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Marriage: The Status of Contract, An Essay on Weitzman's The Marriage Contract

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BOOK REVIEW

MARRIAGE: THE STATUS OF CONTRACT

THE MARRIAGE CONTRACT. By Lenore J. Weitzman. The Free Press, 1981. Pp. xxiii, 536. Price \$17.95.

MARSHA GARRISON†

"[T]he movement of the progressive societies," Sir Henry Maine's famous maxim decreed, "has hitherto been a movement *from Status to Contract*."¹ In a recent book entitled *The Marriage Contract*,² Professor Lenore Weitzman argues that our society's law of marriage and divorce has not followed Maine's maxim—and that it now should.

Professor Weitzman was trained as a sociologist and did postgraduate work at Yale Law School. As principal investigator for the University of California at Berkeley's Divorce Law Research Project,³ she has for several years directed an ongoing empirical study into the effect of California's changing divorce laws in shaping custody awards and post-divorce financial arrangements.⁴ She has also written extensively on divorce and the family,⁵ and is now nationally recognized as an ex-

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¹ H. MAINE, *ANCIENT LAW* 170 (1st ed. London 1861).

² L. WEITZMAN, *THE MARRIAGE CONTRACT* (1981).

³ The Divorce Law Research Project is directed under the auspices of the University's Center for the Study of Law and Society.

⁴ For reports of this research, see Dixon & Weitzman, *When Husbands File for Divorce*, 44 J. MARRIAGE & FAM. 103 (1982); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981) [hereinafter cited as Weitzman, *The Economics of Divorce*]; Dixon & Weitzman, *Evaluating the Impact of No-Fault Divorce in California*, 29 FAM. REL. 297 (1980); Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141 (1980); Weitzman & Dixon, *The Transformation of Marriage Through No-Fault Divorce: The Case of the United States in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES* 143 (J. Eekelaar & S. Katz eds. 1980); and Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C.D. L. REV. 473 (1979).

⁵ Weitzman, *Changing Families, Changing Laws: the Revolution in Family Law*, 5 FAM. ADVOC. 2 (1982); Weitzman, *Contracts for Intimate Relationships: A Study of Contracts Before, Within, and In Lieu of Legal Marriage*, 1 ALTERNATE LIFESTYLES 303 (1978); Weitzman, *Divorce and Marital Partnership: The Problem of Legal Recognition of the Wife's Contribution in GOVERNMENT IMPACT ON FAMILY LIFE* (B.A. Chadwick ed. 1977); Weitzman, *To Love, Honor, and Obey? Traditional Legal Marriage and Alternative Family Forms*, 24 FAM. COORDINATOR 531 (1975); Weitzman, *The Legal Regulation of Marriage: Tradition and Change—A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169 (1974)

pert on the consequences of divorce in modern American society.

In *The Marriage Contract* Weitzman does not present new empirical data on marriage or divorce; instead she argues that, as a matter of public policy, the "state-dictated marriage contract"⁶ imposed by law when individuals assume the status of husband and wife should be replaced by individually negotiated contracts within and in lieu of traditional marriage. The contracts for which Weitzman seeks recognition, it is important to note, are not standard antenuptial contracts concerning post-marriage inheritance and property rights; rather, they are extremely detailed agreements concerning the couple's daily life together.⁷ Weitzman is not the first to argue for legal recognition of such "intimate contracts";⁸ the idea was initially popularized by feminist writers at least ten years ago and has received continuing, if sporadic, treatment in both the legal literature and the popular press.⁹ Weitzman has been an influential contract advocate for some time, however, and *The Marriage Contract* itself grew out of a widely cited 1974 law review article in which she first argued for legal recognition of contracts between cohabiting couples.¹⁰ In the years since that article appeared, Weitzman has obviously rethought and refined her arguments, and has expanded them to take account of recent legal developments that pertain to the contract thesis. Perhaps as a result of this lengthy incubation period, *The Marriage Contract* provides the most thorough and care-

[hereinafter cited as Weitzman, *Marriage Regulation*]; and L. Weitzman, Assumptions About the Nature of Women in Family Law (available from Yale Law School, 1971).

⁶ L. WEITZMAN, *supra* note 2, at xvii.

⁷ See *infra* notes 13, 75-76 and accompanying text. For a list of possible contract topics and representative examples of intimate contracts, see L. WEITZMAN, *supra* note 2, at 255-333.

⁸ The term "intimate contract" is Weitzman's. See L. WEITZMAN, *supra* note 2, at xxii. Herein, I have used that term, "marriage contract," and "contractual marriage" interchangeably.

⁹ For examples of articles aimed at a general audience, see Edmiston, *How to Write Your Own Marriage Contract*, MS., Spring, 1972, at 66; Sheresky & Mannes, *A Radical Guide to Wedlock*, 55 SAT. REV., July 29, 1972, at 33; *To Love, Honor and . . . Share: A Marriage Contract for the Seventies*, MS., June, 1973, at 62; *What to Include When Drawing Up a Marriage Contract*, San Francisco Chron., Feb. 26, 1979, at 24, col. 1.

For examples of the legal literature, see Clark, *Antenuptial Contracts*, 50 U. COLO. L. REV. 204 (1982); Fleischmann, *Marriage by Contract: Defining the Terms of the Relationship*, 8 FAM. L.Q. 27 (1974); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Neely, *Marriage Contracts, for Better or for Worse*, JURIS DR., Sept. 1977, at 38; Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Weitzman, *Marriage Regulation*, *supra* note 5; Comment, *Marriage as Contract: Toward a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROBS. 606 (1973); Note, *Marital Contracts Which May Be Put Asunder*, 13 J. FAM. L. 23 (1973-74); Note, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161 (1974).

¹⁰ Weitzman, *Marriage Regulation*, *supra* note 5. Portions of this article are excerpted in several widely used family law casebooks. See, e.g., J. AREEN, CASES AND MATERIALS ON FAMILY LAW 119-28 (1978); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 730-45 (2d ed. 1976); W. WADLINGTON & M. PAULSEN, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 70-75 (3d ed. 1978).

fully reasoned defense of contractual marriage that has yet appeared.

In advocating contractual marriage, Weitzman's focus is on the personal advantages of an intimate contract to the individuals who negotiate such an agreement.¹¹ Only peripherally does she consider the viability of contractual marriage as a legal innovation.

The contract model that Weitzman proposes, however, would fundamentally change the legal regulation of marriage. Were her proposal to be adopted, marriage as a status would cease to have legal significance. A couple, married or unmarried, could negotiate the terms and duration of their relationship. Additionally, the law of marriage and divorce would be at least partly subsumed by the law of contracts; family and divorce courts would focus on interpreting and enforcing private agreements, rather than on deciding cases in accordance with substantive family law principles. Under Weitzman's proposal, the courts would also become involved in a wider variety of family disputes. Although the judiciary has traditionally avoided spousal disputes unless the couple is separated and the disagreement concerns maintenance, property or child custody,¹² the intimate contracts which Weitzman advocates would be enforceable throughout the relationship and would cover virtually every facet of married life.¹³

¹¹ Weitzman indicates that an intimate contract offers a couple several social and psychological advantages:

Contracts facilitate open and honest communication, and help prospective partners to clarify their expectations. Once this is done, the contract creates a normative guide for future behavior. In addition, a contract can help a couple to identify and resolve potential conflicts in advance, and can provide a useful system for dealing with other conflicts that arise in an ongoing marriage. Finally, contracts increase predictability and security.

L. WEITZMAN, *supra* note 2, at 228. Weitzman also suggests that a contract offers a couple several legal advantages. *Id.* at 227. Each of these supposed legal advantages is dependent, however, on the contract's enforceability.

¹² See, e.g., *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So. 2d 885 (1958). In *Kilgrow*, a father sought to have his wife (the mother of his child) enjoined from interfering with his placing his daughter in a religious school. The Alabama Supreme Court held that although "if this were a proceeding to determine the child's custody the equity court would have jurisdiction," here it did not since the parents continued to live together. *Id.* at 478, 107 So. 2d at 888. "It would be anomalous to hold that a court of equity may sit in constant supervision over a household . . ." *Id.* at 479, 107 So. 2d at 889.

The court also held that an antenuptial agreement between the parents that provided for the child to be "baptized and educated" in the "religion" of the father, *id.* at 478, 107 So. 2d at 888 (quoting the agreement), had "no bearing on the question of the trial court's jurisdiction . . ." *Id.* at 480, 107 So. 2d at 889.

See also *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953) (in order to maintain an action for spousal support, husband and wife must be separated).

¹³ See L. WEITZMAN, *supra* note 2, at 284-85. Examples of provisions in Weitzman's sample contracts include:

Nancy promises to give a dinner party or to otherwise aid David's professional advancement by entertaining at least twice a week.
David agrees to accompany Nancy to the ballet at least once a month.
David also agrees to schedule at least two two-week vacations with her each year, at

The Marriage Contract thus raises far-reaching questions about the role that the state, through the legal system, ought to play in regulating intimate relationships. Although Weitzman does not focus on these questions,¹⁴ she does present an argument that governmental interests support the legal recognition and enforcement of intimate contracts.¹⁵ The fate of the intimate contract as a legal innovation ultimately depends, of course, on the persuasiveness of her argument: if the state has no legitimate interests that support recognition and enforcement of marriage contracts, we would not expect—or consider it appropriate—for the legal system to adopt this approach to the regulation of intimate relationships. Because of its importance, Weitzman's argument for the legal recognition and enforcement of marriage contracts will be the focus of the essay.

I. THE CASE FOR CONTRACT

Weitzman's case for contract rests on two foundations. She claims that the traditional marriage contract imposed by law no longer meets the needs or reflects the personal values of most modern American couples, and that the alternative of contractual marriage will enable

least one of them in Europe.

Id. at 298.

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

Each party will do her or his own cooking and cleanup afterwards for breakfast and lunch, as well as keeping her or his own study clean.

. . . .
In the event that one party neglects to perform any task, the other party may perform it and charge the nonperforming partner \$25 per hour

Id. at 304.

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.

Id.

We . . . commit ourselves to putting time and creative energy into realizing our sexual potential.

. . . .
We will tell each other when we have sex with other people,

Id. at 320 (contract in lieu of marriage).

Linda will be entitled to two days off each week [from full-time employment as a homemaker].

Id. at 329 (contract in lieu of marriage).

¹⁴ *The Marriage Contract* is apparently aimed at an audience of couples who might be considering a contract. (It is subtitled *A Guide to Living With Lovers and Spouses*.) With this audience in mind, Weitzman's presentation of her policy argument in favor of contract is given second billing. The argument is not tightly organized and, more importantly, does not take account of other alternatives. For a discussion of these alternatives, see *infra* notes 30-35, 52-57 and accompanying text.

¹⁵ L. WEITZMAN, *supra* note 2, at 246-54.

couples "to order their personal relationships as they wish and to devise a structure appropriate for their individual needs and values,"¹⁶ thus promoting state interests in family stability as well as the security and happiness of the contracting parties.

A. *What's Wrong with Traditional Marriage?*

The traditional marriage contract imposed by law, Weitzman asserts, consists of four propositions:¹⁷ 1) the husband is head of the household; 2) the husband is responsible for support; 3) the wife is responsible for domestic services; and 4) the wife is responsible for child care while the husband is responsible for child support.

While these propositions accurately describe the traditional family, Weitzman easily establishes that, for an increasingly large segment of American couples, they are inaccurate.¹⁸ The new American marriage is considerably more egalitarian than the traditional model and its division of labor is less likely to be defined by sex.¹⁹ The new American marriage is also punctuated by divorce and remarriage.²⁰ Additionally, there are now many couples, both heterosexual and homosexual, who live in marriage-type relationships without benefit of a formal marriage ceremony.²¹ Legal assumptions about marriage and the family, asserts Weitzman, simply have not kept up with rapid changes in behavior, with the result that the traditional marriage contract is now at odds with social reality.

The traditional marriage contract is also objectionable, Weitzman

¹⁶ *Id.* at xxi.

¹⁷ *Id.* at 2. For a detailed discussion of each provision, see *id.* at 5-134.

¹⁸ See *id.* 135-223.

¹⁹ See *id.* at 168-89. In 1979, 51% of American women of working age were in the paid work force, S. LEVITAN & R. BELOUS, *WHAT'S HAPPENING TO THE AMERICAN FAMILY* 88 (1981), as opposed to less than 5% in 1890. L. WEITZMAN, *supra* note 2, at 169. The greatest increase in women's labor force participation during the 1970's was that of married women. *Id.* The movement of women out of the home has apparently influenced both male and female perceptions of appropriate sex roles. In a CBS-New York Times poll cited by Weitzman, for example, respondents were asked which of two types of marriage they believed to be more satisfying: a marriage in which the husband is exclusively the provider and the wife exclusively a homemaker and mother or one in which partners share the task of breadwinner and homemaker. Although 43% of the general population preferred the traditional roles, only 27% of respondents aged 18 to 29 preferred traditional marriage. *Id.* at 175-76.

²⁰ See S. LEVITAN & R. BELOUS, *supra* note 19, at 139-67.

In 1979 there was one divorce for every two marriages. Projections indicate that about 38% of first marriages by women between the ages of 25 to 29 will end in divorce; but three out of every four will remarry, and 45% of those who remarry will go through divorce again.

Id. at 12.

²¹ See L. WEITZMAN, *supra* note 2, at 204-24. "In 1960 an estimated 439,000 households were made up of unmarried couples. By the end of the 1970s the number of unmarried couples had increased by 150% to over 1 million." S. LEVITAN & R. BELOUS, *supra* note 19, at 35.

asserts, because it perpetuates the subjugation of women.²² It promotes, she claims, their identification as dependents, and encourages a false sense of security based on the husband's obligation of support.²³ Concomitantly, it encourages women to forego their own education and training in order to further their husbands' careers.²⁴ The traditional contract, Weitzman urges, also promotes impermissible gender discrimination by assigning rights and privileges on the basis of sexual stereotypes, without regard to their accuracy.²⁵

Weitzman's final objection to traditional marriage is that it denies the diversity that marks current family forms:

The traditional model assumes that all people marry when they are young and that they stay married to the same person for the rest of their lives. Not only does this model ignore the social reality of marriage, divorce, cohabitation, and remarriage throughout the life cycle, but it is based on the assumption that the state can decide what form marriage should have regardless of its citizens' needs and desires.²⁶

The lives and values of modern couples are, Weitzman claims, simply too various to be dealt with by a single set of behavioral and legal norms.²⁷

B. *A Strategy for Reform: Why Contract?*

The fact that traditional marriage law is objectionable does not, of course, mean that contractual marriage is the only, or the best, cure. In order to assess the merits of the contract model we must know how it compares with other possible reforms. Unfortunately, Weitzman leaps from the defects of traditional marriage law to the merits of the contract model without pause for any discussion of alternatives.²⁸ In fact, however, there are at least two other ways by which the deficiencies in traditional family law might be addressed.

²² See L. WEITZMAN, *supra* note 2, at xx-xxi.

²³ See *id.* at 40-49, 53-59.

²⁴ See *id.* at 57-59.

²⁵ See *id.* at xx.

²⁶ See *id.* at xxi.

²⁷ Weitzman also suggests that a single legal norm for all marriages conflicts with American society's tradition of promoting individual values and autonomy. *Id.* at 137.

²⁸ Weitzman's failure to consider alternatives may be due to the fact that *The Marriage Contract* is primarily aimed at couples who are planning how to order their own relationship. See *supra* note 14. These couples could draft a (perhaps unenforceable) contract in an attempt to "opt out" of the state-imposed contract which Weitzman describes, but could not individually initiate any other type of law reform.

1. Updating Outmoded Marriage Law Rules

a. *What a Revised Marriage Law Could Accomplish*

The most obvious method of reforming traditional marriage law is to simply revise those rules which are outmoded in order to bring them into conformity with modern social conditions and values.

This process is, in fact, already well under way. Like the American family, family law is currently in a state of flux. The traditional rules which Weitzman describes are no longer uniformly applied, and courts and legislatures have adopted a wide variety of new standards in an attempt to "keep up with" the changing family. Legal change has not, of course, kept abreast of social change, but in the last ten years its pace has been rapid and many of the most objectionable features of the traditional marriage contract which Weitzman describes are already passé.²⁹

It is not apparent that contract recognition is a better means of curing the objectionable features of traditional marriage law than this ongoing process of rule revision. On the one hand, contract recognition could not, by itself, cure the deficiencies of traditional marriage law. For example, Weitzman cites five legal rules that buttress the stereotype that the husband is head of the family: different age of marriage requirements for the two sexes, a married woman's automatic assumption of her husband's name, a legitimate child's automatic assumption of its father's name, a wife's automatic assumption of her husband's domicile, and differing rights to sue for loss of consortium.³⁰ None of those rules could be effectively changed through marriage contracts.

²⁹ With respect to the husband's duty of support, for example, post-divorce spousal support laws running in favor of wives only were declared invalid in *Orr v. Orr*, 440 U.S. 268 (1979), and the trend is toward equitable division of the marital assets—an approach which emphasizes the partnership aspects of marriage—rather than on alimony, which is awarded to the wife as a dependent. Forty-eight states and the District of Columbia now have provisions for equitable or equal distribution of marital property. [Ref. File] *FAM. L. REP. (BNA) 400:iv-v* (1982). Similarly, the traditional presumption that a wife will obtain child custody is giving way rapidly. In thirty-six states, both parents now have an equal right to custody. Weitzman's California research also suggests that men are quite successful in obtaining custody; in a 1977 sample, 63% of the divorced fathers who asked for custody obtained it; even in those cases in which custody was fully contested, fathers were granted custody in one out of three cases. L. WEITZMAN, *supra* note 2, at 112. Joint custody is also statutorily authorized in at least twenty-seven states, Freed & Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 *FAM. L. REP. (BNA) 4065, 4090* (1982), and in at least eight states there is a statutory presumption in favor of joint custody. [Ref. File] *FAM. L. REP. (BNA) 400: iv-v* (1982). As to the husband's position as head of the household, one noted commentator has described it as a rule "tacitly . . . relegated to the museum of legal antiquities." Rheinstein, *The Transformation of Marriage and the Law*, 68 *NW. U.L. REV.* 463, 466 (1973). See generally Weyrauch, *Metamorphosis of Marriage*, 13 *FAM. L.Q.* 415 (1979) (describing "[e]xtraordinary changes in American family law within the past decade [that] have affected every institution").

³⁰ See L. WEITZMAN, *supra* note 2, at 5-22.

Contracts could not play any role in altering age requirements or the right to sue for loss of consortium as those rules, to be meaningful, must have uniform application. With respect to the others, contracts could provide no more than a partial, fairly cumbersome solution: unless all couples were required to draft agreements on these subjects, a residual legal standard or presumption would still be needed for those without a contract.³¹ On the other hand, any stereotyping inherent in those rules could be eliminated simply by changing them, without recourse to marital contracts.

Such rule changes would, in general, better achieve improvement in the status of married women.³² Aside from the fact that contract recognition would affect only those women who convince their partners to participate in drafting an agreement³³—a group that is likely to include disproportionate numbers of affluent, well-educated women whose status is least in need of improvement—contract negotiation, in itself, provides no incentive for an egalitarian relationship. Improvement in the position of women is thus dependent, under the contract model, on their individual negotiating skills and assertiveness. A reformed marriage law, on the other hand, could enunciate new egalitarian norms that would apply with equal force to all women.

Nor is it apparent that contract recognition is the best means to accommodate diversity in marital arrangements. A reformed marriage law could accommodate diversity quite simply by eliminating reliance on sex based stereotypes and, instead, requiring courts to determine the norms and expectations a couple actually held during their relationship as a basis for determining the rights of each. This type of reform would, again, have the advantage of applying to all couples, not just those who had drafted contracts.³⁴ Additionally, for some nontraditional

³¹ For two of the rule topics—the determination of a married woman's name and domicile—determination by contract would also seem to raise the same charges of gender discrimination that Weitzman levels against traditional marriage law: if married men may continue to individually determine their names and domicile surely married women should be accorded the same right of individual choice.

³² For a similar view, see Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1159-70 (1981).

³³ The terms of most purported "contracts" between unmarried couples which have thus far been litigated have described very traditional relationships. The alleged contract in the *Marvin* case, for example, provided that the female partner would "render her services as a companion, homemaker, housekeeper, and cook . . . [as well as] give up her lucrative career as a[n] entertainer [and] singer . . ." while the male partner would "provide for all of plaintiff's financial support and needs for the rest of her life . . ." *Marvin v. Marvin*, 18 Cal. 3d 660, 664, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976). See also cases cited *infra* note 34.

³⁴ Very few cohabitants, married or unmarried, draft formal agreements. A Swedish researcher found, for example, that among 250 unmarried cohabitants, only one had a formal cohabitation contract. J. TROST, UNMARRIED COHABITATION 160 (1979), cited in Blumberg, *supra* note 32, at 1164. Similarly, American case law on contracts between unmarried couples reveals vague, oral agreements rather than detailed, specific contract provisions. See, e.g., *Marvin v. Marvin*, 18

couples—those who would like to marry but are prohibited from so doing under traditional marriage law—a change in the rules regarding marriage eligibility would almost certainly be preferred to contract recognition. Weitzman's own research establishes that most couples still define the marital relationship as a different and more committed bond than that implied by nonmarital cohabitation, even if accompanied by a contract.³⁵

b. *Why Weitzman Rejects a Rule Change Strategy*

Weitzman does not explicitly reject rule change as a complement to contract recognition and it is quite possible—particularly in view of the fact that some individuals will undoubtedly choose not to write contracts—that she would approve such a combined approach. Weitzman does, however, implicitly reject rule change as a primary law reform strategy. The basis for this position is, apparently, her concern that a system of state-imposed rules will necessarily provide inadequate protection to rights of individual choice.³⁶ “The very concept of a single structure for all intimate relationships,” Weitzman asserts, “is in its nature tyrannical.”³⁷ The state interests that have been asserted to justify restrictions on private ordering are, she claims, simply not “important enough to supersede individual rights to privacy and freedom.”³⁸

In assessing the validity of this assertion, it is important to note

Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); *Morone v. Morone*, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980). A compendium of additional cases can be found in Freed & Foster, *supra* note 29, at 4099-104.

³⁵ Weitzman surveyed contracts that she obtained from students in an upper division sociology course on sex roles and the law. The group included three types of couples: those already married (22%), those planning to marry (premarrieds) (24%), and those who viewed the contract as an alternative to marriage (cohabitators) (47%). Basic differences emerged between the married and cohabitor groups, with the premarrieds roughly in between. Married couples were future-oriented and collectivist. Their contracts emphasized career, education, and child-rearing goals. They also tended to treat both property and support as joint endeavors. The cohabitators, by contrast, were present-oriented and individualistic. They emphasized present emotional satisfaction rather than long term goals like children and career. They also tended to treat both property and support as separate responsibilities. L. WEITZMAN, *supra* note 2, at 419-24, 426-31, 454.

³⁶ Weitzman urges that “[t]he belief that individuals should have the freedom and privacy to arrange their personal affairs as they wish . . . is fundamental to the philosophy of those who advocate intimate contracts.” *Id.* at 231. In addition to her concern for rights of individual choice, Weitzman's rejection of the rule change strategy may also be influenced by the belief that rule change is not a quick or dependable enough reform process.

³⁷ *Id.* at 137.

³⁸ *Id.* Weitzman makes it clear that she weighs individual rights to freedom and privacy above the state's interest in preserving traditional marriage, *see id.* at xxi, but does not, except for approving nonenforcement of agreements “clearly harmful to children,” *id.* at 414, state whether, in her view, there are any other state interests that would provide valid bases for limiting private contract rights. For discussion of other state interests that can be expected to limit private contract rights, *see infra* notes 86-97 and accompanying text.

that the American legal system traditionally has not, in fact, imposed very many restrictions on the ability of individuals to order their relationships as they wish. The husband's duty of support, as Weitzman notes, has largely been honored in the breach as long as the couple continues to live together.³⁹ Similarly, courts have not enforced the presumption that the husband was head of the household, or that the wife is responsible for domestic services;⁴⁰ if a husband wished to engage in child care while his wife became a wage earner, no court has been heard to complain.

Rather than restricting a couple's freedom to determine the content of their life together, traditional state family policy has focused quite narrowly on entrance and exit from intimate relationships.⁴¹ It has encouraged entrance into marital, rather than informal, relationships;⁴² it has set eligibility criteria for marriage;⁴³ and it has set conditions on divorce.⁴⁴ This focus is far from accidental. Each of these regulatory points touch on the public interests that traditionally were believed to require state regulation of intimate relationships: ensuring stable, adequate care for minor children;⁴⁵ protecting the public purse from the claims of economically dependent wives and children;⁴⁶ and reinforcing the prevailing social consensus.⁴⁷

In recent years, this traditional family policy has indeed lost much of its *raison d'être*. Women have moved into the paid labor force, en-

³⁹ See L. WEITZMAN, *supra* note 2, at 40-43. The Citizens' Advisory Council on the Status of Women concluded in 1972 that "[a] married woman living with her husband can in practice get only what he chooses to give her." CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, THE EQUAL RIGHTS AMENDMENT AND ALIMONY AND CHILD SUPPORT LAWS 1 (1972).

⁴⁰ For example, although a wife's unjustified desertion of her husband, adultery, or other conduct which would provide grounds for a divorce would provide a husband with a defense to a nonsupport action against him, a wife's failure to perform domestic services, to honor her husband as head of the household, or other misconduct short of grounds for a divorce would not. See Annot., *Defenses Available to Husband in Civil Suit by Wife for Support*, 10 A.L.R. 2d 466.

⁴¹ See, e.g., *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953) (court has no jurisdiction to order extremely parsimonious husband to spend more on his wife and family, if husband and wife are living together, in absence of agreement to the contrary); accord *Commonwealth v. Glenn*, 208 Pa. Super. 206, 222 A.2d 465 (1966).

⁴² Marriage has been encouraged through a variety of legal advantages granted only to married couples: automatic legitimacy of offspring, marital rights of intestate succession, and the right to maintain a wrongful death action or loss of consortium claim in the event of death or injury to one member of the couple. L. WEITZMAN, *supra* note 2, at 217-18, 372.

⁴³ Eligibility criteria include those imposed for eugenic reasons, i.e., kinship, mental and physical health requirement; for the deterrence of immature or frivolous marriages, i.e., age and waiting period requirements; and for the support of social consensus about marriage, i.e., bigamy and homosexual marriage prohibitions. For a general discussion of traditional American marriage requirements, see H. CLARK, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 58-151 (2d ed. 1974).

⁴⁴ For a description of traditional grounds for divorce, see *id.* at 680-707.

⁴⁵ See, e.g., *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

⁴⁶ See, e.g., *State v. Clark*, 88 Wash. 2d 533, 563 P.2d 1253 (1977).

⁴⁷ See, e.g., *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974).

sureing that they will not become completely dependent on state support should a husband's support cease.⁴⁸ The nuclear family centered around a married couple has also declined in importance as a central unit of social and economic organization.⁴⁹ Given these social and economic changes, it is easy to make a good case that the state's interests in promoting traditional marriage are largely outmoded,⁵⁰ and Weitzman is not alone in this suggestion. Recently, a number of legal scholars have described the "withering away" of marriage as a subject of public regulation.⁵¹ However, most of these scholars have not seen contractual marriage regulation as the logical successor to traditional marriage law. Instead, they have tended to assume that the withering away of marriage will be followed by yet another alternative: the deregulation of marriage.

2. Deregulating Marriage

a. *The Benefits of Deregulation*

Recent commentators have generally tended to assume that traditional state marriage regulation will be succeeded by *nonregulation*, rather than regulation by contract.⁵² They have predicted that the fam-

⁴⁸ By 1980, half of all married women were in the wage labor force; they contributed a median 38% of their families' income. L. WEITZMAN, *supra* note 2, at 169, 172.

⁴⁹ "Husband-wife couples, who made up about 75 percent of all households in 1960, comprised less than 65 percent of the total by the end of the 1970s and may represent only 55 percent of the total by 1990." S. LEVITAN & R. BELOUS, *supra* note 19, at 127. By contrast, from 1960 to 1980 the number of female headed households almost doubled, jumping from 4,507,000 to 8,540,000, and, during the same period, the number of households comprising single individuals jumped from 6.9 to 17.8 million. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 46-47 (1981). For a detailed account of the progressive social and legal attenuation of family ties, see M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 11-97 (1981).

⁵⁰ See L. WEITZMAN, *supra* note 2, at 135-38.

⁵¹ The phrase is that of Professor Mary Ann Glendon. See Glendon, *The Withering Away of Marriage*, 62 VA. L. REV. 663-65 (1976) (concluding that "[t]he [family law] trend is toward leaving questions such as who can marry, who can marry whom, and how people form, conduct, and terminate their life in common, to regulation by social rather than legal norms"). For similar views, see, e.g., Clark, *The New Marriage*, 12 WILLAMETTE L.J., 441, 449 (1976) ("[T]he law appears to be in the process of redefining marriage."); Clive, *Marriage: An Unnecessary Legal Concept?* in *MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES* (J. Eekelaar & S. Katz eds. 1980) (concluding that marriage is not a necessary legal concept); Hoggett, *Ends and Means: The Utility of Marriage as a Legal Institution in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES* 94, 101 (J. Eekelaar & S. Katz eds. 1980) ("Family law no longer makes any attempt to buttress the stability of marriage or any other union."); Weyrauch, *supra* note 29, at 425 (The "striking feature of [modern] marriage in the formal legal sense is that, except as a symbol, it is decreasingly necessary."); cf. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 987 (1979) (concluding that "the stereotypical [marital] 'family unit' that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality. Such 'exercises of familial rights and responsibilities' as remain prove to be *individual* powers to resist governmental determination . . ." (footnotes omitted, emphasis in original)).

⁵² See, e.g., Glendon, *supra* note 51, at 665 ("the shift that is currently taking place in

ily policy of the future will be almost exclusively concerned with the parent-child relationship, as child care and support are the only traditional state family interests that still remain subjects of public concern.⁵³ With respect to marriage itself, they expect the state to engage in little more than a licensing function, with minimal requirements for entry and exit upon demand, presumptively without continuing spousal support obligations.⁵⁴ These commentators⁵⁵ would not expect (or, likely, believe it desirable) for the state to enforce agreements about how an intimate relationship should be structured any more than they would expect the state to enforce agreements between moosehunters—who are also licensed by the state—on how to manage the hunt and cook the moose.⁵⁶

Deregulation also seems to offer a cure for every defect in traditional marriage law which Weitzman describes. The cure is a simple one: if marriage were deregulated, no rights, obligations or legal presumptions would flow from marital status. Thus, in a dispute between two cohabitants, a court would apply appropriate tort, contract, and property principles rather than marriage law rules.⁵⁷ Individuals would

American family law . . . is a shift from regulation of the formation, effects, and dissolution of marriage to non-regulation").

⁵³ See, e.g., *id.* at 666 ("The State's involvement with the family . . . [increasingly] concentrates on the de facto consequences of cohabitation—economic and child-related matters—without regard to whether formal, legal marriage has taken place."); Hoggett, *supra* note 51, at 100 ("in a very short time the distinction between marriage and non-marriage will be relevant mainly to childless unions where one partner has been economically inactive").

⁵⁴ In California, it is already possible to obtain a divorce by filing a form affidavit when the marriage has lasted no longer than five years, the value of the couple's community property does not exceed \$10,000, neither party owns real property, their unpaid obligations do not exceed \$3,000, they waive rights to spousal support, and there are no children. CAL. CIV. CODE §§ 4550-4556 (West Supp. 1982). The form affidavit is reprinted in W. WADLINGTON & M. PAULSEN, *supra* note 10, SUPP. at 59 (1980).

⁵⁵ Among the commentators, Professor Mary Ann Glendon has been the most forceful proponent of this viewpoint. See Glendon, *supra* note 51, at 666 ("If the state is now in the process of divesting itself of its marriage regulation business, then, of course, it is not likely to set up shop as an enforcer of heretofore unenforceable contracts.").

⁵⁶ Disputes involving such contracts will rarely involve actions for damages since damages are likely to be ephemeral and difficult to prove. The discretion of the equity court is therefore crucial. Yet that court will generally refuse to exercise its power (to order specific performance or enjoin conduct) in those disputes because "supervision of performance would involve an undue investment of judicial time and effort." J. CALAMARI & J. PERILLO, *CONTRACTS* § 16-10 (1977). Furthermore, the expense of litigation will generally stop courts from hearing such suits.

⁵⁷ Under a deregulation policy, some couples might, of course, choose to enter contractual agreements. Recognition of these contracts would not be precluded, as under traditional marriage law. Instead, intimate contracts would be recognized and enforced to the same extent—but only the same extent—as ordinary contracts. See *supra* note 56. Thus nontraditional agreements, like those Weitzman advocates, that set out detailed terms for daily living would probably not be recognized while agreements that simply dealt with a couple's finances and property probably would be recognized. If these economic contracts did not violate contract doctrine or public policy, they would also probably be enforced. For a discussion of public policy concerns that can be expected to limit the future enforceability of marriage contracts, see *infra* notes 86-97 and accompanying text.

order their intimate relationships as they now order personal relationships outside of the family—by choice and custom, but not by law. Furthermore, deregulation would not offend Weitzman's preference for personal ordering. If the fact of marriage had no legal significance, couples could obviously order their relationships just as they wished.

b. *Why Weitzman Rejects Deregulation.*

Although she does not directly consider the alternative, Weitzman apparently rejects deregulation in favor of the contract model because of the value of contractual agreements in promoting the stability of intimate relationships. Weitzman asserts that, although the state no longer has a valid interest in promoting traditional marriage, it continues to have an interest in fostering stable family groups.⁵⁸ The contract model, she claims, will further that goal. "On a commonsense level," says Weitzman, "it would seem obvious that if people are allowed to write their own formula for the kinds of relationships they think will make them happy, they are more likely to create relationships that 'work' for them and are therefore satisfying and enduring."⁵⁹

While this proposition certainly goes beyond "common sense," Weitzman does have some strong evidence to support her claim. Foremost among this evidence is the record of the Los Angeles Conciliation Court.⁶⁰ The conciliation court was originally established in 1939 to attempt reconciliation of couples who had filed for divorce.⁶¹ The court has since expanded its service, and any couple may receive counseling to resolve disagreements. The major tool used in the counseling sessions is a detailed agreement that is negotiated by the marital partners with the assistance of the court's counseling staff. A study of the court found that 75% of the couples whom the court had assisted were still together one year later.⁶² Forms of contract negotiation have also been employed by marriage counselors with reported success.⁶³

Weitzman thus makes a good case that intimate contracts can in-

⁵⁸ See L. WEITZMAN, *supra* note 2, at 238-39 ("One of the most telling arguments in support of contracts is that they tend to further the state's goal of supporting stability in marriage and other family relationships.")

⁵⁹ *Id.* at 239.

⁶⁰ For a description of the court and its operation, see *id.* at 235-36. More detailed descriptions can be found in Elkin, *Conciliation Courts: The Reintegration of Disintegrating Families*, 22 FAM. COORDINATOR 63 (1973); Maddi, *The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage*, 13 J. FAM. L. 495 (1974).

⁶¹ Maddi, *supra* note 60, at 497 n.4.

⁶² PREFACE TO THE SIXTH ANNUAL REPORT OF THE CONCILIATION COURT OF LOS ANGELES COUNTY (1970), cited in L. WEITZMAN, *supra* note 2, at 236.

⁶³ For a description of the use of contracts in marriage counseling, see L. WEITZMAN, *supra* note 2, at 236-37 and sources cited therein.

deed foster stability in intimate relationships.⁶⁴ It is also apparent that traditional antenuptial property contracts would not provide this same impetus to family stability; the conciliation court and marriage counselors have been successful in preserving relationships through contract negotiation because the agreements that they encourage couples to write deal, literally, with “practically every facet of married life.”⁶⁵ In the sample contracts Weitzman provides, couples agree “not to embarrass each other in public,”⁶⁶ to “treat each other with esteem and affection through ongoing companionship and sharing,”⁶⁷ to stay together, “absent intense pain” at least three years,⁶⁸ to terminate by abortion any pregnancy occurring before the husband completes his education,⁶⁹ and to determine child custody, if agreement is not possible, by random lot.⁷⁰ Not only do these agreements frequently exceed the bounds currently permitted for individual agreement within marriage;⁷¹ they invariably regulate areas of private life that courts have consistently avoided.⁷²

Recognition and enforcement of contracts within intimate relationships—at least the type of contracts Weitzman envisions—would thus necessitate increased state supervision of private life on a vast scale. Not only is this a rather ironic result, given Weitzman’s expressed preference for private ordering, but it suggests that the contract model may bring with it some disadvantages that substantially limit its viability.

II. ASSESSING THE VIABILITY OF THE CONTRACT MODEL

A. *The Disadvantages of Intimate Contracts*

While the intimate contracts proposed by Weitzman might have a beneficial impact on family stability, their recognition and enforcement would require an unprecedented degree of intrusiveness into private life. Several factors suggest that a commitment of this sort is ill-advised.

⁶⁴ In addition to her data regarding the utility of marital contracts in counseling couples with marital problems, Weitzman is also convincing in her claim that the process of negotiating a contract will not, as some contract critics have suggested, foster negative attitudes, insecurity, or instability. Neither a contract nor a marriage license, she quite rightly points out, can determine how a couple feels about their relationship. Those attitudes instead will be determined by the personal characteristics of the individuals and the social milieu in which their relationship exists. See *id.* at 239-46.

⁶⁵ *Id.* at 235 (quoting Elkin, *supra* note 60, at 67).

⁶⁶ *Id.* at 326.

⁶⁷ *Id.* at 325.

⁶⁸ *Id.* at 323.

⁶⁹ *Id.* at 298.

⁷⁰ *Id.* at 322.

⁷¹ See *infra* notes 73-76 and accompanying text.

⁷² See *supra* notes 12-13, 38-41 & 55 and accompanying text.

1. The Practical Problem: Enforcement

Weitzman devotes little attention—all of two pages—to the problem of how the judicial system is to enforce contracts of the type she has proposed.⁷³ The problems are, of course, massive. Family courts are already overworked and subject to lengthy case backlogs.⁷⁴ Contracts of the sort suggested, covering every facet of married life, are also likely to raise extremely complicated factual and legal questions. Because they contain vague and novel provisions with which judges are not familiar, such contracts will pose difficult questions of interpretation: what, for example, did the parties intend when they agreed not to embarrass each other in public?⁷⁵ To avoid revealing intimate secrets? To avoid making jokes at the other's expense? Or to avoid getting drunk and jumping in a swimming pool? Under the contract model, judges would have to confront—and resolve—questions like this on a daily basis. Once the contract has been interpreted, courts would then face the equally difficult task of assessing damages.⁷⁶ How much is a right not to be embar-

⁷³ L. WEITZMAN, *supra* note 2, at 252-53. While Weitzman gives enforcement problems fairly short shrift, Professor Marjorie Shultz, another recent contract advocate, admits that the problems are, in some cases, great enough to render any effort at legal enforcement unwise. Shultz, *supra* note 9, at 325. In these cases, in her view, "contractual governance could be used as metaphor at best." *Id.*

For a similar view regarding the difficulties of enforcing contracts such as Weitzman proposes, see Mullenix, Book Review, 15 LOY. L.A.L. REV. 759, 769-75 (1982).

⁷⁴ Delays of up to a year or more for a trial date in a contested divorce are not uncommon in some states. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 956 n. 28 (1979) (reporting delays of "at least a year from the time the parties are ready until a trial date can be scheduled" in Connecticut and New Jersey).

⁷⁵ The sample contract provision states in full that:

We agree not to embarrass each other in public by any distasteful behavior, including sarcasm or uninvited teasing, and that excuses such as being angry or being under the influence of alcohol do not remove responsibilities for such behavior.

L. WEITZMAN, *supra* note 2, at 326. The express inclusion of "sarcasm or uninvited teasing" as prohibited behavior makes clear that jokes at the other's expense are covered by the provision. The word "including" also suggests that some other types of conduct are covered by the prohibition, but does not provide guidance as to what types.

Interpretative problems are not likely to be confined to daily living contract provisions. Several of Weitzman's sample contracts, for example, contain provisions specifying joint ownership of future acquired income and assets. See, e.g., *id.* at 302, 310, 317, 326-27. None of the provisions, however, specifies what types of assets are to be included in the joint property. (Weitzman does suggest that couples so specify. *Id.* at 267-68.) The status of pension benefits, degrees, and licenses—the issue that has, in recent years, most troubled courts engaged in distributing marital assets—is thus unclear, and the existence of these contracts would not serve to avoid litigation on this issue. As many contracts will have been drafted without legal help and years before any judicial intervention, this type of interpretive problem is likely to be extremely common.

Finally, the countless situations that arise during the course of a long relationship make hopeless any attempt to draft more specific provisions.

⁷⁶ Weitzman's only discussion of assessment is included in a paragraph discussing the advantages of a liquidated damages provision:

First, it puts parties on notice as to what they can expect if they fail to comply with specific provisions of their contract. Second, it serves to avoid *post hoc* disputes

rassed in public really worth, anyway? In addition to these problems, intimate contracts like those which Weitzman proposes will often raise extremely difficult issues of legality. Can a woman contract away her constitutional right to decide whether to bear a child? Can parties agree that they will not divorce when state law would permit them to do so?

It is not enough to suggest, as Weitzman does, that most contractual disputes will reach a court only after the relationship has broken down.⁷⁷ It is not at all apparent that this is true—indeed, the contract model seems to invite couples to use the courts as a form of marriage counseling. Even if it were true, the courts would still have to determine, at that point, whether and how to enforce the contract. Nor is it easy to see how, as Weitzman urges,⁷⁸ the existence of a contract could possibly simplify divorce litigation. Those portions of the contract on which the parties still agree would not be litigated and thus would never come before a court; the other portions would become just another issue for the court to consider in resolving the underlying disagreements.⁷⁹

Regulation of marriage by contract would thus require a considerable commitment of judicial resources. Given the novelty and intrusiveness of the regulatory effort to which those resources would be directed, it does not seem likely that legislators or the judiciary would be willing to make such an investment.

2. The State's Interest in Family Stability

It is not immediately apparent that the state's interest in promoting family stability is sufficient to warrant a regulatory commitment on the large scale that a new law of intimate contracts would require.

about the extent of damage (or harm) that the noncomplying partner has caused. Third, it can assist the partners in resolving disputes informally and may help them avoid a legal battle in court. Finally, if the parties must go to court, it documents the parties' intentions for the judge. The last point is especially important if the judge happens not to agree with the parties' intent because, lacking a statement, the judge may independently assess the damages much higher (or lower) than the parties intended.

L. WEITZMAN, *supra* note 2, at 283. Nowhere, however, does Weitzman describe how the judge is to make an independent damages assessment.

⁷⁷ *Id.* at 253 ("it is likely that most contractual disputes, like most marital disputes, will reach the courts only after the relationship has broken down. Thus it is not likely that the court will be called upon to resolve any more cases than it now handles in divorce.").

⁷⁸ *Id.* ("if contracts affect court calendars at all, they are likely to lighten them because most issues that are now litigated in divorce cases will already have been resolved by contract").

⁷⁹ Weitzman also suggests that many contractors will elect to arbitrate their disputes, thus reducing the workload of the courts. *Id.* at 253. While this is undoubtedly correct, the movement toward arbitration is not dependent on acceptance of the contract model. Many couples now elect arbitration who do not have marital contracts and it is likely that this trend will continue. See *infra* note 110 and accompanying text.

First, the state's interest in family stability may itself be minimal. Just as the movement of women into the labor force and the decline of the family as a social and economic institution have caused public interest in marriage preservation to decrease,⁸⁰ these same factors have caused the public importance of preserving *all* intimate relationships to decline.⁸¹ The withering away of marriage thus implies the withering away of state interest in preserving stable family groups. In the passage following his famous maxim, Maine presciently noted this trend, urging that it is "[t]he individual [who] is steadily substituted for the Family as the unit of which civil laws take account."⁸²

In addition, to the extent that family stability remains a subject of public concern, it would appear that judicial involvement of the type Weitzman's proposal contemplates does little to address that concern. The Los Angeles Conciliation Court, which is the prime exhibit in Weitzman's case that contracts do foster family stability, operates much more like a marriage counseling service than a court. The contracts are drafted with the help of marital counselors and, while an agreement is technically enforceable through contempt citations, the court has rarely exercised this enforcement power.⁸³ The impact of intimate contracts on family stability thus appears to derive primarily from the process of resolving marital disagreements under the tutelage of a trained counselor, rather than from access to a court.⁸⁴ Judicial enforcement—or even recognition—of these contracts is therefore unnecessary to promote family stability; referrals by courts to marriage counseling services would indeed appear preferable to any services which the judiciary directly could provide.

Given the practical difficulties and seeming lack of necessity for a large-scale state commitment to family regulation like that which

⁸⁰ See *supra* notes 48-50 and accompanying text.

⁸¹ Even the parent-child relationship has not been immune from this trend. In Washington, on a child's request, a court may order an "alternative residential placement" if it finds that a conflict exists between parent and child that "cannot be resolved by delivery of services to the family during continued placement in the parental home." WASH. REV. CODE ANN. §§ 13.32A.150, 13.32A.170 (Supp. 1982). See IOWA CODE ANN. §§ 232.2(17), 232.127 (West Supp. 1982) for a similar provision. In Connecticut, a parent or a child over sixteen may secure emancipation from the relationship if the court finds that "the minor willingly lives separate and apart from his parents or guardian, with or without the consent of the parents or guardian, and that the minor is managing his own financial affairs, regardless of the source of the lawful income" or that emancipation is in "the best interest" of either the child or parent. CONN. GEN. STAT. ANN. § 46b-150b(3), (4) (West Supp. 1982). For a similar provision, see CALIF. CIV. CODE §§ 60-64 (West 1982).

⁸² H. MAINE, *supra* note 1, at 163. For a detailed discussion of the trend noted by Maine, see M. GLENDON, *supra* note 49, at 17-97.

⁸³ See Maddi, *supra* note 61, at 557 n.86; see also L. WEITZMAN, *supra* note 2, at 235.

⁸⁴ This view is supported by the fact that marriage counselors report success with marital contracts even though the contracts that are negotiated are not drafted under the auspices of a court and are not enforceable by contempt citations. See L. WEITZMAN, *supra* note 2, at 236-37.

Weitzman proposes, it would seem desirable, at the very least, to limit recognition and enforcement of personal contracts to the terms of a relationship's dissolution, the point at which the legal system has traditionally intervened. Even here, however, public policy can be expected to limit the availability of private ordering.

3. The New Family Policy and Its Impact on Private Ordering

While Weitzman is certainly correct that traditional state family policy and its restrictions on private choice are outmoded, this does not imply that the state no longer has any legitimate interests from which a new family policy—with new restrictions on private choice—might be derived. In fact, recent legal trends suggest that such a policy is in the process of formation.⁸⁵ This emerging policy can be expected to reflect, as did its predecessor, contemporary social and economic conditions. The new economic independence of women and the fact that individual mobility and satisfaction have replaced family stability as a dominant social ethic are thus likely to play a prominent role in defining its aims and content.⁸⁶ As a result of these new conditions and values, courts are already less reluctant to treat unmarried couples as if they were married,⁸⁷ but are more reluctant—as is popular opinion—to impose spousal support obligations other than for short-term rehabilitative or restitutional purposes.⁸⁸ Legislatures are also increasingly concerned

⁸⁵ See *infra* notes 87-89 and accompanying text.

⁸⁶ The new ethic is apparent in the growing popular acceptance of divorce, remarriage, and intimate relationships that bypass marriage altogether. See *supra* notes 20-21 for statistics. See generally Clark, *supra* note 51 at 442 ("Today . . . attitudes toward marriage . . . are changing so drastically and are publicized so widely and so rapidly that the law can hardly remain oblivious to them.").

⁸⁷ A growing number of courts are now willing to recognize explicit and implicit agreements by unmarried couples to establish joint property. For discussion of some leading cases and general trends, see L. WEITZMAN, *supra* note 2, at 392-415. See also Flaherty, *Property Rights on Termination of Alternative Life Styles: Cohabitation*, 10 CAP. U.L. REV. 1 (1980); Note, *Enforcement of Property Rights of Unmarried Cohabitants: Morone v. Morone*, 45 ALB. L. REV. 1226 (1981); Recent Developments, *Family Law—Property Rights of Unmarried Cohabitants*, 58 OR. L. REV. 245 (1979). The legal status of unwed parents is also undergoing judicial redefinition, see, e.g., Stanley v. Illinois, 405 U.S. 645 (1972) (unmarried father entitled to hearing on fitness as a parent before state could take child from him), and two courts have now held that an unwed cohabitant could recover for loss of spousal consortium, Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980); Butcher v. Superior Court of Orange County, 9 FAM. L. REP. § 2229 (BNA) (Cal. App. Jan. 11, 1983). See generally, Weyrauch, *supra* note 29, at 426 (Today "[i]f one behaves as if he is married, he is often treated as if he were married.").

⁸⁸ See, e.g., Weitzman, *The Economics of Divorce*, *supra* note 4. Weitzman and her colleagues compared alimony awards in California in 1968 and 1977 after the change to "no-fault" divorce laws. While the number of alimony awards did not significantly decline, *id.* at 1221, their duration did. In 1968 only a third of spousal support awards had a specified duration, while by 1977 two-thirds were limited in duration. The median 1977 duration was 25 months. *Id.* at 1226. The assumption behind these short-term awards seems to be that women needed support only during a transitional period in which they reentered the job market. *Id.*

with questions of child support and its enforcement,⁸⁸ as the emerging family policy must take account of children's continuing economic dependency.

In the same way that governmental interests limit all contract rights, the new family policy will determine what issues are open to contract negotiation,⁹⁰ and may substantially limit the availability of private agreement. Contracts that call for long-term, large scale spousal support after divorce, for example, run counter to the courts' growing preference for short-term, rehabilitative alimony, and thus may be diffi-

Popular opinion, particularly among the young, apparently supports the trend toward short-term alimony. In a recent reader's poll of young American women, 69% said that a husband should be required to pay alimony only until a woman is self-supporting; an additional 14% said that alimony should be paid "to help a woman prepare herself for a career." Only 7% thought that alimony should be paid "all the time," while 10% thought it should "never" be paid. *GLAMOUR*, July, 1982, at 21.

⁸⁸ The Revised Uniform Reciprocal Enforcement of Support Act (RURESA) [Ref. File] *FAM. L. REP. (BNA)* 201:0071 (1982), was developed in response to increasing concern over enforcement of child support. Since its issuance in 1968 at least 31 states have adopted some portions of RURESA. [Ref. File] *FAM. L. REP. (BNA)* 400:iv-v (1982). Congress has also recently established a parent locator service to track down parents who are delinquent in child support payments. See 42 U.S.C. § 653 (1976).

⁹⁰ Public policy, of course, sets limits on the enforceability of all types of contracts. In recent years, perceived public interests, generally centered around specific types of relationships, have come to play an increasingly larger role in determining the rights and duties of contracting parties. For many types of contracts—landlord-tenant, insurance, consumer transactions—rights and duties imposed by public policy have all but superseded those derived from the contract itself. These trends in contract law are now sufficiently developed to have led one noted commentator to proclaim the "death" of traditional contract law. See G. GILMORE, *THE DEATH OF CONTRACT* (1974).

Weitzman's notion of contract largely overlooks these trends. According to Weitzman:

the courts have traditionally given effect to all forms of business contracts as long as they have been freely agreed to . . . by responsible adults The judges do not examine the content of the contract, or attempt to evaluate its wisdom. Nor do they care whether the parties still want to adhere to the contract, or whether it will cost them a lot of money [E]ven if judges themselves consider the agreement unfair or unwise, they are nevertheless generally bound to enforce the terms of a fairly negotiated contract.

L. WEITZMAN, *supra* note 2, at 353. Weitzman apparently approves the application of this traditional contract law deference to private ordering, "hop[ing] . . . that in the vast majority of cases, courts will give effect to contracts that are fairly negotiated and will do true justice to the parties' expectations." *Id.* at 359.

Although Weitzman essentially ignores contemporary contract law trends, Professor Marjorie Shultz, another recent advocate of contractual marriage, recognizes that the trend does conflict with the contract model's strong emphasis on private ordering. See Shultz, *supra* note 9, at 304 ("even while public law intrusion into other contractual relations is increasing, marriage ought to be moved toward the private law end of the modern continuum"). Shultz also sees public policy as an appropriate limiting factor on private contract rights. According to Shultz, "[i]f marriage contracts were legally recognized, social policies would be developed to meet the particular needs of this subject as they have been in other areas of contract law. Thus, even while conceding greater private governance of marriage, the law might choose to retain public policy barriers that might, for example, render invalid contracts such as the Homosexual or Open Marriage examples." *Id.* Shultz does not, however, describe what public policy limitations she believes are appropriate restrictions of contract rights. *Id.* at 332.

cult to enforce in the future.⁹¹ Weitzman discusses only the obverse case of the "weak-minded woman in love" who is willing to accept too little post-divorce support.⁹² Weitzman is not troubled by this possibility and argues that legal protections are not necessary or appropriate.⁹³ As her view is here in accord with the emerging legal trend, it will probably prevail.⁹⁴ But the man who promises to support his wife for decades to come in the style to which she would like to become accustomed is another story. Weitzman's sample contracts include one of this type, in which a first-year medical student promises his wife-to-be that, if their marriage survives until he has finished his residency, he will pay her one quarter of his net yearly income for as long as he continues to practice medicine, regardless of her financial circumstances or remarriage.⁹⁵ Weitzman's view that this type of onerous, lifetime obligation should also be enforceable does not comport with the modern trend toward encouraging self-support among divorced women and thus cannot be expected to prevail.⁹⁶ Similarly, the new family policy can be expected to prevent judicial recognition of private agreements that limit the parties' right to dissolve the relationship or that predetermine child support and custody.⁹⁷

B. *A Different Role for Contract: Orderly Dissolution of Intimate Relationships*

The disadvantages of recognizing and enforcing intimate contracts would, at first glance, suggest that the contract model of marriage regulation is destined for the dustbin. But this would be a hasty judgment.

⁹¹ See *supra* note 88 and accompanying text.

⁹² See L. WEITZMAN, *supra* note 2, at 246-48.

⁹³ *Id.* at 248 ("Of course, the law cannot protect everyone from making an unwise agreement . . . the freedom to contract must include the freedom to make a mistake.")

⁹⁴ See, e.g., *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 359 A.2d 719 (Conn. Super. Ct. 1976) (upholding antenuptial agreement providing that neither husband nor wife could obtain alimony or property from spouse upon dissolution of marriage); *Matlock v. Matlock*, 223 Kan. 679, 576 P.2d 629 (1978) (same); *Goldfarb v. Goldfarb*, 86 A.D.2d 459, 450 N.Y.S.2d 212 (1982) (upholding separation agreement limiting husband's duty of support to \$7,000 over seven years).

⁹⁵ L. WEITZMAN, *supra* note 2, at 295-99. The contract also specifies that the payment is not alimony, which might mean that contract payments would not be tax-deductible. See 26 U.S.C. §§ 71, 215 (1976).

⁹⁶ Weitzman's own research suggests this result. See *supra* note 88.

⁹⁷ There are apparently no reported cases involving agreements that limit the parties' right to dissolve the relationship; with respect to agreements concerning child support, courts generally seem ready to refuse enforcement when it appears that the child's support rights are not adequately protected. See, e.g., *Knox v. Remick*, 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976); ("An agreement to fix a spouse's support for minor children stands on a different footing [than an agreement for spousal support]. Parents may not bargain away the rights of their children to support from either one of them."); *Brescia v. Fitts*, 56 N.Y.2d 132, 436 N.E.2d 518, 451 N.Y.S.2d 68 (1982) (agreement as to child support can be modified if inadequate to meet child's needs).

Contractual marriage like that which Weitzman advocates may not be the wave of the future, but private contracts are playing an increasingly significant role in the legal regulation of intimate relationships. Contracts are not being used, however, to promote family stability, but to promote the orderly dissolution of intimate relationships.

1. Agreements Regarding the Disposition of Property

As Weitzman notes, traditional legal barriers against the recognition of agreements in contemplation of divorce, which were intended to encourage marital stability, have now substantially eroded.⁹⁸ Legal opposition to express agreements between unmarried couples, predicated on discouraging nonmarital relationships, is going the same route.⁹⁹ What these developments promote, of course, is not the stability of relationships but their dissolution; they are a logical outgrowth of the new family policy's emphasis on individualist values. At the same time, the current lack of clear judicial standards regarding the definition and allocation of marital property,¹⁰⁰ and the uncertainty created by *Marvin v. Marvin*¹⁰¹ and other cases that have recognized alleged oral property agreements,¹⁰² have made written agreements increasingly attractive to ensure predictability. It is thus likely that courts will become increasingly willing to recognize property agreements within intimate relationships, and that the number of such agreements will also increase.¹⁰³

2. Divorce: The New Arena for Contract

Divorce agreements are likely to play an even more important part in the family law of the future. Just as family policy has shifted,¹⁰⁴ so

⁹⁸ See, e.g., *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973). For a general discussion of the cases and legal trends, see L. WEITZMAN, *supra* note 2, at 347-52; and Clark, *supra* note 9.

⁹⁹ See, e.g., *Glasgo v. Glasgo*, 410 N.E.2d 1325 (Ind. Ct. App. 1980); *Morone v. Morone*, 50 N.Y.2d 48, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980). For general discussion of the cases and trend, see L. WEITZMAN *supra* note 2, at 392-415. A compendium of cases and recent legislation is available in Freed & Foster, *supra* note 29 at 4099-101.

¹⁰⁰ The status of pension benefits, degrees, and licenses have all been heavily litigated in recent years with widely varying results. See, e.g., *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1982) (license to practice medicine is subject to New York equitable distribution law); *Lesman v. Lesman*, 110 Misc. 2d 815, 442 N.Y.S.2d 955 (1981) (license to practice medicine not subject to New York equitable distribution law). A compendium of cases and statutes up to September 1982 is available in Freed & Foster, *supra* note 29, at 4069-74 (degrees and licenses); and *id.* at 4094-99 (retirement and pension benefits).

¹⁰¹ 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (oral implied-in-fact agreement to pool and share earnings between unmarried cohabitants is enforceable).

¹⁰² See *supra* note 99 and sources cited therein.

¹⁰³ The new family policy's emphasis on individualist values will also set limits on the enforceability of contracts between cohabitants. See *supra* notes 86-97 and accompanying text.

¹⁰⁴ See *supra* notes 85-86 and accompanying text.

have the procedures by which marital and divorce conflicts are resolved. Under the traditional marriage contract, obtaining a divorce required establishing, to a court's satisfaction, that legal grounds for a divorce were present.¹⁰⁵ Thus, even uncontested divorces were litigated. Under the newly emerging family policy, this scenario has changed. A couple seeking a divorce may obtain one essentially upon demand.¹⁰⁶ Litigation is largely unnecessary and, when it does occur, it is focused almost exclusively on the aftermath of divorce—custody, child support, alimony, and property disposition—rather than on the basis for the divorce itself. Increasingly, separating couples avoid the courts altogether; they divorce by filing a separation agreement.¹⁰⁷

Additionally, both popular and legal opinion increasingly view divorce as a process which *should* aim at negotiated accommodation, rather than a litigated contest.¹⁰⁸ Toward this end, a hybrid discipline joining law and marriage counseling has emerged to offer counseling and negotiation services to separating couples.¹⁰⁹ The popularity of these new agencies is growing, and they can be expected to handle an increasing proportion of separation disputes.¹¹⁰ The outcome of their services is, like the intimate contracts which Weitzman proposes, a contract governing every aspect of the relationship—with the focus, of course, on dissolving, rather than continuing it.

Because of the links between the new separation services and the

¹⁰⁵ For a discussion of the traditional grounds for obtaining a divorce and defenses, see H. CLARK, *supra* note 43, at 680-707.

¹⁰⁶ As of April 1982, only Illinois and South Dakota limited divorce to traditional "fault" grounds. Freed & Foster, *supra* note 29, at 4074. "In practice this has come to mean that either spouse can obtain a divorce at will." Clark, *supra* note 51, at 444.

¹⁰⁷ Mnookin & Kornhauser estimate that less than 10% of divorces now involve disputes that are contested in court. Mnookin & Kornhauser, *supra* note 74, at 951 n.3.

¹⁰⁸ For examples of the literature, see O. COOPER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1981); J. HAYNES, *DIVORCE MEDIATION* (1981); Mnookin & Kornhauser, *supra* note 74; Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911 (1976); Winks, *Divorce Mediation: A Nonadversary Procedure for the No Fault Divorce*, 19 J. FAM. L. 615 (1980-81); Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 582 (1979).

¹⁰⁹ In a recent review of family law developments, Freed & Foster note "the proliferation throughout the country of private mediation centers offering services by trained mediators who may be either social scientists or attorneys." Freed & Foster, *supra* note 29, at 4067. The proliferation is evident in the enormous increase in the number of mediation services within the last couple of years. A 1982 directory of mediation services, *DIVORCE MEDIATION RESEARCH PROJECT* (1982), ASSOCIATION OF FAMILY CONCILIATION COURTS, 1982 DIRECTORY OF MEDIATION SERVICES, lists approximately 400 public and private divorce mediation services, as compared to approximately 140 such services listed in a 1981 directory, *SPECIAL COMM. ON RESOLUTION OF MINOR DISPUTES, PUBLIC SERVICES ACTIVITIES DIVISION, DISPUTE RESOLUTION PROGRAM 1981 DIRECTORY* (1980).

¹¹⁰ California, traditionally a legal trend-setter, now statutorily requires mediation in all cases of contested child custody and visitation. CAL. CIV. CODE § 4607 (West. Supp. 1982). Bills to establish public sector mediation services are also currently pending before a number of state legislatures. Freed & Foster, *supra* note 29, at 4068.

marriage counseling establishment, it is quite possible that a continuum will develop between marriage counseling and divorce counseling, with contracts—perhaps including those as detailed as the ones Weitzman advocates—made before and during the marriage providing a foundation for negotiation about separation agreements.¹¹¹ Thus, while noneconomic contracts *within* existing intimate relationships are unlikely to be recognized or enforced by the courts, such agreements may ultimately play a role in shaping the separation agreements by which American couples increasingly terminate their relationships.¹¹²

In short, although family law is not speeding toward contractual marriage, it is certainly moving in the direction of contractual separation. Marriage by contract does not seem a likely prospect, but divorce by contract is already with us and is, apparently, here to stay.

III. CONCLUSION

Although *The Marriage Contract* presents what is probably the best possible case for the legal recognition and enforcement of intimate contracts, that case is ultimately not a persuasive one. The deficiencies in traditional marriage law cannot be resolved by contract alone. Recognition and judicial enforcement of contracts like those Weitzman proposes are both impractical and unnecessary. Public policy with regard to the family can also be expected to substantially limit private contract rights.

That is not to say, however, that contracts have no legitimate role to play in the legal regulation of marriage. Private agreements are increasingly significant as a means of insuring the orderly dissolution of intimate relationships. But this use of contracts in regulating intimate relationships is far more limited than that which Weitzman has urged, and serves quite different purposes.

In the end, Weitzman's argument on behalf of contract fails for a simple reason: it ignores the fact that the legal regulation of marriage—like all types of government regulation—pertains largely to those aspects of the subject that are perceived to have *public* signifi-

¹¹¹ Intimate contracts will not have a significant impact on the negotiation process, of course, where their terms conflict with the likely result of litigating the case.

¹¹² In a revealing passage, Weitzman suggests that "opponents of intimate contracts regard marriage primarily as a public institution, while proponents view it as a private relationship." L. WEITZMAN, *supra* note 2, at 231 (citing Rausmussen, *Interspousal Contracts: The Potential for Validation in Massachusetts*, 9 SUFFOLK U.L. REV. 185 (1974)). But, of course, marriage is both a public as well as a private institution. More importantly, the law generally does not bother to regulate marriage in its purely private aspects. The location of the honeymoon, the housekeeping ability of the spouses, the names of the children, and other aspects of the relationship that are not thought to implicate state interests are simply left to the discretion of the marital partners without any intervention by the legal system.

cance.¹¹³ Accordingly, private contracts cannot be expected to take precedence over other forms of marriage regulation unless they are consistent with the contemporary social and economic context in which regulation occurs and the public interests that are implicated within that context.

The traditional marriage contract did not simply spring forth from the courts by parthenogenesis; it mirrored an evolving social consensus and a pattern of economic organization. The marriage law of the future will continue to mirror this social evolution, and it cannot be expected to focus on family stability, as Weitzman suggests it should, when social and economic institutions demand individual freedom, mobility, and the attainment of personal satisfaction. Family law, like the family, remains tied to the social and economic setting from which it emerges.

¹¹³ See *supra* note 112 and accompanying text.