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MARRIAGE, DIVORCE, AND THE FAMILY: A CAUTIONARY TALE

Judith T. Younger*

The modern American marriage, divorce, and family look very different from those of twenty-five years ago.¹ So does the law governing them. I trace my first inkling of impending change to 1966 when I met Sidney and Walter Siben, in whose honor this speech is given. Their firm, Siben & Siben, was substituted into a matrimonial action in which my firm was representing the defendant-husband. The Sibens came into the case for the plaintiff-wife. She was asking for a separation on the ground of cruel and inhuman treatment. The husband counterclaimed for divorce on the basis of the wife’s alleged adultery with the local undertaker. The husband, an engineer, had tapped his home telephone. The wife spent much of the day in telephone conversations with friends, during which she said some compromising things. Under New York law, the telephone tapes were admissible² and the husband could call his wife to the stand.³ A trial was bound to be nasty and posed risks for both sides. If the husband prevailed on the grounds of adultery, the wife could not receive alimony.⁴ Yet a sympathetic trial court might be reluctant to leave her without continued support and might thus rule against the husband.⁵

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4. Under former § 236 of the New York Domestic Relations Law, a wife who was guilty of misconduct sufficient to justify a divorce was not entitled to receive an alimony award. This rule was eliminated in 1980. N.Y. DOM. REL. § 236 (McKinney 1988); see Brady v. Brady, 476 N.E.2d 290, 293 (N.Y. 1985).

1367
The couple had three children and neither spouse wanted to continue the marriage. The case cried out for settlement. The only obstacle was the wife’s lawyer. Her demands were impossible; she was intransigent and intractable. By the eve of trial, she and I had nothing but harsh words and recriminations for each other. Then the Sibens appeared and immediately the atmosphere changed. Their intelligence and professionalism enabled us to settle the case in a most satisfactory way for both parties. Indeed, the settlement was an unheralded landmark. In exchange for a Mexican divorce, the husband agreed to support the wife for five years so that she could complete her education and become economically independent. It was a very early example of “rehabilitative alimony”—an innovation in 1966; in 1993, a standard practice.7

There have, of course, been many other dramatic changes in divorce law in the last twenty-five years. “Alimony” is now euphemistically called “maintenance.”8 It has also become a two-way street.9 It now runs from ex-wives—like Joan Lunden, Roseanne Barr, Jane Fonda, and Joan Collins10—to their ex-husbands, as well as from ex-husbands to their ex-wives; fault is no longer a bar to awarding it.11 We have also moved from fault-based divorce, a remedy provided exclusively to an innocent person whose spouse has been guilty of a serious wrong,12 to no-fault divorce, available for the asking to any spouse who views his or her marriage as a failure.13 From property division according to title, we have come to equitable distribution regardless of title.14 Discretionary child support awards

12. ELLMAN ET AL., supra note 6, at 165.
13. Id. at 165-68; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 179-186 (1st ed. 1973).
have given way to awards based on statutory guidelines.\textsuperscript{15} Preferences in custody disputes for mothers of young children are fast disappearing.\textsuperscript{16} The inquiry has become a gender-neutral search for the arrangement which comports with the child's best interests.\textsuperscript{17}

These changes in the law have been so dramatic that they are frequently referred to as the "divorce revolution."\textsuperscript{18} To date, attempts to measure the economic and social effects of the revolutionary changes yield conflicting conclusions.\textsuperscript{19} The demographic picture, however, is crystal clear. "[A] large proportion of divorced women, especially those with young children, face very serious financial problems and a reduced standard of living."\textsuperscript{20}

If we add to this group of divorced mothers never-married single mothers, the number of poor women and children grows larger. In 1991, "one in four babies was born to a mother who was not married."\textsuperscript{21} This group of never-married mothers is growing steadily but it is still outnumbered by formerly married mothers. According to 1991 Census Bureau data, "[t]wo out of three single mothers today are women who have been divorced, separated, abandoned by their

(permitting a court to make a direction as to the occupancy of realty only; all other questions raised as to title had to be decided in a separate cause of action) with N.Y. DOM. REL. LAW § 236B(5)(e)-(d) (McKinney 1988) (providing for equitable distribution of marital property regardless of the form in which title is held).


\textsuperscript{16} See, e.g., \textit{Ex parte} Devine, 398 So. 2d 686, 695 (Ala. 1981) (concluding "that the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex"); Johnson v. Johnson, 564 P.2d 71, 75 (Alaska 1977) (concluding "that the doctrine of tender years is not an appropriate criterion for determination of the best interests of the child"); cert. denied, 434 U.S. 1048 (1978); Bazemore v. Davis, 394 A.2d 1377, 1383 (D.C. 1978) (en banc) (directing that "in a dispute between a natural mother and father over custody of their child, the trial courts shall decide the delicate question of what is the child's best interests solely by reference to the facts of the particular case without resort to the crutch of a presumption in favor of either party").

\textsuperscript{17} ELLMAN ET AL., supra note 6, at 492. Some jurisdictions have replaced the tender years presumption with a primary caretaker presumption. See, e.g., Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981). Although facially neutral, this presumption frequently operates in favor of mothers. See, e.g., id.


\textsuperscript{19} See generally \textit{DIVORCE REFORM AT THE CROSSROADS} (Stephen D. Sugarman & Herma H. Kay eds., 1990).

\textsuperscript{20} Stephen D. Sugarman, \textit{Introduction to DIVORCE REFORM AT THE CROSSROADS}, supra note 19, at 1, 4.

husbands or widowed.”

It seems plain that marrying, divorcing, and having children in or out of wedlock are dangerous activities for women. In the process, they risk poverty as well as the loss of financial independence.

Teachers of family law spend an inordinate amount of time these days assessing and reassessing the effects of the so-called “divorce revolution” and talking about the so-called “problem” of poor divorced mothers. It has become a fashionable avocation and has spawned a spate of books and articles suggesting more changes in divorce law, though there is little agreement on what the changes should be. Writings and speeches on divorced mothers have virtually ignored the growing group of never-married mothers. And it may, indeed, be improper to link them with their formerly married counterparts because their poverty seems to be more permanent. Statistics show that forty percent of young unwed mothers end up as long-term welfare recipients, compared to only fourteen percent of the formerly married group. Nevertheless, the two groups have common characteristics. They and their children are poorer than two-parent families, and their family structure is under attack.

Let me sound two warnings at the outset. First, calling the poverty of this group a “problem” implies that there is a solution, and suggesting changes in the law to cure it implies that the solution is legal. Neither may be the case. Second, focusing on the economic

22. Id.

23. See Carol Lawson, When Baby Makes 2: More Women Choose Single Motherhood, N.Y. TIMES, Aug. 5, 1993, at B1. Lawson refers to a recent Census Bureau report that found the number of births to unmarried mothers who are white or college-educated more than doubled in the last decade. Id. at B4. According to the Census Bureau, women with bachelor’s degrees account for 6.4% of unwed mothers. Id. Although these women may be able to afford parenthood, their choice is not problem-free. Id.


hardships that divorce brings to mothers with young children ignores several other facts. Divorce is not a completely happy event for anyone. It makes women poor and men unhealthy, contributing to the premature death of many men. Divorce is not only economically bad for children but damages them psychologically as well. Divorce may, in fact, be psychologically good for some women. During many of the twenty-five years in which divorce has rocketed and women have poured into the labor force, female suicide rates have fallen. Perhaps women, free of unhappy marriages, working in jobs outside their homes, are finding more joy in life.

First, I will identify the main themes in the academic debate about divorced mothers, then I will expand the discussion to include never-married mothers. I will then give you my own iconoclastic and, you may think, outrageous opinions on how to discourage formation of single-parent families. With some hesitation, I accept the view that the two-parent family is better for children than the single-parent family and make six recommendations: deconstitutionalizing the right to marry; creating a special marital status for couples with minor children; reforming the welfare system; repealing the Hyde Amendment; including abortion in the basic benefits offered by any national health plan; and, most importantly, launching a national advertising campaign to teach women the dangers of having children in and out of wedlock and how to protect themselves against the worst consequences of this seemingly immutable conduct. For in the end, the academic debate misses the point: women must save themselves by changing their own behavior; they cannot depend on divorce reform

27. See Sugarman, supra note 20, at 4.
28. See, e.g., GERALD F. JACOBSON, THE MULTIPLE CRISSES OF MARITAL SEPARATION AND DIVORCE 67 (1983) (citing studies showing that divorced men are more likely to commit suicide than married men); JAMES J. LYNCH, THE BROKEN HEART: THE MEDICAL CONSEQUENCES OF LONELINESS 38-68 (1979) (citing statistics showing incidence of every major cause of death from two to six times higher in divorced men than in married men).
30. See Till Death Them Do Part, ECONOMIST, Dec. 12, 1992, at 64; see also John L. McIntosh & Barbara L. Jewell, Sex Difference Trends in Completed Suicide, in SUICIDE & LIFE-THREATENING BEHAVIOR 16, 22-23 (1986) (noting that female suicide rates declined from 1971 to 1980 after increases during the period from the mid-1950s through 1971, and reporting that the evidence is mixed about the effect of labor force participation on female suicide).
or other legal changes.

The academic debate on divorce swirls around four issues: (1) the responsibility of no-fault divorce for the financial difficulties of divorced women with children; (2) the place and theory of alimony in a no-fault divorce system; (3) the proper balance between, on the one hand, private ordering of the economic aspects of dissolving relationships, and, on the other hand, acceptance by society of responsibility for the consequences; and (4) whether discretion and the resulting possibility of achieving individualized justice is better than a system of more rigid rules allowing for predictable results which may encourage out-of-court settlements.

It seems to me that divorced women with children have always faced serious financial problems and a reduced standard of living, and that the change from fault to no-fault grounds for divorce has little to do with it.\textsuperscript{31} Because the divorce rate is higher, there are probably more divorced mothers and children in financial straits now, and the "problem" is, therefore, more acute.\textsuperscript{32} The sad fact is that most divorcing couples have little property to divide, except, perhaps, the family home which is often equally divided between the spouses or awarded to the custodial parent.\textsuperscript{33} Child support and alimony, therefore, are all the courts have to work with. Before no-fault divorce, my experience was that a combined alimony and child support award rarely, if ever, exceeded fifty percent of the payor's earnings. Indeed, the prevailing rule of thumb was closer to one-third. Obviously, a former husband—one person living on half of a given sum—will be better off economically than a former wife and the couple's three children living on the same amount. No-fault divorce has not changed the situation; combined awards yield similar results in this no-fault era.\textsuperscript{34} The most that can be said is that the switch from fault to no-fault divorce deprived innocent, economically dependent spouses who wanted to stay in their marriages of a valuable bargaining chip in negotiating a financial settlement.

In the days of fault-based divorce, a husband who wanted to


\textsuperscript{32} Sugarman, supra note 20, at 3.

\textsuperscript{33} Garrison, supra note 7, at 665, 682-83, 728-29; Sugarman, supra note 31, at 130, 132.

\textsuperscript{34} Garrison, supra note 7, at 717-20.
divorce his economically dependent, innocent wife could not do so
due to the fact he could not prove the requisite fault ground. "If he
got the innocent spouse's cooperation in securing a foreign divorce or her
collusion in obtaining a fraudulent one based on fault, he would have
the power to stay in the marriage. Thus, he had an incentive to try to purchase
his spouse's cooperation or collusion by offering a better financial
settlement. Another aspect of the divorce revolution, equitable distri-
bution, has given an advantage to the economically dependent spouse
who wants to leave rather than stay in the marriage. In the days
when title determined property division, such a spouse usually could
cannot afford a divorce because she had little or no earning power and
the assets were held in the earning spouse's name. Equitable distribu-
tion now empowers the economically dependent spouse to exit with a
share of the marital assets. So no-fault divorce and other attendant
reforms have been bad for some women but good for others. Howev-
er, even if no-fault divorce is the real culprit responsible for the
economic plight of divorced mothers, no serious commentator consid-
ers a return to fault grounds either practicable or wise.

The second issue academics are arguing about is the place and
type of alimony in a no-fault divorce system. Alimony, or "main-
tenance" as we now call it, is available to ex-husbands as well as to
ex-wives. Nevertheless, it is claimed "almost exclusively by wives." In most cases, both before and after the divorce revolution,
alimony was not and is not awarded. It is doubtful that the number
or size of awards has decreased substantially despite the fact that so
many more women are in the work force. What has happened, at
worst, is that courts now favor short-term rehabilitative awards over
so-called permanent ones.

36. ELLMAN ET AL., supra note 6, at 264.
37. Id.
38. Id.: Garrison, supra note 7, at 711-13; Garrison, supra note 31, passim.
39. See Garrison, supra note 7, at 739. Of course, permanent awards were, and still are,
subject to termination or modification on a showing of changed circumstances; short-term
rehabilitative awards are similarly subject to modification or early termination. See, e.g.,
MINN. STAT. ANN. § 518.64(2)(a) (West 1993); N.Y. DOM. REL. LAW § 236B(9)(b)
(McKinney 1988). The only real difference between the two lies in which of the former
spouses has to initiate the modification or termination proceeding. If an obligor wants to
reduce or terminate a permanent award, he must make the first move; the payee, of course,
would have to move for an increase. Similarly, if the payee wants to increase or extend a
rehabilitative award, she must hire a lawyer and make the motion. To reduce or terminate a
rehabilitative award early, the obligor must take the initiative.
Historically, the obligation to pay alimony was imposed on faulty husbands because of the economic dependence of women. This was sometimes viewed as punishment of the guilty husband, and under the traditional American rule, only innocent wives were awarded alim-
ony. The utility of alimony in modern times, however, goes far beyond punishment. Ideally, the goal of any marital property regime, whatever its details, is simple fairness. By fairness, I mean that when properly applied to a divorcing couple, a regime should be capable of achieving at least an approximation of equality of economic and social result between the spouses. Under existing marital property regimes, property division and alimony are the tools for accomplishing this. Few couples have any substantial property to divide. For this reason, alimony is the only tool with which courts can attempt to achieve equality of result and, thus, fairness between the spouses. This view of alimony makes it completely consistent with a no-fault system.

What is more, alimony should be available not on a single theory but on several, whichever best reflects the cause or causes of inequality between the spouses in an individual case. Alimony should be available to support a spouse in need, to provide a homemaker’s pension, to rehabilitate a spouse so that he or she can become self-supporting, to reimburse a spouse for putting the other through school, to compensate a spouse for loss of the marital standard of living and loss of earning capacity, and to compensate a spouse for economic losses due to the other’s conduct—for example, dissipating or mismanaging marital assets. To restrict the courts to a single theory of alimony would reduce the number of awards, thus worsening rather than improving the lot of divorced mothers.

The third issue academics are arguing about is the proper balance between private ordering of the economic aspects of dissolving relationships, on the one hand, and acceptance by society of responsibility for those consequences, on the other. The trend in recent years has been toward private ordering. Couples are free to make their own

41. See Garrison, supra note 7, at 728-29; see also supra text accompanying note 33.
42. But see Principles of the Law of Family Dissolution: Analysis and Recommendations, A.L.I., ch. 5 (Preliminary Draft No. 3, 1992). The ALI project starts with the premise that there must be a single theory of alimony: to compensate a spouse for financial loss arising from dissolution of the marriage.
deals, opting out of marital property regimes by pre-nuptial and post-nuptial agreements. On a daily basis, judges divorce couples, and accept and incorporate the couples' agreements into their divorce decrees. Judges do so without any inquiry into the effect of the divorce on the minor children of the marriage and rubber-stamp couples' custody arrangements. Divorced mothers and their children are not doing so well under this regime and the government is not doing much to help them. Even if government could afford to do more, it may not be desirable for America to follow the lead of Sweden and for American mothers to substitute dependency on government for dependency on the fathers of their children. As I said in another speech not very long ago, families in Sweden are not exactly flourishing. As in the United States, people marry less frequently and dissolve their relationships more frequently; children are more often raised by a single parent and families do fewer things together. Swedish children are not as poor as American children because the Swedish welfare state foots the bill, though recent welfare cuts make it clear that the nation can no longer afford to do so. Despite the


44. See Mnookin & Kornhauser, supra note 43, at 950-56; see generally Younger, supra note 43 (sorting the law of antenuptial agreements into an orderly framework for the guidance of those who draft, rely on, and enforce them).

45. See DAVID POPENOE, DISTURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES 187-258 (Peter H. Rossi et al. eds., 1988) (discussing the decline of the Swedish family as an institution); David Popenoe, Family Decline in the Swedish Welfare State, 102 PUB. INTEREST 65 (1991) (arguing that Sweden's status as a welfare state has contributed to the decline of the Swedish family); see generally Kristina Orfall, The Rise and Fall of the Swedish Model, in A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES 417, 426-32 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer trans., 1991) (discussing Swedish family mores).


47. See Popenoe, supra note 45, at 66 (stating that Sweden has the lowest marriage rate of any industrialized nation).

48. Id. at 75.

49. Id.

50. Id.

fact that Swedish families have been less poor than their American counterparts, signs of trouble are apparent as juvenile delinquency is up52 and depression, alcoholism, and suicide are increasing.53 Accordingly, a welfare state may be just as dangerous to families as a market economy.

The fourth question academics are debating is the role of discretion versus fixed rules in resolving the economic consequences of marital dissolution. At the moment we seem to be moving simultaneously in both directions.54 In the move toward fixed rules, all states have adopted child support guidelines which operate as rebuttable presumptions in establishing levels of support.55 In Minnesota56 and Michigan,57 discretionary alimony has given or is about to give way to awards which, like child support, are based on a guideline calculation. Statutes in Arizona,58 California,59 Colorado,60 and Illinois61 have replaced discretionary decisions with automatic stays of certain typical pre-divorce conduct by the parties. These go into effect on service of a summons and petition for divorce. On the side of expanded discretion is the experimental type of program initiated in California by Justice Donald B. King,62 now being tried in Minnesota.63 Various called "case management" or "collaborative law," it gives the presiding judge such extensive case management powers to get the parties to a settlement that some critics say it ignores due process.64 On this side, as well, is the demise of the tender years

52. Popenoe, supra note 45, at 76.
53. Id.
56. See, e.g., Lorraine S. Clugg, MSBA's Spousal Maintenance Committee Tries to Make Sense of Maintenance, Fam. L.F., Winter/Spring 1993, at 6 (reporting that the Minnesota State Bar Association formed a Spousal Maintenance Guidelines Committee in June of 1991, which has been meeting regularly since then).
57. Id. at 7.
62. J. Donald B. King, Save the Court—Save the Family, Fam. L.F., Winter/Spring 1993, at 1, 2.
64. See Carol Cronin, Case Management: Panacea for the Future or Another California
presumption,\textsuperscript{65} which gave preference in custody disputes to mothers of young children. Given a choice between arguing to the court's discretion and asking it to apply a fixed rule, I would much prefer the discretionary approach. As a practical matter, however, it makes little difference which direction the law takes. Empirical studies show a remarkable consistency between discretionary decisions and those based on fixed rules.\textsuperscript{66}

Of course, none of these issues affects never-married mothers. No-fault divorce, alimony, and fixed rules for resolving the economic and other consequences of marital dissolution versus discretion are all non-issues for them. So is the proper balance between private ordering and public responsibility since so many of these mothers are already publicly supported. As a group they are especially vulnerable to welfare dependency; they stay on welfare longer than other welfare recipients and tend to pass the dependency from one generation to the next.\textsuperscript{67}

The crucial question is what, if anything, we can and should do about this ever-expanding group of single mother families. The answer, of course, depends on what we think of them. Here, I must admit my own confusion. I do not know what to think. Is it true that these families are bad for children and society? Are they really the explanation for increased reports of child abuse and neglect?\textsuperscript{68} drops


\textsuperscript{65} See supra notes 16-17 and accompanying text.

\textsuperscript{66} A study of New York, for example, shows that the shift from property division according to fixed rules, namely title, to discretionary equitable distribution, did not change property division. Garrison, \textit{supra} note 7, at 670-71. Another study on child support in Colorado, Hawaii, and Illinois reports that the shift from discretionary child support awards to awards according to guidelines brought only "modest" change because many families have such low income that the courts could make only very low awards; because most decisions are reached voluntarily by the parties who tend to underestimate the required level of support and courts rubber-stamp them; and because pre-existing yardsticks were incorporated into the child support guidelines and formulae adopted. Thoennes et al., \textit{supra} note 15, at 345. Similarly, a California study shows that the demise of the tender years doctrine—the rebuttable presumption that custody of young children should go to their mother—in favor of a wider ranging discretionary search for the best interests of the child, has not changed the fact that mothers remain the primary custodians of children following divorce. Mnookin et al., \textit{supra} note 43, at 71-72.

\textsuperscript{67} See Douglas J. Besharov, \textit{Beyond Murphy Brown; We're Ignoring the Fact that All Single Mothers Aren't Alike}, WASH. POST, Sept. 27, 1992, at C3, C3 (stating that "children of never-married mothers are three times more likely to be on welfare than are children of divorced mothers").

\textsuperscript{68} Peter Steinfels, \textit{Seen, Heard, Even Worried About}, N.Y. TIMES, Dec. 27, 1992, § 4,
in Scholastic Aptitude Test ("SAT") scores, increases in juvenile and other crime, and increased teenage suicide and homicide rates? Or is family structure insignificant in explaining these societal ills? Do all family structures work roughly as well given equal economic advantage? And should we, instead of criticizing single mothers, applaud them for their courage? It depends on whether we heed Daniel Patrick Moynihan and his supporters or Murphy Brown and hers. Moynihan argues that we have redefined both divorce and out-of-wedlock birth as normal instead of deviant:

"The amount of deviant behavior in American society has increased beyond the levels the community can 'afford to recognize' and... accordingly, we have been re-defining deviancy so as to exempt much conduct previously stigmatized, and also quietly raising the 'normal' level in categories where behavior is now abnormal by any earlier standard.'

Is this what otherwise intelligent people are doing when they bad-mouth the two-parent family and call for recognition of divorce as a "normal social occurrence," a "necessary and appropriate corrective for an unwise or undesired marital choice," a "constructive," "positive, helpful" process? Is the American public merely registering disapproval of Dan Quayle or is it "defining deviancy down" when it makes Murphy Brown's single motherhood into an extraordinary ratings success? A recent article in the Atlantic described the public's response:

On the night Murphy Brown became an unwed mother, 34 million Americans tuned in, and CBS posted a 35 percent share of the audience. The show did not stir significant protest at the grass

at 1.

69. Id. But see Karen DeWitt, College Board Scores Are Up For Second Consecutive Year, N.Y. TIMES, Aug. 19, 1993, at A1 (noting that average SAT scores have risen for two years in a row).

70. Steinfelds, supra note 68, at 1.

71. Id.


73. Herma H. Kay, Beyond No-Fault: New Directions in Divorce Reform, in DIVORCE REFORM AT THE CROSSROADS, supra note 19, at 6, 28.

74. Id. at 29.


76. Id.

roots and lost none of its advertisers. The actress Candice Bergen subsequently appeared on the cover of nearly every women's and news magazine in the country and received an honorary degree at the University of Pennsylvania as well as an Emmy award. The show's creator, Diane English, popped up in Hanes stocking ads.²⁸

What I am asking, in other words, is how shall we label the rise in single mother families? Is it “deviant” and, therefore, a legitimate cause for moral panic, or is it “normal,” a logical, inevitable development in a society that values, indeed constitutionalizes, adult choice, freedom, and happiness in family matters? If I had to choose a position, I would fall back on my own experience, which is admittedly limited. It teaches me that raising children is an exceptionally difficult task and that even a loving, stable, two-parent, two-income family faces a high risk of failure. The task must be much harder for, and therefore less likely to be accomplished in, a family in which there is only a single parent and a single income.

Having edged gingerly over to the side of deviance and moral panic, the next question is what should and can be done about it? Certainly law reform is not the only or even the best answer. All we can ask of the law is that it not abandon its venerable role as teacher. No teacher can guarantee that students will pay attention to the lessons it attempts to impart, but every teacher has the obligation to try to impart the right lessons. To that end, it seems we can properly reform the law to correct the wrong lessons it now proclaims. The law now teaches us that the right to marry is fundamental and constitutional.²⁹ The implication is that marriage is an activity that is suitable for everyone and essential for a happy life. Thus people marry cavalierly, and, of course, one out of two of their marriages eventually ends in divorce.³⁰ Furthermore, because marriage is now characterized as a fundamental constitutional right, the states cannot freely regulate it.³¹

We should reform the law to deconstitutionalize the right to marry,³² thus eliminating the unwanted implications that it is suitable

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²⁸ Whitehead, supra note 26, at 55.
³⁰ Riley, supra note 75, at 5.
³¹ See supra note 79 and accompanying text.
³² See generally Earl M. Maltz, Constitutional Protection for the Right to Marry: A Dissenting View, 60 Geo. Wash. L. Rev. 949 (1992) (arguing that a close analysis reveals substantial difficulties with the concept of a right to marry).
for everyone and is required for happiness. This would free the states to experiment with programs that encourage and, perhaps, permit only the most responsible to marry and discourage and, perhaps, prevent the rest from doing so. Second, the law now tells parents that their personal satisfactions are more important than their children’s welfare. It thus permits parents to divorce without any inquiry into the likely effects of the divorce on minor children of the marriage. Yet we know very well that divorce is both psychologically and economically damaging to children.\(^8\) We should reform the law to create a special marital status for couples with children: the marriage for the benefit of minor children. It should be harder to enter and carry more onerous economic incidents than other marriages. Divorce from it during the children’s minority should be granted only after a finding that it would be better for the minor children than continuing the marriage. Third, the welfare system now encourages female recipients not to marry the fathers of their children,\(^9\) gives them more benefits as they have more babies,\(^10\) seems unconcerned with their failure to stay in school, and penalizes them for earnings and savings.\(^11\) It thus fosters the very behavior it should be trying to discourage. We should reform it to encourage recipients to marry their children’s fathers, to delay having additional children until they are able to support them, to finish school, and to earn and save. A number of states are already experimenting with such programs.\(^12\) Fourth, the Hyde Amendment\(^13\) now makes federal funds unavailable for most abortions.\(^14\) Its net effect has been to encourage states to cease to fund them. The lesson this teaches is that, although theoretically all women have a constitutional right to make reproductive decisions, only the wealthy can effectively exercise it. We should reform the law by repealing the

8. See supra note 29 and accompanying text.
11. Id. at 31.
Hyde Amendment, thus encouraging the states to restore funding for abortions without restrictions. In the same vein, we should include abortion services in the basic benefits package offered by whatever national health plan emerges from Congress.

I certainly would support any and all of these reforms in the law, but I would be careful not to overemphasize their likely effects on human behavior. We have to accept two facts. First, despite the law, whatever it says, and the availability of alternative choices, women are going to continue to engage in the same old conduct—they will marry, divorce, have children in or out of wedlock, and become their children's custodians. This conduct may be immutable—conduct which women not only passionately want to engage in but also have to engage in because of built-in female biological traits. Some will disagree, saying that this conduct is not immutably female but rather the result of societal pressure and conditioning. I reject this view on the basis, in part, of the Kibbutz experiment in Israel.90 During the Kibbutz experiment, traditional female roles were assigned to hired professionals; in the end, however, women themselves insisted on recapturing their traditional roles as mothers, cooks, and laundresses.91 The second fact we must accept is that marrying, divorcing, and having children in and out of wedlock is extremely risky for women. As a society we have an obligation to make that clear. Instead of romanticizing marriage and motherhood we ought to portray it as it is. Marriage is very likely to end in divorce. Having children in or out of wedlock is likely to make women and their children poor. What is more, as Shulamith Firestone so vividly told us in The Dialectic of Sex,92 labor is boring, childbirth hurts, and the prod-

90. See LIONEL TIGER & JOSEPH SHEPHERD, WOMEN IN THE KIBBUTZ 26-33 (1975); see also Christine Gorman, Sizing Up the Sexes, TIME, Jan. 20, 1992, at 42.

It is one thing to recognize that there are biological differences between men and women: the androgen-estrogen phenomenon. See Gorman, supra, at 44. It is quite another to say that human behavior is divided into two categories—female and male—and that the law ought to recognize this and respond to it by treating the sexes differently. This is called "difference feminism." See DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 343-44 (1993). In my opinion, "difference feminism" is dangerous and demeaning to women because it revives the old stereotypes that equality feminists have worked so hard to abolish and exalts so-called female characteristics by labeling them "good" instead of "bad." See Katha Pollitt, Are Women Morally Superior to Men?, THE NATION, Dec. 28, 1992, at 799, 806. Any female who fails to exhibit them, therefore, will be deficient. The best environment for women and men is equality before the law so that all are free to choose how to live and conduct themselves.

91. TIGER & SHEPHERD, supra note 90, at 262-63.

92. SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLU-
uct—a baby all your own to muck up as you please—can be, but frequently is not, very rewarding.93 Women, therefore, should not engage in this conduct without an awareness of the risks. Making them aware should become a concerted national effort. It would require a dramatic change in current individual and societal attitudes. Thus it is a job for the mass media, not the law. We need a national advertising campaign—the kind that taught the American people to smoke cigarettes, then to stop smoking them; the kind that presently sells them billions of dollars of questionable products like soft drinks, deodorants, and frankfurters.

I am not alone in calling for a radical change in the way we look at marriage, divorce, and having children. Other commentators are beginning to recognize this need. As Barbara Dafoe Whitehead put it in her recent piece in The Atlantic Monthly:

At least as important as changes in the law and public policy are efforts to change the cultural climate, particularly the media’s messages about divorce and non-marital childbirth . . . . It would . . . be valuable to enlist the support of leaders in the entertainment industry—particularly sports and movie stars—in conveying to children that making babies out of wedlock is as stupid as doing drugs or dropping out of school. This might, of course, await more exemplary behavior by some of those stars.94

Similarly, Peter Steinfels, writing for The New York Times, in a recent article about children, recognizes the importance of cultural forces. He says:

The most subtle sacrifices may be those facing the culture-makers themselves, a generation of political leaders, media executives, scholars, movie-makers, musicians, novelists, journalists, advertising creators and purchasers, critics and social commentators. For them the challenges to authority of the 1960’s given legitimacy and perpetuated in causes like racial justice, human rights and feminism remain formative.

Their own experiences of marriage and family may now have taught them lessons about the importance of social norms and the absurdities of endless quests for self-realization . . . .

The idea that a serious national campaign for child well-being might demand self-discipline and restraint raises quandries about

93. Id. at 81.
94. Whitehead, supra note 26, at 71.
creative freedom—and painful challenges to the self-image of many who produce or influence mass culture.\textsuperscript{95}

No matter how hard or painful it may be for the culture-creators to tell the truth about marriage, divorce, and having children, it must be done. Women are entitled to the right message and a better chance to protect themselves from the worst consequences of dangerous conduct. If women will not or cannot change their basic behavior, with a revised message they will at least learn that it puts them at risk. Increasing experience of financial independence—women have poured into the labor force in the last twenty-five years\textsuperscript{96}—will enable them to protect themselves from the worst consequences of their conduct. They can negotiate antenuptial and cohabitation agreements; keep their assets separate during relationships; use Norplant, a simple to administer, more-or-less foolproof, inexpensive contraceptive;\textsuperscript{97} and, above all, attempt to retain the ability to support themselves regardless of their living arrangements or children.

It is increasingly clear that women can no longer afford to swallow unquestioningly the current popular mythology about marriage, divorce, and children. Nor can they depend on men, the government, or academics’ divorce reform proposals to save them from the consequences of their conduct. Women, armed with the facts and an increasing degree of economic savoir faire and independence, will have to take precautions to minimize the damage to themselves from their acts. May all women have the resilience and determination of Chaucer’s Wife of Bath. She survived five husbands, and still wore red.\textsuperscript{98} Of course, she never had children. Remember her answer to the age old question, “[w]hat is the thing that women most desire?” It was “dominion”\textsuperscript{99}—dominion over their husbands, and their lovers. I would add “and, above all, dominion over themselves!”

\textsuperscript{95} Steinfels, supra note 68, at 12.
\textsuperscript{96} COMMISSION REPORT, supra note 26, at 21-22.
\textsuperscript{97} See Deborah Franklin, The Birth Control Bind, HEALTH, July 1992, at 42.
\textsuperscript{99} GEOFFREY CHAUCER, The Wife of Bath’s Tale, in THE CANTERBURY TALES, supra note 98, at 239-40.
\textsuperscript{100} Id. at 244.