

her future options. Improving the post-divorce financial position of divorced spouses and children is laudable as far as it goes, but this line of thought assumes that cash can be a perfect substitute for a parent.

The heart of my own proposal is that fault should be restored to its place as a requirement for divorce — at least in cases where the divorce is not by mutual consent. Concretely, there should be a showing of cruelty (including mental cruelty), desertion or adultery before a divorce decree is granted. While this would risk reintroducing the old-fashioned “mess” factors — private detectives, adulterous couples caught in the act by flash cameras and so on — the present system cannot claim to be mess-free. Indeed, new kinds of messes such as ill-founded and irresponsible allegations of child abuse have crept into the system. Hostility has not been eliminated. It merely has been transferred from divorce itself to collateral issues such as child custody.

In the alternative, fault can be considered at other levels of the process, such as alimony and equitable distribution, thereby diminishing the at-fault party's incentive to seek divorce in the first place. Equitable distribution, which has played a much larger role in divorce law since the no-fault revolution, currently is meted out without regard to fault. Therefore, an at-fault party typically will walk away with much more than he or she is morally entitled.

Courts should change the way they deal with the issue of court-ordered, post-divorce payments. These payments, commonly called alimony but more recently called maintenance or support payments, typically are awarded to an ex-wife who had been a full-time homemaker from an ex-husband who has been the primary breadwinner. The label that courts often affix to alimony is “rehabilitative.” This carries the insulting implication that homemaking is an undertaking from which one needs to be rehabilitated — similar to a disease or a crime.

Alimony, where appropriate, should be a way of rectifying the more egregious economic injustices inflicted by divorce — not a way of exculpating ex-wives from the supposed taint of homemaking.

The traditionalist ideal of marriage as a lifelong status and the feminist ideal of spousal equality begin to merge once alimony becomes a tool for equalizing the disparate earning potentials of divorcing spouses by making the better-off party fulfill — so

far as can be done through the award of monetary damages — the implied covenants of traditional marriage.

Our marriage law has deprived marrying couples of the option to make a legally binding, lifelong commitment to family life; we have made a fundamental option in favor of short-term

individual self-fulfillment at the expense of the commitments and connectedness which are the foundation for civilized life. Even as we watch, civilization recedes steadily, as the first post-family generation reaches adulthood. We may not have much time left to recover our moorings. ●

Icon of Marriage Has Had Its Day

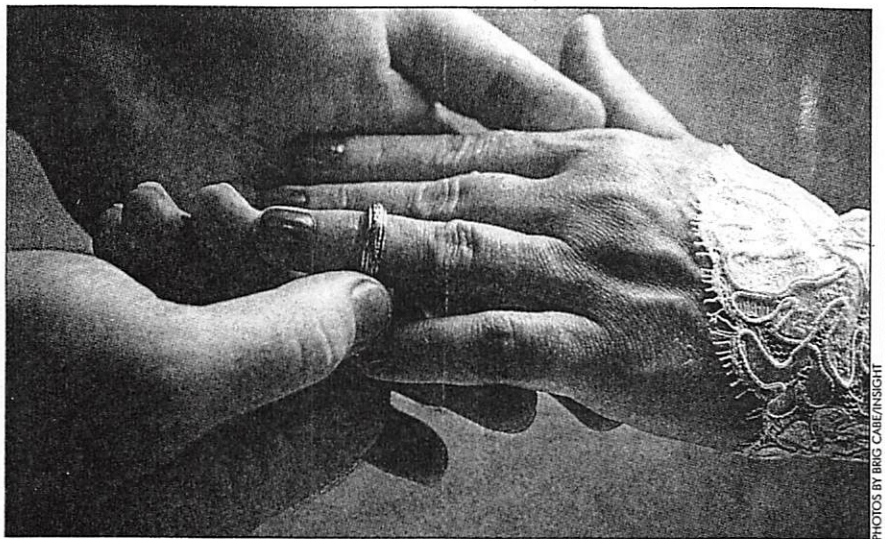
By Martha Albertson Fineman

Marriage stands condemned as a failed social institution in the eyes of many at the end of the 20th century. Increasingly, people are marrying later in life, while others choose not to marry at all. Meanwhile, the divorce rate hovers near 50 percent for all new marriages. Out-of-wedlock motherhood is on the rise, particularly among the well-educated, according to 1990 census data summarized by Amaru Bachu in the journal *Current Population Reports*. Furthermore, the historical assumption that the private, marital-based (or nuclear) family unit can comfortably accept primary responsibility for the care of children and other family members seems increasingly untenable. Marriage is not a realistic bedrock for social policy, although it seems a convenient panacea to politi-

cians and pundits discussing the divorce rate, the shocking figures on child poverty or plans to promote so-called “family values.” And if marriage as a social institution is failing, harsh and punitive measures designed to make the status more rigid and inflexible are absurd.

Policymakers are reluctant to see that a social phenomenon such as a high divorce rate is merely one component in a panoply of indicators chronicling the widespread and irrevocable nature of the changes that have occurred in all areas of our collective lives. We stand in the midst of significant social change and it is important that we realize that there is no uncomplicated past, no lingering utopian vision to which the law can return us.

Our societal goal should be to fashion rules that reflect the ways in which



Young women no longer want to be relegated only to hearth and home.

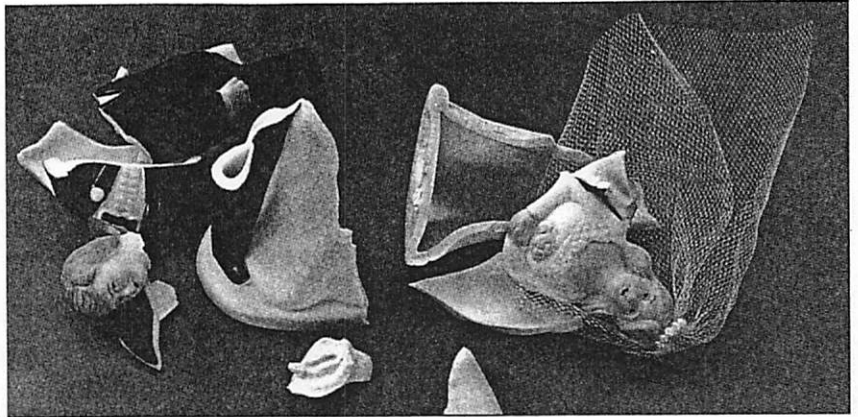
people are living their lives. We should subsidize and support the emerging family units, such as single-mother families, that are performing the valuable task of caring for children and other family members. Recognizing these units as a social reality is not to deny that changing patterns of behavior have the potential for serious consequences, particularly for children. Our obsession with the idealized nuclear family, however, has meant that our solutions for real problems have not been practical or realistic, but reactionary paens to distorted images of "days gone by."

There are significant moral issues associated with the failure of marriage — issues that the current focus of reviving the nuclear family has obscured. Important family issues do not revolve around the question of whether no-fault divorce laws are good or bad social policy. Today's family problems are access to medical care, housing, jobs and education in a society that fails to consider such elements basic human entitlements.

Divorce has exposed the vulnerability of children in our society, which would only be worsened by divorce-focused "reforms" such as David Wagner's. Resurrecting obstacles to divorce simply reinforces the myth that the "private family" offers the best solutions for inevitable dependency and the poverty our current policies have generated. Indeed, the self-sufficient nuclear family, providing for all its members without making demands on the state, was never a reality — the family has always enjoyed legal and ideological subsidies through laws governing inheritance, bankruptcy, insurance and taxes.

The romantic image of the nuclear family is an especially unrealistic one, given today's economy and the federal government's abandonment of social policies aimed at full employment and guarantees of a basic set of entitlements for all Americans. One need only look at the figures to know that marriage, or any basic social policy that relies primarily on private responsibility, will fail. One in five children lives in poverty. One in six has no medical insurance. Tens of thousands are homeless. At least one in four is feeling the effects of hunger, suffering from such problems as inadequate diet, malnutrition and chronic food shortages.

These statistics do not represent failures attributable to divorce or individual shortcomings. They are the casualties of a cultural revolution in the way American men and women



Marriage does not enforce love, cooperation or harmony, says Fineman.

relate to each other and the way society views collective responsibilities for children. They are a national disgrace, and it is about time we started viewing them as such and fashioning remedies that recognize that we have a collective responsibility to children.

Americans frequently ignore basic human realities in favor of simplistic platitudes that pass as conventional wisdom. We cannot afford to continue to do this when the nation's children are at stake. We must confront the fact that dependency is inevitable — it is an inherent human condition that inescapably accompanies childhood and illness and often results from disability and advancing age. It is not only a private matter but a public responsibility as well. Divorce reform ignores this basic tenet and keeps us inappropriately focused on the failings of spouses.

We should remember that law is of limited usefulness as a device for transforming a society. Laws that fail to reflect the realities of the society in which they are forged are doomed to be ignored, violated or manipulated in accordance with dominant societal understandings of what is appropriate behavior. Furthermore, even if law were generally conceded to be an effective tool for change, it would take much more than just rescinding the divorce reforms and returning to a fault-based system to compel people to remain in lifelong monogamous relationships.

It is time for the legal system to abandon marriage as a defining characteristic of the family. In the end, marriage is only a legal category. Marriage does not enforce love, cooperation or harmonious and supportive cohabitation. Even an outright prohibition on divorce would not achieve much in terms of altering behavior — unless we bolstered it with other regulatory and intrusive laws.

When divorce was harder to obtain, abandonment was common. Therefore, in addition to reintroducing fault, the law would have to strengthen its punishment of desertion or abandonment and extramarital sexual relations. Without such complementary regulations, illegal sexual liaisons would offer a tempting alternative for those locked into a marriage they could not escape.

In the fault system, spouses who agreed to end their relationship frequently did so on fabricated grounds. So, if we stiffen the grounds for divorce by requiring that fault of one spouse be proved, we also would have to outlaw and punish connivance. And, of course, we would have to worry about increases in violence fueled by the desperation and frustration of those who perceived no alternative and no escape from a bad marriage.

If states restore the fault-based divorce rules, will they reinstitute complementary laws that also reflect society's preference for formal marriage as the only basis for legitimate sexual relationships? Are we willing to reinstate criminal sanctions against fornication, adultery, nonmarital cohabitation and other potentially marriage-threatening behavior? What about the common-law civil regulations that also accommodated and reinforced marriage? Should we resurrect actions for monetary damages for alienation of affection, breach of promise and seduction? Even if we did reinforce the law, given our culture, it would matter little in regard to how people behaved.

Given our current social climate, we are far beyond divorce reform as the means to address our family situations. Given that Americans are conditioned to think in terms of self-fulfillment, personal development and immediate gratification, we must ques-

tion the continued viability of an institution idealistically defined by lifelong commitment and personal sacrifice.

Making divorce requirements more stringent will not magically transform the character of today's spouses. We are a self-centered people. There are no effective political appeals to empathy for others and no successful attempts to forge a sense of collective responsibility for the weaker members of society. Ours is a bleak and impoverished social vision in which "dependency" has become a dirty word used to stigmatize and an expression of "need" is understood as weakness. In reality, need and dependency are inevitable in the human condition.

High divorce rates are telling us that our society fails to value connectedness and commitment, the lack of which provides a good deal of the momentum behind the resort to divorce. For many Americans, sexual affiliations (of which marriage is but one — albeit the officially sanctified version) are the most tenuous of all intimate associations. If mates are not satisfactory, they can be discarded and new liaisons sought. To suppose that abolishing no-fault divorce will reverse the sexual revolution simply is wishful thinking. Our response to the high and relatively stable divorce rate should not be to advocate a return to some mythical past in which it is asserted that nuclear families thrived. Even if such a world once existed (and the evidence is overwhelmingly to the contrary), making divorce more difficult to obtain will not alter the fact that the aspirations and values of significant segments of the society have shifted. These new norms have undermined the continued viability of the traditional nuclear family model.

Making divorce harder to get will not undo the irrevocable evolution in women's expectations for themselves as members of families and as individuals within the larger society. In their historical roles as wives and mothers, women accepted with little questioning that they were the ones to bear the burdens of intimacy. However, continued self-sacrifice for husband and children in a society that increasingly makes it clear that it does not value noneconomic contributions and judges people by their material successes makes little sense. Women have had to change their behavior and set new priorities.

Young women in particular have internalized a norm of equality, with its attendant assumptions about career and political participation. They will not be relegated to a life that encom-

passes only hearth and home. They may want children, but they also want to be economically self-sufficient and not dependent on a husband for their well-being. With women's expectations for their "public" selves newly defined in the same terms as those for men, society no longer can safely assume that women will continue in the traditional role as an uncompensated family caretaker.

Thus, we find ourselves in the midst of historical behavioral changes affecting marriage and family. The implications of these changes are far-reaching but unclear. Conflict in established institutions and among individuals is inevitable. Internal contradictions are generated as women find themselves torn between the potent ideology associated with their traditionally defined family roles and the inherently just nature of their aspiration for equality. These conflicting and powerful messages often are impossible to reconcile, and choices must be made. Resolution may require the rejection of traditions and often results in rupturing existing relationships.

Adding to the conflict is the fact that many men and most public and political institutions continue along as though no adjustments to the status quo are necessary. For example, women have received little support from political institutions when they have attempted to balance changing roles with a more equitable distribution of nurturing tasks. When women ask government for assistance with their traditional tasks of nurturing and caretaking, they find their requests for day care and family leave cast in political rhetoric as demands for special treatment or welfare handouts.

Empirical studies indicate that women have simply sacrificed leisure for market work while men's day-to-day lives have altered little. The workplace remains relatively unchanged, often presuming that workers have no outside demands. Removing no-fault divorce may sound like a quick legal fix, yet it does nothing to make marriage more attractive to today's women, who are commonly expected to continue as primary caregivers while they also are wage earners.

Within the traditional family, women's primary roles were those of wife and mother, supported by a breadwinner. But today, wives want to (or have to) work and are apt to be as career-minded as their husbands. Paradoxically, at the very moment in history that there has been such a profound change in expectations, women

find they continue to provide the bulk of the caretaking tasks. They do so by default. Within many families, sustained help from male partners typically has been slow and often resentful in coming.

Men as well as women are leaving the traditional family — a cultural shift that divorce law cannot erase. Many men have reacted to women's changing aspirations and behavior by stubbornly holding on to the privileges they have enjoyed as the "head" of the family — a position around which other members organized their lives. Such men are unwilling to change. Some men leave old wives to look for more compliant (often younger) mates with whom they recreate the dream of a haven in a heartless world. Many women, responding to the profound contradiction between their newly forged expectations of equality and the reluctance of men and society to change, prefer to remain childless or become mothers without becoming (or remaining) wives.

The availability of no-fault divorce makes it easier to end marriages, but it does not explain the impetus behind the decisions to do so. Rather than trying to turn back the clock with revised divorce laws, we should move forward with a social commitment to support caretakers regardless of their marital status.

Many industrialized countries have child allowances to parents or mothers — whether married or not. By contrast, several states are pursuing welfare reforms that stigmatize unwed mothers and threaten to eliminate their payments by including "bride-fare components." The government should give employers tax incentives to fund day care for all of their employees that parallel tax incentives for such items as research and product development. Congress should make as its first priority universal health care, including prenatal care. In addition, more liberal tax deductions should be allowed for people caring for elderly and disabled people, regardless of their family affiliation.

Behavior should be seen as adaptive — as a simple, evolutionary adjustment to the demise of the traditional nuclear family as an institution with well-defined gender roles for husbands and wives. Instead of casting the changing family and divorce as social "crises" and proposing punitive and unrealistic measures by crafting laws to compel people to conform to an outmoded model, law and policy should explicitly respond to the new social realities. ●