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## FINEMAN'S *THE ILLUSION OF EQUALITY*: A REVIEW-ESSAY

THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM. By Martha Albertson Fineman. Chicago: University of Chicago Press, 1991. Pp. 252.

Grace Ganz Blumberg\*

In *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, Martha Albertson Fineman collects and connects five law review articles that she published during the last decade. The volume is well worth reading for its basic thesis: Women and children are not well served by a law of divorce based upon formal equality of the spouses, a law that posits degendered spouses rather than husbands and wives. It is a critical point and one that has not been adequately developed in the literature of feminist legal theory or family law. Fineman's collection of essays makes a good start, but it does not fully cover the necessary ground.

Fineman tracks the effects of formal equality, or sameness of treatment, which she also calls *equal treatment* and *rule equality*, in two central areas of divorce law: wealth allocation and child custody. In wealth allocation, formal equality treats wives and husbands as though they were economically equally-situated; in child custody, formal equality considers fathers and mothers equally deserving of child custody. In this review-essay I shall confine myself to the first issue, wealth allocation at divorce, because it is the area with which I am most familiar and because it presents more difficult issues than those posed by child custody.<sup>1</sup>

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1. There is an adequate and readily available solution to most of the child custody problems that Fineman identifies: the primary caretaker standard, which she and others espouse. (pp. 180-84). This standard awards custody to the parent who has

As the book's subtitle indicates, Fineman is interested in rhetoric, and she explores the political and intellectual provenance of formal sex equality in liberal feminist divorce law reform. Although highly critical of the equal treatment construct, she sensitively and sympathetically reconstructs the thinking of liberal feminists who came to divorce reform fresh from the formal equality regimes of Title VII (equal employment opportunity) and Title IX (equal educational opportunity).<sup>2</sup> Formal equality was, at the very least, a good starting place for labor market access and education. (Without formal equality, it is improbable that Martha Fineman would have written, or I have reviewed, or this journal have existed to

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taken primary responsibility for child care and nurturance. See, e.g., *Garska v. McCoy*, 167 W. Va. 59, 278 S.E.2d 357 (1981); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 561 (1984); Jeff Atkinson, *Criteria For Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 16-19 (1984). Wealth redistribution, in contrast, presents more intractable problems.

2. Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in employment. 42 U.S.C. § 2000e-2(a) (1989). Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational institutions that receive federal funding. 20 U.S.C. § 1681(a)(1) (1989).

Fineman explains the persistence and strength of liberal feminist adherence to rule equality in family law as a consequence of primary concern with women's equality in the marketplace and political sphere:

As such, feminist dialogues on the family during the past few decades have centered on changing role expectations within marriage and on the notion of shared domestic responsibilities between spouses. . . . The family discussion . . . has proceeded as an adjunct to the primary discussions of the ideal market functions that women could and should perform.

(pp. 24-25). Fineman explains liberal feminist adoption of gender-neutral family law rules as "conscious symbolic choices about how best to ensure a more just society," but reminds us that laws that significantly affect many people "must conform to more than an abstract legal norm and [must] reflect the actual experiences of peoples' lives." (p. 28).

The peripheral interest of liberal feminism in family law has been mirrored by academic proponents of a feminist jurisprudence, who have largely ignored family law other than in its physically violent manifestations, such as wife-battering, rape, and child abuse. Their lack of primary interest in family law may, in part, be explained experientially. Female legal academics are, effectively, economically male and hence need have little personal concern about family-generated need. Moreover, their marriage rate is low and many are childless. As Fineman notes, some condemn marriage as an institution (p. 25).

In contrast, academics who specialize in family law, women and men, generally are married or divorced and the active parents of children. Although they may describe themselves as "having feminist concerns," most would not identify with "feminist jurisprudence." They tend to express strong allegiance to the institution of marriage and considerable concern about the economic and social consequences of its dissolution. (I base these generalizations on personal observation during the last two decades and reading dedications to family law case books. See particularly IRA MARK ELLMAN, PAUL M. KURTZ & KATHERINE T. BARTLETT, *FAMILY LAW* (2d ed. 1991)).

publish this review.)<sup>3</sup> Yet formal equality bears little promise for women and children in divorce law, suggesting the need for a variegated approach to equality constructs.

Nevertheless, Martha Fineman begins her book with Wendy Williams' well-known line about choosing between formal equality and special treatment. Writing in the context of market employment and pregnancy, Williams advised: "If we can't have it both ways, we need to think carefully about which way we want to have it."<sup>4</sup> Wendy Williams chose formal equality. Martha Fineman contemplates family law and chooses special treatment. But as the United States Supreme Court ultimately concluded in the context of employment and pregnancy, we need not accept Wendy Williams' bait.<sup>5</sup> Professor Williams invites us to make an unnecessary and

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3. It was not until 1970 that the American Association of Law Schools ("AALS") prohibited sex discrimination in law school admissions. The AALS prohibition preceded by two years Title IX, which prohibits sex discrimination in educational institutions receiving federal funds. Education Amendments of 1972, 20 U.S.C. § 1681(a)(1). Female enrollment in law schools rose from four percent in 1965 to 40% in 1985. HERMA HILL KAY, *SEX-BASED DISCRIMINATION* 880-81 (3d ed. 1988) and sources cited therein.

4. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175, 196 (1982) (quoted by Fineman at p. 1). See also Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 325 (1985).

5. In *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), the United States Supreme Court held that Title VII rule equality designed to ensure women equal access in the labor market did not preempt a California law guaranteeing women a right to job reinstatement after short-term pregnancy disability leave. The court reasoned that both Title VII rule equality and California special treatment were designed to achieve the goal of outcome equality in the labor market: "By 'taking pregnancy into account,' California's pregnancy disability-leave statute allows women, as well as men, to have families without losing their jobs." *Id.* at 289. As UCLA Professor Christine Littleton, whose Coalition for Reproductive Equality in the Workplace ("CREW") took this position in an *amicus* brief, succinctly observed: "Sometimes equal treatment is what is necessary for long-term equality. Sometimes it is not." *Are Women "Male Clones"?*, *TIME*, Aug. 16, 1986, at 63.

Professor Williams was also concerned about a problem presented by the history of American protective labor legislation: Rules seeming to single out women for benign special treatment were sometimes used to exclude them from labor market opportunities. Reflecting on this experience, feminist reformers in the sixties and seventies were understandably wary of *special treatment*. Interestingly, Martha Fineman makes the same claim about rule equality: Rules of gender equality at divorce effectively oppress women.

It should not be surprising that both special treatment and equal treatment may and do oppress women. All law is susceptible to being used to enforce existing power relations. This does not mean that it is all a wash and we should therefore ignore law's capacity to oppress women when we choose among the alternatives. Rather, we should look contextually to figure out what is likely to do the most good, what is least likely to get twisted, and what we can do to insure that it does not get twisted. For example, traditional divorce laws investing great discretion in judges, which Fineman seems to

misleading choice: The question is not *which* but *when*. Formal equality is unobjectionable, even desirable, when it fosters substantive equality. Formal equality is a cruel hoax when it enforces, reinforces, and exacerbates substantive inequality. The challenge is to develop an accessible rubric that enables us to discern when one or the other is appropriate and to develop the flexibility and confidence to be comfortable with a nonunitary approach and hence a certain amount of ambiguity.

Although Fineman implicitly acknowledges the usefulness of formal equality at various points in her book,<sup>6</sup> the book's introductory chapter, concluding lines,<sup>7</sup> and main title, *The Illusion of Equality*, may be misunderstood by the casual reader as a blanket rejection of formal, or rule, equality as well as a denial of the efficacy of reconstructing equality notions in divorce law. On the contrary, the rhetorical power of equality is so great that Fineman keeps the word and changes the content: Divorce law should strive for *equality of outcome, equality of result*.<sup>8</sup>

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prefer (pp. 20, 72), have in fact and are likely to be used in ways that reproduce current power relations, i.e., that harm women. The recent case law history of alimony is a prominent example. Although alimony statutes prominently feature *need, even marital standard of living*, in the list of factors to be taken into account, judges exercising discretion have routinely ignored both criteria in rejecting or minimizing alimony claims. See generally Grace G. Blumberg, *The Relationship Between Property Division and Spousal and Child Support*, 2 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 41.01[2] (John P. McCahey ed., 1990) and Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988). On the other hand, nondiscretionary, even mathematical standards, such as 50-50 distributional rules and child support guidelines, are much more resistant to abusive application.

6. See, e.g., pp. 21, 33, 189-90.

7. Fineman concludes: "The rhetoric of equality is too easily appropriated and utilized to gain support for antifeminist measures. Equality rhetoric is a rhetoric that belongs both to no one, and to everyone. For this reason alone, it would seem time to abandon equality." (p. 190).

8. See pp. 3-4, 21-23, 35, 176. Fineman does not elaborate on this end goal, but focuses her attention instead on *need* and on rhetorical devices that may divert our attention from *need*. See *infra* text accompanying notes 9-19. Equality of result is more than a rhetorical device; it proposes a determinate mathematical standard for an area of law in which principles and standards have historically been vague and indeterminate. Even in the pre-1960s rhetoric of female *need*, see *infra* text accompanying notes 19-21, legal responsiveness to a divorcing wife's need was contingent upon her husband's absence of need, i.e., his ability to pay. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 443-45 (1968). In a world in which male need was generally conceptualized more expansively and generously than female need, equality of outcome was unlikely.

Economic equality of outcome has already entered the rhetoric of child support guidelines, which often recite the goal of equalizing the standard of living in both parents' households. See, e.g., Cal. S.B. 370 (1992). But in practice, current guidelines are

I agree with Martha Fineman, and I agree with the methodological principles that she carefully develops in the first chapter.<sup>9</sup> But I fear that she has not made the case to the unpersuaded, in part because her interpretation of divorce rhetoric is not always convincing, but more importantly because she does not move beyond her critical analysis of arguably unhelpful rhetoric to challenge and reconstruct systematically the belief systems that stand as impediments to adoption of an equality-of-outcome rubric. The introduction and effect of formal equality is clearly evident in the changing rhetoric of alimony.<sup>10</sup> Yet Fineman concentrates instead

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likely to realize this goal only when the custodial parent's earnings are relatively equal to those of the noncustodial parent.

An enlarged equality-of-outcome rubric might also shed some light on a generally contested area of divorce law: qualitative and quantitative expectations about mothers' participation in market labor and the implications of their full attachment to the labor force. Divorced mothers who are full-time workers tend to suffer not only a dollar decline in standard of living but also a marked loss of leisure. An expansive outcome-equality rubric would account for leisure as well as dollar income.

9. Fineman advises beginning with an examination of the economic, social, and emotional circumstances of the real people who experience the application of legal rules. She counsels against accepting the status quo as *natural* or bias-free, and urges doing everything possible to expose its bias. She chafes against the requirement that legal rules be gender-neutral, a requirement now constitutionalized by *Orr v. Orr*, 440 U.S. 268 (1977). *Orr* would, at least technically, impede Fineman's prescription that we develop divorce rules that are not "facially neutral but instead take into account women's disadvantaged position in society." (p. 35). (After *Orr*, our analysis must be functional rather than gender-specific. We must talk about "primary caretakers of children" and "persons socialized to be homemakers as well as market workers" rather than "mothers" and "wives.") She also resists the pressure to make language gender-neutral because both practices tend to deflect us from "an appreciation of the gendered society in which we live." (p. 13). Fineman defines "law" broadly: When examining child custody resolution, she pays attention to its implementing institutions, such as social work and mediation.

The only thing Fineman fails to promise and neglects to do is closely examine traditional legal sources. Thus, her treatment of marital property is weak descriptively as well as analytically. I treat this in more detail *infra* in the text accompanying notes 30-32.

10. Fineman spends only a short paragraph on the changing rhetoric of alimony (p. 40), where rule equality has been much in evidence in the form of gender-neutral expectations about postdivorce self-support and where rhetorical losses for women have arguably wiped out gains in property division. It is unclear to me why Fineman has ignored this conceptually rich area and concentrated instead on the rhetorical content of property division. Perhaps it is because the sources of change in alimony rhetoric are more confused and diffuse and because, in the past several years, some jurisdictions have, at least in their appellate case law and guiding statutes, reinvigorated need-based transfers. See Blumberg, *supra* note 5; Krauskopf, *supra* note 5.

Fineman tends to confuse property distribution and support law, and to blame property distribution for supposed shortcomings in support law. Fineman states, for example, that "the new property rules removed economic security from women by abolishing the common-law obligation of a husband to support his wife and children (even after the marriage ends)." (p. 34).

on the much more ambiguous and open-ended rhetoric of property division, where she is highly critical of the successful use of "contribution" as a supporting rationale for property division at divorce. "Contribution" posits that both spouses contribute to the acquisition of property during marriage and thus both enjoy an earned entitlement in its distribution at divorce. Contribution itself does not posit qualitative or quantitative equality of husbands' and wives' contributions. On the contrary, statutory emphasis on homemaker as well as market contribution suggests that the spouses may contribute differently along gendered lines.<sup>11</sup> Some jurisdictions conclusively or rebuttably presume quantitatively equal contribution or equal distribution, but this remains a minority perspective.<sup>12</sup> What bothers Fineman about *contribution* is that it may effectively, although not nominally or necessarily, displace *need* as a distributional criterion,<sup>13</sup> and *need*, according to Fineman, is the proper

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11. See Brian Diamond & William A. Prinsell, Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOK. L. REV. 67, 81 n.53 (1980), listing 20 common law equitable distribution jurisdictions that have homemaker provisions. See, e.g., ME. REV. STAT. ANN. tit. 19, § 722-A(1) (West 1981 & Supp. 1991), which provides that the divorce court "shall divide the marital property in such proportions as the court deems just after considering all relevant factors, including . . . the contribution of each spouse to the acquisition of marital property, including the contribution of a spouse as homemaker." The Maine provision tracks the Uniform Marriage and Divorce Act § 307, 9A U.L.A. 238 (1987).

Community property laws never refer to market or homemaker contribution because they effectively presume that the spouses contribute equally to the acquisition of community property.

Special "homemaker" provisions should be irrelevant in community property states, since those states do not start with the common law premise that there is some connection between a spouse's relative earnings and her claim on property acquired during the marriage. The community property system has embedded within it the alternative premise that both spouses have contributed equally to the acquisition of all assets.

There is no doubt that the trend in common law states is toward this approach, but there remains a great variation in the nature and extent of the common law marital property reforms.

ELLMAN, KURTZ & BARTLETT, *supra* note 2, at 235.

12. In 1986, I counted 15 community property and equitable distribution states with presumptive or absolute 50-50 distribution rules. Grace G. Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250, 1251-52 n.4 (1986). The remaining 35 jurisdictions allow divorce courts to equitably distribute property according to a number of contribution-based and/or need-based criteria.

13. It is true that there is a good deal of conceptual dissonance in an equitable distribution rubric that instructs the court to consider both need (likely to favor the wife) and contribution (likely to favor the husband or to treat the spouses equally). Not surprisingly, one scholar has found that common law states have emphasized spousal contribution more than need in equitably distributing the marital estate. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to*

focus of a just law of divorce. A presumptive or absolute 50-50

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*Address Need*, 56 FORDHAM L. REVIEW 827 (1988). There are both sinister and benign explanations. Once again, ambiguous law is interpreted in a manner that favors men. More innocently, routine and widespread application of equitable distribution law is relatively recent, and norms of partnership and equal contribution are still not fully established. (See the observations of ELLMAN ET AL., *supra* note 11.) Thus, when courts still think of marital property as "the earner's property," it is not surprising that they should rely heavily on contribution as a justification for distributing a portion to the "non-earner." As contribution becomes better established and entitlements are assumed rather than proven, doctrine can be developed and elaborated so that entitlement and distribution are distinguished insofar as equal contribution may be presumed but distribution may be based upon the parties' relative need. (This will, of course, entail strengthening our account of *why* need should be determinative in the distribution. See *infra* text accompanying notes 19-28.) This is perhaps easier to see from a community property perspective. Spouses equally *own* community property, but in more than half of the community property states, divorce distributions need not be equal. Consider, for example, the divorce distribution provision of Washington, a community property state that practices equitable distribution at divorce. The Washington statute provides that, at dissolution:

the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of time.

WASH. REV. CODE ANN. § 26.09.080 (West 1992). Washington courts interpret this provision and its predecessors to make *need* the most important factor: "It is the economic condition in which the decree will leave the parties that engenders the paramount concern in providing for child support and alimony and in making a property division." *DeRuwe v. DeRuwe*, 72 Wash. 2d 404, 407, 433 P.2d 209, 212 (1967), *cited approvingly in In re Marriage of Kraft*, 61 Wash. App. 45, 808 P.2d 1176 (1991), *rev. granted*, 816 P.2d 1223 (1991). See also *In re Marriage of Salerno in In re Marriage of Dessauer*, 97 Wash. 2d 831, 650 P.2d 1099 (1982) (en banc); *In re Marriage of Sheffer*, 60 Wash. App. 51, 802 P.2d 817 (Wash. Ct. App. 1990); *In re Marriage of Parks*, 58 Wash. App. 511, 514 n.4, 794 P.2d 59, 62 n.4 (Wash. Ct. App. 1990). If community property states are able to unlink *ownership* and *distribution*, equitable distribution states should become able to unlink *contribution* and *distribution*.

Contribution and partnership theory have proven remarkably successful in establishing property entitlements for wives at divorce. It would seem foolhardy to junk this theory, as Fineman proposes to do, in order to substitute *need*. *Need* can more suitably function as a distributional criterion, undergirded by the entitlement secured by contribution and partnership.

In the rights/needs discussion of critical legal studies, *contribution* and *partnership* may be understood to create economic rights for the economically subordinated sex, rights for which Fineman would substitute *need*-based claims. As some critical legal theorists have noted with respect to race and sex, need-based claims are problematic for subordinated groups. See *infra* note 27.



distributional rule reinforces this displacement because it allows little or no room for judicial need-sensitive deviation; that is, for awarding *more* than half of the marital property to the wife on the ground that she has the greater need for it.

From an historical perspective, this analysis is problematic. Although there is considerable jurisdictional variation,<sup>14</sup> the adoption of contribution-based entitlement, and in some cases presumptive 50-50 distribution, has generally been favorable to divorcing women,<sup>15</sup> who previously faced presumptive nonentitlement or considerably weaker claims to property purchased with the husband's labor.<sup>16</sup> From this historical perspective, both reforms have in fact been responsive to women's economic needs, even though their rhetoric may not specifically reference need.

Fineman's close analysis of the rhetoric itself is also problematic. The formal equality difficulty is not located in the rhetoric of *contribution*, which gives rise to an earned entitlement, but rather in a minority distributional rule used to execute the entitlement. Fineman's confusion of *contribution* and *distribution* is unfortunate because close analysis suggests that contribution and need are con-

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14. In discussing marital property developments during the last two decades, there are at least four developmental variations. In 1970, some jurisdictions, mostly populous eastern states including Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, and Virginia, had no marital property systems at all. Other common law states had weakly developed doctrines of equitable distribution, which had relatively little bite at divorce, although some midwestern states may have had older and stronger distributional norms. The eight traditional community property states, in contrast, had well-developed marital property systems, with well-defined distributional norms and expansive definitions of distributable "property." What we now see is convergence toward the community property model. See generally ELLMAN, KURTZ & BARTLETT, *supra* note 2; Blumberg, *supra* note 12, at 1251-52.

15. Adoption of 50-50 distributional norms could only harm women if they were generally receiving more than 50% of the marital property under prior *de jure* regimes or under *de facto* negotiation regimes that would have survived the adoption of no-fault divorce grounds. See *infra* note 16. This rare *de jure* result did occur in California with the introduction of no-fault. Under prior fault-based divorce law, the "innocent" spouse was entitled to more than half of the community property; under no-fault law, each spouse was entitled to half. Thus, as Weitzman observed in California, 50-50 distribution tended to decrease distributions to wives, who had generally been the "innocent" spouse under prior fault-based divorce. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 30-31 (1985). This result, however, should not be generalized. In most states even now, a 50-50 distributional rule would tend generally to increase distributions to divorcing wives.

16. For a general discussion of marital property developments in the last two decades, see Blumberg, *supra* note 12, at 1251-52. It is true, as Fineman recounts, that under prior divorce regimes, an "innocent" woman might exact property from her husband in exchange for the divorce he sought. Given, however, that this bargaining system has been undermined by various forms of no-fault divorce, entitlement theories that have demonstrable bite necessarily advance women's economic position.

ceptually separable and reconcilable<sup>17</sup> and because *contribution* is a useful device for rationalizing need-based alimony and child-support as well. *Contribution* tends to direct our attention to some of the factors that warrant postdivorce economic transfers to women. Similarly, Fineman's critique of the "partnership" metaphor of marriage is historically and linguistically unpersuasive. She identifies it as a modern metaphor "chosen by feminists" (p. 24), that associates marriage with the market and calls for gender-neutral rule equality (pp. 4, 18). But the origin of the metaphor is ancient; it comes to us via the Spanish-derived community property law of the western states.<sup>18</sup> It entered the national lexicon to promote adoption and expansion of a common law equivalent to community property, the equitable division of property at divorce. Like the term *contribution*, *partnership* tends to spotlight and dignify the work of homemaking and child-caring.<sup>19</sup>

Even though I agree with Fineman that *need* is ultimately the proper focus of divorce law, I am unpersuaded by her critique and doubtful about the efficacy of her proffered solution, which is to abandon contribution and partnership in order to pave the way for solely need-based claims. As she acknowledges later in the book, efforts to develop marital property law with what has proven a suc-

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17. See *supra* note 13.

18. Historically, the very notion of marital property has prompted partnership language and imagery. California, like Spain and Mexico, early adopted partnership language and imagery. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 95 (2d ed. 1971) (citing Spanish and Mexican sources). The experience of early Anglo-Saxon California judges, who were attempting to make some sense of their "exotic" community property system, is instructive. They were working in a context in which sexual inequality was the legal norm, sexual roles were polarized, and women were universally considered the economic dependents of men. Yet they wrote regularly of spouses as "copartners" and observed that "the relation of the husband and wife as to their property is somewhat in the nature of a partnership." *Lynam v. Vorwerk*, 13 Cal. App. 507, 509, 110 P. 355 (1910). See also *Ord v. De La Guerra*, 18 Cal. 67, 74 (1861) (referring to the spouses as "matrimonial partners" and to the marriage as a "matrimonial copartnership").

19. DE FUNIAK & VAUGHN, *supra* note 18, § 95 at 237. Writing in 1971, De Funiak and Vaughn take a thoroughly traditional patriarchal view of this "partnership":

[T]here is attached to the marriage a marital partnership based on the view that two individuals are equally devoting their lives and energies to furthering the material as well as the spiritual success of the marriage. The wife usually remains the home maker, the husband the bread winner, and because his share thus has to do with the earnings and properties acquired, their management remains in his hands. The view most correctly expressed by our American [community property] courts, then, is that it is a form of partnership with the husband as the managing partner.

*Id.*

cessful and compelling rationale (contribution) and to expand the scope of marital property law by extending it to intangible as well as tangible assets<sup>20</sup> have often been undertaken by persons whose unstated agenda seems to be wealth transfer to wives at divorce (pp. 52, 178). The search for alternative paths was prompted by the recognition that need-based claims were not commanding economic transfers to wives and children.

Fineman's nostalgia for the "need," or "dependency," of fault-based divorce is misplaced. Even in the generous rhetoric, as opposed to the less generous practice, of fault divorce, need alone was never enough; fault was always an adjunctive, if not primary, justification for postdivorce transfers. Need was the measure, but fault was the rationale. Wives who were themselves at fault generally forfeited all economic claims, no matter how needy or dependent they might be.<sup>21</sup> With the demise of fault divorce, perceiving the historic weakness of claims based upon economic need alone, family law specialists concerned about economic outcomes turned elsewhere. Many wealth transfer proponents, recognizing that women's claims for themselves are likely to go unheard, have turned to child support, where transfers have been increased, regularized, and made enforceable.<sup>22</sup> Others have worked on expanding marital property transfers,<sup>23</sup> and yet others have worked out new rationales for alimony.<sup>24</sup> It is surely true, as Fineman suggests, that *need* is the mother-rationale.

Yet it is not enough merely to revive, or reinvoke, need. Need must be resurrected and recreated. In the United States, as Fineman recognizes, a demonstration of need does not assure that such need will be met (p. 173). That is the stumbling block today in private and public divorce-related resolutions. There is no doubt that in particular cases the economic outcomes for the divorcing husband and wife are unequal. The rhetoric of formal equality does not blind any participant (parties, attorneys, or judges) to the reality

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20. See *infra* notes 31-32.

21. For a 1968 discussion of fault as a bar to temporary and permanent alimony, see CLARK, *supra* note 8, at 425, 442, 445-46.

22. See generally Irwin Garfinkel & Marygold S. Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157 (1990).

23. See, e.g., Grace Ganz Blumberg, *Intangible Assets: Recognition and Valuation* in 2 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY (John P. McCahey ed., 1984, rev. 1988); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980).

24. See, e.g., Krauskopf, *supra* note 5.

that this wife is and will continue to be economically unequal to this husband. The impediment to outcome-equality is the absence or ambivalence of belief that this particular husband (or anyone else, including the State) should be required to contribute to the economic well-being of this particular wife.<sup>25</sup>

Because Fineman concentrates on the rhetoric of equality rather than the substance of economic outcomes at divorce, she avoids the more serious impediment to outcome-equality: resistance to wealth transfer. Feminist theorists may spend long hours brooding about equality theory but the bottom line, in America, is holding on to the wealth one has "earned," for which purpose any rhetorical device is welcome. Fineman explains that result-equality rules are hard to justify "because [they] are facially unequal . . . ." (p. 3). This may be true in a feminist gathering or a law school class, but elsewhere the more strenuous objection relates to their wealth-redistributive consequences. It is the resistance to postdivorce wealth transfer that must be overcome if need is to be resurrected as a criterion for wealth transfer at divorce. It must be persuasively demonstrated, not merely asserted,<sup>26</sup> that gender-roles

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25. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

26. It is not that Fineman is unaware of the contours of the argument. For example, she describes men and women, husbands and wives, as "stand[ing] in culturally constructed and socially maintained positions of inequality" (p. 29) (citing Victor Fuchs to the effect that a full analysis requires perspectives provided by, *inter alia*, the social sciences, the humanities, biology, and law). Rather, she seems unaware that an extensive, well-developed account is central to her position. Although the content of the account is necessarily interdisciplinary, its formulation is very much a lawyer's job, a Brandeis brief.

In a sense, the difficulties I have with the book may stem from difficulties inherent in addressing two audiences simultaneously. When I espouse outcome-equality as a teacher of community property and family law, I encounter two very different sets of objections. The first comes from feminists well-schooled in equality theory who object, on a symbolic level, to the "demeaning" picture I paint of women. They reject any non-idealized portrayal of women's economic capacities as harmful to women in the market and in family life as well. On the other hand, many of their male classmates all too willingly accept that women are significantly disadvantaged by the family and in the labor market, but do not see why that disadvantage warrants wealth transfer at divorce from individual husbands to their wives.

Fineman's book would seem primarily addressed to my feminist students, to show them the error of their insistence on rule equality, to expose the fallacy of universal rule equality. That task requires some elaborated references to gendered differences, but it does not require a full exposition because the persuader's task is more in the nature of a logical exercise than an exhaustive demonstration.

But my male students are not the victims of a logical fallacy or methodological error. They must be persuaded, by demonstration, that the inequality they perceive is of a nature that justifies private and public wealth transfer. My experience in state family law reform with attorneys and judges, male and female, largely tracks my experience with male law students, although concerns about symbolic content do also occasionally

are socially constructed and socially enforced, that divorced wives and mothers are needy because they are or have been performing socially-required tasks, that inequality is persistent, not short-term, and that much income inequality is the result of female role-demands and hence is unreached by antidiscrimination laws. This is, of course, the agenda for another book. And it remains to be seen how well it "writes."<sup>27</sup> Conceptually, however, it is the predicate,

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surface. Thus my concern for a persuasive demonstration that divorce-related need warrants private and public response.

Reading and rereading Fineman's book brought to mind an orthodox Rosh Hashanah service my husband, daughter, and I mistakenly attended and derisively walked out of many years ago. Far from home on this holy day, I organized the family for what I imagined to be a reform or conservative university-related Hillel service but was instead an orthodox Chabad (Lubavitcher) service. As soon as we entered the door, to our surprise my husband was ushered to a good seat up front while my daughter and I were pointed to a crowded rear corner where the view of the podium was further obscured by sheets erected to protect male worshippers from impure thoughts and other female contaminants. The rabbi began to preach, to exhort the entire congregation, or so I imagined, to develop the life of the spirit. It was true that he only spoke to the men, but I imagined that was because they were frontally positioned before him. After ten minutes or so of impassioned spiritual exhortation, he seemed suddenly to recollect that he had a second audience. Turning to the women's section he said "And you women, make sure you keep a good, clean home for your family, and take good care of your children." That done, he turned his attention back to his primary audience and repeated the alternating sequence several more times before my seven year old daughter insisted that we leave.

Oddly, I have always remembered this rabbi sympathetically. For me he represents the dilemma of the two audiences. It is hard simultaneously to address two audiences with quite different messages, even when you are clear about what you want to say to each. Fineman's argument seems to shift back and forth between an audience of otherwise worthy feminists who have committed a methodological error, pursued a logical fallacy, and a general audience of nonfeminists, including misogynists, whose main failing is probably that they do not care enough about women and who are generally in need of substantial moral correction.

27. It may be that no matter how persuasive a case is developed for need-based divorce-occasioned economic transfer, transfer will not be forthcoming because postdivorce need serves an important instrumental purpose: It disciplines women to stay in marriage and to accommodate their husbands by assuring that they cannot afford to leave marriage themselves or to have their husbands leave them.

In a related vein, much attention has been paid to the declining value of real wages for working and middle-class workers, but the disciplinary impact upon women has not been noted. What has generally been emphasized is increasing male inability to support a family alone and hence the consequent need for a second (lesser) female wage to keep the family standard of living intact. Yet the divorced male's wage is more than adequate to support himself. Indeed, to the extent that he keeps it for himself after divorce or has it diminished only by child support, divorce is likely to increase his standard of living. But his divorced wife, even though she is employed full-time in the labor market, is increasingly unable to support herself and the children. Thus, the declining value of real wages also tends to discipline women.

I would like to situate myself in this critique. I value marriage and regularly counsel disaffected spouses to give their marriage another chance. I do not, in principle,

not the sequel, to Fineman's rejection of family law's search for alternative wealth transfer rationales. Until a persuasive account of *need* is developed, an account that compels wealth transfer to women at divorce, it would seem premature to renounce other approaches. To do so prematurely is also inconsistent with Fineman's introductory exhortation that we abandon grand theory and empty rhetoric in favor of instrumental need-focused initiatives. Yet her account ignores such recent initiatives in child support,<sup>28</sup> income transfer to one-parent families,<sup>29</sup> and alimony.<sup>30</sup> In the one wealth transfer area she does address, marital property distribution, Fineman seems unaware of the extent of its current redistributive reach,<sup>31</sup> and she dismisses without adequate discussion initiatives to

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oppose pressures that tend to keep spouses in marriage. I would prefer, of course, that such pressures not be lopsided and hence disproportionately oppressive; I would prefer pressures that would encourage both spouses to stay in marriage and to accommodate each other. It may be that there are corresponding pressures for men: Disruption of their relationship with their children may have such an effect. Nevertheless, in a culture of female subordination, we should expect such pressures to run largely against women in favor of men. Inattention to female income inequality at divorce may not solely be negligent or thoughtless or even misogynist. Its perpetuation may also serve an instrumental purpose in disciplining and subordinating women.

More generally, need-based claims, as opposed to right-based claims, may be ineffective when needs are asserted by sexually or racially subordinated groups who, together with their needs, are rendered invisible, unworthy, or insignificant in proportion to their social subordination. Critical legal studies has broadly debated this issue. Initially, white male scholars critiqued right-based claims in favor of need-based claims. Black scholars, particularly female black scholars, rejoined that rights analysis has special meaning for the racially oppressed, for whom need-based claims are likely to be unavailing. For an account of this discussion and citations, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146-65 (1991). With respect to sexual oppression, see Christine A. Littleton, *Equality Across Difference: A Place for Rights Discourse?* 3 WIS. WOMEN'S L.J. 189 (1987).

28. Garfinkel & Melli, *supra* note 22.

Fineman mischaracterizes the content of current child support rules: "However, as with property division, equality in shouldering child-support obligations may mean equally splitting the monetary costs, not contributing according to ability [to pay]." (p. 49). See also pp. 52, 176. The dominant *income-shares* model requires proportional contribution from each parent according to his or her income. The minority *percentage-of-income* model nominally requires contribution only from the noncustodial parent. Garfinkel & Melli, *supra* note 22, at 164-65.

29. Irwin Garfinkel & Marygold S. Melli, *Maintenance Through the Tax System: The Proposed Wisconsin Child Support Assurance Program*, 1 AUSTL. J. FAM. L. 152 (1987).

30. See Blumberg, *supra* note 5; Krauskopf, *supra* note 5.

31. The only distributable property Fineman explicitly identifies is the family home. She describes vested and unvested pension benefits as "other economic circumstances [that] may be considered" in the division of assets at divorce (p. 41), apparently not realizing that pension benefits themselves have for some time now been universally treated as divisible property, substantially enriching the distributional pot of working-class and middle-class divorcing couples. See Blumberg, *supra* note 23, § 23.02. Simi-

further enlarge its scope.<sup>32</sup> Although Fineman urges that we eschew the abstract for the concrete, she repeats the very error that she criticizes.

With respect to the book that needs to be written, it does not have to be constructed from new cloth. It is more a matter of collection and synthesis. Fineman's conviction that substantial postdivorce wealth transfers to women are appropriate, a conviction I share, is based on experience and knowledge that has not been sufficiently communicated or disseminated. The experience and knowledge derive in part from feminist observation and reflection,<sup>33</sup>

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larly, in her brief discussion of "the current battle to expand the concept of property" (p. 178), she lumps together goodwill and education, leaving the impression that neither is as yet well established in legal doctrine. While only two states, Michigan and New York, treat maritally-acquired professional education as marital property, virtually all states recognize goodwill and most recognize nonmarketable as well as marketable goodwill. See Blumberg, *supra* note 23, §§ 23.05-23.06.

32. Fineman concedes that goodwill and professional education may be the entering wedge for treating all human capital acquisition during marriage as marital property:

[A]s the [human capital] argument gains adherents, the concept may be expanded as a way of dealing with need within the framework of equality. . . . How much better for the image of woman as independent and equal if future salary or earnings could be characterized as property and therefore be subject to equal division as a matter of right.

(p. 178). But she concludes illogically by reverting to a critique of the limitations of the entering wedge: "The difficulty with this resolution is that it only applies to those cases where a [marital?] 'contribution' has been made to the acquiring degree or the goodwill." (p. 178). It is true that a theory that would capture all noninflationary marital gains in earning capacity, as human capital accounting would do, will not reach those families where the spouses' real wages have declined or remained level over marriage, but the question is always: "As compared to what?" Such a regime would certainly effect far more postdivorce transfer than we see now or ever saw under any prior regime.

At bottom, however, the rhetorical and doctrinal distinctions pale in significance. The impediment to widespread acceptance of human capital accounting is the same as the impediment to need-based wealth distribution: the failure of family law to develop and adopt a social account of sex-based inequality that is sufficiently compelling to warrant substantial postdivorce wealth transfer.

33. When, for example, I ask myself why I, a middle-aged wife and mother, have improbably achieved "male" professional status, I cannot overstate the central significance of social deviance: Growing up as a woman, I was peculiarly and unaccountably unresponsive, even resistant, to social cues and pressures. Behaviors that are increasingly seen as acceptable in either sex by middle-class American parents were perceived as deeply problematic in a girl by my middle-class family and community in the forties, fifties and early sixties, sufficiently problematic to require psychiatric intervention. Such behaviors included intellectual curiosity, argumentativeness, iconoclasm, love of math, bookishness, athleticism, physical adventurousness and risk-taking, and dislike of physically restrictive clothing. The concern was less sexual orientation than gender identity: How would I ever make a successful adjustment to wifedom and motherhood? My parents, school counselors, and mental health professionals agreed: I needed

but much of the knowledge comes from the social sciences, particularly economics, sociology, anthropology, and education. Fineman cites some of these sources in her book and makes frequent reference to Victor Fuchs' excellent *Women's Quest for Economic Equality* (1988). But she does not systematically confront the heart of the matter: that many people, including some feminists, while fully aware of postdivorce income inequality, are not persuaded that it is problematic in the sense that it should be addressed by private or public wealth transfer. This is the case that must be made.

Finally, from a rhetorical perspective, it is not "either . . . or . . . ." Language and thought are infinitely malleable and suggestive. Concepts can be cumulated as well as opposed. The *contribution* and *partnership* concepts that have been so widely accepted but so roundly criticized by Fineman carry within them the seeds of future contribution (alimony) as well as past contribution (property distribution) and the notion that even a failed marriage is a continuing enterprise. Although not yet universally reconciled in property distribution, *need* and *contribution* team up nicely for post-divorce alimony resolution. More basically, *contribution* is what Fineman argues on behalf of women. The need-based entitlement that she would establish for them is largely predicated upon the importance of their nonmarket contribution and the extent to which it inhibits their market power.

I engage and criticize *The Illusion of Equality* so vigorously because I find it a stimulating and provocative book about an important subject. That both the author and I may sound a bit querulous at times is in part a function of the subject, which entails achieving social welfare in an inhospitable environment. It is disturbing to live in a country where resources abound but needs often go unmet. Divorce law is an egregious instance, one where the consequences of our failure to effect adequate private interspousal wealth transfer are exacerbated by our failure to take up the slack through public subsidy of one-parent families and general basic needs subvention.<sup>34</sup>

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psychiatric help in order to develop and adopt a "feminine identity." Fortunately for me, an unwilling patient is untreatable, and thus the psychiatric project was abandoned.

34. In substantial measure, the need Fineman identifies may alternatively be discussed in terms of the inadequacies of the American welfare state: the absence of national health care, child allowances, one-parent family grants, subsidized housing, and subsidized child care.

The failure of private and public wealth distribution may be related. It is commonplace in America to assert that a highly developed welfare state, such as Sweden, may lessen an ethic of personal responsibility. Yet it would seem at least equally plausible to



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posit a positive rather than an inverse relationship between societal and individual non-responsibility and to suspect that each is likely to reinforce the other. A divorced non-custodial father, observing that the state does not appear to value or care for his children, may well draw negative instead of positive inferences about his own responsibility.