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COMMENT: RECURRENT PATTERNS OF FAMILY LAW

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A commentator whose work in the “law of intimate associations” has been primarily historical should not enter directly into criticism of proposals to change the law. He is apt to take the part of the grumbler. He will too quickly dismiss some ideas because they are untried. He will too quickly dismiss others because he has seen them, or their like, somewhere before in the historical record and found their results unfortunate. The commentator will thereby miss what is important in the proposals advanced in articles like Mr. Temple’s.¹

To recognize a natural propensity to err, however, is not to say that some historical comparisons entail great risk. They may be profitable, and they can hardly be unfitting. In fact, the situation described by Mr. Temple does not seem altogether unparalleled. Some of its elements, such as the large scale entry of women into the marketplace and the acceptance of “alternative life-styles,” do seem genuinely novel. However, the broad patterns described present some recurrent, and even important, patterns in family law. Therein, for this commentator, has been the value of Mr. Temple’s article. It calls to mind patterns that are recurrent in the context of developments that are unprecedented.

DIVERGENCE BETWEEN LEGAL RULE AND COMMON USAGE

The first recurrent pattern is the emergence of a sharp separation of family law from the realities of family life. Mr. Temple notes that recent years have witnessed an increasing disparity between the law’s assumptions and society’s practices, and he holds that this divergence requires something like the proposal he advances. His proposal may be good. For someone who knows something about the history of the subject, however, the divergence itself is not very startling. It has happened before. Probably no area of the law ever matches human life perfectly,

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1. Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL’Y 121 (1985).

but family law has always seemed particularly prone to fall out of joint with the perceptions and desires of the men and women whose lives are regulated by it.

One of the most striking examples of this divergence comes from the dawn of the modern era of family law, the Twelfth Century. The law that regulated the formation of marriage, the canon law, adopted a rule that if a man and a woman both uttered present words of consent ("I take thee as my husband [wife]"), they had entered into a valid and indissoluble union.² No ecclesiastical ceremony, no parental approval, no negotiations about property, not even subsequent sexual relations were required to make them man and wife. It was a purely consensual doctrine of what made a valid marriage.

This rule of the canon law bound all Christians, which is to say, all but the smallest part of the medieval population. In theory, disobedience meant excommunication, entailing exclusion from virtually all civil rights, and, at least in places, actual imprisonment until the person excommunicated was brought to at least nominal compliance with the canonical rules.³ However, the consensual view of marriage adopted by the canon law did not carry the day with a large part of European society. Recent research has shown that most people continued to hold to an older tradition, in which consummation was required to make a marriage complete, in which the family had a legitimate though not absolute say in their children's choice of spouse, and in which the settlement of property was a normal part of a marriage agreement.⁴ In short, family law and common assumptions about marriage fell out of joint. There was a lay view, real but largely inarticulate,⁵ that a true marriage required more than the simple consent of the man and woman.⁶

2. See *Decretales Gregorii IX*, Lib. IV, titl. 1, caps. 9-10, in 2 *CORPUS IURIS CANONICI* 663-64 (A. Friedberg ed. 1879). The text somewhat simplifies a development which was more complicated. The law contained several exceptions, and the consensual rule was not without precedent. See generally 1 A. ESMEIN, *LE MARIAGE EN DROIT CANONIQUE* 35-137 (1891).

3. See generally F. LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* (1968).

4. See G. DUBY, *LE CHEVALIER, LA FEMME ET LE PRETRE* (1981), trans. as *THE KNIGHT, THE LADY AND THE PRIEST* (1983); see also 8 *J. FAMILY HIST.* (1983), a special issue devoted to religion and the family, including a full bibliography of recent work.

5. The tradition is not completely inarticulate; see, e.g., H. EMANUEL, *THE LATIN TEXTS OF THE WELSH LAWS* 141-46, 341-45 (1967).

6. The parallel example provided by modern attitudes toward contraception among Roman Catholic laymen, while not exact, is instructive.

What is arresting is that this divergence continued for centuries.

The process by which partial accommodation between these seemingly irreconcilable views was worked out belongs to historical inquiry, not to this commentary, but for present purposes it is instructive to view the present situation in light of this historical context. There is little doubt that the divergence now exists.⁷ With few exceptions, American law continues to regard marriage entered into with state sanction as the sole legitimate form of union between man and woman. It bestows special privilege on that sort of union alone, and it refuses to cross the threshold of the family home, assuming that custom and mutual accommodation will regulate what goes on inside. In such a regime divorce represents failure, not something to be expected and planned for.

This traditional marriage law, however, no longer represents something everyone accepts. If it once squared with reality, it does so no longer. Mr. Temple holds that this divergence requires a change in our ways of dealing with the marriage bond. He makes a good case for it, but from an historical perspective the situation is less disquieting than he assumes. The emerging divergence between law and societal assumptions is an example of the same sort of divergence that emerges from time to time in family law. The details are different. The broad pattern is the same.

THE NATURE OF LEGAL RESPONSE

To see a common pattern in family law does not, of course, compel inaction. It does not mean that there is no serious problem to be met. Lawmakers have rightly advanced reform proposals in the past, and Mr. Temple suggests they must do so today. His proposal, I think, fits a second recurring pattern in the history of family law. Where there is rift between legal rule and social reality, lawmakers determined to do something about it have gone about their task indirectly, rather than by meeting it head-on. The legal standard is thought too important an ideal to discard, but the divergence from practice is too sharp not to deal with somehow. The result is a compromise.

7. See generally M. GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 1-9 (1977).

Such was the case with the early marriage law just discussed. Lawyers regularly affirmed the pure consensualist doctrine of marriage as the rule of law, and the courts of the Church regularly applied it.⁸ However, various responses recognizing the lay view were also adopted. Take the question of parents' influence over their children's marriages. The canon law did not allow the father any direct say. Instead, the lawmakers adopted a rule that distinguished between fully licit marriages and those that were valid but illicit. In order for a marriage to be fully licit the marriage had to be celebrated in the presence of witnesses, preceded by public reading of the banns, and solemnly blessed by a priest. Anything less was held to be clandestine and subjected the contracting parties to public penance, though the validity and enforceability of the marriage were not affected.⁹

The canon law's full approval, in other words, was reserved for deliberate and formal marriages. Into such a regime, family influence and property settlement more easily fit. The publicity and delay could readily accommodate the interests and the influences of persons other than the contracting couple. The law did not take direct account of such outside forces. It did not require parental consent, even for the marriages of minor children. It simply left room and time for those interests, and societal habits and family wishes took advantage of the opening provided.¹⁰

Is not the proposal that contracts can provide the best way to accommodate changing patterns of married life something like the same thing? Vastly different in detail though it is, it fits the same pattern. Rather than accepting, for example, a new type of relationship of sexual union without formal marriage, the proposal is to let all who enter into such unions contract for themselves about what its terms will be. The proposal essentially leaves the definition of marriage as it is, but indirectly permits informal unions by broadening the scope of contract law.

8. See R. H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 25-73 (1974).

9. See *Decretales Gregorii IX*, Lib. IV, tit. 3, cap. 3, in 2 *CORPUS IURIS CANONICI*, *supra* note 2, at 679; for England, see the Provincial constitution or statute of Archbishop Simon Mepham (1328), *PROVINCIALE (seu Constitutiones Angliae)* 273 (W. Lyndwood ed. 1679).

10. See Donahue, *The Canon Law on the Formation of Marriage and Social Practice in the Later Middle Ages*, 8 J. FAMILY HIST. 144 (1983).

It would be *possible* for a responsible reformer to propose direct recognition of a new type of union. Roman law knew something very much like it: concubinage, a union which did not have the pejorative connotations later ages associated with it.¹¹ From such a proposal a new semi-marital status might be fashioned. However, no one advances such a direct solution. Instead, what lawyers propose is to allow the development to occur, even to promote it, by slightly expanding the law of contracts and by slightly narrowing the public policy against fornication and adultery. This may in fact be the best way to proceed. Certainly contract law has enough inherent flexibility to take such a development in stride,¹² and consensus about what should be the incidents of a newly recognized status of semi-married partners would be difficult to achieve. Equally certainly, the proposal fits the common historical pattern of family law development by dealing with divergence between law and reality by indirection.

Much the same can be said for what is the most controversial aspect of Mr. Temple's article—his advocacy of the use of contracts to regulate domestic duties, spousal vacations, income production, and the like. He urges the use of such contracts and their recognition by our legal system. He marshalls reputable opinion to show that such contracts would actually promote harmony at home, and he believes that our legal system would not in fact be overwhelmed with petty lawsuits if courts were to enter this presently untouched area of human life.

The impetus for this proposal is the movement for legal equality between the sexes, coupled with the entry into the world of business (and out of the family home) of large numbers of women. The wisdom of such a proposal may be open to doubt. Certainly some doubt it.¹³ That is not for me to say. I mean only to point out the indirectness of the way it meets the problem. The proposal does not suggest that the law adopt equality as a rule for domestic relations. Something like an expanded and more rigorous community property system might issue from direct acceptance of the new developments. In-

11. See P. MEYER, *DER ROMISCHE KONKUBINAT NACH DEN RECHTSQUELLEN UND DEN INSCRIFTEN* (1895).

12. The example of the requirement of consideration and the enforcement of gifts in contemplation of marriage come to mind. See A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 418-21 (1975).

13. See, e.g., H. KRAUSE, *FAMILY LAW* 100 (2d ed. 1983).

stead, Mr. Temple suggests that it would be preferable to meet the problem by applying an existing body of contract law to domestic regulation and disputes. If the fit is not exact (and he shows that in its current form the law of contracts is not quite suitable for the task assigned), nevertheless contract law can be stretched and reformed to meet most of the needs of working spouses. It does not *necessarily* follow that greater equality, freedom and happiness will prevail in such contracts, but at least that seems the likely outcome. Equality, freedom and happiness are the goals of the proposal, and Mr. Temple's notion is that they will follow indirectly but surely from the use of such contracts.

THE LIKELIHOOD OF UNEXPECTED CONSEQUENCES

Things do not always work out as planned, in law and in life, and the results of changes in legal rules regulating family law are a rich mine of examples of the unexpected consequence. Professor S. F. C. Milsom has recently demonstrated this in discussing the origins of the early common law rules governing inheritance by women.¹⁴ No one intended them to take exactly the form they did. They were the by-products of other, more directly desired, legal changes. This is not, of course, an invariable rule. Not everything occurs by chance. But the pattern in which the adoption of one legal rule gives rise to results that are not expected, or even acceptable, to the formulators of the rule has been a common one in the history of family law. It is common enough that we should not be surprised if the use of contracts to govern relations in the home repeated it.

The history of the canon law of marriage discussed above provides an instructive example. The canon lawyers who developed the distinction between valid and licit marriages must have thought of it as a sensible compromise between the pure consensualist view of marriage and the evident need for safeguards recognizing society's needs and interests. Doubtless they expected that the publicly celebrated marriage would be the norm, while the law preserved the ideal that marriage depended solely on consent, not family approval or sexual relations. To some extent their hopes were realized in the

14. *Inheritance by Women in the Twelfth and Early Thirteenth Centuries*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 60 (M. Arnold, T. Green, S. Scully, & S. White, eds. 1981).

developments of the later Middle Ages.¹⁵ However, the distinction they arrived at had at least one unintended consequence. It meant that many marriages, privately entered into and valid in the eyes of God and the couple, could not be proved in a public court because they had been made privately, without witnesses. Where one of the parties to such a private marriage subsequently married someone else in public, only the second marriage could be proved in a public court. Hence the prior, and theoretically valid marriage, would fail a court test if one party disavowed it. The courts of the Church had therefore to uphold as legitimate the subsequent, public marriage even though such marriages were in truth no more than perpetual adultery. Because laymen did not accept the consensualist rule, the problem was exacerbated. Laymen took advantage of the rules of proof to avoid the canon law's rule of what constituted a valid marriage, and thereby left the Church in the unexpected position of enforcing what were, canonically speaking, sinful marriages.¹⁶ That consequence followed naturally, but unexpectedly, from the rules the Church adopted to narrow the divergence between law and society's expectations.

Would similar unexpected consequences attend the adoption of Mr. Temple's suggestion that contracts offer a promising way of dealing with current family law problems? I suspect so. No one has powers of divination, I admit. It is impossible to know with certainty what consequences would attend the adoption of the article's proposals. Nonetheless, some unintended consequences probably would arise, and it may be worth speculating briefly on a few of the possibilities.

One is that courts will be encouraged to look even further into the fairness of antenuptial property settlements than they currently do. If courts get into the business of enforcing domestic contracts between husband and wife, they will almost certainly have to do so with an expanded view of the doctrines of unconscionability and overreaching. Mr. Temple advocates an expanded inquiry into the fairness of contracts regulating intimate associations, and he is right to do so. The nature of the marriage tie—intimate, continuing, and changing—re-

15. Sheehan, *The Formation and Stability of Marriage in Fourteenth-Century England: Evidence of an Ely Register*, 33 *MEDIAEVAL STUDIES* 228 (1971).

16. See, e.g., Brundage, *Concubinage and Marriage in Medieval Canon Law*, 1 *J. MEDIAEVAL HIST.* 1, 8-9 (1975).

quires it. But can a satisfactory line be drawn between contracts for division of property at death or divorce and contracts regulating the details of married life? They are likely to be made at the same time, even in the same document. Or would the line be crossed by courts looking closely into the details of property settlements, taking into account how things have worked out, to insure that both parties were getting a fair shake? There are signs already of how tempting courts find the prospect,¹⁷ and an unexpected consequence of the widespread use and enforcement of "contracts of intimate association" might well be the destruction of the rule that prenuptial agreements will be enforced according to their terms as long as there has been full disclosure at the time of contracting.

A second possibility is that the proposal's adoption would have a considerable impact on the law of contracts itself. Traditional common law allows only a small role to specific performance; money damages have always been the rule. However, if courts are to enforce domestic contracts, they are almost bound to move in the opposite direction. If a couple agrees that each will have a three-week vacation, any court called upon to enforce that agreement will have to enforce it by means which amount to specific performance, whether this is by penal damages, a negative injunction, or direct order. Ordinary money damages make no sense. If this happens, what becomes of the argument that specific performance cannot be awarded in ordinary contract cases because courts will not impose, and cannot supervise, continuing personal service contracts? Regular enforcement of marriage agreements, the most intimate of all personal service contracts, will make the old law suspect. This is not necessarily bad. There may be signs of it already.¹⁸ But it would be an unintended consequence of a change of law made for quite a different reason.

A third possibility is that the proposal might actually lead to restrictions on divorce. This would be the most unintended consequence of all, but it is possible. No contract would be easier for a couple in love to sign than one which put some teeth into the promise "to have and to hold till death do us

17. See, e.g., *In re Estate of Edsell*, 447 So.2d 263 (Fla. App. 1983); *Matter of Estate of Benker*, 416 Mich. 681, 331 N.W.2d 193 (1982); *Eule v. Eule*, 24 Ill. App. 3d 83, 320 N.E. 2d 506 (1974); *Connolly v. Connolly*, 270 N.W.2d 44 (S.D. 1978).

18. See Burrows, *Specific Performance at the Crossroads*, 4 LEGAL STUDIES: THE JOURNAL OF THE SOCIETY OF PUBLIC TEACHERS OF LAW 102 (1984).

part.” The churches, the most likely drafters of the form-type marriage contracts most couples would doubtless use, might naturally favor some such restriction. If state-declared public policy is to give way to enforcement of agreements between spouses, why should they not be free to restrict their own right to divorce? Such agreements would not need to contain absolute prohibitions against divorce; they might merely limit the right to a given set of circumstances or make provision for post-divorce support that would make divorce impractical. The law of recent years has seen the emergence of a “right to marry,” but it does not necessarily follow that there is a constitutional right to desert and remarry.¹⁹ Its main prop so far has been public policy declared by statute. If that falls to a regime of free contract, the way would be opened to a result its proponents would find most incongruous: the tie that binds by law as well as by moral force.

Against such a result loud voices would be raised. Perhaps it could happen only if there were a real shift in moral sentiment. But such things have occasionally occurred. Intimate associations have always had a life of their own, one beyond the power of legislators to control, or commentators to predict. This most important area of human life has often moved in response to forces that are beyond the law’s power to dictate. Sometimes we cannot even describe them with accuracy. Recurrent patterns in the history of family law show, above all, how resistant our conduct is to regulation from outside.

19. See *Loving v. Virginia*, 388 U.S. 1 (1967). Of course, such a constitutional right could conceivably be fashioned, using, for example, *Boddie v. Connecticut*, 401 U.S. 371 (1970) and *Redhall v. Zablocki*, 418 F. Supp. 1061 (E.D. Wis. 1976).

