responsibilities to the former marriage, and the mutual adjustments of new spouses and stepchildren.¹⁷⁰ Thus men and women who remarry may want a marriage contract which clarifies and specifies their obligations to prospective and existing children and to their current and former spouses. When there are children from a former marriage, they may want explicit arrangements for visitation, support, adoption, inheritance, and custody.

169. J. BERNARD, *REMARRIAGE: A STUDY OF MARRIAGE* (1956).

170. Bittermann, *The Multimarriage Family*, 49 *SOC. CASEWORK* 218 (1968).

The number of children affected by divorce has more than doubled in the past two decades.¹⁷¹ Now 60 percent of the divorces involve children under the age of 18.¹⁷² Thus an increasing number of remarried parents will be concerned with defining their relative obligations to "his, her, and their children."¹⁷³ Support and property obligations to former spouses will also be of concern to those entering a second marriage. In addition to commitments of direct financial support, questions of life and accident insurance, medical coverage, retirement benefits and pension rights, shared investments in careers, real estate, business, and other property will arise. Some may want to specify how income and property will be apportioned between first and second spouses, others will want to ensure the inheritance rights of each spouse as well as those of the various offspring.

There are several distinct age-linked concerns of persons who remarry in their later years. In 1960, the United States had the highest rate of remarriage for women over 60.¹⁷⁴ For men over 60 it ranks second only to Australia.¹⁷⁵ In 1962 there were at least 35,000 marriages in the United States in which at least one partner was 65 or older.¹⁷⁶ With the current redefinition of age roles,¹⁷⁷ and especially female age roles,¹⁷⁸ the number and variety of social, sexual,¹⁷⁹ and legal relationships among elderly persons will probably increase.

171. In 1953 there were 330,000 children under the age of 18 in divorcing families. By 1967 this number had increased to 650,000. H. CARTER & P. GLICK, *supra* note 154, at 253-54.

172. *Id.* at 255.

173. Schwartz, *Reflections on Divorce and Remarriage*, 49 SOC. CASEWORK 213 (1968). Schwartz found that the kind of family seeking help with a family agency has changed from intact first marriages to new kinds of extended families—divorced spouses, their new mates, and their respective sets of children.

174. H. CARTER & P. GLICK, *supra* note 154, at 21-24.

175. *Id.*

176. M. PLOSCOWE, H. FOSTER & D. FREED, *supra* note 1, at 238. The marriage rate per thousand for those over 65 was 4.8 for men but only 1.6 for women. The difference appears to be due to the imbalance in the sex ratio among older persons and to the greater number of men who marry younger women. *Id.*

177. Gerontologist Bernice Neugarten envisions a new age group of Americans between 55 and 75, which she calls the young-old, who could vastly alter old-age stereotypes during the next 20 years. In contrast to the old-age stereotypes of poor, sick, isolated, passive, or incompetent, the young-old are well educated, politically active, in good health, and have a good deal of leisure time. *S.F. Chronicle*, Tues., Feb. 26, 1974, at 4, col. 1.

178. See, e.g., Brabec, *Being Our Age and Learning to Like It*, 2 PRIME TIME: FOR THE LIBERATION OF WOMEN IN THE PRIME OF LIFE 5 (Jan. 1974); Sontag, *The Double Standard of Aging*, 55 SATURDAY REV. SOC'Y No. 39, 29 (Sept. 1972).

179. Masters and Johnson found that male sexual response and performance may extend beyond the eighty-year level. For women "there is no time limit drawn by the advancing years to female sexuality." W. MASTERS & V. JOHNSON, *HUMAN SEXUAL RESPONSE* 247 (1966).

Persons who are retired or about to retire may be especially interested in providing for a specific property settlement in the event of dissolution or death. They are less likely to have day-to-day problems with the support of their children, who are probably financially independent and raising their own families by the time their parents are 65, and former spouses, since they may no longer be alive.¹⁸⁰ However, elderly persons may want to retain their separate property, and in common law states they may want to ensure that their new spouse will not automatically inherit one-third to one-half of their estate.¹⁸¹ Further, they may want to specify or limit their financial obligations to one another with respect to support, medical costs, health and accident insurance, and retirement and pension benefits. Although the possible loss of pension and social security benefits¹⁸² may currently deter many widows from entering a new legal marriage,¹⁸³ each year an increasing number of older persons form new couple relationships—and many of these are legal marriages.

As noted above, a second consequence of the current increase in divorce and remarriage is that American society is moving toward a pattern of serial monogamy or serial family formation.¹⁸⁴ With the formation of new families throughout the life cycle, there will be a greater diversity in the functions and purposes of marriage. Some of the new units will want to raise children, while others will not; some will focus on shared leisure activities, others on work or a career; some of the new families will last for 20 or 40 years, others for two or three years; some will want to build a total life together, while others will be limited-sphere relationships in which the spouses will decide to share a stage or period in life, such as going through graduate school, working in a foreign country, raising small children, middle-age travel, in-

180. Seventy-eight percent of the brides over 65 were widows and 73 percent of the grooms over that age were widowers. 1962 HEW study summarized in M. PLOSCOWE, H. FOSTER & D. FREED, *supra* note 1, at 238.

181. The concerns of the elderly themselves must be distinguished from those of relatives. The infringement upon the rights of the elderly by those who seek to impose a guardianship, to prevent an older person's entry into legal relationships, such as marriage, or to otherwise prevent the spending of an older person's funds to insure a prospective inheritance is raised in Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676 (1964).

182. For a more detailed account of women's difficulties with social security see Abern, *Social Security—A Gross Misnomer, Especially for Women*, 2 PRIME TIME: FOR THE LIBERATION OF WOMEN IN THE PRIME OF LIFE 11 (Jan. 1974).

183. Sociologist Arlie Hochschild reports that many older people are living together without legal marriage to avoid losing a pension or social security benefits. Letter from Arlie Hochschild to the author, Jan. 1974. Cf. *The Old in the Country of the Young*, TIME, Aug. 3, 1970, at 49.

184. See INSTITUTE OF LIFE INSURANCE, TREND REPORT NO. 8, THE LIFE CYCLE: TRENDS IN LIFE STAGES AND LIVING PATTERNS 8 (Feb. 1974).

volvement in a campaign or political cause, or the empty-nest period before and after retirement.

In addition to the increase in divorce and remarriage there is a second reason for a movement toward a pattern of serial monogamy. With increased longevity, early marriage, and closer child-spacing, the average couple that stays together will have many more years of life together and will share 10 to 25 years after their children leave home.¹⁸⁵ In the absence of children there will be a greater stress on the marital diad and on each spouse fulfilling the other's needs throughout the changing course of their lives. "This postparental stage of marriage is a brand-new phenomenon in human history. People did not live long enough in the past to reach it. One spouse or the other had died long before the youngest child had left home or was married."¹⁸⁶ As Lawrence Kubie has explained:

Divorce today is accomplishing some of the reshuffling of marriages which only a few years ago occurred through death Apparently, longevity has now exposed the fact that the human race never has been mature enough for enduring marriages, a fact which used to be obscured by early deaths.¹⁸⁷

Some social scientists have asserted that either serial monogamy or institutionalization of extramarital relations may be necessary to cope with the expanded time burden placed on marriage, for with increased longevity it may be difficult to require both exclusivity and permanence of the marital bond.¹⁸⁸ Marital sabbaticals have also been suggested as a means of providing variety in a marriage which today can last 50 years instead of 30 years. As our expectations for marriage increase and change, and as psychological pressures on the two-person bond multiply, the social influences towards serial monogamy are becoming as powerful as the demographic ones. Each of these changes presents a challenge to the traditional marriage contract. Clearly a more flexible legal model is needed in a society with increasing serial family formation throughout the life cycle.

185. For recent changes in the typical family life cycle see Glick & Parke, *New Approaches in Studying the Life Cycle of the Family*, 2 DEMOGRAPHY 187 (1965). They report that younger women are marrying at an earlier age, having fewer children and spacing them closer together, completing their child rearing at a younger age. Thus women today are younger when their last child is married—fifty years instead of fifty-six years—which leaves the couple with ten to twenty-five years together in the "empty-nest" stage.

186. J. BERNARD, *THE FUTURE OF MARRIAGE* 68 (1972).

187. Kubie, *Psychoanalysis and Marriage*, in *NEUROTIC INTERACTION IN MARRIAGE* 12 (V. Eisenstein ed. 1956).

188. As Bernard explains:

*C. The Marriage Contract Assumes Procreation Is an
Essential Element in the Relationship*

In *Reynolds v. Reynolds*,¹⁸⁹ the Massachusetts Supreme Judicial Court noted that "one of the leading and most important objects of the institution of marriage under our laws is the procreation of children"¹⁹⁰ Procreation has always been considered one of the "essentials" of the marriage contract. "Marital intercourse, so that children may be born, is an obligation of the marriage contract, and 'is the foundation upon which must rest the perpetuation of society and civilization.'"¹⁹¹ In the past, the courts have viewed marriage and procreation as inextricably linked, as if they could not conceive of one without the other. As the United States Supreme Court stated in *Skinner v. Oklahoma*, "Marriage and procreation are fundamental to the very existence and survival of the race."¹⁹²

The assumption that procreation is an essential element in the marriage contract is so basic and taken for granted that it is rarely challenged and thus is rarely dealt with explicitly in judicial opinions. However, because the assumption of procreation in marriage is so pervasive there are many areas of law which have touched on the issue, either directly or indirectly, and they are cumulatively significant in documenting the importance of the law's procreative assumption. The following are briefly discussed below: the granting of annulments on the basis of procreative failure and fraud; the state's traditional regulation of premarital and extramarital sexual relationships; the numerous restrictions on access to sterilization and contraception; the prohibition on same-sex marriages; the priority given to women's maternal roles; the structure of incentives embodied in tax laws; and the series of government programs and regulations which reward procreation.

Because procreation and parenthood are assumed to be goals of all who enter marriage, concealment or fraud about one's ability or

Both exclusivity and permanence are required in marriage as institutionalized in our society. They may be incompatible with one another in the kind of world we now live in where men and women are, in Bernard Farber's words, "permanently available."

It may be that we will have to choose between exclusivity and permanence. If we insist on permanence, exclusivity is harder to enforce; if we insist on exclusivity, permanence may be endangered. The trend . . . seems to be in the direction of exclusivity at the expense of permanence in the younger years but permanence at the expense of exclusivity in the later years.

Bernard, *Infidelity: Some Moral and Social Issues*, in *RENOVATING MARRIAGE: TOWARD NEW SEXUAL LIFESTYLES* 75-76 (R. Libby & R. Whitehurst eds. 1973).

189. 85 Mass. (3 Allen) 605(1862).

190. *Id.* at 610.

191. *Miller v. Miller*, 132 Misc. 121, 122, 228 N.Y.S. 657 (1928).

192. *Skinner v. Oklahoma*, 136 U.S. 535, 541 (1942).

willingness to have children has provided one of the few justifications the law has allowed for annulment of a marriage:¹⁹³

Implicit in the marriage contract is the representation that the parties will have normal and natural relations and that they will not do anything which will frustrate the normal and natural result of those relations. Where nothing is said prior to the marriage by a spouse on the subject of children, it is presumed he or she intends to enter the marriage contract with all the implications, including a willingness to have children

A promise by one spouse before the marriage, expressed or implied, to have children without any intention to keep the promise, is a sufficient fraud to void their marriage under Civil Practice Act, § 1139.¹⁹⁴

Further indication of the essential nature of procreation in the legal conception of marriage is provided by the traditional prohibitions against sexual relations which would not lead to procreation: sodomy and "unnatural acts," against premarital and extramarital sexual relations,¹⁹⁵ and against same-sex marriages.¹⁹⁶ By explicitly excluding from the marital relationship those who are not able (homosexuals), or are not in a social position (minors and those already married) to have and raise children, the law has implicitly defined the ability to procreate as a prerequisite to marriage. In addition, the legal restrictions on access to contraception,¹⁹⁷ sterilization,¹⁹⁸ and abortion¹⁹⁹ have,

193. In its pure form, the doctrine of essentials is limited to misrepresentations related to the sexual obligations of marriage, i.e., the ability or willingness to have sexual relations and the ability to bear children." M. PLOSCOWE, H. FOSTER & D. FREED, *supra* note 1, at 264.

194. *Gerwitz v. Gerwitz*, 66 N.Y.S.2d 327, 329 (Sup. Ct. 1945).

195. "In nearly every state, coitus was explicitly prohibited by law for unmarried juveniles, classified as 'delinquent' behavior and made subject to corrective action. Coitus for the unmarried beyond juvenile status—in most states, those of 18 and over—was labeled 'fornication,' a crime punishable by fines or imprisonment or both. To this date, about half of the states will classify fornication as a crime . . ." M. HUNT, *SEXUAL BEHAVIOR IN THE 1970's* 113-14 (1974).

Rheinstein notes that not only was premarital and extramarital sex forbidden, but that intercourse within marriage was to be carried on only in the "natural" way in order to result in the procreation of children. M. RHEINSTEIN, *supra* note 141, at 11.

Adultery, Bernard observes, is considered both an offense against the spouse and an offense against the state: "Sexual relations with anyone other than the spouse is forbidden by the seventh commandment and also by law. Adultery, though rarely prosecuted, is a crime in most states. Society itself is the injured party. . . . [A]dultery is universally accepted as a ground for divorce. The spouse is now the injured party. No marital partner has to tolerate it." Bernard, *supra* note 188, at 76 (footnotes omitted).

196. See discussion of same-sex marriages in text accompanying notes 318-19 *infra*.

197. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

198. See, e.g., *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2d Cir.

until very recently, similarly functioned to encourage procreation within—and limited to—a legal marriage.

The priority given to women's maternal roles, discussed in the first section of this Article,²⁰⁰ represents another form of legal encouragement of and priority for parenthood in marriage. The legal tradition of allowing special legislation for women is based on an assumption of motherhood for all women and, as analyzed above, serves to reinforce and sometimes compel maternal roles in women. As the demographer Judith Blake has noted, the "strong pronatalist coercion in the law"²⁰¹ is a result of the law's emphasis on the different familial roles of the sexes, particularly their parental roles. When the sexual division of labor in the family is enforced through law, with women assigned child-care duties and men assigned support responsibility, the effect is the "application to all men and all women of a legal philosophy that assumes universal parenthood"²⁰²

The essential nature of procreation in marriage is also found in the current legal assumptions in tax laws documented by Kingsley Davis. Davis points to the laws which encourage and assume childbearing in marriage by giving parents special tax exemptions, by an income tax policy which discriminates against couples when the wife works, and by awarding tax benefits to the heads of families on the basis of family size.²⁰³ Other government programs which reward and assume procreation in marriage include those which award family allowances and public housing on the basis of family size,²⁰⁴ and those which grant government fellowships with special allowances for wives and children to married students.²⁰⁵ This cumulatively strong pronatalist bias in the law certainly seems questionable in light of our current societal need for limited population growth.²⁰⁶

1971). On the question of why access to sterilization has been so restricted see Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 427-39 (1965).

199. *Roe v. Wade*, 410 U.S. 113 (1973). *Doe v. Bolton*, 410 U.S. 179 (1973).

200. See text accompanying notes 90-135 *supra*.

201. Blake, *Coercive Pronatalism and American Population Policy*, in 6 ASPECTS OF POPULATION GROWTH POLICY 85 (R. Parke & C. Westoff eds. 1972).

202. *Id.* at 100.

203. Davis, *Population Policy: Will Current Programs Succeed?* 158 SCIENCE 730, 738 (1967). For additional information on the pronatalist bias in the tax laws see Veit, *How Should Non-Parents Approach the Question of Taxes?*, in National Organization for Non-Parents, Newsletter No. 12, April-May 1974, at 3.

204. Davis, *supra* note 203.

205. *Id.*

206. Ehrlich and Ehrlich have characterized such laws as still reflecting the requirements of a nation seeking to fill a frontier. P. Ehrlich & A. Ehrlich, *I Have Six Bright, Beautiful, Well-Behaved Children/Shame on You!* in POPULATION RESOURCES ENVIRONMENT, 1970, reprinted in NEW WOMAN, Aug. 1971, at 107. See generally E. PECK & J. SENDEROWITZ, PRONATALISM: THE MYTH OF MOM AND APPLE PIE (1974).

In addition to public policy considerations, the emphasis on procreation as an essential element of the marriage contract may be increasingly inappropriate for many individuals marrying today. A growing number of marriages are being contracted by people who have young children from their first marriage to raise, by people whose children have grown up and are independent, and by people who have passed their childbearing years. As was noted earlier, many persons entering new marriages have already been married and may not want to begin childbearing and rearing in their second or third marriage. In general, divorce and remarriage appear to have a negative effect on fertility.²⁰⁷

An equally significant challenge to the pronatalist assumption of present legal marriage is provided by young couples who have decided not to have children. Although they do not yet represent a very large percentage of the population, an increase in the number of married couples who are rejecting parenthood seems likely.²⁰⁸ A 1973 survey indicates that just over 4 percent of a national sample of women under 25 stated that they do not expect to have children.²⁰⁹ Although this number may seem statistically unimpressive, the percentage is high for a national sample.²¹⁰ Further, the present generation is the first one

207. See Lauriat, *The Effect of Marital Dissolution on Fertility*, 31 J. MARR. & FAM. 484 (1969). Although there is some tendency for young (divorced and) remarried women to make up for the fertility they presumably would have experienced if they had remained in their previous marriage (perhaps to "legitimate" their new marriage with children), overall women thirty-five to forty-four years old in discontinuous marriages had been only 79 percent as fertile as comparable women in a continuous marriage. *Id.*

A recent analysis by Sarah Cohen and James Sweet, *The Impact of Marital Disruption and Remarriage on Fertility* concludes:

[F]or women 25 to 54 years of age in 1965 . . . controlling for age and race differentials women whose first marriage was terminated by divorce have 0.14 children fewer than those who remain in intact first marriages:

. . . This is an understatement of the overall differential in fertility since women who have experienced divorce have an earlier age at marriage and thus higher fertility. When we take this fact into account the fertility deficit [for divorce] is about 0.6 children.

36 J. MARR. & FAM. 87, 95 (1974).

A slightly different finding is suggested by recent Hungarian data. Hooz reports that "the remarriage increases the woman's inclination to bear a child (about 50 percent of them do have another child), and its positive impact is so great that their fertility hardly differs from that of the first married." Hooz, *A Hazassagok Stabilitasanak Hatasa A Hazas Nok Termekeny-segere*, 13 Demografia 95 (1970).

208. J. BERNARD, *THE FUTURE OF MARRIAGE*, 55 (1972).

209. R. DIXON, *Measuring Equality Between the Sexes*, at 9, 1974 (unpublished paper, Dep't of Sociology, Univ. of Cal., Davis.) Another 6 percent of the married couples are physically unable to have children. Dixon relies on data from the U.S. BUREAU OF THE CENSUS, *CURRENT POPULATION REPORTS*, 19 (Series P-20, No. 248, 1973).

210. See generally Blake, *supra* note 201.

to have a genuine option about procreation.²¹¹ With the current population pressures and the exhortations of groups like Zero Population Growth and the National Organization for Nonparents,²¹² this percentage is likely to increase. In addition, the women's liberation movement is likely to have a powerful antinatalist impact,²¹³ with some proponents seriously questioning the value of motherhood and others already rejecting it as a "trap."²¹⁴ This increase in the open expression of antinatalist ideas, the public policy concern with limiting population growth, and the growing attention given to social science reports of greater happiness among childless couples²¹⁵ will certainly have the effect of raising the option of nonparentage for many people who would not have considered it a decade ago.

While it is likely that childless marriages for both young and middle-aged couples will increase, a more easily documented and more widespread trend is that those who do have children will have fewer of them in the future.²¹⁶ Birth and fertility rates in the United States dropped to their lowest points in history last year.²¹⁷ In addition, the

211. As Blake has noted, ". . . at present, marriage and parenthood are ascribed statuses. They are not really chosen—they happen to people." Blake, *Feminism and the "Do Both" Syndrome* in National Organization for Non-Parents, Newsletter No. 8, Aug. 1973, at 3, quoting from Blake, *supra* note 201.

212. The titles in National Organization for Non-Parents newsletters are indicative: "Mother's Day is Over," *Author Declares*, Newsletter No. 7, June 1973, at 1, *Research Shows Child-free Women Happiest with Life*, Newsletter No. 8, Aug. 1973, at 1.

213. Blake contends that feminists have been pronatalist because they have supported the "do both" syndrome, *i.e.*, that women should be able to combine a career and family role, and not be pressed to choose between them. Blake, *supra* note 201. The May 1973 issue of *Ms*, *Up With Motherhood*, supports Blake's assertion, but there are growing segments of the women's movement that are clearly antimotherhood. See, *e.g.*, Rollin, *Motherhood: Who Needs It?* LOOK, Sept. 22, 1970, at 15-17.

214. See *e.g.*, E. PECK, *THE BABY TRAP* (1971); S. RADL, *MOTHER'S DAY IS OVER* (1973).

215. There are a number of social science reports which indicate that childless marriages are happier than marriages with children. See Renne, *Correlates of Dissatisfaction in Marriage*, 32 J. MARR. & FAM. 54, 61 (1970). Research indicating that children decrease rather than increase marital happiness dates back to the 1950's when "motherhood was almost a mania and admitting to negative effects was not acceptable." J. BERNARD, *supra* note 186, at 57. See, *e.g.*, E. BURGESS & P. WALLIN, *ENGAGEMENT AND MARRIAGE* 707-08 (1953). A 1973 study of mothers of children under six years of age found that "[d]espite the very threatening nature of the question, two in every five confessed to wishing—at least occasionally—that they did not have children." Kolsrud, *Research Shows Childfree Women Happiest with Life*, in National Organization for Non-Parents, Newsletter No. 8, Aug. 1973, at 1 (emphasis omitted), summarizing a survey conducted by the Univ. of Mich. Institute for Social Research. This survey also found that married women were happiest before their first children were born and after they had grown up and left home. *Id.*

216. J. BERNARD, *supra* note 186, at 55.

217. N.Y. Times, April 16, 1974, at 1, col. 2, and at 14, col. 3, quoting from a summary report by the National Center for Health Statistics. This was the second consecutive year in which the rates recorded record lows.

proportion of Americans who favor large families had declined dramatically and is now at the lowest point in the 38 years that national surveys on the subject have been conducted.²¹⁸ A recent trend report concluded that "[y]oung people seem to be reexamining the ideal that parenthood is fun. More are looking at it as an economic and social burden that they might not be willing to undertake in this age of affluence, mobility and personal freedom."²¹⁹ Thus, the already inappropriate pronatalist assumptions of the present marriage contract may become even less appropriate in the future.

*D. The Marriage Contract Assumes a Strict
Division of Labor in the Family*

The sexual division of labor assumed by the marriage contract was documented in the first section of this Article.²²⁰ The husband is assumed to be the head of the household and responsible for the economic support of the family; the wife's role is defined as that of housewife and mother. This assumed division of labor may be challenged by both economic and sociological data. The assumption that the husband alone is responsible for family support is questionable in light of economic data on the labor force participation and earnings of married women. The assumption of strongly differentiated and mutually exclusive roles for husbands and wives may be questionable in light of sociological data on increasingly varied and egalitarian role patterns within the family. Each of these challenges is explored in more detail below.

Three types of economic data challenge the law's continued assumption of a division of labor within the family and its consequent assignment of sole responsibility for family support to the husband. The first is the increase in the number and percentage of married women in the labor force. The second is the increase in the number and percent-

A major question now is how much of the decline represents a decision of younger women to forego childbearing altogether, how much represents a decision for smaller families, and how much represents a tendency to simply postpone first births. Demographer Ruth Dixon's analysis points to an increase in decisions for smaller families. R. Dixon, *supra* note 209, at 9.

218. Gallup, *Growing Appeal of Small Family*, S.F. Chronicle, April 19, 1974, at 11, col. 7.

The Gallup survey showed that only 19 percent of the public said that their ideal number of children was four or more. Only six years ago, in 1968, the percentage was twice as high, 41 percent. The recent median response regarding the ideal number of children in a family was two. Thus the appeal of the small family (one or two children) has dramatically increased while the desirability of larger families (four or more children) has declined.

219. INSTITUTE OF LIFE INSURANCE, *supra* note 184, at 8.

220. See text accompanying notes 10-134 *supra*.

age of mothers, especially mothers of young children, who work outside the home. The third type of data indicates the importance of women's wages to the vital support of the family.

Women have always worked, in the field and in the home, but in the past most women were engaged in domestic employment or agricultural work, and in both types of work their jobs were obtained through, and were done under the supervision of, their male kinsmen.²²¹ The major change in the last century has been in women's participation in the nonagricultural, nonfamilial, industrialized labor force.²²² Modern industrial society has provided the first opportunity for women "to enter the labor market on their own, to obtain jobs and promotions without the help or permission of their men."²²³ At the turn of the century only 5 percent of all married women worked outside the home for wages and salaries.²²⁴ By 1940 this increased to 17 percent, by 1950 to 25 percent and by 1960 to 32 percent.²²⁵ By 1972, 42 percent of all married women were in the labor force.²²⁶ This ten-fold increase represents a dramatic change in the economic position of married women.²²⁷ While the average woman worker in 1920 was a single woman in her late twenties who usually worked as a factory worker or clerk until she got married;²²⁸ the average woman worker today is married, 10 years older, and may be found in a much wider variety of occupations.²²⁹ With married women now making up 60 percent of

221. W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 59 (1963).

222. In 1890 most employed women were working on farms, in domestic or personal service, teaching, or in the clothing and textile industries. In 1963 less than one out of 10 employed women are in domestic service. *Id.* at 61.

223. W. GOODE, *THE FAMILY* 75 (1964).

224. R. SMUTS, *WOMEN AND WORK IN AMERICA* 23 (1959).

225. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 26 (1969).

226. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 222 (1972). The percentage of black married women in the work force is significantly higher than for whites; in March 1971 about 53 percent of all black wives were in the labor force compared to 40 percent of white wives. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *THE ECONOMIC ROLE OF WOMEN* 96 (1973).

227. The greatest rise in female labor force participation (from 1940 to 1960 when the percentage of married women rose from 17 percent to 32 percent) was, according to Professor Valerie Oppenheimer, "in good part a *response* to increased job opportunities." She hypothesizes that labor shortages caused employers to abandon their prejudices against employing older married women. V. OPPENHEIMER, *THE FEMALE LABOR FORCE IN THE UNITED STATES* 187 (1970). Economics Professor Francine Blau uses Oppenheimer's thesis (that the growing *demand* for women workers was the critical factor in expanding their labor force participation) to suggest that many more married women would be working today if there were sufficient opportunities for them to work. Blau, *Women in the United States Economy*, in *WOMEN: A FEMINIST PERSPECTIVE* (J. Freeman ed. 1974).

228. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *WOMEN WORKERS TODAY* 1 (rev. 1973).

229. *Id.*

the female labor force,²³⁰ the continued legal assumption of a wife's dependency is clearly outmoded.

A second major change in the labor force participation of married women has been the increase in the number of mothers in the labor force. Between 1940 and 1967 the labor force participation rate of mothers showed a 400 percent increase.²³¹ In 1940 only 9 percent of mothers with children under the age of 18 worked outside the home; by 1967 this proportion increased to 38 percent.²³² By 1973, almost 13 million women in the labor force had children under the age of 18.²³³ Even in the major childbearing years, ages 20 to 24, 43 percent of the married women were in the labor force.²³⁴ Perhaps more surprising is the number of mothers with preschool children who are in the labor force: in 1972, over 30 percent of the mothers with children under six worked outside of the home.²³⁵ Further, even with children under three, 27 percent of the mothers held full-time jobs.²³⁶ Thus the traditional assumption of a housebound mother whose exclusive attention is devoted to her children appears increasingly inappropriate.

The over 20 million married women currently in the labor force²³⁷ certainly contribute to the financial support of their families. Contrary

230. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 2 (rev. 1971).

231. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 40, table 17 (1969).

232. *Id.*

233. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 2 (rev. 1973).

234. A. FERRISS, INDICATORS OF CHANGE IN THE AMERICAN FAMILY 83, figure 36 (1970) (data for 1968).

235. Hayghe, *Labor Force Activities of Married Women*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., April 1973, at 34, table 4. The trend for more women with young children to work has also shown a dramatic increase in the past twenty years. In 1950 only 12 percent of the women with children under six were in the labor force; in 1960 the percentage rose to 19 percent, in 1965 to 23 percent, and in 1971 to 30 percent. *Id.* at 33. Waldman & Gover, *Marital and Family Characteristics of the Labor Force*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., Sept. 1971, at 7, table 3.

236. *Id.* Of women with children under the age of three years, 41.9 percent had some labor force experience during 1969. Almost two-thirds (66.3 percent) of these women were working full time. Waldman & Gover, *Children of Women in the Labor Force*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., July 1971, at 21, table 2.

Of women with children 6-17 years old, 50.2 percent were in the labor force in 1972. Hayghe, *supra* note 235, at 34. However it is interesting to note that there is no "jump" in the number of women who return to the labor force when their youngest child enters school. There is instead a steady rise in the proportion of women employed from the group whose youngest child has just been born to those whose youngest child is 12 to 13. After the youngest child reaches 13, the proportion of mothers employed stays constant at about 43 percent. J. SWEET, WOMEN IN THE LABOR FORCE 60-61, figure 3-2 (1973).

237. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, THE AMERICAN ALMANAC: THE STATISTICAL ABSTRACT OF THE U.S. 222-23 (1974).

to the myth that married women are working for pin money or extras, the facts show that the wages of these married women are of vital importance to their families.²³⁸ Their impact is illustrated by data on families whose incomes are near the poverty level: when the wife is in the labor force, only 2 percent of the husband-wife families have incomes below \$3,000. In contrast, when the wife is not employed, 9 percent of the husband-wife families had incomes below \$3,000.²³⁹ Thus today, when almost half of all married women are in the labor force,²⁴⁰ and over 25 percent of them earn as much or more than their husbands,²⁴¹ social reality strongly contradicts the legal assumption that the husband should, and does, support his family alone. These economic data indicate that neither marital nor parental roles currently preclude women from active participation in the labor force or from major contributions to family support, and thus challenge the economic assumptions of traditional legal marriage.

The sociological assumptions of traditional legal marriage appear to be equally anachronistic. The traditional legal contract continues to assume that the husband is head of the family and that roles within the

238. Two-thirds of all women work because of immediate economic need: 23 percent are single; 19 percent are divorced, separated or widowed; 22 percent of women workers are married to men with incomes under \$7200, the "modest adequacy" level established by the U.S. Department of Labor; 6 percent have husbands earning less than the poverty level of \$3000 per year. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WHY WOMEN WORK 1 (rev. June 1973). See also Griffiths, *The Economics of Being Female*, 9 TRIAL 10, 17 (Nov.-Dec. 1973). The data are discussed more fully in Suelzle, *Women in Labor*, 8 TRANS-ACTION 50 (Nov. 1970).

239. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WORKERS TODAY 6 (rev. 1971).

240. In some cases, increased labor force participation for women has not meant a decline in their household tasks, but has instead doubled women's work by adding a factory or office job to their household responsibilities. On the average, working women still spend from .8 to 3.5 hours more per day in housekeeping and child-care activities than their husbands. R. Dixon, *supra* note 209, at 12.

241. INSTITUTE OF LIFE INSURANCE, *supra* note 184, at 9. The average wages of women remain lower than those of men. In 1966, women earned 63.3 percent of what men earned. By 1971, women earned only 59.5 percent of what men earned. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, ECONOMIC REPORT OF THE PRESIDENT 104 (1973).

In a recent review of the differential earning power between men and women Professor Blau found that after controlling for work experience, job tenure, and part- or full-time employment, women's wages in most job categories were only 60 percent of men's wages. Blau points to a discriminatory "dual labor market" with most women segregated into predominantly "female" occupational categories that are paid less than comparable male categories. Even when men and women are in the same occupation, they are likely to be employed in different industries or establishments—and paid different wages. Blau, *Women in the United States Economy*, in WOMEN: A FEMINIST PERSPECTIVE (J. Freeman ed. 1974). On the persistent decline in women's occupational, economic and educational achievements, compared to those of men, see Knudsen, *The Declining Status of Women: Popular Myths and the Failure of Functionalist Thought*, 48 SOCIAL FORCES 183 (1969).

family are strictly divided on the basis of sex. In contrast to these assumptions, sociological data indicate a trend toward more egalitarian family patterns in which both authority and roles are increasingly shared.²⁴² The sociological data discussed below are closely related to the economic data noted above, for in large part it is the changing position of women with respect to men in the larger society which has influenced and altered the position of the two sexes within the family.²⁴³ Thus the increased labor force participation of married women has probably been instrumental in causing a decline in the absolute authority of the husband, with a consequent growth in the wife's role in the family decisionmaking.²⁴⁴ With an expansion in women's roles, especially economic roles, outside the family, roles within the family have also become less strongly differentiated.²⁴⁵ Wives are assuming more responsibility for financial and domicile decisions, and husbands are assuming a greater share of the responsibility for housework and child

242. Although the ideal of male authority was stronger in the past, a more sensitive analysis of the relationships between the sexes indicates that while women may have deferred to men in public, they often had great covert power and considerable control over men in some spheres. Warner, Wellman & Weitzman, *The Hero, the Sambo, and the Operator: Three Characterizations of the Oppressed*, 2 URBAN LIFE & CULTURE 60, 61 (April 1972).

Differences in the kind of authority may also be important. As Goode explains:

[Those] who have observed first- or second-generation immigrant families from Italian, Greek, or Eastern European Jewish backgrounds are likely to have noticed that though the rhetoric of male dominance is common, the middle-aged or elder matriarch is to be found in many homes. The woman seems to be the center of initiative and decision. However, the male head of the family seems to be *conceding* this authority, reserving the right to take it back when he wishes. If he wants to oppose her will, he can do so successfully. That is, a distinction should perhaps be made between day-to-day initiative and direction, and negative authority—the right to prevent others from doing what they want.

W. GOODE, *THE FAMILY* 75 (1964).

243. W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* 55 (1963). This is not to imply that industrialization and changes in women's labor force participation are *responsible* for changes in family patterns. As Goode notes:

I believe that the crucial crystallizing variable—i.e., the necessary but not sufficient cause of the betterment of the Western woman's position—was *ideological*: the gradual, logical, philosophical extension to women of originally Protestant notions about the rights and responsibilities of the *individual* undermined the traditional idea of "woman's proper place."

Id. at 56.

244. As Ruth Dixon has observed, a status inequality is built into the marital relationship because most men marry younger women. The age gap creates an initial power differential between the husband and wife, and compounds other sources of inequality. R. Dixon, *supra* note 209, at 6. The declining age gap between brides and grooms throughout the century suggests another indication of a movement towards more egalitarian relationships in marriage.

245. In general, the woman's power within the family seems to increase when she is employed outside the home. Heer, *Dominance and the Working Wife*, 36 SOCIAL FORCES 341 (May 1958). Blood & Hamlin, *The Effect of the Wife's Employment on the Family Power Structure*, 36 SOCIAL FORCES 347 (May 1958).

care. In general, there is a strong trend toward egalitarian family patterns, those in which authority is shared and decisions are made jointly by the husband and the wife.²⁴⁶

The spread in egalitarian family patterns may be briefly noted in several areas. First, there is an increase in the sharing of financial decisions within the family.²⁴⁷ As the wife's contribution to the total family budget assumes greater relative importance, financial responsibilities within the family are more equally shared.²⁴⁸ Decisions on family expenditures, savings, and the general "struggle for financial security" are now made jointly or apportioned on a less sex-stereotyped basis.²⁴⁹ Second, the determination of the family domicile and the decision of when and where to move has become more of a family decision, with the needs and interests of the wife and children assuming a much greater importance than in the past.²⁵⁰ Although both of these trends represent a decline in the traditional authority of the husband, there is also a significant decline in the traditional authority of the wife as the husband assumes a more important role in household decisions and in household tasks.²⁵¹ As noted above, the general trend toward more egalitarian decisionmaking in the family also varies by social class.²⁵² While the working wife gains more power toward the lower socio-economic strata, there is a much greater acceptance of the ideology of egalitarianism toward the upper strata.²⁵³

246. Foote, *Changes in American Marriage Patterns*, 1 EUGENICS Q. 254 (1954). It is clear that some define these trends as equivalent to the destruction of the family. For example, Andrée Michel's qualitative analysis of the French sociological literature on the family indicates that many scholars view the authority of the father as identical with the "strength" or "solidarity" of the family; the prerogatives of the husband and father (in deciding the place of residence, the children's education, etc.) as necessary for the "unity of the family;" and the notion of the emancipation of both women and children as equivalent to the disintegration of the family. Michel, *La Femme dans la Famille Française*, 111 CAHIERS INTERNATIONAUX 61 (Mar.-April 1960).

247. In 1946, 27 percent of the men but only 11 percent of the women thought that husbands should have the most to say in deciding how family money was to be spent; and 16 percent of the men and 23 percent of the women thought the decision should be left to the women. The most frequent answer among both men and women was that both the wife and the husband should decide together. PUBLIC OPINION 1935-1946, 60-61, 433 (H. Cantril & M. Strunk eds. 1951).

248. Foote, *supra* note 246.

249. *Id.*

250. INSTITUTE OF LIFE INSURANCE, *supra* note 184. "About one person in every five shifts residences over a year's time. About three-quarters of our urban citizens were living in 1950 in places in which they did not reside in 1940." P. ROSSI, WHY FAMILIES MOVE 1 (1955). See also V. PACKARD, A NATION OF STRANGERS 6-8 (1972).

251. Blood, *The Husband-Wife Relationship*, in THE EMPLOYED MOTHER IN AMERICA 294 (F. Nye & L. Hoffman eds. 1963).

252. See note 51 *supra* for a more detailed discussion of the complexities of the class factor in intrafamily power.

253. W. GOODE, THE FAMILY 74-76 (1964).

A third area in which there is a significant trend toward more egalitarian patterns is that of sexuality.²⁵⁴ The current sexual revolution has focused increased attention and emphasis on the wife's participation and satisfaction in sexual relations, and consequently on more mutual and egalitarian sexual relationships. Marital sex became more respectable for married women in the 1950's,²⁵⁵ though the husband was still seen as the initiator and orchestrator of marital sex.²⁵⁶ At that time a woman's own needs were secondary, but if she was a "good and mature wife," which meant, at that time, being able to have vaginal orgasms, she would be "happy and satisfied."²⁵⁷ In the late 1960's, however, with the publication of Masters and Johnson's research demonstrating the range of female sexual response,²⁵⁸ both men and women began to redefine female sexuality and women's sexual needs.²⁵⁹

A fourth and closely related trend is in the increased sharing of responsibility for birth control. Knowledge and use of some form of contraception has become nearly universal in the United States today. By 1965, 97 percent of white and black couples in a national sample had used or expected to use contraception at some point in their married lives.²⁶⁰ The most recently introduced and most highly effective methods of contraception, the pill and the I.U.D., are the first to give

254. The traditional definition of marital sexuality was one in which the wife became the private sexual property of her husband and she could not refuse to have sexual intercourse with her husband. As wives were assumed to be completely available to their husbands, a woman could never charge her husband with rape. See generally M. PLOSCOWE, *SEX AND THE LAW* (1951).

255. Schwartz, *Female Sexuality and Monogamy*, in *RENOVATING MARRIAGE: TOWARD NEW SEXUAL LIFE-STYLES* 211, 214 (R. Libby & R. Whitehurst eds. 1973).

256. Gordon & Shankweiler, *Different Equals Less: Female Sexuality in Recent Marriage Manuals*, 33 *J. MARR. AND THE FAM.* 459 (Aug. 1971).

257. Schwartz, *supra* note 255, at 214.

Despite women's superior biological potential, women experience orgasm less often than men. A. KINSEY & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); W. MASTERS & V. JOHNSON, *HUMAN SEXUAL RESPONSE* (1966). Women with less education and women in more traditional role-segregated marriages indicate a lower frequency of orgasm and express less satisfaction with their sexual relations in marriage. R. DIXON, *supra* note 209, at 5. See also M. KOMAROVSKY, *BLUE-COLLAR MARRIAGE* (1964); Bell, *Some Factors Related to the Sexual Satisfaction of the College Educated Wife*, *FAM. LIFE COORDINATOR* 43 (May 1964); Rainwater, *Marital Sexuality in Four Cultures of Poverty*, in *THE SOCIAL DIMENSION OF HUMAN SEXUALITY* 79 (R. Bell & M. Gordon eds. 1972).

258. W. MASTERS & V. JOHNSON, *HUMAN SEXUAL RESPONSE* (1966).

259. Atkinson, *The Institution of Sexual Intercourse*, in *NOTES (FROM THE SECOND YEAR): WOMEN'S LIBERATION* 42 (A. Koedt & S. Firestone eds. 1970); Koedt, *The Myth of Vaginal Orgasm*, in *RADICAL FEMINISM* (A. Koedt, E. Levine & A. Rapone eds. 1973); Lydon, *Understanding Orgasm*, *RAMPARTS* 59 (Dec. 14-24, 1968); Sherfy, *The Evolution and Nature of Female Sexuality in Relation to Psychoanalytic Theory*, 14 *J. AM. PSYCHOANALYTIC ASS'N* 28 (1966).

260. Westoff, *The Modernization of U.S. Contraceptive Practices*, 4 *FAM. PLANNING PERSPECTIVES* 9-12 (July 1972).

women independent control over their reproductive decisions,²⁶¹ and the first to allow couples a real choice about the number and timing of children.²⁶² With technological advances in effective methods of female contraception, the decision of when to have children, as well as the decision of when to have sexual relations, may be increasingly decided by the husband and wife together.

Fifth, and most important, is an extended range of family roles which are now being shared or alternated between husbands and wives. As one report notes: "An increasing number of married couples are interchanging the traditional roles assigned to them within the household. Going well beyond helping with the chores there is a growing acceptance of the idea that the man can stay home to raise the children while the woman returns to the labor force."²⁶³

The extent to which husbands and wives share rather than segregate a wide range of family activities—from domestic chores to recreation and leisure activities—in part depends on their class status and social network. Husbands and wives in the lower class tend to belong to more tightly knit social networks in which sex-segregated activities within and outside of the home are more normative. These husbands and wives are more likely to engage in complementary but independent activities and will spend more time apart. Middle-class and professional families tend to form more loosely knit networks with a resulting greater reliance on the husband-wife bond. In these families the husband and wife spend more time together and tend to share household tasks and domestic roles as well as leisure and recreational activities.²⁶⁴ Although this more egalitarian pattern is now more common among the middle classes, the general trend, throughout society, appears to be in that direction.

261. Medical problems with the pill and I.U.D. still limit their use by many women. In 1970, 42 percent of the married couples using contraceptives relied on less effective techniques such as withdrawal, rhythm and douching. R. Dixon, *supra* note 209, at 43 n.12.

262. Surprisingly, as recently as 1970 only 20 percent of the couples reported that their fertility was completely planned with respect to both the timing and the number of children. *Id.* at 8.

263. INSTITUTE OF LIFE INSURANCE, *supra* note 184, at 9. The New York City Board of Education recently announced that male employees will now be eligible for child care leaves. Formerly such leaves were granted only to women. The change in policy seems to have come as a result of the suit brought by Gary Ackerman charging the Board with discriminatory practices for not allowing him an unpaid leave to participate in caring for his children. 3 WOMEN TODAY No. 26, Dec. 24, 1973, at 3. See generally Widmer, *Reflections of a Male Housewife: On Being a Feminist Fellow-Traveller*, *The Village Voice*, June 10, 1971.

264. This is the central thesis in E. BOTT, *FAMILY AND SOCIAL NETWORK* (1957). Bott focuses on the tightly knit network in working-class neighborhoods in London, but her analysis seems as accurate for the blue-collar families in the U.S. studied in M. KOMAROVSKY, *BLUE-COLLAR MARRIAGE* (1964).

Parenting roles are likely to be the most resistant to change and yet there appears to be a growing acceptance of an enlarged, if not yet completely equal, role for husbands in this sphere as well.²⁶⁵ As noted above, sex-typed parenting roles go to the very core of the traditional legal assumptions about women as mothers and to the assumed natural division of labor between husbands and wives.²⁶⁶ In the past, social scientists supported the traditional legal model and, in fact, strongly asserted that the homebound mother was necessary for the proper development of the child.²⁶⁷ Further, social theorists assumed that clearly differentiated parental sex role models were necessary to facilitate a child's normal sex role development.²⁶⁸ Freud's identification theory was

265. Arlene Skolnick sees parenthood as "coming to be defined more and more as a joint enterprise of both the husband and the wife . . . not only because the women are insisting that the men share some of the load, but because many young professional men themselves no longer accept as their fate the compulsive male careerism that dominated the 1950's." A. SKOLNICK, *THE INTIMATE ENVIRONMENT* 311 (1973). See also Leonard, *The Fathering Instinct*, in *Ms.*, May 1974, at 52; Jonas, *Jonas and Daughters*, in *id.* at 57; and Sutherland, *Childbirth is Not for Mothers Only*, in *id.* at 47.

However, males' willingness to assume primary parenting roles should not be exaggerated. In Komarovsky's recent study of male college seniors at an ivy league university, "Many respondents expressed their willingness to help with child care and household duties. Similarly, many hoped to spend more time with their own children than their fathers had spent with them. But such domestic participation was defined as assistance to the wife who was to carry the major responsibility." Komarovsky, *Cultural Contradictions and Sex Roles: The Masculine Case*, 78 *AM. J. SOC.* 873, 882 (Jan. 1973).

266. As Professor Kay has noted:

Critics blame Dr. Spock for inhibiting women from entering the labor force with his postulate that mothers of young children are more valuable when tending their children than when pursuing occupations outside the home. Although the Supreme Court has established that employers engage in unlawful sex-based discrimination when they refuse to hire mothers, but not fathers, of pre-school aged children, the Court left open a dangerous legal avenue for reinforcing Spock's rule by its suggestion that not being the mother of young children might constitute a bona fide occupational qualification reasonably necessary to the normal operation of a business. Unless this unfortunate dictum is speedily repudiated, further legal and economic barriers will be erected to prevent young mothers from going to work.

The social attitude that a mother's place is in the home is further reflected in the myriad confusing, inconsistent, and totally inadequate regulations dealing with childbearing and childrearing leaves of absence. The lack of job security for the childrearing parent during the early months of an infant's life, together with the virtual absence of good child care centers and the still meagre tax support for child care expenses make it imperative in most families that one parent stay home during the child's infancy.

Kay, *Making Marriage and Divorce Safe for Women*, 60 *CALIF. L. REV.* 1683, 1695-96 (1972) (footnotes omitted).

267. Wallston, *The Effects of Maternal Employment on Children*, 14 *J. CHILD PSYCHOLOGY AND PSYCHIATRY* 81 (1973); Wortis, *The Acceptance of the Concept of the Maternal Role by Behavioral Scientists: Its Effects on Women*, 41 *AM. J. ORTHOPSYCHIATRY* 733 (1971).

268. The following section is paraphrased from Weitzman, Eifler, Hokada & Ross,

championed by social scientists, and as recently as 1955 one of the most prominent American sociologists, Talcott Parsons, advocated the necessity of strong distinctions between the roles of mother and father so that the child could learn proper sex role behavior.²⁶⁹ More recently, however, social scientists have begun to question the necessity of polar sex roles and stereotyped sex role models. For example, Philip Slater has argued that adult role models who exhibit stereotyped sex role differentiation may impede, rather than facilitate, the child's sex role identification.²⁷⁰ Children more naturally identify with less differentiated and less stereotyped parental role models. It is easier for them to internalize parental values when nurturance, the assertedly feminine role, and discipline, the allegedly masculine role, come from the same person.²⁷¹ Thus children can learn a wider range of traits and develop their more "natural" talents if they are not pushed into predetermined sex role boxes.

Further, the fears of "maternal deprivation of latch-key children" and the harmful effects of working mothers on their children, which dominated social scientists' concerns in the past, have been proven fallacious.²⁷² Working mothers may, in fact, provide more positive role models and better parents for growing children of both sexes. In contrast, it has been suggested that an exclusive devotion to motherhood may have a negative effect on children.²⁷³ As Alice Rossi has observed:

If a woman's adult efforts are concentrated exclusively on her children, she is likely more to stifle than broaden her children's perspective and preparation for adult life In myriad ways the mother binds the child to her, dampening his initiative, resenting his growing independence in adolescence, creating a subtle dependence which makes it difficult for the child to achieve full adult stature. . . .²⁷⁴

In addition to having a negative effect on children, a preoccupation with motherhood may be harmful to the mother herself. Pauline Bart has reported extreme depression among middle-aged women after their

Sex-Role Socialization in Picture Books for Preschool Children, 77 *AM. J. SOC.* 1125 (1972).

269. T. PARSONS, *Family Structure and the Socialization of the Child*, in T. PARSONS & R. BALES, *FAMILY SOCIALIZATION AND INTERACTION PROCESS* 35, 80 (1955).

270. Slater, *Parental Role Differentiation*, in *THE FAMILY: ITS STRUCTURE AND FUNCTIONS* 350 (R. Coser ed. 1964).

271. *Id.*

272. See, e.g., Hoffman, *Effects on Children: Summary and Discussion*, in *THE EMPLOYED MOTHER IN AMERICA* 190 (I. Nye & L. Hoffman eds. 1968); Wallston, note 267 *supra*; B. Wallston & M. Citron, *The Myth of the Working Mother* (1973) (K.N.O.W. mimeo).

273. Rossi, *Equality Between the Sexes: An Immodest Proposal*, in *THE WOMAN IN AMERICA* 113 (R. Lifton ed. 1964).

274. *Id.*

children leave home when the mothers have been overly involved with and have too closely identified with their children.²⁷⁵

It is likely there will be a continued weakening of the traditional division of labor within the family—and a consequent continued growth of more egalitarian family patterns. This effect is ensured by the interplay of the new awareness of social science prescriptions, the current feminist challenge to early sex role stereotyping and the traditional mother role, the increasing male dissatisfaction with the occupational burdens of the male role, and the economic changes noted earlier.

Two other important societal forces are augmenting the present trend toward more egalitarian family patterns. The first is the changing expectations for a marital relationship, with multiplied emphasis on the emotional and psychological needs of the spouses²⁷⁶—love, sex, intimacy, companionship, emotional support, security, and ego enhancement. At the same time that the economic functions of the family have declined, the emotional interdependence of family members has increased, and these emotional and psychological needs would appear to be better met in more egalitarian relationships. They thus serve as a further force in pushing intrafamilial patterns in that direction.

A final and most significant thrust toward more egalitarian family patterns is coming from women's increasing dissatisfaction with the traditional role of the housewife and mother, and their resulting demands for more independence, greater participation and compensation in the labor force, and more sharing of domestic chores by husbands and children.²⁷⁷ Jessie Bernard has shown that marriage puts a greater emotional strain on women and that "traditional marriage makes women sick—both physically and mentally."²⁷⁸ As Dr. Bernard explains, in every marriage there are really two marriages: the husband's marriage and the wife's marriage. The husband's marriage is a beneficial one in that it enhances the husband's mental health, happiness, career success, income, and life expectancy. The wife's marriage is a destructive one. Married women are more depressed, have more nervous breakdowns, have more feelings of inadequacy, and are generally less healthy, both mentally and physically, than single women. Dr. Bernard writes that women are "driven mad, not by men but by the anachronistic way in which marriage is structured today—or rather, the life style which accompanies marriage today and which demands that all wives be housewives."²⁷⁹ Women are increasingly expressing

275. Bart, *Mother Portnoy's Complaint*, 8 TRANS-ACTION 69 (Nov.—Dec. 1970).

276. See note 139 *supra*.

277. Foote, *supra* note 246.

278. J. BERNARD, *THE FUTURE OF MARRIAGE* 3-53 (1972).

279. *Id.* at 48.

their dissatisfaction with the traditional role and demanding changes.²⁸⁰ Their disaffection from marital and family roles should provide a powerful force in the restructuring of relations between the sexes in marriage.

The changes noted above only highlight the profound changes in the internal structure of marriage taking place in our society today. Although this section has summarized a vast array of data very briefly, the implications of these trends are nothing less than revolutionary. There can be no doubt of the fundamental change in the relations between husbands and wives today and of the very inadequate nature of the present legal assumptions.

*E. The Marriage Contract Assumes a White,
Middle-Class Family*

Class, race, and ethnic bias in family law and its administration have been widely documented in the legal literature.²⁸¹ In its provisions regarding marriage, divorce, property, support, alimony, and custody, the traditional model of universal legal marriage and universal legal divorce incorporates a white, middle-class ideal. For some of the poor, "the law of marriage and divorce has priced itself out of the market. The financial obligations incurred as an incident to marriage may make it a luxury that the poor cannot afford."²⁸² And the poor man's substitute for divorce—desertion²⁸³—typically leads to further legal difficulties. As Kay and Philips have observed:

An unspoken assumption [is that] when parents separate, they divorce; and that when they divorce, a court somewhere will award custody of the children. This assumption does not hold true for

280. See generally B. Friedan, *THE FEMININE MYSTIQUE* (1964); *RADICAL FEMINISM* (A. Koedt, E. Levine & A. Rapone eds. 1973).

281. See, e.g., M. PAULSEN, *CASES AND SELECTED PROBLEMS IN FAMILY LAW AND POVERTY* (1969); tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 *STAN. L. REV.* 257 (part I), 900 (part II) (1964); Kay, *The Offer of a Free Home: A Case Study in the Family Law of the Poor*, in *LAW IN CULTURE AND SOCIETY* 304 (L. Nader ed. 1969).

282. Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 *IND. L.J.* 192, 193-94 (1967). Sheila Cronan has suggested that the increased availability of legal services to the poor and the decision in *Boddie v. Connecticut*, 401 U.S. 371 (1971), may have changed this somewhat.

283. Mueller, *Inquiry into the State of a Divorceless Society: Relations Law and Morals in England from 1660-1857*, 18 *U. PITT. L. REV.* 545 (1957) discusses desertion in England before 1957. Foster, *Common Law Divorce*, 46 *MINN. L. REV.* 43 (1961) discusses the informal termination of marriage in various subcultures in the United States. As Foster and Freed have observed:

Poverty usually promotes extra-legal action rather than a resignation to and endurance of an intolerable situation. The poor resort to desertion and propagate illegitimate children in large measure because law has priced itself out of the market. The law itself is not discriminatory, but in operation it produces discrimination because historically the indigent cannot afford the luxury of formal justice. Foster & Freed, *supra* note 282, at 196.

parents afflicted by poverty. Evidence has mounted swiftly that many parents lack funds to secure divorces and either separate by mutual agreement or one parent—usually the father—deserts the spouse and children. Legal Aid Societies typically . . . refuse to process divorces in such cases. . . . Spouses who have thus informally separated can establish new relationships only by illegal means. The number of families living together with one or both spouses married to others has become a serious problem in California.²⁸⁴

The experiences of the poor with the harsh administration of family law in "the foreign land of the New York Family Court" have been dramatically described by Professor Paulsen,²⁸⁵ and Professor tenBroek has vividly described their plight in the courts of California.²⁸⁶ Professor tenBroek's research carefully documents the "dual system" of family law for alimony, support, and property: the law for the poor is heavily political and measurably penal, whereas the law for the middle class is civil, nonpolitical, and less penal.²⁸⁷ The differential enforcement of child support obligations is illustrative of this "dual system:" although middle- and upper-class men have a greater ability to pay child support, enforcement proceedings are more frequently brought against poor men because of the state's concern with reducing public expenditures for their children and ex-wives.²⁸⁸ Foster and Freed have observed the devastating effects the enforcement proceedings have on poor men:

[T]he wholesale defiance of court orders by embittered men may be accounted for, at least in part, by the failure of courts to be realistic and to appreciate that an automatic imposition of the support duty is not in accord with current values and in many cases is highly penal.

In the case of the more prosperous, the husband's duty to support or pay alimony may be an unpleasant but tolerable burden, but where a poor or low income husband is involved, even a minimal order may constitute a great hardship or impossible burden. Of necessity, he may become a fugitive. Moreover, if he remarries or establishes a new family, further complications inevitably arise, making his primary obligation to the first family unrealistic. *In short, both support and alimony law occasion hardship to poor and lower income husbands and in application often force the man into defiance of the law or prevent him from living in dignity.*²⁸⁹

284. Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 726 (1966).

285. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966). Professor Paulsen documents the poor's difficulties in custody, neglect, and adoption proceedings.

286. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964).

287. *Id.*

288. Eckhardt, *supra* note 132.

289. Foster & Freed, *supra* note 282, at 202 (emphasis added).

Outside the courtroom, traditional legal marriage can also be faulted for the double burden it imposes on poor women. The stay-at-home housewife which the legal model presumes is a luxury that poor families cannot afford. When economic circumstances require a woman to work in the labor force, her legal obligations to provide domestic service and child care impose a double burden on her by obligating her to perform one job in the home and another outside the home.

The wife's legal obligation to perform domestic and child-care services has also fallen more heavily on black and minority women. Throughout the past century black and minority women were more likely to be in the labor force and thus to be subjected to these double burdens. Professor Fran Blau has shown that as early as 1890, when only 4 percent of all married women in this country were in the labor force, there were two groups of married women for whom work outside the home was fairly common: black women, the majority of whom still lived in the South, and immigrant women in the textile towns of New England.²⁹⁰ Blau reports that among blacks in 1890 one out of every four married women was gainfully employed,²⁹¹ many doing the same kinds of jobs they did in slavery.

Finally, the ideal family type assumed by traditional legal marriage may be less appropriate for some ethnic groups. While the conjugal family model that the law assumes is common among white Protestants, Jews and Italians are more likely to have extended families, and a single-parent family is more common among blacks.²⁹² Families in some ethnic groups might want a marriage contract which extended support obligations beyond the conjugal family unit to include grandparents, aunts, uncles, and cousins among those who would provide or receive support. These families might also find it more appropriate and prefer to apportion financial, domestic, and child-care responsibilities along generational rather than sex-linked lines. However, by imposing the white middle-class ideal family type on all, traditional legal marriage often ignores and excludes the special concerns and needs of ethnic and racial minorities—as well as those of the poor.

290. Blau, *supra* note 241, at 6.

291. *Id.*

292. This is a summary of Winch & Blumberg, *Societal Complexity and Familial Organization*, in *FAMILY IN TRANSITION* 122 (A. Skolnick & J. Skolnick eds. 1971). There has been considerable controversy about black family patterns, which is beyond the scope of this article to report fully, much less to settle. See, e.g., TenHouten, *The Black Family: Myth and Reality*, 33 *PSYCHIATRY* 145 (Mar. 1970). For an excellent sociological description of the life of black lower-class men see E. LEIBOW, *TALLY'S CORNER* (1966).

F. *The Marriage Contract Assumes the Judeo-Christian Ideal of a Monogamous Heterosexual Union*

Our society has institutionalized the Judeo-Christian ideal of monogamous, heterosexual marriage with its prohibition of polygamy, bigamy, adultery, and homosexual unions in both statutes and case law. Three distinct components of the traditional legal model of a monogamous heterosexual union will be discussed below. The first is the assumption that marriage is a union of two single individuals, exemplified by the prohibition against polygamy and bigamy. The second is the assumption of sexual fidelity to that one spouse, exemplified by the prohibition against adultery. The third is the assumption of a heterosexual union, exemplified by the denial of the marriage license to homosexual couples.

The assumption that marriage is a union of two individuals is evident in judicial decisions dealing with polygamous marriages, and in the continued statutory prohibition of bigamy in almost all states. As recently as 1946 a fundamentalist Mormon was convicted of violating the Mann Act because he transported a woman across a state line for a plural marriage ceremony and subsequent cohabitation.²⁹³ "[T]here has never been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity."²⁹⁴

While no sociologist would seriously claim that the prohibition against polygamous marriages is at odds with the dominant and widely accepted norms of our society, there is a growing number of persons who are joining together in plural marriages, communes, and other family-like units of more than two adults.²⁹⁵ These alternatives to traditional legal marriage have been suggested by some to "obviate[e] the need for paternalistic state regulation of . . . [family] relationships."²⁹⁶ For others an extended family or commune provides a unique atmosphere of closeness, acceptance, and community as well as opportunity for personal exploration and growth.²⁹⁷

293. *Cleveland v. United States*, 329 U.S. 14 (1946).

294. *Reynolds v. United States*, 98 U.S. 145 (1878).

295. See, e.g., Berger, Hackett, Cavan, Zickler, Millar, Noble, Theiman, Farrell & Rosenbluth, *Child-Rearing Practices of the Communal Family*, in *FAMILY IN TRANSITION* 509 (A. Skolnick & J. Skolnick eds. 1971); Berger, Hackett & Millar, *The Communal Family*, *THE FAMILY COORDINATOR* 419 (1972); Davidson, *The Hippie Alternative: Getting Back to the Communal Garden*, in *FAMILY IN TRANSITION* 523 (A. Skolnick & J. Skolnick eds. 1971).

296. Comment, *All in the "Family:" Legal Problems of Communes*, 7 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 393, 410-11 (1972).

297. This is the general impression one receives from reading the articles cited *supra* note 295, and from B. ZABLOCKI, *THE JOYFUL COMMUNITY* (1971).

Restrictions on more than two unrelated adults living together as a family have recently come in the form of single-dwelling zoning restrictions.²⁹⁸ In *Palo Alto Tenants Union v. Morgan*²⁹⁹ and *Village of Belle Terre v. Boraas*,³⁰⁰ two communities successfully excluded groups living together as a family from "single family residential neighborhoods." In both cases the groups contended that the zoning restrictions violated their constitutional rights to privacy and freedom of association, and in *Palo Alto* the group specifically asserted that they were living together as a family, "treating themselves and treated by others as a family unit."³⁰¹ But while the courts recognized the strongly held value of protection for the traditional family relationship, they were unwilling to attach the same status to the voluntary family:

The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. A zoning law which divided or totally excluded traditional families would indeed be "suspect".

The communal living groups represented by plaintiffs share few of the above characteristics. They are voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation. They are in no way subject to the State's vast body of domestic relations law. They do not have the biological links which characterize most families. Emotional ties between commune members may exist, but this is true of members of many groups. Plaintiffs are unquestionably sincere in seeking to devise and test new life-styles, but the communes they have formed are legally indistinguishable from such traditional living groups as religious communities and residence clubs. The right to form such groups may be constitutionally protected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not.³⁰²

Groups of unrelated persons living together as a family have also had difficulty with food stamp regulations.³⁰³

298. See generally Note, *Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HAST. L.J. 1459 (1972); Note, "Burning the House to Roast the Pig" *Unrelated Individuals and Single Family Zoning's Blood Relation Criterion*, 58 CORN. L. REV. 138 (1972).

299. 321 F. Supp. 908 (N.D. Cal. 1970).

300. 94 S. Ct. 1536 (1974).

301. *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908 (N.D. Cal. 1970).

302. *Id.*

303. See *Moreno v. United States Dep't of Agriculture*, 345 F. Supp. 310 (D.D.C. 1972), *aff'd*, 413 U.S. 528 (1973), in which the definition of household for the food stamp program as including only "a group of related individuals (including legally adopted children . . .) or nonrelated individuals over age 60 living as one economic unit

Communal living arrangements are also increasing among the elderly.³⁰⁴ Because of the shortage of older men, some gerontologists and social analysts have suggested legalizing polygamy to legitimate the elderly's economic and social needs for extended family relationships.³⁰⁵

The legal prohibition against bigamy may also present unnecessary problems for some people. As noted above, serial monogamy, the movement from a first to a second monogamous union, is becoming more common in our society. Although serial monogamy usually involves the sequential rather than concurrent assumption of a second spouse and is usually accompanied by a divorce from the first spouse, as we have noted, many marriages are dissolved by desertion and neither partner obtains a divorce. When these persons marry a second time, they and their new spouses—and especially their new children—may run afoul of the legal prohibition against bigamy. As Foote, Levy, and Sanders have commented:

American bigamy statutes draw no distinction between what we might term "concurrent" bigamy and "sequential" bigamy. The first is probably extremely rare, and most of our legal problems concern situations where the challenged second marriage is sequential to an earlier family already terminated in fact.³⁰⁶

Because bigamy is illegal, the courts have traditionally held that only one marriage—the first or the second—may be considered valid.³⁰⁷ However, especially when bigamous marriages are sequential, both marriages may have been "socially real marriages" and in many situations justice would seem better served by legal recognition of this social reality. Thus, instead of having to award insurance, pensions, widow's benefits, social security, unemployment compensation, and a wide range of other benefits to the "legitimate wife and children," if the courts recognized bigamy, and thus both families, it could more fairly apportion such benefits among the various wives and children.³⁰⁸

and purchasing food in common" was held to be a denial of equal protection to those in communal living arrangements because it bore no relevant relationship to the program's intent of alleviating hunger.

304. Hochschild, *Communal Life-Styles for the Old* in *INTIMACY, FAMILY, AND SOCIETY* 565 (A. Skolnick & J. Skolnick eds. 1974).

305. Roy & Roy, *Is Monogamy Outdated?* in *RENOVATING MARRIAGE: TOWARD NEW SEXUAL LIFE-STYLES* 59, 71 (R. Libby & R. Whitehurst eds. 1973) [hereinafter cited as *RENOVATING MARRIAGE*].

306. C. FOOTE, R. LEVY & D. SANDERS, *CASES AND MATERIALS ON FAMILY LAW* 220 (1966).

307. See H. CLARK, *supra* note 12, at 67-70, on presumptive validity of second marriages.

308. See generally Annot., 80 A.L.R. 1428 (1932). The problems are further complicated when one of the parties to a marriage disappears and the other spouse remarries presuming the absent spouse to be dead. See Feit, *The Enoch Arden: A Problem in Family Law*, 6 BROOKLYN L. REV. 423 (1937).

The second component of the monogamous ideal, the assumption of sexual fidelity and the prohibition of adultery, may be equally inappropriate for many people. The data on extramarital sex tends "to support the notion that we pay lip-service to the monogamous ideal but in fact do maintain a significant variety of other forms of sex life."³⁰⁹ Kinsey reported that by age 40, 50 percent of his male subjects and 26 percent of his female subjects had engaged in extramarital sexual relations.³¹⁰ Marriage experts today commonly estimate that 60 percent of the married men and 35 to 40 percent of the married women engaged in extramarital sexual relations at some time during their married life.³¹¹ Because the incidence and acceptance of extramarital intercourse is most widespread among the younger generation (extramarital intercourse is three times as common among white women 18 to 24 today as it was a generation ago), further increases in the incidence of extramarital sex may be reasonably predicted.³¹² It is not only the incidence of extramarital sex which appears to be increasing, but also the open acknowledgement and acceptance of such behavior. For example, in their study of sex among upper-middle-class Americans, Cuber and Harroff point out that the assumption that extramarital sex is furtive is not validated by the data.³¹³ For some spouses

309. Whitehurst, *The Monogamous Ideal and Sexual Realities*, in *RENOVATING MARRIAGE: TOWARD NEW SEXUAL LIFE-STYLES* 38, 42 (R. Libby & R. Whitehurst eds. 1973).

310. A. KINSEY & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 437 (1953).

311. M. HUNT, *THE AFFAIR* 11 (1969) (quoting Dr. Gebhard, successor to Dr. Kinsey as Director of the Institute for Sex Research at Indiana University, as to a 1968 estimate).

In Hunt's most recent book he revises his estimate slightly, stating: "A reasonable estimate would be that the ultimate accumulative incidence [of extramarital coitus for males] will probably be close to, but not above, 50 percent." M. HUNT, *SEXUAL BEHAVIOR IN THE 1970's* 257 (1974).

312. M. HUNT, *SEXUAL BEHAVIOR IN THE 1970's* 263 (1974). However, Hunt cautions that "[w]hile most Americans—especially the young—now feel far freer than formerly to be sensation-oriented at times, for the great majority of them sex remains intimately allied to their deepest emotions and is *inextricably interwoven with their conceptions of loyalty, love and marriage*. *Id.* at 253 (emphasis added).

Hunt's national survey indicated that except for those under 24, there has been no overall increase in extramarital experience among men and only a limited increase among women in the generation since Kinsey's work. *Id.* at 254. Today, however, there is more open discussion of such behavior and more permissive attitudes towards it. *Id.* at 264.

313. J. CUBER & P. HARROFF, *SEX AND THE SIGNIFICANT AMERICANS* 62 (1965).

"There seems to be a growing tolerance of the idea that some men and women need or want enduring sexual as well as platonic relationships with more than one person concurrently. . . . Condonment of such relationships seems to come from a variety of motives. Sometimes . . . it comes more from resignation and empathy than from clear commitment to the practice. . . .

"sexual aggrandizement is an accepted fact of life. Frequently the infidelity is condoned by the partner The act of infidelity in such cases is not construed as disloyalty or as a threat to continuity, but rather as a kind of basic human right which the loved one ought to be permitted to have—and which the other perhaps wants also for himself."³¹³ Both the Cuber and Harroff study and Hunt's research on extramarital affairs concluded that extramarital relations were not necessarily destructive to marriage.³¹⁴ Further, recent national data indicates that attitudes towards swinging are more permissive and some have advocated it as a means of enlancing a marriage.³¹⁵ For example, the recent social science literature distinguishes between extramarital sex, which has the "old pejorative meaning of adultery and unfaithfulness," and comarital sex which "exists alongside of and in addition to a marriage relationship . . . is not competitive with the marital relationship . . . and may have a neutral or even positive effect on it."³¹⁶ There is also a growing body of literature which challenges the concept of monogamy as increasingly inappropriate given our new knowledge of female sexuality.³¹⁷ While a complete examination of this position is

Sometimes the 'other involvement' [is] explained as demonstrably beneficial to both husband and wife. . . .

In still other instances the affairs are almost quasi marriages." *Id.* at 159, 161, 162.

314. *Id.* See also M. HUNT, *supra* note 311.

315. Hunt's survey of a national sample of the U.S. population concluded that "Mate swapping, virtually unmentionable until recently, and violative of our most deeply entrenched ideas about sex and marriage, is wrong in the eyes of the majority—but, surprisingly, not an overwhelming one: Only 62 percent of men and 75 percent of women agreed that it was wrong, while a sizeable minority—nearly a third of the men and a fifth of the women—felt that it was not." M. HUNT, *SEXUAL BEHAVIOR IN THE 1970's* 22 (1974). G. BARTELL, *GROUP SEX: AN EYEWITNESS REPORT ON THE AMERICAN WAY OF SWINGING* (1971); Constantine & Constantine, *Sexual Aspects of Multilateral Relations*, in *BEYOND MONOGAMY: RECENT STUDIES OF SEXUAL ALTERNATIVES IN MARRIAGE* (J. Smith & L. Smith eds. 1974) [hereinafter cited as *BEYOND MONOGAMY*]; Denfeld, *Dropouts from Swinging: The Marriage Counselor as an Informant*, in *BEYOND MONOGAMY, supra*; Gilmartin & Kusisto, *Some Personal and Social Characteristics of Mate-Sharing Swingers*, in *RENOVATING MARRIAGE, supra* note 305, at 146; Varni, *Contexts of Conversion: The Case of Swinging*, in *RENOVATING MARRIAGE, supra* note 305, at 166; Varni, *An Exploratory Study of Spouse Swapping*, in *BEYOND MONOGAMY, supra*; Walshok, *The Emergence of Middle-Class Deviant Subcultures: The Case of Swingers*, in *BEYOND MONOGAMY, supra*; Bartell, *Group Sex Among the Mid-Americans*, 8 *J. SEX RESEARCH* 113 (1971); Denfield & Gordon, *The Sociology of Mate Swapping*, 7 *J. SEX RESEARCH* 85 (1970).

316. Gilmartin, *Sexual Deviance and Social Networks: A Study of Social, Family, and Marital Interaction Patterns Among Co-Marital Sex Participants*, in *BEYOND MONOGAMY, supra* note 315; Libby, *Extramarital and Co-Marital Sex: A Review of the Literature*, in *RENOVATING MARRIAGE, supra* note 305, at 116; Roy & Roy, *Is Monogamy Outdated?*, in *RENOVATING MARRIAGE, supra*, note 305, at 59; Smith & Smith, *Co-Marital Sex: The Incorporation of Extra-Marital Sex into the Marriage Relationship*, in *BEYOND MONOGAMY, supra* note 315.

317. Professor Pepper Schwartz suggests reconsideration of three well-accepted myths which restrict female sexuality: (1) the assumption "that women need a com-

beyond the scope of this article, it is clear that the traditional assumption of monogamy, and the importance of monogamy in marriage, is being subjected to a growing number of theoretical and empirical challenges in our society.

The third component of the Judeo-Christian ideal is that of a heterosexual marriage. Although traditional legal marriage has also been restricted to heterosexual couples, there appears to be an increasing number of homosexual couples who want to legitimize their relationships. In *Baker v. Nelson*,³¹⁸ one such couple challenged the restrictions on homosexual marriages, arguing that "the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." The court disagreed, affirming the traditional position that marriage "is the state of union between persons of the opposite sex."³¹⁹

The cumulative effect of the restrictions on traditional legal marriage is to enforce the thesis that one man and one woman will find happiness if they commit themselves to each other for life. The commitment obviously goes beyond sexual and social monogamy: it implies a psychological monogamy and the assumption that each will find happiness with and through the other. This model assumes such an intertwining of lives that today many would find it psychologically

mitted (love) relationship for sexual satisfaction;" (2) the assumption "that female sexual satisfaction can best be produced in a monogamous, marriage . . . , [and that] two people [can] provide all of each other's sexual needs;" and (3) the assumption "that the marital dyad cannot tolerate any additional sexual access by third parties, [and that] a female interacting sexually outside the dyad will destroy the dyad." Schwartz, *Female Sexuality and Monogamy*, in *RENOVATING MARRIAGE*, *supra* note 305, at 211, 215.

Schwartz argues that socialization, peer groups, limited access to information, and the structure of the family make a woman feel that love and sex must go together and that one man, her husband, should be able to satisfy her. However, she argues that women have only begun to discover the extent and degree of their own sex drives, and hypothesizes that when they do, sexually liberated women will generally desire more sexual activity than one monogamous, long-term relationship can provide. She predicts nonmonogamous marriages and an extension of nonmonogamous affectional and sexual relationships outside of marriage. As she notes:

[W]e already know that marriages, even operating as deviant structures in a monogamous system, can tolerate non-marital sex and still maintain their continuity. Traditionally, only men have been allowed the liberty of relating sexually to persons outside the marriage and they often have rationalized their actions by saying that they "can handle it" while their wives would become "too emotionally involved." Under a more egalitarian model, we know that non-marital sex can exist when adequate rules, ideology, and trust have been established to protect the original couple. . . . [A] variety of sexual partners in an open and egalitarian framework does not signal the end of the marital dyad.

Id. at 223-24.

318. *Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971) *appeal dismissed*, 409 U.S. 810 (1972).

319. *Id.* at 311, 191 N.W.2d at 185-86 (footnote omitted).

oppressive. The result is a form of psychological tyranny that limits individual choice in the degree of commitment and involvement. Not all people want the same degree of intensity in their personal relationships; some may want intensity in some relationships, at some times, but not necessarily in a marriage relationship at all times. Although some individuals have always found traditional marriage unnecessarily confining,³²⁰ the rapidly expanding number of individuals who are now experimenting with new forms of marriage,³²¹ marriage contracts,³²² living together without marriage,³²³ and other innovations in personal and family relationships certainly indicates the limitations of the present legal model for many people. It is difficult to imagine a single model for personal relationships fitting the lifelong needs of all individuals in a society as diverse as ours.

III

LEGAL CHALLENGES

Given the inapplicability of the assumptions underlying traditional marriage to a large and increasing proportion of our society, it seems reasonable to inquire into the likelihood of altering the present system. This Section presents such an inquiry. The most promising avenues of direct attack on the present structure of marriage would seem to lie along constitutional grounds. One theory would be that the individual's interest in marriage is a "basic civil right" and therefore the state's power to regulate the relationship is strictly circumscribed; another theory is that to the extent the present system is based on sexual stereotypes, it is in violation of the equal protection clause. These two approaches rely on equal protection analysis and thus require a close examination of the state's interests served through the present system of regulating marriage. A third avenue of constitutional attack on state regulation of marriage would be under the Equal Rights Amendment currently being considered by the states for ratification. The potential for success under each of these constitutional lines of attack will be appraised. Another alternative to state regulation—contracts within or in lieu of

320. See, for example, N. NICHOLSEN, *PORTRAIT OF A MARRIAGE* (1973), which describes an upper-class English marriage during which both partners had homosexual affairs but were deeply committed to each other and to their marriage.

321. See, e.g., *Life Magazine's* special issue *The Marriage Experiments*, which included stories on unmarried parents, a collective family, a housework-sharing contract, and a frontier partnership. *LIFE*, April 28, 1972, at 41-75. See also N. O'NEILL & G. O'NEILL, *OPEN MARRIAGE: A NEW LIFE STYLE FOR COUPLES* 53 (1972); Korda, *New Ways to Love Together*, *VOGUE*, Jan. 1974, at 98.

322. See Shulman, *A Marriage Agreement*, in *WOMEN'S LIBERATION* 211 (S. Stambler ed. 1970); Edmiston, *How to Write Your Own Marriage Contract*, MS., Spring 1972, at 66.

323. See, e.g., Lyness, Lipetz & Davis, *Living Together: An Alternative to*

marriage—will be considered in the final section of this Article.

A. Marriage as a "Fundamental Right"

The concept of marriage as a civil right has been advanced by the courts in a variety of circumstances. In *Skinner v. Oklahoma*³²⁴ the United States Supreme Court reversed an order directing sterilization of a man convicted of grand larceny and robbery in accordance with an Oklahoma statute. In reviewing the Oklahoma law the Court held that strict scrutiny was appropriate because it impinged on a fundamental right:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.³²⁵

The California Supreme Court has also characterized marriage as a fundamental right. In *Perez v. Sharp*,³²⁶ that court overturned a state law prohibiting marriages between whites and members of other races. Speaking for the court, Justice Traynor stated:

Marriage is . . . more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means. Legislation infringing [marriage and procreation] must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws.³²⁷

The United States Supreme Court faced this same issue in *Loving v. Virginia*,³²⁸ a case dealing with a Virginia statute prohibiting miscegenous marriages. As in *Perez*, the statute was held unconstitutional primarily because of its racially discriminatory nature; however, Chief Justice Warren speaking for the Court included language describing marriage as one of the basic civil rights of man:

Marriage, 34 J. MARR. & FAM. 305 (1972); Wells & Christie, *Living Together: An Alternative to Marriage*, 4 FUTURIST 50 (1970).

Studies of cohabitation among college students (defined as a heterosexual couple consistently sharing a living facility without legal marriage) indicate that as many as 30 percent of the undergraduate population of some colleges has experienced at least one such relationship. Macklin, *Report of the Workshop on Non-Marital Cohabitation*, in LETTING MANY FLOWERS BLOOM: IMPLICATIONS OF IDEOLOGY FOR FAMILY RESEARCH AND THE PROFESSION 10 (Report of the 1973 Groves Conference on the Family, May 10-13, Myrtle Beach, S.C.). See also Macklin, *Heterosexual Cohabitation Among Unmarried College Students*, in INTIMACY, FAMILY, AND SOCIETY 290 (A. Skolnick & J. Skolnick eds. 1974).

324. 316 U.S. 535 (1942).

325. *Id.* at 541.

326. 32 Cal. 2d 711, 198 P.2d 17 (1948).

327. *Id.* at 715, 198 P.2d at 18-19.

328. 388 U.S. 1 (1967).

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

. . . To deny this fundamental freedom on such unsupportable a basis as the racial classifications embodied in these statutes, . . . is surely to deprive all the State's citizens of liberty without due process of law.³²⁹

In *Griswold v. Connecticut*³³⁰ the Court approached the issue of marital freedom from another perspective. In holding a Connecticut statute forbidding the use of contraceptives unconstitutional, the Court found a right of marital privacy within the penumbra of the Bill of Rights. And more recently, in *Cleveland Board of Education v. LaFleur*,³³¹ the Court again referred to the fact that it has "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."³³²

It is not clear, however, what impact the courts' treatment of marriage as a fundamental right or the right of marital privacy will have on the states' traditional function of regulating marriage. *Loving* and *Perez*, while dealing with state regulation of marriage, involved classifications based on race which traditionally have triggered strict judicial scrutiny. It can be argued that the language in both cases—that marriage is a fundamental right—has added significance by virtue of the fact that it was unnecessary; in both instances the statutes in question could have been overturned on racial grounds alone. And while one scholar has suggested that the freedom to marry is synonymous with the right to marry the person of one's choice,³³³ this idea has not yet been extended to the right to marry a person of the same sex,³³⁴ or to marry more than one person at a time.³³⁵ *Skinner*, of course, did not deal with state regulation of marriage at all, but rather with a statute requiring sterilization of certain classes of felons. *Griswold* and *LaFleur* likewise are more directly concerned with laws affecting procreation rights than with the regulation of marriage. However

329. *Id.* at 12.

330. 381 U.S. 479 (1965).

331. 414 U.S. 632 (1974).

332. *Id.* at 639-40.

333. Drinan, *The Loving Decision and the Freedom to Marry*, 29 OHIO ST. L.J. 358, 360 (1968).

334. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971) *appeal dismissed*, 409 U.S. 810 (1972). See also Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

335. *Cleveland v. United States*, 329 U.S. 14 (1946); *Mormon Church v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

Griswold does form the basis for an argument that state regulation of the terms of the marriage relationship may constitute unreasonable government interference with the right to marital privacy. If marriage is a fundamental right as suggested in *Skinner*³³⁶ and *Loving*,³³⁷ then each couple should have the opportunity to determine the terms of their marriage. Surely the exercise of the fundamental right to marry involves more than the opportunity to select a partner of a different race from one's own. While the extent of this right is not clear at the present time, in its treatment of other fundamental rights such as the right to vote³³⁸ and the right to travel,³³⁹ the Supreme Court has stated that, absent a compelling state interest, it is unconstitutional not only to prohibit the exercise of these rights, but also to burden them unreasonably or restrict their exercise.³⁴⁰ One might therefore expect the Court to treat the terms of the marriage relationship in a similar fashion and to limit state-imposed restrictions on the form and content of this basic civil right.

B. Marriage and Sex-Based Discrimination

A second constitutional attack on the present state-imposed marriage contract would claim that the state's interest is not strong enough to withstand scrutiny under equal protection analysis. Basic to this approach is the proposition that many of the terms of the traditional marriage contract create distinctions in marital responsibility solely on the basis of sex. This challenge is founded on the analysis of the disadvantages to the woman partner in loss of identity and domicile, in the right to marriage property, and in the areas of support and custody, set out in the first part of this Article.

Under traditional equal protection principles, a state retains broad discretion to regulate by classification as long as the classifications relied on have a reasonable basis.³⁴¹ However, when a classification impairs a fundamental interest or is based on a suspect category, it must be shown to be necessary to further a compelling state interest in order to withstand constitutional attack.³⁴² The state has the burden of

336. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). It is to be noted that while the opinion in *Skinner* proclaimed the existence of a right to marry, it actually dealt with state interference with procreation, not marriage.

337. *Loving v. Virginia*, 388 U.S. 1 (1967).

338. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

339. *Id. Shapiro v. Thompson*, 394 U.S. 618 (1968).

340. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1968).

341. *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

342. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-131 (1969). *See also Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

proving that a compelling interest is involved and this burden is so weighty that it is extremely difficult to sustain. In contrast, the tradition of judicial deference to legislative decisions requires that, in cases where no fundamental interest or suspect classification is involved, the challenged statute be upheld if it bears a rational relationship to a legitimate state purpose.³⁴³

At present the only classifications held to be suspect by the Supreme Court are those based on race,³⁴⁴ alienage,³⁴⁵ and national origin.³⁴⁶ The California Supreme Court, however, has held in the case of *Sail'er Inn, Inc. v. Kirby*³⁴⁷ that sex is a suspect classification; thus in California one could challenge the sex-based division of duties in marriage.

The United States Supreme Court has demonstrated some movement in this direction as well. In *Frontiero v. Richardson*,³⁴⁸ the Court considered federal statutes which allowed a male member of the uniformed services to claim his wife as a dependent for the purpose of obtaining certain benefits whether or not she was actually dependent upon him, but prohibited women members from claiming their husbands as dependents unless they were, in fact, dependent upon their wives for over half of their support. A four-justice plurality stated that classifications based on sex were inherently suspect and should therefore be subjected to close judicial scrutiny:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." And what differentiates sex from such nonsuspect statutes [*sic*] as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.³⁴⁹

Three justices expressly reserved decision on the issue of whether or not sex was a suspect classification on two bases: first, they did not have to reach the issue since the statutes in question were unconstitu-

343. See *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

344. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964).

345. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

346. See, e.g., *Oyama v. California*, 332 U.S. 633, 644-46 (1948).

347. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

348. 411 U.S. 677 (1973).

349. *Id.* at 686-87 (citation and footnote omitted).

tional under the standards developed in earlier cases;³⁵⁰ and second, it was inappropriate to face the issue at that time since the Equal Rights Amendment had been presented to the states for ratification.³⁵¹ Thus, while sex has not been held to be "suspect" by a majority of the Court, *Frontiero* would appear to be a step in that direction.

The earlier case of *Reed v. Reed*³⁵² marked a significant departure from the traditional approach of deference to legislative decisions. In *Reed*, the Court considered the constitutionality of an Idaho statute providing that when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female. Despite contentions that the scheme was a rational means for dealing with court overload and that it was justified on the basis that men as a rule were better qualified to administer estates than were women—contentions that probably would have passed muster in earlier years³⁵³—the Court held that the statute was unconstitutional since "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution] . . ."³⁵⁴ This approach was characterized by the plurality in *Frontiero* as a "departure from 'traditional' rational basis analysis with respect to sex-based classifications."³⁵⁵

Thus it appears that the maintenance of sex-based classifications as a legislative purpose is impermissible. Furthermore, it seems that even without a holding that sex constitutes a suspect category, classifications based on sex stereotypes will be subject to careful judicial scrutiny in the future.³⁵⁶

C. *The State's Interest in Regulating Marriage*

If sex is held to be a suspect classification or if marriage is regarded as a fundamental right entitled to the same treatment as other fundamental rights, it will be necessary for courts to scrutinize closely the state interests served through the present scheme of regulating marriage. Although the state's right to regulate marriage has long been recognized in this country, the courts have not been very explicit in

350. *Id.* at 691-92, citing *Reed v. Reed*, 404 U.S. 71 (1971).

351. 411 U.S. at 692.

352. 404 U.S. 71 (1971).

353. *See, e.g., Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesart v. Cleary*, 335 U.S. 464 (1948).

354. 404 U.S. at 76.

355. 411 U.S. at 684.

356. *But cf. Kahn v. Shevin*, 94 S. Ct. 1734 (1974), in which the Court held that a Florida law providing an annual \$500 property tax exemption to widows but not to widowers was constitutional. The Court did not apply a close scrutiny test.

setting forth the interests of the state in such regulation. A number of landmark cases merely refer to the importance of marriage as the foundation of our society:

[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization or progress.³⁵⁷

Beyond these generalities it is possible to identify a number of specific interests which are served by the present system of marriage regulation.³⁵⁸ These interests may be divided into two broad categories. In the first are state interests served through the marriage licensing process—for example, maintaining vital statistics, promoting public health, and protecting children too young to consent to marriage—which are not at issue here. They are not vulnerable to constitutional attack,³⁵⁹ and each could be as easily served through regulation of contracts in lieu of or within legal marriage.³⁶⁰

The second category of state interests are those which depend on the family to ensure more general societal goals. In all societies the family has been the prime mechanism for linking individuals to the larger society, for providing them with the motivation to participate in the economic and occupational structure of the society, and for protecting them from the harshness of that participation by providing affective emotional support and a sense of individual dignity and security.³⁶¹ Traditional legal regulation of marriage has been justified

357. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

358. See Foster, *Marriage: A "Basic Civil Right of Man,"* 37 *FORD. L. REV.* 51 (1968), and Drinan, *supra* note 333. I have taken a number of the specific interests discussed here from these two articles.

359. As Foster has noted, while the present system of requiring licensing and registration of marriage is arguably a violation of the right to marital privacy established by *Griswold*, the invasion of privacy is so slight that such an argument would most likely fail. See Foster, *supra* note 358, at 55-56, 79.

360. The state's interest in maintaining vital statistics and public health, now served by requiring licensing and registration of marriage, could be easily extended to contracts in lieu of marriage. This would probably increase the number of couples about whom statistics could be collected, as presumably a number of those who would contract in lieu of marriage would be people who would have avoided a traditional marriage. Similarly, venereal disease testing or other health examinations of couples prior to registering contracts in lieu of marriage would probably increase the number of people the state would reach. The state's interest in protecting children who are too young to consent to marriage could also be extended to contracts in lieu of marriage; presumably, children under 18 years of age would be protected by the usual contract defense of infancy. If it were thought desirable that persons under 18 be held accountable under these contracts, as where the permission of a parent or guardian to enter the contract was given, special legislation could be enacted to make this possible.

361. The strategic significance of the family is to be found in its *mediating* function in the larger society. . . . A society will not survive unless its many needs are met, such as the production and distribution of food, protection of

in order to protect and preserve this essential role of the family by ensuring a strong family system. More specifically, legal regulation of marriage is thought to serve four state interests examined below: promoting public morality, ensuring family stability, assuring support obligations, and assigning responsibility for the care of children.

The state's traditional interest in promoting public morality was thought to be served by requiring and regulating legal marriage. Some have argued that allowing persons to engage in sexual relationships without first going through a civil or religious marriage ceremony is conducive to a decline in public morality.³⁶² While this view might have been accurate in the past, present standards of public morality are such that it is not unusual for people to have intimate relations or to live together without marrying. Allowing those who do so to contract about the terms of their relationship would have the function of encouraging more responsible attitudes toward these relationships, and thus actually enhance public morality. Further, one may seriously question the legitimacy of the state's interest in regulating intimate personal relations under the banner of "promoting public morality." Finally, whether the state's interest is actually served by such regulation is open to serious challenge.

The state has also asserted an interest in promoting family stability by controlling marriage and divorce. Yet it is doubtful that present state control has been effective. Certainly current divorce statistics would lead one to question its effectiveness, and current norms might lead one to challenge its desirability. Further, if family stability were the

the young and old, the sick and the pregnant, conformity to the law, the socialization of the young, and so on. Only if *individuals* are motivated to serve the needs of the society will it be able to survive. The formal agencies of social control (such as the police) are not enough to do more than force the extreme deviant to conform. Socialization makes most of us wish to conform, but throughout each day we are often tempted to deviate. Thus both the internal controls and the formal authorities are insufficient. What is needed is a set of social forces that responds to the individual whenever he does well or poorly, supporting his internal controls as well as the controls of the formal agencies. The family, by surrounding the individual through much of his social life, can furnish that set of forces.

The family then, is made up of individuals, but it is also part of the larger social network. Thus we are all under the constant supervision of our kin, who feel free to criticize, suggest, order, cajole, praise, or threaten, so that we will carry out our role obligations. Even in the most industrialized and urban of societies, where it is sometimes supposed that people lead rootless and anonymous lives, most people are in frequent interaction with other family members. Men who have achieved high position usually find that even as adults they still respond to their parents' criticisms, are still angered or hurt by a brother's scorn.

W. GOODE, *THE FAMILY* 2-3 (1964).

362. "[T]he law of marriage is to protect society against being confounded by laxity of morals, promiscuity, free love and general profligacy." M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 42 (1972).

main goal, then encouraging couples to contract regarding the terms of their relationship should increase rather than decrease stability. By allowing couples to face squarely the possibility that their relationship might not last a lifetime and to plan realistically for its termination, private contracts would provide for a more orderly method of transition between marriage and divorce than is presently possible in most states. Although some have argued that prenuptial negotiations would deter some unions, it would most likely deter those about to make a mistake and might therefore have the effect of lessening divorce.

It has been argued that the state's interest in family stability is also served by the maintenance of the sexual division of labor to ensure responsibility for economic and social tasks within the family. This position has been discussed in connection with the challenge of sex-based distinctions and has been shown to be inappropriate, ineffective and discriminatory.

A third state interest is that of securing the continued welfare of its citizens by making them legally responsible for one another.³⁶³ This interest is served by making the husband legally responsible for the support of his wife and by making both spouses financially responsible for their children. However, even if this is a legitimate state interest, it is questionable whether sex-based support laws are rationally related to its achievement. While the state may be justified in requiring members of a family to bear some legal responsibility for supporting one another, laws requiring that only the husband bear this burden would be overly broad in some instances, as where the wife and children are able to support themselves, and underinclusive in others, where the husband is the one in need of support. "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearing on the merits, is to make the very kind of arbitrary legislative choice forbidden by the [Constitution]"³⁶⁴ Even if the husband's support obligation were extended to the wife, it might still be overly broad and unconstitutional as an unreasonable burden on the fundamental right of marriage. The state has no interest in requiring that one individual subsidize the other's standard of living, regardless of the present circumstances of their relationship or the nature of the agreement between them. At most, the state's interest is limited to the situation where one partner is in danger of becoming a public charge. This interest could be vindicated without discrimination and with minimal interference with marriage and marital privacy by requiring that family members

363. See Comment, *The Modern Theory and Practice of Antenuptial Agreements*, 5 JOHN MARSHALL J. PRACTICE & PROCEDURE 179 (1971).

364. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

be held financially responsible for one another only to prevent a member from becoming a public charge.

The state also has an interest in ensuring that children are properly cared for. It is beyond the scope of this Article to examine whether or not the traditional method of assigning the family the responsibility for the support and care of children is the best public policy. However, assuming that it is a legitimate state interest, it can be accomplished through nondiscriminatory means, without assigning responsibility for child care or child support on the basis of sex. Contracts in lieu of marriage would permit the accomplishment of the state's interest without discrimination by allowing parents to determine the terms of child-care and child-support arrangements between themselves. If, for example, the parents wanted to agree that only one of them would be responsible for the child's financial support, then that parent could agree to compensate the other for child-care and child-support expenditures. An "indemnification" type agreement would be needed because parental obligations to children cannot be contracted away.³⁶⁵ This kind of agreement would not interfere with the state's interest in ensuring that children are cared for, since it would be enforceable only between the parents, not in relation to the children. Alternative arrangements to ensure the continued support of the children are discussed further below. By encouraging parents to plan their apportionment of child-care responsibilities in advance, such agreements may actually increase stability and orderly transition from one family situation to another, thus enhancing the child's environment.

D. *Marriage and the Equal Rights Amendment*

In addition to the arguments based on present constitutional provisions, the pending Equal Rights Amendment (E.R.A.) may also offer a basis for legal attack on the traditional structure of marriage. Although the E.R.A., which passed Congress with an overwhelming majority, is still being considered by the states for ratification,³⁶⁶ its legislative history indicates that its spare wording, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,"³⁶⁷ demands an absolute interpretation. No

365. See discussion in text accompanying note 465 *infra*.

366. House approved by a vote of 354-23. 117 CONG. REC. H. 9392 (daily ed. Oct. 12, 1971). Senate approved by a vote of 84-8. 118 CONG. REC. S. 4612 (daily ed. March 22, 1972). The E.R.A. was passed by Congress on March 23, 1972. 118 CONG. REC. H. 2423 (daily ed. March 23, 1972). The states now have seven years to ratify it. It would become effective two years after its ratification by 38 states. For a full account of the progress of the E.R.A. through Congress, see S. REP. NO. 92-689, 92d Cong., 2d Sess. 4-6 (1972).

367. H.R.J. Res. 208, S.J. Res. 8, 92d Cong., 1st Sess. (1971).

state interest, however compelling, can justify a sexual classification.³⁶⁸ This indicates a much stronger prohibition of sexual classification than would be the case if Congress had intended the judiciary to apply the usual fourteenth amendment "rational basis" test or even its "compelling state interest" test.³⁶⁹

The question of the E.R.A.'s effect on laws regulating marriage arose several times in the debates surrounding its passage. Senator Ervin, who opposed its passage, argued that the amendment would so change present marriage laws that it should not be passed.³⁷⁰ Ervin praised the way current law established "the institutions of marriage, the home, and the family, and . . . laws making some rational distinctions between the respective rights and responsibilities of men and women" within these institutions. He expressed regret that the E.R.A. would eliminate such distinctions.³⁷¹ According to Ervin, if the Equal Rights Amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all state laws providing for women to be homemakers and mothers and precluding them from pursuing gainful occupations. It would also nullify laws that impose upon husbands the primary responsibility to provide homes and livelihoods.³⁷²

Although Ervin's minority report finds the results of the E.R.A. objectionable, his delineation of its practical consequences are similar to those of the E.R.A.'s proponents. The Majority Report of the Senate³⁷³ indicates that the E.R.A. principle might have to yield at times to another constitutional principle, but it would not have to yield to the myriad laws based on the states' traditional police powers.³⁷⁴ The

368. See, e.g., H. REP. NO. 92-359, 92d Cong., 2d Sess. 5-6 (1972) (separate views).

369. See 118 CONG. REC. S. 4263 (daily ed. March 20, 1972) (statement of Professor Paul Freund). See also Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAW. 80 (1972) (arguments by the Senate sponsor).

370. Ervin even worried that, "I do not know what effect the amendment will have . . . [b]ut there are some . . . persons . . . who take the position that if the . . . amendment becomes a law, it will invalidate laws prohibiting homosexuality" 118 CONG. REC. 4372 (daily ed. March 21, 1972). See also Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-84 (1973).

371. S. REP. NO. 92-689, 92d Cong., 2d Sess. 49 (1972).

372. *Id.* at 40-42, 47-48.

373. *Id.* at 12.

374. In its opening section, the *Effect of the ERA: A. General Principles*, the Senate Report does contain words which might prove a specific obstacle to persons who desired contracts in lieu of marriage: "[T]he principle of equality does not mean that the sexes must be regarded as identical In this regard, two collateral legal principles are especially significant. One principle involves the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons." (The other deals with separate sleeping quarters and restrooms in public facilities.) S. REP. NO. 92-689, 92d Cong. 2d Sess. 12 (1972). This sentence, which purports to reserve to the

Senate Report's section on family law stresses changes that would have to be made by all states to bring their domestic relations law into conformity with the amendment: "State domestic relations laws will have to be based on individual circumstances . . . and not on sexual stereotypes."³⁷⁵ It quotes with approval a report of the Association of the Bar of the City of New York requiring changes in alimony and divorce laws:

The Amendment would bar a state from imposing a greater liability on one spouse than on the other merely because of sex [U]pon the dissolution of marriage both husbands and wives would be entitled to fairer treatment [A]limony laws could . . . take into consideration the spouse who had been out of the labor market for a period of years³⁷⁶

The Senate Report also points to the recently adopted Uniform Marriage and Divorce Act which properly defines marital rights and duties "in terms of functions and needs."³⁷⁷ Significantly, the Senate specifically rejected an amendment to the E.R.A. designed to "extend protections . . . to wives, mothers, or widows" and "impose upon fathers responsibility for support of children"³⁷⁸

Both the House and Senate Reports relied on Professor Emerson's evaluation³⁷⁹ of the E.R.A. with regard to domestic relations.³⁸⁰ As stated in the *Yale Law Journal* article co-authored by Emerson, the effect of the E.R.A. on marriage and divorce law will be to treat the spouses "equally or on the basis of their individual capacities."³⁸¹ Today's "network of legal disabilities for women" will all have to disappear.³⁸² Since name and domicile law "continu[e] overtly to subordinate a woman's identity to her husband's"³⁸³ any law that requires a name change for the married woman would become a legal nullity.³⁸⁴

states—untouched by E.R.A.—any power the state might now have to regulate unmarried persons' sexual activities is copied out of the separate views of the *House Report*. H. REP. NO. 92-359, 92d Cong., 2d Sess. 7 (1972) (separate views). It is presented without comment in the *House Report* and repeated without comment in the *Senate Report*. Since it seems contradictory to the spirit of the *Senate Report* overall, its weight is questionable. The E.R.A. does not speak specifically to the point of whether states have power to regulate the sex lives of unmarried persons or not; it would simply require that unmarried females and unmarried males be treated sex-neutrally by all state laws.

375. S. REP. NO. 92-689, 92d Cong., 2d Sess. 17-18 (1972).

376. *Id.*

377. *Id.* at 18.

378. *Id.* at 20.

379. See Brown, Emerson, Falk & Freedman, *supra* note 20, at 936.

380. See, e.g., S. REP. NO. 92-689, 92d Cong., 2d Sess. 11-12 (1972). See also Senator Ervin's statement, ". . . a good analysis of what the amendment will accomplish . . . was set out in the *Yale Law Journal* . . ." *Id.* at 70.

381. Brown, Emerson, Falk & Freedman, *supra* note 20, at 937.

382. *Id.* at 937.

383. *Id.* at 937.

384. *Id.* at 940.

Married women would have to be granted "the same independent right to choice of domicile as married men now have."³⁸⁵ Since the E.R.A. would "prohibit enforcement of the sex-based definitions of conjugal functions . . . [c]ourts would not be able to assume . . . that women had a legal obligation to do housework, or provide affection and companionship, or be available for sexual relations, unless men owed their wives exactly the same duties."³⁸⁶ The duty to support would no longer fall on men alone; each spouse would be equally liable "based on current resources, earning power, and nonmonetary contributions to the family welfare."³⁸⁷ Any community property owned would have to be subject to the joint management of husband and wife.³⁸⁸ The E.R.A. would require that alimony be available equally to husbands and wives, although laws could be passed to "grant special protection to any spouse who had, in fact, been out of the labor force for a long time in order to make a noncompensated contribution to the family's well-being."³⁸⁹ The authors concluded that the E.R.A. "would prohibit dictating different roles for men and women within the family on the basis of their sex."³⁹⁰

According to the Emerson article, passage of the E.R.A. would also result in expanding a given couple's right to have their marriage governed by an enforceable contract drawn to their own specifications. The E.R.A. would "prohibit enforcement of the sex-based definitions of conjugal functions,"³⁹¹ and thus would leave couples free to allocate privileges and responsibilities between themselves "according to their individual preferences and capacities."³⁹² Only if hardships developed could legislatures intervene; even then they would have to base marital rights and duties on functions actually performed within the family, rather than on sex.³⁹³

While the E.R.A. may ultimately provide a permanent solution for those dissatisfied with the present structure of legal marriage, ratification is not imminent and, with two states having recently rescinded their prior ratifications,³⁹⁴ it may not be assured. Furthermore, since it would be applicable only to sex-based discrimination, the E.R.A. would not be useful in challenging the state's right to regulate marriage

385. *Id.* at 941.

386. *Id.* at 944.

387. *Id.* at 946.

388. *Id.* at 947.

389. *Id.* at 952.

390. *Id.* at 953.

391. *Id.* at 944.

392. *Id.* at 953-54.

393. *Id.* at 954.

394. Tennessee & Nebraska both have withdrawn their prior ratification of the E.R.A., S.F. Chronicle, April 25, 1974, at 12, col. 1.

when such regulation is not based on sexual classifications. Thus although attacks on traditional marriage, based on an equal protection analysis or on the E.R.A., offer hope to those dissatisfied with the current arrangement, the long-range outlook is more promising than the immediate prospects. For the present, the most effective approach may lie in circumventing, rather than overthrowing, the traditional legal regulation of marriage. It is suggested that this can best be achieved through the use of individual contracts, either within or in lieu of marriage. Further, as we have seen, each of the state interests in regulating the content of the marriage relationship could just as well be served, without discrimination, through such individual contracts.

IV

AN ALTERNATIVE: CONTRACTS WITHIN AND CONTRACTS IN LIEU OF MARRIAGE

In a society very conscious of individual rights and accustomed to depending on contracts to order many different types of relationships, it is reasonable for people to consider negotiating their own marriage contracts. Such contracts could be fashioned after the parties' own needs and lifestyles. A man and a woman could decide, in advance, on the duration and terms of their relationship, as well as the conditions for its dissolution. They could specify their respective rights and obligations for the financial aspects of the marriage (support, living expenses, property, debts, and so forth) as well as those for their more personal relations (such as responsibility for birth control, the division of household tasks, child-care responsibilities). Further, they could make some decisions before entering the relationship (such as their intentions with regard to procreation or adoption), while reserving others for later (such as domicile changes). They could also specify the process of making a later decision, such as an agreement to use an arbitrator in the event of disputes. Such provisions could be included in a contract in lieu of or within legal marriage.

Contracts in lieu of marriage would allow for legal relationships not contemplated under the present structure of state-regulated marriage. Some ethnic families might agree to extend support obligations beyond the conjugal family unit, to include grandparents, aunts, uncles, and cousins, and to apportion domestic and child-care responsibilities along generational rather than sex-linked lines. Contracts in lieu of marriage could also be used to ensure many of the functions that families have performed in situations where legal marriage is impossible: in communes, group marriages, and other family-like units of more than two adults. These contracts would also provide an alternative for homosexual couples wishing to legitimize their relationships. Although

many of the above mentioned marital and family forms do not seem to create any "societal problems," the courts have been slow to grant them recognition. Contracts in lieu of marriage would provide a flexible alternative for those who want to join together in a nontraditional legal relationship. In addition to offering greater individual choice, marriage contracts would serve the same state interests now vindicated by state regulation of marriage.³⁹⁵

Given the diverse needs and desires of persons who might enter into marriage contracts, the variety of possible provisions in such contracts is virtually infinite. A list of topics individuals might wish to address is suggested below. This is followed by five brief descriptions of individuals for whom contracts would be useful, with more detailed examples of the terms of their contracts outlined in the Appendix. The remainder of this part of the Article discusses a legal model for contracts in lieu of marriage, and examines current problems with judicial enforcement of contracts within and contracts in lieu of marriage.

A. *Suggested Topics for Personal Contracts*

Below is a list of areas individuals might wish to include in their contracts. This list is meant to be suggestive; it is certainly not a list of imperatives to be included in all contracts, and it is by no means exhaustive. It is hoped that the topics suggested may stimulate contracting parties to define the areas and concerns of most relevance and importance for their particular situation. Different people may wish to order their lives differently; the philosophy of individually arranged contractual agreements supports their right to do so.

1. *Aims of and Expectations for the Relationship*
 - a. aims and purposes of the relationship
 - b. personal goals within the relationship
 - c. future expectations
2. *Duration of the Contract*
 - a. specific term (*e.g.*, three years, 20 years)
 - b. goal-linked duration (until a specific goal is accomplished, *e.g.*, completing law school, raising children through college)
 - c. indefinite duration
3. *Property*
 - a. inventory of assets at time of contracting
 - b. ownership
 1. definition and itemization of separate property
 2. definition and itemization of community property
 3. share of children or others (former spouses, dependent par-

395. See text accompanying notes 358-365 *supra*.

ents or other relatives) in property or ownership of specific types of property

- c. management and control
 - 1. management and control of separate property
 - 2. management and control of community property
 - 3. assignment of management and control to others

4. *Income*

- a. ownership and control of wages and salary when single earning partner
- b. ownership and control of wages and salaries when multiple earning partners
- c. provision for periods of lessened or nonexistent income (layoffs, disabilities, education, vacations)
- d. ownership and control of other income (capital gains, interest, insurance, pensions)

5. *Debts*

- a. definition of and responsibility for separate debts
- b. definition of and responsibility for community debts
- c. responsibility for debts of children and others

6. *Support and Living Expenses*

- a. specification of items to be included in living expenses
 - 1. routine household expenses (rent, utilities, food, telephone)
 - 2. routine nonhousehold expenses (automobile, clothing, medical and dental bills, leisure activities, gifts)
 - 3. provisions to ensure continued support and medical care for nonincome earning partner (payment of social security tax, health insurance premiums, private pension plan)
- b. allocation of financial responsibility for support and living expenses
 - 1. specific amounts or proportional contribution to total expenses
 - 2. division of responsibility by category or type of expense
- c. changes in financial responsibility for specific items, categories of expenditures, or for different years or stages in life

7. *Household Arrangements*

- a. legal domicile
 - 1. separate or joint
 - 2. physical location and whether separate or together
 - 3. provision for changes and phasing
- b. responsibility for household tasks (where joint household)
 - 1. assignment of responsibility for specific tasks or agreement on a system of allocation
 - 2. provisions for changes or phasing (alterations by month, season, year, stage of life)

3. option of paying either a party to the contract or a third party for household work or for specific tasks
 - c. provisions for, or restrictions on, additional people visiting or joining the household unit
8. *Personal and Interpersonal Relations*
- a. surname of each partner
 - b. sexual commitment or decision on sexual access/monogamy
 - c. allocation of responsibility for birth control
 - d. decisions and responsibility for entertainment, leisure activities, vacations
 - e. provision for illness or incapacity of one party
9. *Relations with Others Outside the Contract Relationship*
- a. nature and extent of permissible social or sexual relations with others.
 - b. specific commitments to other persons (parent, child, former spouse, friend, lover, business partner)
 - c. career commitments and priorities
 - d. social and community commitments
10. *Children*
- a. decision to have or adopt children
 1. current decision on whether or not to have or adopt children and if so, how many
 2. provision for periodic review of any current decision or, if presently undecided, procedure for making this decision
 - b. plans for birth control in accord with above decision
 1. responsibility for birth control
 2. contingency plans and decisionmaking process if birth control fails
 3. financial responsibility for abortion, if necessary
 - c. maternity arrangements, costs and compensation
 - d. physical custody of children
 1. during the contract period
 2. custody presumption or arrangement in event of dissolution
 - e. allocation of child-care responsibilities
 1. responsibility for child care or for specific child-care tasks
 2. changes in child-care arrangements for specific time periods, stages in the children's life cycles, or for different children
 - f. responsibility for financial support of children
 1. during the contract period
 2. after dissolution
 - g. provisions for the care, custody, and support of other children (from previous marriages, godchildren)

11. Religion

- a. clarification of each partner's religious commitment
- b. allocation of religious responsibilities in the home
- c. agreement on church or synagogue attendance
- d. agreement on religious training of children

12. Provisions for Wills, Inheritance

- a. provisions for estates and trusts
- b. provision for specific or mutual wills
- c. inheritance provisions for children of this or former relationships

13. Procedures for Changing the Contract

- a. periodic review of entire contract or of specific sections
- b. procedure for renegotiating specific provisions

14. Resolving Disagreements

- a. ground rules for arguments
- b. procedure for resolving continuing conflicts
 1. agreement to seek professional assistance
 2. provision for conciliation or binding arbitration

15. Liquidated Damages for Breach of Contract

- a. specification of damages to be assessed for breach of specific sections of the contract
- b. provision for bond or other form of security for damages

16. Dissolution

- a. conditions, time or terms of dissolution
- b. division of property, debts, income and living expenses upon dissolution (agreement on a specific division for each, or agreement on principles or a formula to govern the division)
- c. termination fee (may be included where dissolution would severely hurt or handicap one party)
 1. sum specified by year (or timing) of dissolution
 2. lump sum or periodic payments
- d. provision for support of partner, children, or others after dissolution
 1. specific amount of support or periodic payments
 2. formula for calculating amount of support

B. Case Examples of Personal Contracts

Since the motives for drawing up contracts will differ from couple to couple, the specifications of individual contracts will also differ. Some couples will want to focus their contracts on financial and property matters, others on home and child care, and others on equality of career opportunity. To illustrate the ways in which contract specifications may be tailored to individual cases, five hypothetical contract-

ing couples are presented below with examples of their possible contracts detailed in the Appendix.

1. Traditional Marriage—Partnership of Doctor and Housewife

David is a first-year medical student who may have to drop out of medical school for lack of financial support. Nancy wants to be a professional dancer. She is planning to enroll in a special training program in Paris for the following two years. Although David and Nancy have known each other only two months, they are madly in love. David wants Nancy to give up her dancing and Paris, and to stay in New York and marry him. In return he promises her a comfortable life as a doctor's wife. He asks Nancy to get a job to support him through medical school and internship. He assures her of lavish support in return, once he becomes a doctor. Nancy decides that she could be happy as the wife of a successful doctor, and she agrees to accept David's proposal on the condition that they have an explicit agreement giving her a future share in his career and making adequate provision for her in the event of dissolution. Nancy feels that she is giving up her potential career to become a partner in David's career. She knows her expectations will be drastically altered in the event of a divorce, and she will then be too old to pursue her dancing career. David realizes that Nancy is making a great sacrifice for the relationship, and for him personally, and he wants to assure her of future compensation. David and Nancy write a contract to make their relationship an equal partnership in which everything will be community property. Their contract also provides compensation for Nancy's psychological, educational, and financial loss if the marriage dissolves.

2. Young, Dual-Career, Professional Couple

Susan and Peter will be graduating from college in June and both want to continue their education. Susan wants to obtain a law degree, and Peter wants to obtain a master's degree in social work. Although they want to share their future lives, both are deeply committed to their work and feel that their careers need not be sacrificed for their personal relationship. They want a contract in lieu of marriage that will assure both of them a professional education and an equal opportunity to pursue their careers. The contract they write focuses heavily on equality of career opportunity.

3. Middle-Aged, Working-Class Family

Betty and Joe have both been married and divorced. Betty, a hair stylist at a neighborhood beauty parlor, has a six-year-old daughter from her previous marriage. Joe, a municipal bus driver, has two

children, aged seven and 11 from his previous marriage; both of whom are living with his former wife. Betty and Joe are committed to a long-term relationship and would like to have an additional child together. However, they want to work out a plan to equalize what each puts into the relationship—both financially and otherwise—in order to equalize their vulnerability if the relationship is terminated. Since both have been divorced before, they are particularly concerned about providing for their own financial security and for the financial security of their children in the event of dissolution.

4. *Alternative Lifestyle, Homosexual Couple*

Chris and Robin, a homosexual couple, decide to enter into a household agreement after living together for several years. Chris is a sailboat enthusiast. Robin is a painter who has sold very few paintings. Both have worked on and off at various jobs such as waiting on tables, dishwashing, and doing clerical work. They have decided that in order for Chris to have time for sailing and Robin for painting, they will take turns supporting each other, so that the one being supported can sail or paint on a full-time basis. This is possible even though neither is able to make much money, since both partners are content to lead very frugal lives. Neither wants children.

5. *Woman Paid for Household and Child-Care Services*

Tom, a 50-year-old plumber, owns a lucrative plumbing contracting business. Two years ago his wife died, leaving him with two children, now 10 and 14. Tom met Linda at a "Parents Without Partners" meeting and they have been seeing each other for the past year. They care for each other deeply, and have recently decided to live together. Tom's children are having problems in school, needing more attention than he is able to give them while running his business full-time. Linda is recently divorced, and the mother of an eight-year-old girl. Her former husband does not pay child support, and she has been having a difficult time finding work and managing financially. Linda is willing to stay home and care for the house and both Tom's and her children, but she wants to be compensated for her work and to be assured that she will not later be penalized by the loss of social security and other benefits. Tom and Linda agree to a contract that will assure Linda of money and employment benefits while she devotes herself to housework and child care.

C. *One Model for Contracts in Lieu of Marriage: The Uniform Partnership Act*

One legal relationship which might provide a model for contracts in lieu of marriage is that of a business partnership under the Uniform

Partnership Act (U.P.A.).³⁹⁶ This act sets out a sample partnership contract that makes clear the rules the court will apply to all partnerships, while leaving most of the precise terms of each individual contract flexible; that is, it spells out what provisions will be assumed to apply to the partnership unless both parties to the partnership contract for different terms.

Most of the provisions of the U.P.A. could be applied to a conjugal partnership. Under the U.P.A., commercial partners specify what pre-existing property they are designating "partnership property." All property acquired thereafter with partnership funds is to be partnership property.³⁹⁷ Each partner is an agent of the partnership with an agent's duties and responsibilities.³⁹⁸ If either partner commits a tort while acting on partnership business, the partners are jointly and severally liable.³⁹⁹ The U.P.A. allows the partners to spell out their duties and rights, but also outlines a regime to govern if the partners do not specify their arrangement. Under this standard regime each partner is to share equally in profits and to contribute equally towards losses. If any partner makes an extra payment into the partnership, he is to be repaid with interest. Each partner is to have "equal rights in the management and conduct of the partnership business."⁴⁰⁰ Any act in contravention of the partnership agreement requires the consent of all partners.⁴⁰¹ Such a regime would be equally workable in a marital partnership: equal management and control, an equal share in profits, and equal contributions toward losses—unless the couple specifically agrees to a different arrangement.

Furthermore, the standards of accountability for partners called for in the U.P.A. would have an equally beneficial effect in keeping the affairs of a conjugal partnership orderly and aboveboard. The U.P.A. provides that "partnership books shall be kept . . . [where] every partner shall at all times have access to . . . them."⁴⁰² It further provides that upon demand, "[p]artners shall render . . . true and full

396. See CAL. CORP. CODE §§ 15001-45 (West Supp. 1974).

Although it may be argued that the analogy is strained because marriage lacks the profit motive that breathes life into the U.P.A., a useful analogy can be drawn. After all, a business partnership is also a human relationship, and the U.P.A. provisions form a basis for a sound human relationship. In addition, "It has been observed that the modern trend is toward consideration of marriage as a business transaction, with the rights of parties to be determined by general principles of the law of contract." 52 AM. JUR. 2D *Marriage* § 4, at 867 (1970).

397. CAL. CORP. CODE § 15008 (West 1955).

398. *Id.* § 15009 (West 1955).

399. See *id.* §§ 15013-15 (West 1955).

400. *Id.* § 15015(e) (West 1955).

401. *Id.* § 15018(h) (West 1955).

402. *Id.* § 15019 (West 1955).

information of all things affecting the partnership"⁴⁰³ Either partner can have a formal accounting when it is "just and reasonable."⁴⁰⁴ Each partner has an "equal right" to possess partnership property for "partnership purposes,"⁴⁰⁵ and each one's "share of the profits and surplus" becomes his "personal property."⁴⁰⁶

This arrangement, wherein the partnership's income and expenses are regularly monitored and the excess is divided at stated intervals among the partners to vest as their personal property, provides a scheme of money management for the conjugal partnership more equitable than the one commonly used in America today. Typically one spouse (usually the wife) does not have any management or control and may be left without financial assets that become "her own" until catastrophe or acrimony forces some distribution of whatever happens to be left of communal holdings as of that moment. Since marriage law does not provide a cause of action for reasonable value of services rendered, periodic vesting or compensation would be especially important for the housewife. This would alleviate the current societal dilemma of how to finance the divorcee, long unemployed and usually without property, while she makes the transition from marriage to a job. Periodic division of assets and immediate vesting would help alleviate this problem, and would seem to provide a much more equitable approach in any partnership—conjugal as well as business.⁴⁰⁷

The U.P.A. scheme for dissolution of a partnership may also be of value in the marriage arena. The U.P.A. encourages partners to stipulate for themselves exactly what will trigger dissolution. This can be the termination of a definite number of years or the end of a particular undertaking.⁴⁰⁸ But if partners prefer, their partnership can dissolve simply "at will."⁴⁰⁹ Dissolution can be caused at any time by the express will of a partner, though certain dissolutions will be in accord with, others in violation of, the agreement.⁴¹⁰ Courts are directed to decree dissolution of a commercial partnership whenever sufficient grounds for dissolution exist, for example, exclusion of a partner from his just share of the management, a breach of the partnership agreement, or quarrels which have destroyed all confidence and cooperation between the parties.⁴¹¹ If dissolution is not in contravention of the

403. *Id.* § 15020 (West 1955).

404. *Id.* § 15022 (West 1955).

405. *Id.* § 15025(2)(a) (West 1955).

406. *Id.* § 15026 (West 1955).

407. For reference to an alleged "marital partnership" with this financial regime, see *Garfein v. Garfein*, 16 Cal. App. 3d 155, 93 Cal. Rptr. 714 (2d Dist. 1971).

408. CAL. CORP. CODE § 15031(1)(a) (West Supp. 1974).

409. *Id.* § 15031(1)(b) (West Supp. 1974).

410. *Id.* § 15031 (West Supp. 1974).

411. *Cf. id.* § 15032(1)(d).

partnership agreement, debts are paid off and the surplus distributed to partners as agreed.⁴¹² If dissolution is in contravention of the partnership agreement, the innocent partner in a commercial partnership may get damages for breach of the agreement.⁴¹³ Since the measurement of future profits in a personal relationship would encounter uncertain treatment in the courts at this time, a conjugal agreement should specify the damages that would accrue to the innocent party. For example, a liquidated damages clause could take into account the possibility that the partnership would break up at a time which might disproportionately burden one spouse. Thus if one partner has put the other through school, and has borne the expenses as the other prepared for a career, a dissolution immediately after the supported spouse's graduation might prevent the working partner from enjoying the anticipated benefits of future leisure and a higher standard of living. In this case liquidated damages for the working spouse might be appropriate and could be specified in advance. The advantage of the U.P.A. model is that it allows partners to provide for such exigencies before the acrimonious day of dissolution arrives.

These few observations suggest that if conjugal partnerships were handled by the law as commercial partnerships under the Uniform Partnership Act currently are, a couple would still have a great deal of freedom in ordering their unique relationship, and the state would have a recognized but not too burdensome role in regulating and enforcing these partnership agreements.

D. Current Problems with Judicial Enforcement of Contracts Within and Contracts in Lieu of Marriage

A Uniform Conjugal Partnership Act, modeled after commercial partnership legislation, would not only provide flexibility in designing marital-type relationships but would secure judicial enforcement for the provisions of contracts entered into under its aegis. Since no such act exists, the possibility of securing judicial enforcement of contracts within or in lieu of marriage must be appraised in light of existing precedent.

1. Legal Enforcement of Contracts Within Legal Marriage

At common law husband and wife became one upon marriage;⁴¹⁴ since the law did not recognize one-party contracts, contracts between husband and wife were regarded as impossible. However, the Married Woman's Property Acts in the 19th century⁴¹⁵ granted married

412. *Id.* § 15038(1) (West 1955).

413. *Id.* § 15038(2)(a)II (West 1955).

414. *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J. dissenting).

415. See note 14 *supra*.

women limited power to contract. Ultimately, postnuptial as well as antenuptial agreements between husbands and wives became widely accepted.⁴¹⁶ The courts, however, have maintained two basic limitations on the enforceability of contracts between husbands and wives. Courts will not enforce contracts (1) that alter the essential elements of the marital relationship, or (2) that are made in contemplation of divorce.

An exception to these two rules has been carved out to allow separation agreements between spouses. While such agreements may alter essential elements of the marital relationship and are usually made in contemplation of divorce, they are generally allowed "if they do not tend to induce divorce or separation."⁴¹⁷ Thus, they must be entered into *after* the decision to separate has been made.⁴¹⁸

a. Courts will not enforce contracts which alter the essential elements of the marital relationship

"A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal."⁴¹⁹ This

416. These antenuptial agreements must be in writing. The third clause of the Statute of Frauds, found in most states, provides that promises made in consideration of marriage (other than mutual promises to marry) must be in writing and signed by the party to be charged. See H. CLARK, *supra* note 12, at 27-28.

417. *Id.*, *supra* note 12, at 521.

418. This exception has been explained as follows:

One reason why the courts uphold such separation contracts is that under the laws of most states married persons can secure a judicial separation with a judicial division of their property and a release of the husband's duty of support; and it is therefore felt that the parties should be permitted to enter into a fair agreement between themselves covering the same things upon which they could obtain relief in court. The problem is entirely different, however, where the parties are living together and contemplate a continuance of that relationship.

Graham v. Graham, 33 F. Supp. 936, 940 (E.D. Mich. 1940). See also CAL. CIVIL CODE § 4802 (West 1970).

419. RESTATEMENT OF CONTRACTS § 587 (1932). The *Restatement* gives two illustrations:

Illustrations:

1. A and B who are about to marry agree to forego sexual intercourse. The bargain is illegal.
2. In a state where the husband is entitled to determine the residence of a married couple, A and B who are about to marry agree that the wife shall not be required to leave the city where she then lives. The bargain is illegal.

Although explicitly mentioned in the *Restatement* illustrations, there are few cases dealing with contracts to alter the duty of husband and wife to engage in sexual relations or to alter the wife's obligation to follow her husband's choice of domicile. In *Miller v. Miller*, 132 Misc. 121, 228 N.Y.S. 657 (Sup. Ct. 1928), an annulment was granted where husband and wife had an agreement to refrain from intercourse indefinitely. The court cited *Mirizio v. Mirizio*, 242 N.Y. 74, 150 N.E. 605 (1926) and stated the following: "Marital intercourse, so that children may be born, is an obligation of the marriage contract, and 'is the foundation upon which must rest the perpetuation of society and civilization.' The obligation may not be modified by private agreement between the

principle is most frequently applied to two aspects of the traditional marriage relationship which courts have deemed to be "essential obligations": the husband's duty to support the wife and the wife's duty to serve the husband. The issue arises both in contracts to alter these essential obligations, and in contracts in which the performance of the obligation is consideration for some other promise or act. In the first instance, the contract is said to be void because it violates public policy; in the second, it is void for lack of consideration, on the theory that a party cannot contract to perform that which she or he is already legally bound to do.⁴²⁰

The public policy considerations usually advanced to void marital contracts are varied. According to one court:

If [married persons] were permitted to regulate by private contract where the parties are to live and whether the husband is to work or be supported by his wife, there would seem to be no reason why married persons could not contract as to the allowance the husband or wife may receive, the number of dresses she may have, the places where they will spend their evenings and vacations, and innumerable other aspects of their personal relationships. Such right would open endless field for controversy and bickering and would destroy the element of flexibility needed in making adjustments to new conditions arising in marital life. There is no reason, of course, why the wife cannot voluntarily pay her husband a monthly sum or the husband by mutual understanding quit his job and travel with his wife. The objection is to putting such conduct into a binding contract, tying the parties' hands in the future and inviting controversy and litigation between them.⁴²¹

Where the parties attempt to contract regarding the husband's obligation to support the wife, the usual rationale for refusing enforcement is:

The law requires a husband to support, care for, and provide comforts for his wife in sickness, as well as in health The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the most important duties pertaining to the social order. Husband and

parties." *Miller v. Miller*, 132 Misc. at 122, 228 N.Y.S. at 657. The issue of the wife's inability to contract regarding her duty to follow her husband's choice of domicile has come up occasionally in cases dealing with other essential elements of the marital relationship. *See, e.g., Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940) (a contract in which the wife agreed to pay the husband a specified sum in consideration of his agreement to accompany her on her travels held to be void as against public policy); *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E.2d 171 (1951).

420. 41 AM. JUR. 2D *Husband and Wife* §§ 320, 322 (1968).

421. *Graham v. Graham*, 33 F. Supp. 936, 939 (E.D. Mich. 1940).

wife . . . cannot vary the personal duties and obligations to each other which result from the marriage contract itself.⁴²²

Contracts regulating the wife's duty to provide domestic services are similarly prohibited. As recently as 1961 the Iowa Supreme Court held that a wife's performance of "the usual duties of a farm wife, such as raising poultry, at times hogs, and . . . a big garden" did not constitute consideration in an alleged oral contract between husband and wife to make mutual wills.⁴²³ "It is well settled that a husband's agreement to pay for services within the scope of the marital relation is without consideration and contrary to public policy."⁴²⁴ The wife's duty to her husband is often found to extend beyond the performance of basic household tasks. For example, farm work and caring for the husband's relatives have been held to be duties for which the wife cannot recover payment.⁴²⁵

In examining the many cases in which contracts regarding the husband's duty to support or the wife's duty to provide service have not been enforced, one begins to suspect that the courts often use the public policy or lack of consideration rationale to invalidate contracts that seem questionable on entirely different grounds. In many cases which deal with an alleged oral contract, one party is dead or there is vigorous disagreement between the parties regarding the terms or even the existence of the contract. Other cases involve contracts that were not negotiated at "arm's length" and thus would result in an injustice

422. *Ryan v. Dockery*, 134 Wis. 431, 434, 114 N.W. 820, 821 (1908). *See also* *Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940); *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972) (husband cannot contract away his future obligation to support wife during separation prior to dissolution of marriage); *Vock v. Vock*, 365 Ill. 432, 6 N.E.2d 843 (1937) (postnuptial agreement in which wife released husband from all obligations of future support against public policy); *Corcoran v. Corcoran*, 119 Ind. 138, 21 N.E. 468 (1889) (executory contract of wife to support husband, in consideration of a conveyance made by him to her, is void); *Norris v. Norris*, 174 N.W.2d 368 (Iowa Sup. Ct. 1970) (public interest does not allow antenuptial agreement relieving husband of the duty to support wife); *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521, 522 (1939) (husband obliged to support wife as long as they are living together as husband and wife, and contracts made which place any limitations upon the obligations imposed by law are illegal); *Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961) (antenuptial agreement relieving husband of duty to support wife in the event of separation against public policy).

423. *Youngberg v. Holstrom*, 252 Iowa 815, 108 N.W.2d 498 (1961). *See also* *Miller v. Miller*, 78 Iowa 177, 35 N.W. 464, *aff'd on rehearing*, 42 N.W. 641 (1889); *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945); *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931); *Oates v. Oates*, 127 W. Va. 469, 33 S.E.2d 457 (1945).

424. *Youngberg v. Holstrom*, 252 Iowa 815, 823, 108 N.W.2d 498, 502 (1961). *See also* 41 AM. JUR. 2D *Husband and Wife* § 320 (1968); H. CLARK, *supra* note 12, at 227.

425. "Under the law, a husband has the right to the services of his wife as a wife, and this includes his right to her society and her performance of her household and domestic duties." *Mathews v. Mathews*, 2 N.C. App. 143, 162 S.E.2d 697, 698 (1968).

if enforced. Thus the courts have relied on the dubious rationale of marital obligations to invalidate contracts which actually presented other problems. However, these problems are not unique to contracts between husbands and wives, and legal principles that have evolved to handle these problems in other areas of contract law could be applied to marriage contracts as well. This would certainly be preferable to resorting to the outmoded doctrine that a bargain to change the essential incidents of marriage is illegal.

While courts have been scrupulous in preventing spouses from contracting to alter their marital relationship with regard to the husband's duty to support the wife or the wife's duty to provide domestic services, wider latitude has been allowed with regard to marital property. In California, couples are allowed to make antenuptial agreements reversing the characterization of either separate or community property.⁴²⁶ The distinction between support and property may be conceptually clear, but the practice of allowing couples to contract about property but not about support often seems arbitrary and may have some unusual results. For example, an antenuptial agreement in which the wife is obligated to support her husband with the income from her separate property would probably not be enforceable under traditional principles. However, an antenuptial agreement in which the income from her separate property is deemed community property, and therefore usable for the support of the community is perfectly acceptable.⁴²⁷ This distinction operates to disadvantage working- and middle-class couples, since they often have little property and thus have no way of avoiding the restrictions against contracting regarding support. It may be questioned why certain aspects of the marital relationship, support and domestic service, should be deemed essential and therefore unalterable, even by explicit agreement between the spouses, whereas another aspect of the relationship, legal property rights deriving from the marriage, should be alterable by such agreement. The basis for this distinction is not articulated in the cases.

Further, as we have noted, the designation of sex-stereotyped "duties" as "essential incidents of marriage" is questionable under recent developments in the law of equal protection, and surely would be in violation of the proposed Equal Rights Amendment. In addition, while it is traditionally argued that allowing husbands and wives to contract regarding their relationship promotes inflexibility, it is clear that

426. Grant, *Marital Contracts Before and During Marriage*, 1 CAL. FAM. LAW. 151, 156-59 (1961) (C.E.B.). They can also transfer or agree to transfer property, waive property rights in each others' estate, and provide for each other by will. One spouse can agree to assume the obligation to support the other's children; they can both agree that, after marriage, the earnings of either one or both shall be the separate property of the one who earns them.

427. *Id.* at 159.

forcing them to accept a relationship whose fundamental structure is dictated by the state is far more inflexible.

b. Courts will not enforce contracts in contemplation of divorce

Just as legally married couples may wish to enter into enforceable contracts altering the traditional sex-stereotyped roles within marriage, they may also wish to negotiate agreements providing for property division, support obligations, or child custody in the event of divorce. Such agreements are usually enforceable if made after the couple has decided to separate.⁴²⁸ However, if this type of agreement is made prior to marriage or during inmarriage, when the spouses have no immediate intention of separating, the traditional view has been that it is unenforceable: "A bargain to obtain a divorce or the effect of which is to facilitate a divorce is illegal."⁴²⁹

There appear to be four concerns behind this rule. The first is that such agreements tend to encourage divorce and divorce is against the public interest.⁴³⁰ However, it is far from certain that such con-

428. See text accompanying note 418 *supra*.

429. RESTATEMENT OF CONTRACTS § 586 (1932). The *Restatement* gives the following illustrations:

1. In a State where husband and wife have capacity to contract with one another, A and B, married persons, agree that A shall obtain a divorce. The bargain is illegal without regard to whether there is ground for the divorce or not.

2. In a State where husband and wife have capacity to contract with one another, A and B, married persons, have been divorced, but it is possible that the divorce can be set aside for fraud. In consideration of A's promise to pay \$25,000 B agrees not to attempt to have the divorce set aside. The bargain is illegal, and although B refrains from taking proceedings, the promise to pay money cannot be enforced; nor if the money is paid, can the promise to refrain from having the divorce set aside be enforced.

3. A promises B in consideration of B's marrying him that in case of divorce he will settle \$25,000 upon her. The marriage takes place. The bargain is illegal.

4. A has begun proceedings for divorce from B. A bargain between A and B in regard to the support of their child in case a divorce takes place is not illegal unless the purpose is to induce or facilitate the divorce.

5. A has begun divorce proceedings against B. A and B agree that if a divorce is granted, alimony shall be fixed at a stated sum. The bargain is not illegal unless intended to promote the granting of the divorce.

6. A, in order that she may thereafter marry B, then a married man, lends money to B so that B may obtain a collusive divorce from his wife, who demanded the amount of the money lent in return for her agreement to procure a divorce. A cannot recover the money lent.

See also H. CLARK, *supra* note 12, at 28; Grant, *supra* note 426, at 160-62.

430. In *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968), the wife attempted to enforce a contract with the husband whereby he had promised to give everything he had to her and the children if he ever left her. The court stated:

If such an agreement as the one alleged by respondent were enforceable, it would induce the wife to goad the husband into separating from her in order that the agreement could be put into effect and she could strip him of all of

tracts tend to encourage marital breakup.⁴³¹ By forcing couples to negotiate their differences in the premarital situation, they may prevent some marriages that would have later ended in divorce. In other cases they may make possible marriages that otherwise would not have occurred. For instance, a very wealthy man might hesitate to marry unless he could be sure that his assets would not be dissipated in a divorce.⁴³² Even if an agreement contains a clause that gives one party inducement to seek a divorce, it is very likely that the same clause would give the other party equal incentive to preserve the marriage.⁴³³ More importantly, however, it is no longer clear that public policy considerations require discouragement of divorce.⁴³⁴ As discussed above, liberalized divorce laws in many states and ever rising divorce rates are signs of the increased normality and frequency of divorce today.⁴³⁵ Surely it is reasonable for courts to allow couples to plan realistically in the event that marital breakdown should occur.

The second reason for prohibiting contracts in contemplation of divorce is to prevent the parties from manufacturing "grounds" for divorce in order to dissolve their marriage when they would not be legally entitled to do so.⁴³⁶ But with the growing adoption of no-fault divorce laws, the necessity of showing "fault" to obtain a divorce has decreased, and thus the likelihood and importance of collusion will diminish.⁴³⁷ Consequently, there would appear to be little justification for disallowing contracts which make provisions for property division and spousal support in anticipation of divorce.⁴³⁸ Since the parties in other kinds

his property. Our society has been built around the home, and its perpetuation is essential to the welfare of the community. And the law looks with disfavor upon an agreement which will encourage or bring about a destruction of the home.

Id., 162 S.E.2d at 699.

431. H. CLARK, *supra* note 12, at 522.

432. See *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

433. H. CLARK, *supra* note 12, at 28.

434. See generally *Boddie v. Connecticut*, 401 U.S. 371 (1971).

435. See also *Hill v. Hill*, 23 Cal. 2d 82, 142 P.2d 417 (1943): "Public policy seeks to foster and protect marriage, to encourage parties to live together, and to prevent separation. But public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed." *Id.* at 93, 142 P.2d at 422 (citations omitted).

436. H. CLARK, *supra* note 12, at 526-28.

437. Ten states have adopted "irretrievable breakdown" as the exclusive ground for divorce and ten other states have added it to existing grounds. Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169, 194-95 (1974). The California Supreme Court is still concerned about guarding against collusive dissolutions. See *McKim v. McKim*, 6 Cal. 3d 673, 493 P.2d 868, 100 Cal. Rptr. 140 (1972).

438. Clark suggests that agreements which seek to conceal a valid defense or fabricate grounds for divorce should be invalid, and that the burden of coming forward with evidence on this point should lie with the party attacking the agreement, but the ultimate

of relationships are able to provide for dissolution,⁴³⁹ the state should not prevent forethought and planning in the marital arena.

The third reason for prohibiting contracts in contemplation of divorce is to prevent fraud or unconscionability in the negotiation of the contract.⁴⁴⁰ Of course, if the unfairness can be traced to fraud, duress, undue influence, or unconscionability in the original negotiation of the contract, a court should refuse to enforce it as it would any other such contract.⁴⁴¹ Some jurisdictions currently apply a higher standard in reviewing contracts between husbands and wives on the theory that the relationship is a confidential one. Thus full disclosure as to financial assets can be required, as well as a showing that the parties had complete understanding of the legal implications of the contract.⁴⁴² Therefore, it would seem that modern courts have the doctrinal tools necessary to handle the problems of fraud or unconscionability that may arise in administering antenuptial or postnuptial agreements in contemplation of divorce.

Finally, contracts in contemplation of divorce have been prohibited to avoid the hardships that might result from changed circumstances of the parties.⁴⁴³ The possibility of unfairness due to changed circumstances is a serious one. Even the most scrupulously fair negotiations, carried out with full disclosure of the assets of both parties and with sound legal advice for both parties, could result in a contract that, although fair at the time of negotiation, would be unfair if enforced a number of years later because of some intervening changes in the parties' life situations. Once again, however, there is precedent for

burden of persuasion should remain with the party asking enforcement. H. CLARK, *supra* note 12, at 528.

439. See CAL. CORP. CODE §§ 15029-43 (West Supp. 1974).

440. Cf. H. CLARK, *supra* note 12, at 28-29. See text following note 425 *supra*.

441. See, e.g., UNIFORM COMMERCIAL CODE § 2-302.

442. See 41 AM. JUR. 2d *Husband & Wife* §§ 270 *et seq.* (1968).

Clark states:

For example, it is often held that the relation of husband and wife is a confidential one, even after separation, so that the husband must make a full disclosure of the extent of his property and of the amount the wife is to receive at the time the agreement is made. Furthermore, many courts create a presumption that the agreement is unfair, and the husband loses unless he can rebut the presumption. He may do this by proof that he made a full disclosure, that the wife had independent legal advice, and that she executed the agreement with full understanding of its implications. In some states proof of either full disclosure or independent advice is sufficient. This presumption is sometimes stated in terms of the burden of proof. In most cases where the agreement makes inadequate provision for the wife, the husband is unable to rebut the presumption or sustain the burden of proof and the agreement is held invalid. In the rare case where there is full disclosure and understanding of the agreement on the wife's part, but where the consideration is still inadequate, the wife's bad bargain is enforced against her.

H. CLARK, *supra* note 12, at 524-25 (footnotes omitted).

443. H. CLARK, *supra* note 12, at 28-29.

dealing with such difficulties. Although at common law impossibility of performance of a contract did not discharge the duty of a promisor, under the approach accepted in most American courts today, impossibility of performance will release a party from a contract,⁴⁴⁴ although the general rule is that difficulty or improbability of accomplishment without financial loss will not.⁴⁴⁵ There is a growing tendency to apply more liberal standards to commercial contracts involving severe financial loss,⁴⁴⁶ and these principles could be extended to marriage contracts. If the supervening events that make performance impracticable are willfully or negligently caused by one party, the burden will fall on him or her; where neither is at fault, the burden may be apportioned.⁴⁴⁷

c. *New trends in the law*

Several recent cases indicate a new trend toward a more realistic approach to contracts between husbands and wives. Some courts have been willing to disregard the outmoded doctrine of not allowing contracts made in contemplation of divorce, and have upheld reasonable contracts between husbands and wives with regard to both support and property upon divorce. In a 1970 case, *Posner v. Posner*,⁴⁴⁸ the Florida Supreme Court upheld an antenuptial agreement providing the wife with \$600 a month in alimony in the event of divorce or separation. The court stated:

We have given careful consideration to the question of whether the change in public policy towards divorce requires a change in the rule respecting antenuptial agreements settling alimony and property rights of the parties upon divorce and have concluded that such agreements should no longer be held to be void *ab initio* as "contrary to public policy."⁴⁴⁹

The court felt that these agreements should be tested by the same standards applied to antenuptial agreements settling the property rights of spouses in each others' estates upon death. The court held:

444. RESTATEMENT OF CONTRACTS § 457 (1932).

445. 17 AM. JUR. 2D *Contracts* § 402 (1964).

446. *Id.*

447. A. CORBIN, *CONTRACTS* § 1354 (one vol. ed. 1952). Of course one may question the wisdom of applying this kind of analysis to marriage since searching for "fault" could be regarded as a step backward from recent developments in creating "no fault" divorce. However, even states with no fault divorce laws have provisions for compensating a person whose spouse has deliberately dissipated or misappropriated community funds or property.

448. 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds on rehearing*, 257 So. 2d 530 (Fla. 1972).

449. 233 So. 2d at 385. It is to be noted that two years later the Posner contract was held to be void on rehearing as the wife did not have full knowledge of her husband's wealth at the time they contracted. *Posner v. Posner*, 257 So. 2d 530 (Fla. 1972).

[T]he antenuptial agreement . . . was a valid and binding agreement between the parties at the time and under the conditions it was made, but subject to be increased or decreased under changed circumstances as provided in § 61.14, Florida Statutes, F.S.A.⁴⁵⁰

In 1972, in *Valid v. Valid*,⁴⁵¹ an Illinois appellate court upheld an antenuptial agreement providing for a lump sum settlement in the event of divorce. The agreement provided for the wife to receive \$50,000 as a lump sum settlement if the divorce occurred within three years and \$75,000 if the divorce occurred thereafter. The money was to be paid at the rate of \$600 per month for 125 successive months. In upholding this agreement, the court specifically noted that a premarital contract may promote rather than reduce marital stability:

The most frequent argument made for holding agreements limiting alimony invalid is that such agreements encourage or incite divorce or separation. There is little empirical evidence to show that this assertion is well founded. It is true that a person may be reluctant to obtain a divorce if he knows that a great financial sacrifice may be entailed, but it does not follow from this that a person who finds his marriage otherwise satisfactory will terminate the marital relationship simply because it will not involve a financial sacrifice. *It may be equally cogently argued that a contract which defines the expectations and responsibilities of the parties promotes rather than reduces marital stability.*⁴⁵²

Further, this court held: "Public policy is not violated by permitting these persons prior to marriage to anticipate the possibility of divorce and to establish their rights by contract in such an event as long as the contract is entered with full knowledge and without fraud, duress or coercion."⁴⁵³

In 1973, in *Unander v. Unander*,⁴⁵⁴ the Oregon Supreme Court upheld an antenuptial agreement providing for \$500 a month alimony and a \$25,000 life insurance policy for the wife in the event of divorce. In so doing, the court overruled its 1970 decision in *Reiling v. Reil-*

450. *Posner v. Posner*, 233 So. 2d 381, 386 (Fla. 1970).

451. 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972).

452. *Id.* at 391, 286 N.E.2d at 46 (1972) (emphasis added).

453. *Id.* at 392, 286 N.E.2d at 47. The court's reasoning here is interesting: Once it appears (1) that some marital rights may be waived before the wedding and (2) that the right to support can be terminated upon divorce, it would be anomalous to hold that the parties cannot plan and agree on a course of action in the event that the marriage is unsuccessful and ends in divorce. This is particularly true where the parties are older and where there is little danger that either party would be without support. The incidence of divorce in this country is increasing, and consequently more persons with families and established wealth are in a position to consider the possibility of a marriage later in life.

Id.

454. 506 P.2d 719 (Ore. Sup. Ct. 1973).

ing,⁴⁵⁵ a case in which it had invalidated an antenuptial agreement stating that the wife would not receive alimony. The court said its previous position that "such agreements encourage divorce" was of "extremely doubtful validity."⁴⁵⁶ It stated that while the great weight of authority holds that alimony provisions in antenuptial agreements are invalid, the very recent judicial trend is to the contrary.

We believe it necessary to depart from the principle of stare decisis primarily because we have become convinced that *it is important to a large number of citizens, as typified by the parties to this case, that they be able to freely enter into antenuptial agreements in the knowledge that their bargain is as inviolate as any other except when it must be voided to provide support.*⁴⁵⁷

The *Unander* decision is significant because the Oregon Supreme Court articulated the importance of according marital partners the same freedom of contract that other contracting parties have. However, the court also reserved the right to invalidate antenuptial agreements in extreme circumstances by holding:

We have now come to the conclusion that antenuptial agreements concerning alimony should be enforced unless enforcement deprives a spouse of support that he or she cannot otherwise secure. A provision providing that no alimony shall be paid will be enforced unless the spouse has no other reasonable source of support.⁴⁵⁸

In *Buettner v. Buettner*⁴⁵⁹ the Nevada Supreme Court upheld an antenuptial agreement setting forth property rights and alimony in the event of divorce. The agreement gave the wife the house, half the community property, and \$500 per month for a period of five years (regardless of whether she remarried). The court applied normal contract standards to review the antenuptial agreement.

[A]s with all contracts, courts of this state shall retain power to refuse to enforce a particular antenuptial contract if it is found that it is unconscionable, obtained through fraud, misrepresentation, material nondisclosure or duress.⁴⁶⁰

The court also concluded that antenuptial agreements setting forth alimony and property rights upon divorce are not to be viewed as void as contrary to public policy in Nevada.

In addition, both *Unander* and *Posner* suggest possible solutions to the problem of changed circumstances. *Unander* suggests that antenuptial agreements be upheld, except where one party requires support

455. 256 Ore. 448, 474 P.2d 327 (1970).

456. *Unander v. Unander*, 506 P.2d 719, 720 (Ore. 1973).

457. *Id.* at 722 (emphasis added).

458. *Id.* at 721.

459. 89 Nev. 39, 505 P.2d 600 (1973).

460. *Id.* at 45, 505 P.2d at 604.

in order to avoid becoming a public charge. *Posner* favors treating antenuptial agreements as separation agreements are treated in many states—that is, court modification is possible upon a showing of changed circumstances.

Although California was the first state to adopt the liberal no-fault divorce law, it has not as yet joined in the trend toward honoring antenuptial agreements making provision for support, or lack thereof, in the event of divorce. In *In re Marriage of Higgason*⁴⁶¹ the California Supreme Court considered the case of an antenuptial agreement entered into by a wealthy 73-year-old woman and a 48-year-old waiter of little or no means. Their contract provided that each party waive any right to receive support from the other. The couple had been married for two years, during which time the wife had been adjudicated an incompetent person (15 days after the wedding) and had filed one action for annulment of the marriage and two for dissolution. Although the husband was apparently healthy at the time of the marriage, he subsequently became totally disabled from lung cancer and a heart attack. In refusing to uphold the provisions of the antenuptial agreement regarding support, the court held it to be within the discretion of the court alone—and not of the couple—to decide whether or not one spouse was obligated to support the other after dissolution. Of course the facts here are quite different from the cases previously mentioned—and indeed from most cases. The man in *Higgason* was ill, had little means of support, and may have become a public charge. It is not clear how the California court would have dealt with *Posner*, *Valid*, *Buettner*, or *Unander*.

Thus although most states, including California, still adhere to the notion that antenuptial agreements in contemplation of divorce are not to be enforced, there is some movement away from that position. Couples wishing to enter into such agreements have reason to hope that the modern trend will continue and that courts will find it increasingly difficult to disallow fairly negotiated contracts governing the spouses' financial rights and obligations upon dissolution.

To date, the new recognition of contracts between spouses has only been accorded to contracts covering the spouses' financial rights upon dissolution; many questions remain about the enforceability of other contractual rights and obligations, both within marriage and after dissolution. For example, in *Belcher v. Belcher*,⁴⁶² two years after *Posner*, the Florida Supreme Court held that the principles in *Posner* apply only to support obligations after dissolution, but not during a separation prior to dissolution. If the traditional standard of not up-

461. 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).

462. 271 So. 2d 7 (Fla. 1972).

holding contracts that alter the "essential elements" of the marital relationship were applied, contracts in which the spouses agreed to share the housework, or to pay one spouse for domestic tasks, or to relieve the husband of support obligations during the marriage, would all be unenforceable. To date, however, courts have not been confronted with contracts like the ones contemplated in this Article. Since many of the older cases in this area deal with oral contracts of doubtful validity, or with contracts which appear unconscionable either procedurally or substantively, it would be more difficult for a modern court to rely on them and refuse to enforce a written contract between a husband and wife that was carefully drafted and fairly negotiated. This is particularly true in light of changing attitudes toward women's role in society as well as the constitutional developments which make the legal enforcement of sexual stereotypes questionable.

Problems of enforceability of contracts within marriage may also arise from the traditional reluctance of courts to become involved in disputes within an ongoing marriage.⁴⁶³ As a practical matter, however, courts are much less likely to be confronted with these cases since breaches of contract serious enough to result in litigation are also usually serious enough to result in termination of the relationship. However, couples wanting outside help in settling contractual disputes within their marriages might wish to borrow the concept of arbitration used in labor law or to provide for marriage counseling in their contracts. Although enforcement of the counselor's decision or arbitrator's award could become a problem, a court would be likely to give it some weight, as more courts are themselves moving toward the use of specially trained personnel to assist with family problems much like the Family Court in Japan.⁴⁶⁴

Assuming that suits involving breach of marital contracts will usually reach the courts after the couple has separated, another problem may be the availability of a remedy. Specific performance will not normally be available in disputes involving matters other than money or property, but courts could award monetary damages to the injured party. For example, in a suit brought by the wife on the husband's breach of his contractual obligation to do half the housework, a court could award her damages based on the losses she incurred as a result of the breach, such as the expense of hiring someone else to do the work or the value of her labor if she were forced to do it herself. Couples should understand, however, that some of the rights and obligations which they in-

463. H. CLARK, *supra* note 12, at 186.

464. See generally Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968). For a description of such procedure in the Japanese Family Court see RHEINSTEIN, *supra* note 141, at 110-14.

clude in their contracts may not be subject either to specific performance or money damages. If a breach of contract caused no tangible damage to the other party, as for example where one spouse breaches an agreement to practice a particular religion or to accompany the other to football games or the ballet, monetary damages might be difficult to assess and the award might not comport with the injured party's expectations. There may also be difficulties when the damages likely to be awarded are not great enough to justify the expense of a lawsuit or when the monetary value of damages is uncertain. Couples may wish to include liquidated damages provisions in cases where a court would have difficulty assessing the amount of damages, or they may wish to adopt arbitration arrangements that empower the arbitrator to award damages, or both. Couples writing this type of contract must realize that some of the provisions in their contract are there to clarify their own thinking and to set forth ideals and aspirations, and they cannot expect that they will all be enforceable.

Contracts regarding children involve slightly different problems. The right to receive support from her or his parents legally belongs to the child, and parents cannot contract away this right.⁴⁶⁵ Contracts regarding the custody of children are usually honored by courts, but the court may review them to see if they appear to be in the child's best interest.⁴⁶⁶ Thus parents can never be sure that the arrangement they have negotiated will be upheld, so long as there is a possibility that a judge may find some other situation to be better for the child. If a couple includes a provision in their contract specifying which spouse is to have custody of the children in the event of separation, the other spouse could challenge the agreement and obtain custody if he or she were able to convince the court that this would be in the child's best interests. And if the person who agreed to take custody later refused to do so, specific performance would probably be unavailable (and unwise) since it would rarely be in a child's interest to be cared for by an unwilling parent. However, once again, money damages could be awarded to the injured party if a contract regarding custody is breached.

465. H. CLARK, *supra* note 12, at 549.

466. *Id.*

Another conception of the child's interest would try to preclude dissolution when children are involved. This view would limit the option of contracts to childless couples in order to safeguard against marital breakdown in families with children: "[A]s long as breakdown does demonstrable social damage—as it surely must, particularly where children are involved—any system that would invite separation of the spouses must be regarded as highly dubious in terms of social policy. *The obvious solution is to limit the term-of-years option [term contracts] to childless couples only, with the option to expire upon pregnancy.*" McWalter, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROB. 607, 638 (1974) (emphasis added).

If moving or household arrangements were made for the child, their cost could be calculated easily. Similarly, a spouse who refused to perform his or her contractual obligation to take custody of the child could be required to reimburse the other spouse for the actual cost of rearing the child. Where the person who was to get custody under the agreement was deprived of this right, however, the damage of psychological stress and thwarted expectations would be difficult, but not impossible, to compute in dollar terms.

Although parents are not allowed to contract away a child's right to support, a problem would not normally arise with this type of support agreement if neither spouse challenged it, since a child must usually depend on an adult to assert his or her rights. Thus if, for example, a couple agree to have a child with the understanding that one spouse would assume full financial responsibility for that child, no problem should arise unless the spouse with financial responsibility refuses to accept that responsibility. In that instance, despite a contract to the contrary, the other spouse could be required by the court to pay child support. In this event the injured spouse would then have a cause of action against the breaching spouse, and the latter could be required to reimburse the injured party for whatever amount he or she was required to pay for the child's support. Thus if a couple wants to be as certain as possible that one partner is relieved of any obligation for the child, they probably should include a provision that in the event that partner is required to pay support, he or she will be entitled to reimbursement from the other partner.

2. *Legal Enforcement of Contracts in Lieu of Marriage*

As we have seen, persons who enter into contracts within legal marriage may, in most states, still encounter difficulties if they wish to contract regarding the "essential elements" of the marital relationship or to make provisions for property division and support in the event of divorce. Further, married persons will always be uncertain about how the courts will treat their agreements. For example, Mrs. Buettner⁴⁶⁷ had no assurance that the courts would enforce her marital contract. If she had not had the money to appeal to the Supreme Court of Nevada she would have been left with the trial court's discretionary rewriting of the alimony specified in her contract, not the \$500 per month for five years that the contract called for, but rather the \$166.67 per month for one year that the trial judge awarded.

Even without the traditional legal impediments to contracts between husbands and wives and the present uncertainty about enforcement, those who want an egalitarian relationship may not wish to enter a legal

467. See *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973).

marriage with its accompanying notions of the husband as head of the family and the wife as subordinate. No matter how "liberated" a person may feel, he or she is bound to have absorbed some of the traditional legal conceptions of marital roles. When a person is legally married, these conceptions are reinforced, and therefore more difficult to counteract.⁴⁶⁸ Thus legal marriage may be inadvisable for those who want egalitarian relationships. However, it would be wise for people who want to live together on a long-term basis to have some kind of legally enforceable understanding regarding the division of property, future support obligations, and care and raising of children in the event of dissolution. There is a need for a new form to meet the needs of those who do not want a traditional marriage relationship, yet want some legal assurance that their expectations will be met.

The form proposed here—contracts in lieu of marriage—has the advantage of being adaptable to almost any situation, since the parties set the terms of the contract according to their own needs and desires. Thus a great amount of flexibility and adaptability in the type and terms of the contract are possible. Contracts in lieu of marriage may be entered into by heterosexual couples and homosexual couples, by two persons and by groups, by young, middle-aged, and older persons, by those wanting limited-purpose and limited-time relationships and by those wanting a lifelong contract, by those who intend to remain childless and by those wishing to have and rear children. These contracts need not be limited by traditional concepts of rigid, sex-determined roles; nor will they be hampered by legal restrictions based on these concepts. Although the idea that each couple might better be left to devise its own contract, rather than just "sign on" for a state designed relationship, raises visions of anarchy for some, Americans already cope with 50 different versions of the marriage contract since each state is left to regulate marriage within its own boundaries.⁴⁶⁹

Several legal obstacles must be overcome in gaining court enforcement of contracts in lieu of marriage. Courts have traditionally held that contracts in derogation of marriage are void as against public policy.⁴⁷⁰ But this rule has usually been applied in instances where persons contract to forbear from marriage on a permanent basis,⁴⁷¹ and should not present an obstacle to those who wish to contract in lieu of

468. Cf. Cronan, *Marriage*, in *RADICAL FEMINISM* 213 (A. Koedt, E. Levine, & A. Rapone eds. 1973).

469. By Fall 1974 The Uniform Marriage and Divorce Act of the National Conference of Commissioners on Uniform State Laws had been adopted only by Colorado in full.

470. 6A A. CORBIN, *CONTRACTS* § 1474, at 610 (1962); 17 C.J.S. *Contracts* §§ 233 *et seq.* (1963).

471. 6A A. CORBIN, *CONTRACTS* § 1474, at 610-12 (1962).

marriage unless they include a clause that one or all parties are not to marry. This type of clause would be unwise at present, since it could cause a court to hold the entire agreement void.

A more serious obstacle is the rule that contracts involving non-marital sex are illegal.⁴⁷² Some contracts in lieu of marriage will involve nonsexual relationships, in which case this rule should not prove a problem unless a court assumes that the relationship is sexual. Others may seek to avoid the problem by omitting any reference to sexual relations, but a court may see through the omission and still hold the contract unenforceable if it believes that illicit sex constitutes part or all of the consideration. Many persons using contracts in lieu of marriage will want their contracts to include clauses fixing responsibility for birth control, the nature and frequency of sexual relations, or the number of children to be born of the relationship. These clauses will indicate that sex is meant to be a part of the relationship, and if sexual relations are found to be part or all of the consideration, a court might hold the contract unenforceable.⁴⁷³ However, a bargain is not illegal simply because the parties are involved in a sexual relationship—for the contract to be void, the sexual relationship must furnish consideration for or be a condition of the bargain.⁴⁷⁴ Thus, it is quite possible that a court may find the existence of a sexual relationship irrelevant to a contract in lieu of marriage.⁴⁷⁵ Further, the court might decide to sever the illegal clause, leaving the remainder of the contract enforceable. The crucial question on which the enforceability of a contract in lieu

472. This principle is clearly set forth by Corbin as follows:

A promise is not enforceable if part or all of the consideration for it is illicit sexual intercourse or the continuance of such an illicit relationship. This is true even though the relationship is not adulterous or otherwise criminal; the bargain is *contra bonos mores* in any case and the parties are regarded as *in pari delicto*.

6A A. CORBIN, CONTRACTS § 1476, at 621-22 (1962) (footnotes omitted). See also CAL. CIV. CODE §1667 (West 1973). In California it is to be noted that fornication is not illegal. See *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1972). Of course this does not mean that if illicit sex were found to constitute all or part of the consideration in a bargain that the bargain would be enforceable.

473. An old California case, *Heaps v. Toy*, 54 Cal. App. 2d 178, 128 P.2d 813 (1st Dist. 1942), involved an agreement between a divorced woman and a married man, whereby the woman would forego marrying again and would accept employment as a companion to the man and would maintain a home for him in return for his support. Seventeen years later the woman sued for damages for breach of the agreement. The court held the agreement to be void because it was in restraint of marriage and was founded on a consideration contrary to good morals.

474. "A bargain between two persons is not made illegal by the mere fact of an illicit relationship between them, so long as that relationship constitutes no part of the consideration bargained for and no promise in the bargain is conditional upon it." 6A A. CORBIN, CONTRACTS § 1476, at 622 (1962) (footnotes omitted).

475. See *Tyranski v. Piggins*, 44 Mich. App. 570, 205 N.W.2d 595 (1973), in which the plaintiff claimed she was entitled to a house held in the name of the defendant's

of marriage may rest is thus the factual one of whether the contract is tainted by the existence of the "illicit" relationship. Recent years have seen a tremendous change in community moral standards, and there is considerable question as to whether sex between unmarried persons is considered immoral today.⁴⁷⁶ Since doctrine based on public policy is subject to change as public mores change,⁴⁷⁷ the courts should now reexamine the illegal contract doctrine as applied to consensual sexual relations. Further, in the light of the recent indications of a constitutional right to privacy,⁴⁷⁸ there is a serious question as to whether the state has any legitimate interest interfering with contracts regarding non-commercial sexual relations between consenting adults.⁴⁷⁹

Inevitably, any discussion of contracts in lieu of marriage must deal with the issues of unfair or unconscionable contracts. It may be argued that the likelihood of such contracts is much greater in personal relations than in the business world, where the parties are dealing at "arm's length." When emotions are involved, one party may use the emotional relationship to take unfair advantage of the other. Moreover, women entering a relationship, as they almost inevitably do in this culture, with less real or felt power, and with more emotionality and trust than men, are more likely to be victimized. Because many women

decendent, on the basis of an oral agreement. The defendant claimed the agreement was void as an illegal contract because the parties were cohabiting without marriage. The court held that the parties' living in a meretricious relationship did not render all agreements between them illegal—agreements with respect to money or property would be enforced if independent of the illicit relationship.

476. "More than half the [college] freshmen said that they have had sexual intercourse, and by the time they are seniors that figure rises to about 75 per cent." Katz, *Sex and the Single Coed*, S.F. Chronicle, Feb. 14, 1974, at 19, col. 1.

477. It must ever be borne in mind that times change, and that with them public policy must likewise change. A decision or a rule that is believed to be in accord with the general welfare today may not accord with it tomorrow. The mores of a people, those generally prevailing practices and opinions as to what promotes welfare and survival, also slowly change with time and circumstance. Especially this is true in times of stress and discomfort, like those of the two World Wars and the intervening severe business depression. Doubts arise as to the soundness of old practices and opinions. Experiment is demanded by the miserable and the discontented, always to the grief and dislike of those who are neither; and "wise" men [*sic*] arise to tell the multitude that old truth has become falsehood and to point out the shining new road to fortune.

6A A. CORBIN, *CONTRACTS* § 1375, at 12 (1962).

478. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

479. Particularly where the relationships are not of a commercial nature public policy considerations of the courts should respond to the change in public consciousness and allow enforceable contracts involving sexual relationships. However, those contemplating entering into contracts in lieu of marriage should be aware that problems may arise, particularly in regard to homosexual relations, which are still prohibited by the criminal codes of most states.

have not received adequate education regarding property values and legal processes and have been encouraged to depend on men to take care of these matters for them, the danger exists that some women may simply sign whatever contract the man presents to them without any negotiation at all. Or, if negotiations do take place, such women may be bullied into agreeing to a contract favorable to the man's interests.⁴⁸⁰

While these concerns are legitimate and important, courts presently have the means to handle such problems and have become accustomed to dealing with problems of unconscionability in commercial contract law.⁴⁸¹ The principles developed therein can be applied to contracts in lieu of marriage. Furthermore, courts have developed special standards for dealing with contracts between persons in confidential relationship and these standards could be applied to contracts in lieu of marriage as well.

One practical objection to the use of contracts in lieu of marriage is that they would increase the workload of courts already greatly overburdened. On the contrary, since dissolution can be anticipated and provided for by the parties themselves, and since arbitration clauses could be included in these contracts, there is likely to be a reduction in the number of contested cases and thus the workload of the courts should be lightened. Further, those disputes involving contracts in lieu of marriage that do reach the courts will—like marriages—reach the courts only when the relationship is in the process of dissolution. If so, these contracts will result in no more work for the courts than if the partners had been legally married. In addition, contracts in lieu of marriage may provide a unique opportunity for the courts to cooperate with social workers, psychiatrists, and marriage counselors, and to experiment with paralegal service. These services could be made available at less cost and in a more informal setting—either outside the courts or along the lines of the family court model⁴⁸²—and might relieve some of the present burdens and stress on domestic relations courts.

CONCLUSION

The legal structure of marriage today is similar to the legal structure of divorce 10 years ago. The discrepancy between legal reality

480. Although there is a possibility of form contracts that preserve the interests of the more powerful party (typically the man) the attention given to marriage contracts by members of the Women's Liberation Movement suggest the possibility of "liberated" form contracts as well.

481. Moreover, it is difficult to imagine people entering marriage today writing a contract that would be made more disadvantageous to women than the traditional marriage contract.

482. Cf. Kay, *supra* note 464.

and social reality is great and the law on the books is widely divergent from the law in action. The law on the books is archaic: it is the 200-year-old vestige of an extinct social structure. The law in action is a patchwork attempt to stretch this old law to deal with modern realities.

An underlying premise behind the sociological challenges raised in this Article has been the belief that wise social policy must have some basis in social reality. A law that is too divergent from social reality undermines the rule of law. A law that is arbitrary, outmoded, and anachronistic makes a mockery of the rule of law. Although law should always embody societal ideals, the norms and ideals of a society change, and when they do, the law must change with them. Today there is a widespread awareness of the outmoded nature of the traditional marriage contract, and the need for change is evident.⁴⁸³ Clearly the time has come for a major reformulation of the legal structure of marriage and its role in modern society.⁴⁸⁴

483. The model of individual contracts has been suggested because it seems to combine best the diverse needs of couples in a modern society: the need for both structure and flexibility, stability and change, security and freedom. In the past, the law has favored structure, stability, and security to the exclusion of flexibility, change, and individual freedom. It is hoped that in the future the law will foster a more balanced and judicious combination of both sets of individual and societal needs.

484. Reformulating the legal structure of marriage may provide a unique opportunity for lawyers and social scientists to work together and to share their professional expertise. The societal task is a challenging one, and one that is particularly conducive to interdisciplinary cooperation.

Appendix

Excerpts from Personal Contracts

Five excerpts from the personal contracts described in Section IV are presented below. These examples are meant to illustrate specific issues and are not presented as complete contracts.

1. *Traditional Marriage—Partnership of Doctor and Housewife*

David, a medical student, and Nancy, an aspiring dancer, agree to a contract under which Nancy will give up her potential career as a dancer and support David through medical school in return for a comfortable life as a doctor's wife and a guarantee of financial compensation if the relationship dissolves.

a. *Aims and expectations*

Both parties want to state their goals and future expectations at the time this contract is signed. Nancy is entering into the relationship with the expectation that she will enjoy the usual benefits of being a doctor's wife. In return for the assurance of a future in which she will be supported in comfort, she is willing to give up her dancing career and to support David until he completes his internship. While she supports David she realizes that she will have to work hard and make do with very little money. Further, she realizes that David's studies will be very time-consuming, and that he will be less than an ideal companion. Since she will be making a very significant contribution toward David's career, she expects to have a future interest in it. Once David becomes a doctor, she will enjoy the social benefits of being a doctor's wife. Nancy expects to have a beautiful home and summer home, expensive clothing, vacations in Europe, child care and private schools for her children, and a housekeeper.

David understands that Nancy's efforts will make it possible for him to obtain his medical education in a fairly comfortable fashion. Her support will ensure that he will not have to drop out of school to earn money and he will not have to spend any time on part-time jobs or housework. He will be able to devote all his time to his studies. In return, he wants to guarantee Nancy a share in his future career.

Both parties feel that they are making a life-time contract and are building a community from which they will both benefit. Both parties feel that they are equal partners in this community and that income, property, and other gains that may accrue to the income-earning partner are the result of the joint efforts of both parties—and therefore belong equally to both parties.

b. *Property*

Any property of the parties shall be jointly owned as community prop-

erty. Nancy will manage and control the community property and will take care of all other household business matters.

c. Support

Nancy will work as a secretary in order to support David until he has finished medical school and an internship. David will support the family from then on; he will take a (paying) residency, or begin to practice medicine. Nancy will not work outside the home after David's career has commenced.

d. Domicile

The location of the family domicile will be decided by David; the main consideration in making such a decision will be the best interests of David's career.

e. Name

Both parties will use David's surname.

f. Housekeeping responsibilities

Nancy will be responsible for maintaining the household with the assistance of a full-time housekeeper.

g. Birth control

Since the most efficient contraceptives currently available are female contraceptives, Nancy will assume the responsibility for birth control for the present. However, if a male oral contraceptive or other safe and effective male contraceptive is perfected, David agrees to use it.

h. Other responsibilities

Nancy agrees to further David's career by entertaining, serving on medical auxiliary committees, and maintaining good social relations with other doctors' wives. She will also participate actively in church and country club activities in order to maintain good contacts with potential patients and physicians. David agrees to accompany Nancy to the ballet at least once a month. He also agrees to schedule at least two two-week vacations with her each year, at least one of them in Europe.

i. Children

Children will be postponed until David's education is completed. If Nancy should become pregnant prior to that time, she will have an abortion. Nancy will have full responsibility for the care of the children; financial responsibility will be assumed by David.

j. Termination

This partnership may be dissolved by either party, at will, upon six months notice to the other party.

If this partnership is terminated by either party prior to the completion of David's education, Nancy's obligation to support him will cease. Moreover, once David's career is begun, he will have the obligation of supporting Nancy at the rate of \$12,000 a year (1974 rate to be adjusted for inflation and cost of living) for as many years as she supported him. If necessary, David will secure a loan to repay Nancy for her support. If Nancy prefers a lump sum settlement equal to the value of this support, David will arrange a loan to provide it. Both parties agree to treat Nancy's original support of David as a loan of the value specified above. David's obligation to repay this loan has the standing of any other legal debt.

If the partnership is terminated after David's career has begun, Nancy will be entitled to one-fourth of his net income for as many years as the partnership lasted. David will purchase insurance or a bond to guarantee this payment. It is agreed that this payment is not alimony, and that it shall be continued unmodified regardless of her earning capacity or remarriage. The parties consider this Nancy's reimbursement for helping David's career. It is agreed that her efforts will have helped to make his success possible and he will therefore owe her this compensation.

David also agrees to pay Nancy the fixed sum of \$15,000 if their marriage terminates within 15 years, as liquidated damages for the pain and suffering she will experience from the change in her expectations and life plans.

David also agrees to pay for Nancy's medical expenses or to provide her with adequate insurance at the rate of one year of coverage for every year of marriage. It is explicitly agreed that psychiatric and dental bills be included in the above.

Community property will be divided equally upon termination. If there are children, Nancy will have custody of the children. David will have full responsibility for their support, as well as the responsibility for compensating Nancy for her services in caring for them (at the then current rate for private nurses). Suitable visiting arrangements will be made.

k. Death

Both parties agree to make wills stipulating the other partner the sole legatee. After termination of this agreement this obligation will not continue; however, David is obliged to make sure any continuing support obligations toward Nancy and the children are reflected in his will.

2. Young, Dual-Career, Professional Couple

Susan, an aspiring lawyer, and Peter, an aspiring social worker, have devised the following contract to maximize both career opportunities and their personal relationship.

a. Educational and living expenses

Susan and Peter decide that they will take turns going to school, so that the nonstudent partner can support the other until he or she receives a de-

gree. Because Susan will earn more money as an attorney, they decide that they will maximize their joint income if Susan goes to school first. They therefore agree that Peter will be solely responsible for Susan's educational expenses and support for three full years. Susan will assume these same responsibilities for the following two years. If their partnership should dissolve at any time during these first five years, their contract stipulates that each shall have the following financial obligations to the other: (1) If dissolution occurs during the first three years, Peter will pay Susan's remaining tuition (which may be up to three full years' tuition in graduate school) and pay her \$4,200 a year for living expenses. (2) Thereafter, Susan will pay Peter's remaining tuition (up to two full years of tuition in a school of social work) and pay him \$4,200 a year in living expenses. All living expenses will be paid at the rate of \$350 a month. This amount will be tied to the cost-of-living index to allow for automatic increases.

b. Domicile

Susan and Peter agree to maintain a joint domicile for the first five years of their relationship, location to be determined by the student partner to maximize educational opportunity.

After the first five years, Susan and Peter will make decisions regarding domicile jointly, with no presumption that the career of either is of greater importance in making the decision. However, if they cannot agree on where to live, the decision will be Susan's—for a period of three years. Peter will then have the right to choose the location for the following three years. They will continue to rotate the domicile decision on a three-year basis. As both parties realize that their career opportunities may not coincide with this pre-arranged schedule, they may decide to exchange the right of decision for any given period or make another equitable agreement which would then be incorporated into this contract. Further, both parties will always retain the option of establishing a temporary separate residence, at their own expense, if this is necessary for their careers.

c. Property

During the first five years all income and property, excluding gifts and inheritances, shall be considered community property. The income-earning partner shall have sole responsibility for its management and control.

After the first five years an inventory will be taken of all community property. Thereafter each party's earnings, as well as any gifts or bequests or the income from any property held, shall be her or his separate property. Neither party will have any rights in any present or future property of the other. A list will be kept of all household items in order to keep track of their ownership; in the event Susan and Peter decide to make a joint purchase, this will be noted on the list. Any joint purchase of items of value over \$100 will be covered by a separate agreement concerning its ownership. Each party will manage and control her or his separate property, and will maintain a separate bank account.

d. Household expenses

(This part of the agreement shall go into effect five years hence.)

Household expenses will consist of rent, utilities, food, and housekeeping expenses. Susan and Peter will each contribute 50 percent of their gross income to household expenses. Their contributions will be made in monthly installments of equal amounts, and placed in a joint checking account. Responsibility for the joint account and for paying the above expenses will be rotated, with each having this responsibility for a three-month period. Each partner will be responsible for his or her own cleaning expenses, and for food and entertainment outside of the household. Each will maintain a separate car and a separate phone and will take care of these expenses separately. If money in the joint account is not exhausted by household expenses, it may be used for joint leisure activities.

Both parties recognize that Susan's income is likely to be higher than Peter's and that 50 percent of her income will allow her more money for separate expenses. The parties therefore agree to review this arrangement six months after it goes into effect. If it seems that the arrangement places an unfair burden on Peter, they will change the second line above to read: Each party's contribution to household expenses shall be as follows: Susan shall contribute 55 percent of her gross income; Peter shall contribute 40 percent of his gross income.

e. Housekeeping responsibilities

Housework will be shared equally. All necessary tasks will be divided into two categories. On even-numbered months Susan will be responsible for category 1 and Peter for category 2; and vice versa on odd-numbered months. Each party will do her or his own cooking and clean up afterwards for breakfast and lunch, as well as keeping her or his own study clean. Dinner cooking and clean up will be considered part of the housework to be rotated as specified above. In the event that one party neglects to perform any task, the other party can perform it and charge the nonperforming partner \$15 per hour for his or her labor, or agree to be repaid in kind.

f. Sexual relations

Sexual relations are subject to the consent of both parties. Responsibility for birth control will be shared equally. Susan will have this responsibility for the first six months of the year, Peter for the second six months.

g. Surname

Both parties will retain their own surnames.

h. Children

While the parties have decided to have two children at some time in the future, birth control will be practiced until a decision to have a child has been reached. Since the parties believe that a woman should have control

over her own body, the decision of whether or not to terminate an accidental pregnancy before then shall be Susan's alone. If Susan decides to have an abortion, the party who had responsibility for birth control the month that conception occurred will bear the cost of the abortion. This will include medical expenses not covered by insurance, and any other expenses or loss of pay incurred by Susan. However, if Susan decides to have the child and Peter does not agree, Susan will bear full financial and social responsibility for the child. In that event, Susan also agrees to compensate Peter should he be required to support the child. If the parties agree to have a child and Susan changes her mind after conception has occurred, she will pay for the abortion. If Peter changes his mind after conception has occurred and Susan agrees to an abortion, he will pay for it. If she does not agree, Peter will share the social and financial responsibility for the child, just as if he had not changed his mind.

When the parties decide to have a child, the following provisions will apply: Susan and Peter will assume equal financial responsibility for the child. This will include the medical expenses connected with the birth of the child as well as any other expenses incurred in preparation for the child. If it is necessary for Susan to take time off from work in connection with her pregnancy or with the birth of the child, Peter will pay her one-half of his salary to compensate for the loss. If either party has to take time off from work to care for the child, the other party will repay that party with one-half of his or her salary. All child-care, medical, and educational expenses will be shared equally.

Since Peter expects to become a psychiatric social worker specializing in preschool children, he will have the primary child-care responsibility. He will take a paternity leave after the birth in order to care for the child full-time, until day-care arrangements can be made. Susan will compensate him at the rate of one-half of her salary. Responsibility for caring for the child on evenings and weekends will be divided equally.

Any children will take the hyphenated surname of both parties.

i. Dissolution

If there are children, both parties agree to submit to at least one conciliation session prior to termination. In addition, if a decision to dissolve the partnership is made, both parties agree to submit to binding arbitration if they are unable to reach a mutual decision regarding the issues of child custody, child support, and property division. A list of mutually agreeable arbitrators is attached to this agreement. While both agree that custody should be determined according to the best interests of the child, a presumption exists in favor of Peter, since he will have had superior training in the rearing of children. Each party agrees to assume half of the financial burden of caring for the child.

If there are no children, this household agreement can be terminated by either party for any reason upon giving the other party 60 days' notice in writing. Upon separation, each party will take his or her separate property

and any jointly owned property will be divided equally. Neither party will have any financial or other responsibility toward the other after separation and division of property.

3. *Middle-Aged, Working-Class Couple*

Betty and Joe, both recently divorced, devise the following contract to equalize their contributions and risks.

a. *Financial agreement*

Betty, a hair stylist, earns \$6,000 a year. Joe, a municipal bus driver, earns \$10,000 a year.

Each partner will retain whatever property he or she currently holds as well as all future gifts or bequests as separate property. All other property and income will be treated as community property. However, each partner will retain \$150 per month as his or her separate property. Each partner is expected to pay for clothing, gifts, and other personal expenses from this separate property. All income over the \$150 per month, from whatever source, including income earned from separate property, will be considered community property and will be put into a joint checking account. All checks written from this account will require both signatures. Each month \$150 will be transferred from the joint account to Joe's former wife for the support of his two children.

Each month \$100 will be transferred from the joint account to a reserve fund to be used for support of their children and the children's custodian in the event of separation, or the death of one party. The partners agree to appoint their friend Robert Jones trustee of the reserve fund. His duties shall be limited to ensuring (1) that the fund is kept in a high interest account at a savings bank, and (2) that neither party draws on the account until the other party dies or a formal separation agreement is written.

All other expenses (including food, laundry, car and furniture payments, entertainment, leisure activities, travel, and mortgage payments on the house they plan to purchase) will be paid out of the joint checking account. Any surplus funds in the joint account at the end of each month will be transferred to the reserve fund.

Any advances made to either partner from the separate property of the other or from the community accounts will be considered loans to be repaid with 5 percent yearly interest.

Each partner agrees to support and care for the other in the event of illness, disability, or unemployment while this agreement is in effect. Since Joe's job provides a more comprehensive medical insurance program than does Betty's, he will arrange medical coverage for both partners, Betty's daughter, and for any future children.

b. *Housekeeping responsibilities*

Betty will be in charge of cooking and grocery shopping; Joe will be in charge of laundry, cleaning the apartment, and doing the dishes. They will

take turns mowing the lawn and staying at home for repairmen and deliveries.

c. Children

Both agree that Joe's children may live with them (or vacation with them) for up to two months and 10 weekends a year, and that the expenses thus incurred will be community expenses. Further, both agree to be jointly responsible for the support of Betty's daughter so long as this agreement is in effect. Her support will be provided by community funds. It is agreed that community funds will be used to pay for her education if necessary.

If they decide to have another child, all expenses related to the birth and care of the child will be paid out of the community fund, including medical expenses in connection with Betty's pregnancy. If the amount in the fund is not sufficient to cover these expenses, the parties will assess themselves further in order to increase the amount in the fund. If Betty must take time off from her work in connection with the pregnancy or birth, she will be compensated from the fund in such a way that she will continue to receive at least her \$150 per month separate property, whether or not she has actually earned that much in salary. If one party has to lose time from work to care for either child, the same principle will apply. As soon as feasible, the new child will be placed in a day-care facility during the partners' working hours. They will rotate taking the child to the day-care center (and school) on a yearly basis.

All child-care related tasks will be divided equally. During the first year of this contract Betty will be responsible for buying the children's clothing and taking them to the doctor. Joe will be responsible for trips to the dentist and for attending teacher conferences and open school week. These jobs will be rotated on a yearly basis. The parties will take turns staying home from work to care for the children should this become necessary. Responsibility for caring for the children on weekends and evenings will be divided equally. Disciplining the children will be rotated on a monthly basis.

d. Termination

Upon separation, each party will take her or his separate property. If there are no children, all community property will be divided equally. Unless this section is renegotiated, Betty will have custody of any children. If there are children, Betty, as the custodial parent, will have the option of keeping the house (and assuming the remaining mortgage payments alone, with the help of the money from the reserve fund), and will be entitled to all property purchased jointly, including furniture, car, household items, children's clothing, and toys. In addition, she will receive the full amount of the community property to be used for household and child support.

The noncustodial parent, presumably Joe, will continue to have an obligation to contribute toward the support of the children in the amount of 1

percent of annual net income or \$100 per month per child, whichever is greater, until the children reach age 18 or complete college, whichever is later. If extraordinary expenses occur with regard to the children (for example, special schooling or medical needs), both parties agree to contribute toward this in amounts proportional to their income.

Neither party will have any responsibility to support the other after separation; however, the person not having custody will have the obligation of compensating the person having custody at the rate of 5 percent of his or her annual net income per month, or \$50 per month, whichever is greater. This is not support or alimony, but an attempt to provide some compensation for the time spent in child-care tasks (in excess of the time that would have to be spent if both parties were sharing child-care responsibilities equally). This responsibility will continue as long as the need for child care continues. The person not having custody will have reasonable visiting rights, as well as the right and obligation to take the children for 10 weekends and a three-week vacation every year, if the children wish to go.

e. Special provisions for division of reserve fund upon emancipation of children

If all children are over 18, and the partnership has survived, the reserve fund will be used as follows: Enough money to cover either child's remaining tuition to finish school may be set aside in an educational trust for that child. Further, when Joe reaches 60, monthly contributions to the fund will cease and half of the reserve fund may be withdrawn and split equally between the parties for each to use as separate property. When Betty reaches 60, half of the then remaining funds may be withdrawn and split equally between the parties as above. Similar withdrawals and divisions may be made when Joe reaches 65, and when Betty reaches 65. When Joe reaches 70 all of the remaining funds may be withdrawn and divided.

4. Alternative Lifestyle, Homosexual Couple

Chris, a sailboat enthusiast, and Robin, a painter, interested in an alternative lifestyle, agree to a contract which guarantees each of them six months of financial support to enable them to pursue their special interests.

a. Property

Both partners will retain separately whatever property they presently hold. However, any property or income from property (including salary) which either acquires during the term of this agreement will become community property. All community property will be jointly managed and controlled with the exception of Chris' sailboat and Robin's paintings, which will be managed and controlled by Chris and Robin respectively. However, community funds will be used for supplies for both these activities. Any income from the sale of Robin's paintings will be jointly managed and controlled. All funds will be kept in joint savings and checking accounts.

b. Support

In the event that Robin becomes financially successful as a painter and earns enough to support them both throughout the year at the equivalent of double their current income of \$6,000 a year, then Robin agrees to assume the responsibility for all living expenses. In the meantime, however, they agree to take turns working at regular jobs in order to earn enough money to live. Robin will work from March to September and Chris will work from September to March. All household expenses and the personal and medical expenses of both parties will be assumed by the party who is employed at the time.

c. Housekeeping responsibilities

Both parties will be responsible for their own clean up and laundry. Cooking and other household chores will be assumed by the partner who is not employed at the time.

d. Termination

Prior to termination of this agreement, both parties agree to participate in three conciliation sessions with a mutually acceptable third party. If after conclusion of the three sessions, one or both parties desires termination, it will then take place after 60 days notice. Upon separation both parties will take their separate property, and all joint property will be divided equally. No financial or other responsibilities will continue between the parties after separation and division of property.

e. Death

Both parties agree to write wills leaving all of their property to the other in the event that death should occur while this agreement is in effect. After termination of this agreement and division of the jointly held property, neither party will have any obligation to provide for the other in a will.

5. Woman Paid for Household and Child-Care Services

Tom, a 50-year-old widower who is a successful plumbing contractor, and Linda, a divorcee, write a contract which provides for Linda to be compensated for housework and child care.

a. Financial arrangement

Linda will work in the home on a full-time basis, supervising the children and taking care of all domestic chores including cleaning, laundry, cooking, entertainment, and gardening. She will be paid \$150 per week for this work; the salary will be subject to periodic readjustments tied to changes in the cost of living. Linda will be entitled to two days off a week which she can spend either away from the home or in the home, but with no domestic responsibilities.

Tom will make social security payments for Linda, as an employee. He will arrange a private pension plan for her, and will arrange for complete medical and hospital insurance for her and her daughter.

b. Property and support

Each party will retain her or his separate property; the house, furnishings, and car will be provided by Tom and owned by him. Tom will support the family and will have full responsibility for support of his two children; Linda will have no support obligations with regard to them. Tom will have full responsibility for supporting Linda's child during the time this agreement is in effect, but if it terminates this obligation will end.

c. Sexual relations

Sex will be by mutual consent only. Since Tom has had a vasectomy, no birth control will be necessary. Neither party wants additional children.

d. Vacations, entertainment, and education

Tom agrees to take Linda on a three-week vacation in Europe during their first summer together and thereafter they will arrange at least one three-week vacation per year (not necessarily in Europe). Linda will allow Tom to invite his friends and relatives to dinner at least twice a month—she will cook for and entertain his guests. Tom will pay Linda's tuition for two classes per semester at the community college until she earns a degree in accounting.

e. Termination

Either party can terminate this agreement by giving the other party 90 days notice. If Linda terminates the agreement, she will be entitled to severance pay at the rate of one month for every year the agreement has been in effect. If Tom terminates it, Linda will be entitled to severance pay at the rate of three months for every year together. Tom will take out a bond to insure his ability to pay the severance pay.

Neither party will have any additional responsibility toward the other or the other's children after termination. Both will retain their own separate property.

f. Religion

Linda agrees to take the children to church at least twice a month.

g. Death

Each party agrees to assume full responsibility for the other's children in the event the other dies during the time this agreement is in effect. Tom agrees to make ample provision for the support of Linda and the children in his will.