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Book Review

In Search of a Normative Principle for Property Division at Divorce

Patricia A. Cain*


Feminists have wrestled with the concept of equality for some time. In the nineteenth century, feminists demanded "equal treatment" in the form of equal access to education and to jobs, often without success.  

Early in the twentieth century, feminists requested and the Supreme Court upheld protective labor legislation, despite its apparent conflict with the principle of equality. The "special

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treatment" versus "equal treatment" debate continues today as feminists grapple with the problem of pregnancy in the workplace.³

The fight for sex equality, in the latter part of the twentieth century, has taken place in state legislatures, in Congress, and in state and federal courts. The United States Supreme Court did not recognize sex equality as a constitutional principle until 1971;⁴ that year marked a turning point in constitutional litigation. Encouraged by this early success, feminist litigators began filing more cases in federal court challenging laws that treated women differently from men.⁵ As these cases worked their way up to the Supreme Court, a new jurisprudence of sex equality was developed. Early on, we learned that discrimination against pregnant women raised no constitutional issue of sex equality.⁶ After one preliminary sign of hope,⁷ we learned that sex equality would not be accorded the same constitutional protection as race equality.⁸ We also learned that men and women are not similarly situated with respect to the military draft,⁹ statutory rape,¹⁰ or their own illegitimate children.¹¹

The feminist debate over equality that followed the development of this new Fourteenth Amendment jurisprudence initially centered on whether equal treatment is the best equality model for sex

³. See, e.g., Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 BERKELEY WOMEN'S L.J. 1 (1985) (arguing in favor of maternity leaves for pregnant employees in order to give female workers equal opportunity to keep their jobs when compared with male workers who have also engaged in reproductive sex); Linda J. Krieger & Patricia N. Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 GOLDEN GATE U. L. REV.: WOMEN'S LAW FORUM 513 (1983) (discussing the need for positive action as opposed to equal treatment in the workplace when dealing with pregnancy and childbirth).

⁴. Reed v. Reed, 404 U.S. 71, 74 (1971) (striking down, on equal protection grounds, an Idaho statute that preferred males over females in appointing estate administrators).

⁵. Professor (now Judge) Ruth Bader Ginsburg was a major participant in this era of feminist litigation. See Ruth B. Ginsburg & Barbbara Flagt, Some Reflections on the Feminist Legal Thought of the 1970's, 1989 U. CIN. LEGAL F. 9 (giving a concise and insightful view of this period of feminist action).

⁶. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that the exclusion of women from receiving disability benefits on the basis of pregnancy does not violate the Equal Protection Clause of the Fourteenth Amendment).

⁷. Frontiero v. Richardson, 411 U.S. 677, 672 (1973) (holding by four justices that sex discrimination was entitled to the same heightened scrutiny accorded race discrimination).


⁹. Rostker v. Goldberg, 433 U.S. 57, 64-83 (1981) (holding that Congress acted within its proper discretion by authorizing the registration of a select group of men for military service, without including women).

¹⁰. Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) (upholding the conviction of a seventeen-year-old male for engaging in consensual sex with a sixteen-year-old female under a California statute that criminalized only the male's conduct). The court went on to state that "the Equal Protection Clause does not 'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact . . . to be treated in law as though they were the same." (quoting Tigner v. Texas, 310 U.S. 141, 149 (1940)).

discrimination cases. Focusing on the differences between men and women as a class, some feminists have argued that special treatment is a better model, especially with respect to pregnancy-related issues. Other feminists have tried to redefine equality to meet the concerns raised by the different social, legal, and economic positions of men and women in society. More recently, feminist theorists have argued that because equality analysis masks deeper problems, feminist litigators ought to move beyond equality arguments in the fight for meaningful social change.

The feminist debate has focused primarily on sex equality issues in the public sphere, including the job market, as well as in governmental, educational, and social institutions. Perhaps equal protection challenges have not been as prevalent in the more private spheres of sex and family because such spheres are protected from governmental invasion by constitutional claims of privacy and liberty. This is not to suggest that equal protection challenges

12. See supra note 3; 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) (rejecting the special treatment approach in favor of an equal treatment approach that is broad enough to cover all temporarily disabled workers, including those disabled by pregnancy).


14. Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118, 1121 (1986) (suggesting that the equal/special treatment debate distracts from a deeper analysis of the root problems of gender hierarchy); Patricia Cain, Feminism and the Limits of Equality, 24 GA. L. REV. 803, 806 (1990) ("[F]eminist theory will be better served if we refocus our energy from the debate about equality to a more direct debate about the meaning of self-definition.").

15. See Cain, supra note 14, at 804 (noting that equal/special treatment debate focuses on pregnancy in the workforce).

16. Equality as to governmental benefits sometimes raises the question of affirmative action, e.g., whether government can favor women to make up for past discriminations. See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a state tax preference for widows, but not widowers); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding a navy regulation that gave women extra time to earn required promotions).

17. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that a state-supported university which limits its enrollment to women violates the Equal Protection Clause of the Fourteenth Amendment); Deborah L. Rhode, Association and Assimilation, 81 NW. U. L. REV. 106, 128-142 (1986) (discussing equality as an ideal that raises the issue of separate but equal in the context of educational institutions).

18. Equal access to power in society was the goal behind feminist challenges to certain private clubs. Equality arguments in this context raise issues of the conflicting rights to privacy and association. See, e.g., New York State Club Ass'n v. City of N.Y., 487 U.S. 1 (1988) (holding that New York City's Human Rights Law is not unconstitutional); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) (holding that the Unruh Act requiring California Rotary Clubs to admit women did not violate the First Amendment); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (holding that the Minnesota Human Rights Act compelling Jaycees to accept women did not violate male member's freedom of association); see also Deborah L. Rhode, Association and Assimilation, 81 NW. U. L. REV. 106 (1986) (analyzing sexually segregated associations).

19. See Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497 (1983) (discussing the dichotomy between public market place and private family). Some feminists argue that equality arguments ought to be made more often in the private sphere because privacy arguments serve the interests of the more powerful by maintaining the status quo. Equality arguments, by contrast, ask the state to implement equality by aiding the less powerful. See, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED 93-102 (1987) (suggesting that classifying abortion as a private right bars change in the "existing distribution of power."

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have never been raised in the family law arena; the equal protection clause has been specifically applied to the questions of alimony, spousal rights to manage community property, and a putative father's right to a relationship with his child. I only mean to suggest that the feminist debate over equality has addressed a greater number of issues in public arenas such as employment and education than in the more private arena of family law. The debated ideas have included affirmative action for women, special treatment versus equal treatment, the possibility of separate but equal treatment, and the critique of equality as non-neutral. Some of these debates have been intense, and the process has enriched the current feminist understanding of equality by clarifying the benefits and detriments of using equality rhetoric to gain rights for women in the public sphere. An analogous debate in the sphere of family law would surely produce a similarly beneficial depth of understanding and knowledge about the role of equality in both acquiring and protecting rights for women in the private sphere.

Martha Fineman is a feminist scholar who engages in the debate over equality in the family law context. Over the past ten years, she has produced a substantial body of scholarship warning that equality arguments are ill-suited to remedy the very real inequalities that exist and resources within the private sphere); see also Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 DUKE L.J. 324, 355-57 (suggesting a framework to create a gender-based equal protection policy that is attentive to the impact of United States reproductive health policies on adolescent women); Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 FLA. L. REV. 45, 50 (1990) ("[T]he endurance of marital rape exemptions partly is a function of the inadequacy of the dominant legal understanding of the constitutional mandate of equal protection.").

20. Orr v. Orr, 440 U.S. 268 (1979) (holding that an ex-husband in arrears on alimony payments could raise defense that state law imposing alimony obligations on husbands but not wives violates the Equal Protection Clause of the Fourteenth Amendment).

21. E.g., Kirchberg v. Feenstra, 450 U.S. 455 (1984) (holding that a Louisiana statute giving a husband the unilateral right to dispose of jointly owned community property without his wife's consent violates the Equal Protection Clause of the Fourteenth Amendment).

22. See, e.g., Parham v. Hughes, 441 U.S. 347, 349 (1979); Caban v. Mohammed, 441 U.S. 380 (1979) (holding that a sex-based distinction in a New York statute preventing a putative father from objecting to the adoption of his child violated the Equal Protection Clause of the Fourteenth Amendment); Lehr v. Robertson, 463 U.S. 248 (1983) (holding that a New York statute refusing to recognize parental rights of a putative father who had never established a substantial relationship with his child was not a violation of the Equal Protection Clause); Michael H. v. Gerald D., 111 S. Ct. 1645 (1991) (applying California's presumption that a woman's husband is the father of her children to deny parental rights to the biological father).

23. I am referring to the criticism that sex equality is a comparative right that necessarily compares women to men. Thus, the normative principles about what rights individuals ought to have are all set in male terms. In this case, women benefit only to the extent they are similar to men. They can obtain male-defined rights under equality, but no more. Historically, of course, these male-defined rights were designed to benefit men of privilege, typically white male property owners. See MARTHA MINOW, MAKING ALL THE DIFFERENCE 56 (1990) ("It is misleading to treat the implicit norm as consisting of all men, as rhetoric for women's rights tends to do, for that obscures historical racial and class differences in the treatment of men themselves.").
in marriage and divorce. Her recent book, *The Illusion of Equality*, makes this scholarship available in a single, coherent source. Feminist theorists and family law experts alike will find much of value in this book, whether or not they agree with Fineman's conclusions.

The book is divided into two parts, with the first part focusing on property divisions at divorce and the second part focusing on child custody issues. Because I am particularly interested in property division issues, I will concentrate on the first portion of the book in this review. I choose to focus on property division because I think that we need a normative theory to guide us in making decisions about property at divorce. Equality theory is one possibility.

The problem with equality as a normative principle is that equality can have different meanings. Equality theory has evolved as scholars have wrestled with these different meanings and tried to explain which meaning is best suited to which task. For example, some feminists support the concept of marriage as a partnership of equals in which husband and wife are presumed to make equally valuable contributions, despite the differences in kind of those contributions. Under one meaning of equality, this

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27. FINEMAN, supra note 25, at 173-90. There is a Part III in the book as well, but it consists of a single chapter setting forth Fineman's proposals regarding property division and child custody.

28. Of course, child custody is relevant to property division issues. The possibility of mandatory joint custody is a prime example of how equality rhetoric has been used to disadvantage many women. These two aspects of child custody are topics on which I will touch in this review. However, Fineman's book contains much more, and I would do her book a disservice if I did not note that her work on child custody issues is superb. In short, Fineman prefers clearly delineated rules to determine custody, less participation in the process by so-called experts, and decisions that are more final once made. For sheer efficiency, these proposals have much to commend them.

29. Indeed, according to some theorists, equality may have no meaning at all. See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that the rhetoric of equality should be abandoned).

presumed existence of equal contribution during marriage supports an equal distribution of marital property at divorce. The principle of equality implicated in this normative argument is that equal contributions deserve equal reward.\(^{31}\) In law, this principle is reflected in the notion of equal treatment: equal contributions should be treated equally at the time of divorce.

Presumed equality, however, is not real equality. If contribution to the marriage is the relevant factor, then a true equality norm would require an accurate measurement of actual contributions in place of a presumption of equal contribution. The difficulty is that, absent such a presumption, the law might view the more readily measurable contributions of the traditional husband as greater than the more personal and non-monetized contributions of the traditional wife. Thus, there is a risk in relying on an equality principle that measures distribution according to contribution.

Professor Fineman acknowledges the varying meanings of equality, as well as the troublesome interplay between equality and the notion of contribution. She rejects the equal treatment model and its focus on contribution in favor of an equality model that would focus on the economic needs of women who are impoverished by divorce. Her model, which she calls result equality, would support a distribution rule aimed at correcting the economic disparities that result from divorce.\(^{32}\) Despite the possibilities for reform based on this model of equality, Fineman ultimately concludes that the rhetoric of equality is too easily appropriated by antifeminists and, thus, that it is "time to abandon equality."\(^{33}\)

Although Fineman makes a good case for the abandonment of equality, I am left wondering what normative principle we can adopt to take its place. Fineman blames equality for supporting property division rules that have benefitted men at the expense of women. Her call to abandon equality is, in part, a call for new rules governing property distributions at divorce, rules that she believes will treat women more fairly by acknowledging need. Yet she fails to offer a clear normative principle in support of need-based distributions.

Despite the validity of Fineman's critique, I find myself reluctant to abandon equality until feminist theorists have engaged in

\(^{31}\) See infra text accompanying notes 65-66.

\(^{32}\) infra note 69.

\(^{33}\) FINEMAN, supra note 25, at 190.
a more thorough debate about its meaning in the context of family relationships and divorce. And if equality fails as a normative guide for property divisions, then I believe feminist theorists should work towards developing alternative norms that can respond to the divergent needs of the divorcing spouses, especially when those needs are exacerbated by the gender roles that accompany marriage and divorce.

This review focuses on the need to identify a normative theory for property divisions at divorce, whether or not that theory is expressed in the rhetoric of equality. In Part I, I begin with Fineman's treatment of the Wisconsin experience in adopting equality as a rule for property division. I discuss this portion of the book first because I think it helps set the stage for Fineman's objections to equality theory. In Part II, I turn to the question: What is wrong with equality? In Part III, I search for a norm other than equality to guide us in making decisions about property at divorce. Finally, I conclude that Fineman is correct in arguing that our current property distribution rules inadequately address need. What is required, I suggest, is a normative principle, strong enough to compete with equality, that will justify need-based distribution rules.

I. The Wisconsin Experience With Divorce and Equality

One way in which equality principles become relevant at divorce is in the division of marital property. In Chapter 3, Professor Fineman traces the development of the equal division rule in the state of Wisconsin, a development she attributes to a misguided effort by liberal feminist reformers. The chapter provides some useful insight into the process of law reform as it occurred against a backdrop of the national feminist movement. This reform occurred in the mid-1970s, well before feminists in law had adequately debated the problems with equality theory. Given the historical context in which the Wisconsin reform occurred, Fineman might have been more generous in her description of the reformers. Nonetheless, her treatment of the topic does reveal a very important deficit in much feminist activism: the failure to listen adequately to all women.

The women's movement of the 1960s and '70s has been criticized for initiating legal reforms that primarily serve the interests of white, middle-class women. Equal pay for equal work is such a
reform; it particularly benefits women who are trained and capable of doing the same highly paid work that some men do (e.g., doctors, lawyers). Highly paid women can afford to pay others for child care. But lower class working women, even if they receive equal pay for doing the same work as men, cannot afford child care. The specific criticism levelled against the women's movement of the 1960s and '70s is that activists should have listened more closely to these working women of lower socio-economic groups so that working class reforms might have been given a higher priority.

Professor Fineman levies a similar attack against the feminists who fought for divorce reform in Wisconsin. That is, she charges them with listening only to the stories of white, middle-class women in garnering support for the reform statutes. The primary story used by the reformers is one that Fineman dubs the "horror story" of the displaced homemaker. To understand this so-called horror story, one must remember that divorce reform in Wisconsin began, as it did in most states, with the battle over no-fault. No-fault divorce means that, absent a required proof of fault, either spouse has equal power to initiate and obtain a divorce. On the surface, no-fault divorce rules are consistent with the principle of equality because they provide equal access to divorce. Although this principle of equal access may be true conceptually, the practical reality is that, absent fault, a male spouse's power to acquire divorce is greater than a female spouse's simply because males in general have more power than females. The problem is that power at the time of divorce implicates more than the mere ability to obtain a divorce. Power also determines relative property rights and custody issues. The person with greater power is more likely to obtain a larger share of property, as well as custody, if it is desired. The male's power at time of divorce had been partially offset under old law by the female's power to refuse to grant a divorce; no-fault divorce stripped females of that power.

34. Id. at 63 (telling the story of a woman in a common law state whose husband decides to leave her; because she has acquired no property of her own and common law states did not at the time recognize spousal rights in property at divorce, she could be dispossessed of the family home, as well as anything else that was separately owned by the husband-despite the fact that she had cared for the home and the children for most of her adult life).

35. This is especially true in common law states where a husband might have acquired all of the property during marriage in his own name as his separate property. Despite equitable distribution laws, property divisions have tended to emphasize individual entitlements. See Rhode & Minow, supra note 30, at 199-201 (arguing that the state needs to play a greater role in specifying standards for property allocation to ensure that distributive decisions depend on the parties' domestic as well as economic contributions to the relationship and on their future needs and earning potential).
Fortunately, the Wisconsin liberal feminist reformers, who supported no-fault divorce, became aware of the potential economic harm to women that was likely to accompany enactment of a no-fault divorce statute. This awareness was heightened by horror stories imported from other states that had enacted no-fault. The typical horror story involved a dutiful wife who had worked in the home during a long-term marriage, thereby acquiring no property in her own name. At the time of divorce, she was virtually kicked out into the cold, with no property or viable means of support. To protect against this result, no-fault divorce would have to be accompanied by the enactment of economic protections for such women. In Wisconsin, the economic protection supported by the reformers and ultimately adopted by the state was equal division of property at divorce. Fineman criticizes this solution.

II. What's Wrong With Equality?

The concept of equality in this country is rooted in liberal political theory. Liberal feminists have applied the concept of equality by arguing that women should be treated the same as men. Fineman refers to this concept of equality as "rule-equality." Another possible concept of equality is known as result-equality. Feminists use this concept of equality when they argue for substantive changes in existing institutions that will lead to equality of result between men and women. For example, employer-provided maternity leave and child care would produce substantive changes in the market that would enable women to work full time on an equal basis with men. Rule-equality arguments cannot bring about this change in the marketplace because rule-equality works only when women are similarly situated with men.

Fineman notes that result-equality has been more readily embraced by feminists in the fight for legal reform in public sphere activities than in the fight for legal reform in the private sphere of

36. See FINEMAN, supra note 25, at 62-64 (giving examples of disturbing divorce experiences).
37. Id. at 20-21 (referring sometimes to rule equality as formal equality); see also Cain, supra note 14, at 817-20 (discussing historical roots and construction of formal equality).
38. See FINEMAN, supra note 25, at 21 (referring sometimes to result equality as substantive equality); see also Cain, supra note 14, at 825 ("Equality is capable of being understood to require redistributions and substantive changes in material conditions.").
39. Since only women get pregnant and since mothers, rather than fathers, tend to take primary responsibility for childcare, women and men are not similarly situated with respect to childbirth and childcare.
family law.\textsuperscript{40} She cites comparable worth and affirmative action as two reform efforts in the public sphere that reflect notions of result-equality.\textsuperscript{41} One possible reason that feminists are more willing to fight for substantive reforms in the market is that, due to women’s historical exclusion from the public sphere, the market has been constructed by men. "By contrast, women’s experience in the family is not an experience of exclusion or suppressed opportunity but of overparticipation and extensive responsibility."\textsuperscript{42} Thus, observes Fineman, if affirmative action principles are to be applied in the private sphere of family in the same way that they have been applied in the public sphere, they will likely be applied in favor of men, "particularly fathers seeking custody."\textsuperscript{43}

Equality arguments that favor women in the context of families support equal responsibility for child care and domestic chores. If husbands and wives bore equal responsibility for these burdens, then wives would be as free to enter the market as are their husbands.\textsuperscript{44} Note, however, that these equality arguments have more application within an ongoing marriage than at divorce. Fineman suggests that liberal feminists readily embraced the rhetoric of equality in the home as a consequence of their true goal: equal access to the market. Because one’s participation in the family necessarily affects one’s ability to participate in the marketplace and the political sphere, arguments about participation in each sphere ought to be consistent. If gender equality rules are applied in the public sphere, then similar rules ought to be applied in the private sphere.\textsuperscript{45}

Although Fineman notes the symbolic power of this consistent approach regarding equality arguments,\textsuperscript{46} she clearly rejects symbolism as a sufficient justification for the effects of rule-equality in the real lives of real women.\textsuperscript{47}

Whereas rule-equality as to child care and domestic chores within an ongoing marriage might result in some real benefits for
wives who bear an unequal portion of the total domestic responsibility, an extension of rule-equality principles at divorce can result in unwarranted detriments to wives. At divorce, rule-equality supports treating husband and wife the same with regard to property division and child custody. On its face, equal division of property and equal access to child custody may seem to produce just results. After all, if marriage is an equal partnership, then there theoretically ought to be an equal division of assets at dissolution. Fineman argues, however, that the intellectual appeal of equality may not, in fact, withstand closer scrutiny. The difficulties she discusses include:

1. The presumption of equal contribution can disadvantage the wife who over-contributes. The purpose of equal division of property at divorce is to reimburse the marital partners equally for their presumably equal contributions to the partnership. Liberal feminists supported this reform because it benefitted women who previously were given no credit at the time of divorce for unpaid labor in the home. By presuming that the wife’s contributions in the home are equal to the husband’s financial contributions derived from his work outside the home, liberal feminists viewed rule-equality as improving the condition of most divorcing women. Fineman argues that this view of the matter ignores the fact that most women work outside the home as well as inside the home. In such cases, the wife’s contribution to the marital unit is likely to exceed her husband’s, and thus an equal division of property is actually unjust as to the wife.48

Comment: This criticism is not a critique of the equality norm that requires equal distribution to equal contributors. That equality norm, if applied correctly, would distribute more property to the greater contributor, which in this case would be the wife. The difficulty that Fineman identifies here is not a difficulty inherent in the concept of equality. Rather, it is a difficulty that results from a reform movement which adopted a presumption of equality rather than from the principle of equality itself. At its core, her criticism is that the rhetoric of equality tends to mask important inequalities.

48. Id. at 29, 47.
2. Treating parents as equal when they are not can disadvantage women in the property division process. The creation of equal custody rights can be justified under rule-equality because parents are presumed to be equal in terms of social distribution of power; rule equality supports joint custody as the ideal solution. In an ideal world, perhaps parents would be equal, both in their actual participation in childrearing and in their desire to do so. But in the real world, parents do not play the same roles or carry the same responsibilities in the majority of families. Mothers actually do most of the child rearing and they seem to have a stronger desire to do so. To make joint custody available in this non-ideal world causes a shift in power from mothers to fathers that may not be just. First of all, such a rule ignores the possibly unequal contributions of mother and father to the process of childrearing. Second, the shift in power creates a further imbalance in the bargaining process at the time of divorce. Because mothers typically have a stronger desire than fathers to retain custody of their children, they will be more willing to bargain away property rights in exchange for the father’s release of custody rights. Given that women generally have less economic power than men, any reduction in property awarded to the mother will merely contribute to the increasing “feminization of poverty.”

Comment: This criticism also fails as a critique of equality per se. The difficulty arises because the reformers have presumed an equal desire for child custody when the reality is otherwise. Again, the rhetoric of equality has masked an important inequality.

49. Id. at 84.
50. Id. at 222 n.40 ("Mothers still perform not only the vast bulk of child care, but also the majority of housework.") (citing Mary J. Bane et al., Child Care Arrangements of Working Parents, 102 MONTHLY LAB. REV. 50, 52-53 (Oct. 1979) (reporting on the child care arrangements of working parents)). See generally Catherine F. Fisk, Employer-Provided Child Care Under Title VII: Toward An Employer’s Duty To Accommodate Child Care Responsibilities of Employees, 2 BERKELEY WOMEN’S L.J. 89, 90-96 (1986) (discussing child care, equal employment, and economic equality for women); Mary J. Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U. L. REV. 55, 56 (1979) (stating that women, more than men, are disadvantaged by the barriers operating against parents in the labor market).
51. See Victor F. Fuchs, Women’s QUEST FOR ECONOMIC EQUALITY 67-68 (1988) (Fuchs argues that if men’s desire for children and concern about their welfare were equal to women’s, then when women performed child care services, men would readily pay for these services and “the present hierarchy of power would be reversed.”). Id. at 68.
52. Fineeman, supra note 25, at 222-23 n.43.
53. See Mary J. Bane, Household Composition and Poverty, In FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN’T 209, 220-31 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (discussing reasons why a female household head and her children might have become poor).
In sum, the problem with equality in the context of family law is that the rhetoric of equality has resulted in equal treatment for individuals who are not similarly situated. Although the rhetoric of equal treatment has improved the economic situation of some women at divorce by giving them credit for previously unvalued contributions to the marital relationship, such as, housework and child care, the rhetoric has also served to disadvantage women by masking the reality of their overparticipation and by ignoring their unequal bargaining power in general. To treat unequals as equals is not only unjust, it also can create further inequality.

III. If Equality is Abandoned, What is the Just Measure for Property Division at Divorce?

If equal division is not the correct rule, then how should we determine who gets what property at divorce? What factors should we consider, and what underlying normative principle ought to guide us? These are the remaining questions if one agrees with Professor Fineman that we ought to reject equal division.

Historically, equal division rules were found in community property states in which spouses were viewed as equal partners in the marital partnership. Equal division rules can be either absolute, that is, with no deviations, or presumptive, with deviations permitted if equal division would be inequitable. Based on the theory that marriage is a partnership of equals, community property regimes purported to recognize equal rights of the spouses in the property acquired during the partnership. Despite the inaccuracy of the portrayal of husbands and wives as equal partners, the norm


55. See Doris J. Freed & Timothy B. Walker, Family Law in the Fifty States: An Overview, 24 Fam. L. Q. 309, 335-37 (1991) (listing seven community property states currently enforcing equal or presumptively equal divisions of property at divorce). California, for example, requires equal division unless one spouse has misappropriated community property deliberately. Id. Table IV, n.3 (listing ten community property states, including the eight traditional ones: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington as well as Wisconsin, which is considered a community property jurisdiction since it adopted the Marital Property Act, and Mississippi). I have no idea why Mississippi is included.

56. Of course, the principle that spouses had equal property rights was not in fact the rule at the time community property regimes developed in the eight traditional community property states. For example, only the husband had management powers of the couple's property. See generally, Smith, supra note 54, at 689 (stating that the "real objective of early marital property laws was to create and protect a wife's separate property, not to create community property").
of equality nonetheless remains as the operative principle behind the concept of community property and its presumption of equal division at divorce.

Alternatively, the partnership metaphor suggests a different normative principle: that individuals should be compensated fairly for their labor. This principle is consistent with the "labor-desert theory" of property rights reflected in the writings of John Locke. Equal distribution at divorce can be justified by the desert principle, provided husband and wife have made equal contributions to the marriage and provided that the property subject to distribution is traceable to spousal labor. The labor-desert theory is consistent with community property regimes because marital partners are treated as though they contributed only labor (and not property) to the partnership. Pre-marriage property, as well as gifts and devises acquired during marriage, are characterized as separate property and thus are not available for division at divorce.

In contrast to community property states, common law states, prior to recent reforms, did not treat marriages as a partnership of equals. Historically, common law states relied on title as the most important factor to determine distribution of property at divorce. Since title to property was usually vested in the person making monetized contributions to the marriage, common law states tended to reward the wage-earning spouse, typically the husband.

With the passage of equitable distribution laws over the past twenty years, title has become less important in determining ownership of property at divorce. Some common law states, taking their lead from community property regimes, have included in their equitable distribution statutes a presumption of equal distribution at

57. See John Locke, Two Treatises of Government 303-320 (Peter Laslett ed., 1960) (explaining that things produced from one’s own labor become one’s property); Walton H. Hamilton, Property—According to Locke, 41 Yale L.J. 864 (1932).

58. Eggemeyer v. Eggemeyer, 554 S.W.2d 137 (Tex. 1977) (holding that a husband’s separate realty could not be awarded to wife at divorce); see also Cameron v. Cameron, 641 S.W.2d 210 (Tex. 1982) (citing Eggemeyer with approval, but holding that personally acquired during marriage in a common law state, even though technically separate property, is subject to division at divorce). See Tex. Fam. Code Ann. § 3.63(b) (Vernon Supp. 1992) (authorizing division at divorce of any quasi-community property, e.g., property acquired during marriage in a common law state).

The concept that marriage is a partnership of equals is behind much of this common law reform.

Thus, in both community property and common law states, current rules regulating division of property at divorce reflect a recognition of the desert principle that property distributions should be made in accord with labor contributions. Equal division rules can also be explained by equality theory. The argument that spouses should be compensated justly for their individual contributions to the marriage is based, as I suggested earlier in this review, on an equal treatment model of equality. Equal treatment requires an identification of the factor in regard to which individuals should be treated equally. The relevant factor here is "contribution." The model might more accurately be referred to as "desert-equality." Whether desert-equality will prove a satisfactory principle for feminists who are concerned about the needs of wives who have been disadvantaged by marriage and divorce depends on how "contribution" is defined. A large part of Fineman's concern about the misuse of equality might be resolved if "contribution" were defined to value fully the various forms of women's contributions to marriage. Under such circumstances, she might feel less compelled to abandon equality as a principle in making property divisions.

Perhaps it is the rhetoric of contribution rather than the rhetoric of equality (related though they may be) that does most of the damage in property division. Reward for individual contribution under the desert principle will naturally disadvantage wives if their contributions are valued less in the distribution process. Given society's undervaluation of homemaking and child rearing generally, it should not be surprising that contributions of this sort are undervalued at divorce.61

One solution to the valuation problem is to presume equal contribution and thus to grant equal division under desert-equality. This solution, however, is not as successful as it might be since, in most states, the presumption is rebuttable. It is rebuttable by reference to factors that judges may consider in varying equal

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60. See, e.g., Ark. Code Ann. § 9-12-315(a)(1)(A) (Michie 1991) (stating that "all marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable"); N.C. Gen. Stat. § 50-20(c) (1991) (stating that "there shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable").

61. See Melli, supra note 59, at 772 ("As long as society continues to undervalue the economic status of homemaking and child rearing, any solutions at the time of divorce will probably only have a minor impact.").
division. Professor Fineman lists nine of the most common factors and concludes that they fall into two primary categories: contribution and need.62

Factors in the contribution category include: (1) length of marriage; (2) property brought into the marriage; (3) labor contributions to the marriage, including child care and homemaking activities; (4) one spouse's contribution to the other spouse's education or earning power. Factors in the need category include: (1) whether there are additional assets available to the spouse post-divorce that are not subject to division; (2) age and health; (3) earning capacity; (4) custodial responsibility for children; (5) time and expense necessary for spouse to retrain for work outside the home.

Fineman emphasizes need over contribution, and she explains why the current statutory framework makes that impossible. Assume an equal division principle as the starting point. Equal division presumes equal contribution. To avoid pure equal division, each spouse will point to factors in her or his favor.

Even if a wife could meet the burden of demonstrating that her needs should outweigh the equal contribution assumptions, her husband could argue the presence or absence of other factors in an attempt to counter the assertion that deviation is appropriate. Because the factors are not weighted or ranked, one factor or set of factors may be balanced against another in the decisionmaking process. As a result, unless one spouse can assert that she occupies all, or most of the categories (an unlikely scenario since they are inherently incompatible), her spouse may use the remaining factors to push the allocation toward the rule-equality norm.63

This criticism seems logically and intuitively correct as applied to most fact situations. Furthermore, as an empirical matter, other family law scholars have documented the fact that need factors tend to be ignored by the courts, whereas contribution factors are favored.64 However, in some fact situations, I can imagine a wife who might argue both contribution factors (e.g., long-term marriage, performance of child care and homemaking services, supporting

62. FINEMAN, supra note 25, at 41-42. Title and fault are two additional, but less prevalent, categories into which these factors might be placed.
63. Id. at 50.
64. See Suzanne Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 FORDHAM L. REV. 827 (1988) (exploring the relationship of property division and alimony in addressing the need for spousal support at divorce).
husband's career) and need factors (e.g., age and health, no earning capacity outside home) to support a distribution of more than half of the marital property to her. Whether she will be successful depends not on her inability to argue contribution and need, but on her husband's ability to argue that he contributed more and that his contribution should trump her need.

Fineman blames rule equality for the legal emphasis on contribution and the diminished attention to need. She identifies the nexus between equality and contribution when she observes: "Contribution is an equalizing concept, while need demands an acknowledgment and evaluation of differences." I have focused on this very same nexus in my explanation of the principle of desert-equality (i.e., equal distribution to equal contributors). Fineman understands the moral suasion of this principle, but she also understands that it provides us with little guidance for dealing with the problem of need. Given the established needs of divorced wives and children, Fineman's critique of equality forces us to reconsider whether desert-equality is a sufficient principle for making property division decisions at divorce.

Consider again Fineman's criticism of the inherent incompatibility of the factors. A wife can argue that, because of her lower earning capacity, she has a need for more property at distribution. Her husband can then counter that he brought most of the assets into the marriage, that the marriage has been short-term, and that she did not contribute to his earning power. These arguments do not disprove the fact of her need. They do support the claim that the marital property is primarily the result of his personal efforts and thus rightly belongs to him. The court will favor his arguments over her argument so long as it envisions marriage as a partnership of equals in which individual contributions are to be tallied up and paid out to the partners at time of dissolution in accord with their respective contributions.

65. FINEMAN, supra note 25, at 46.
66. FINEMAN, supra note 25, at 52 ("[T]he equality solution is inadequate for the problem of need.").
67. See generally LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985). Weitzman's statistics, which focus on California divorces after the enactment of no-fault, show that divorced women and their children are economically disadvantaged when compared with divorced men. She further shows that this economic disadvantage has increased as a result of the fact that no-fault divorces result in lower property awards to women; see also Weitzman, Bringing the Law Back In, 1986 AM. B. FOUND. RES. J. 791, 794.
68. FINEMAN supra note 25, at 50.
It should not be surprising that an emphasis on equality has lured courts toward an overvaluation of contribution factors. Equality is an attractive principle with a venerable history in American law. If need-based factors are to be given equal attention by the courts, then we must identify an equally appealing principle that justifies distribution rules based on need.69

Although she does not offer a normative principle in support of need-based distributions in this book, Fineman's earlier scholarship suggests one possibility.70 She describes the controversy over property distribution rules as stemming from "two competing and, perhaps incompatible and unrealistic, political visions of contemporary marriage."71 In contrast to the equal partnership model is the dependency model, based on the principle that "the family is the appropriate, perhaps solitary, institution to resolve problems of dependency or need that inevitably arise in the context of families."72 Fineman does not develop this point further, either in her earlier work or in this book. Thus, she never explains why the family is the appropriate institution to resolve problems of need.73

While there may be no obvious answer to this question, it is worthy of debate. Arguably, there is something about the fact that society is organized into families which justifies holding family members responsible for each other's needs, including post-divorce needs. Perhaps the justification is that, in general, families are good for a society; they provide an efficient means of social organization, especially when one spouse takes on the responsibility of childcare and stays out of the marketplace. Before entering into such an arrangement, however, a rational actor would require some assurance that the choice to stay out of the marketplace, would not be

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69. Historically, of course, concerns about need were remedied primarily by an award of alimony. Alimony is still available and it can take many forms (such as permanent, temporary, or rehabilitative). Factors that determine whether an award of alimony is appropriate include matrimonial misconduct, fault, and the relative needs of the spouses. See generally Freed & Walker, supra note 55, at 353-61. The current wave of divorce reform has promoted the philosophy that need is better addressed by property division than by alimony. Despite this aspect of the reform movement, courts have apparently been reluctant to follow through and use available property to address need. See Reynolds, supra note 61 (addressing the relationship of property division and alimony).


71. Id. at 265.

72. Id.

73. Fineman's task in the article was descriptive (explaining that the existence of two conflicting visions of the family has contributed to the conflict between contribution and need factors) rather than normative. Since she was not advocating the dependency model as a preferred norm, she was not required to argue in favor of the family as the appropriate resolver of need problems.
unduly disadvantageous in the future. Governmental imposition of responsibility for family members post-divorce gives to the rational actor the requisite assurance to encourage participation in family units, even when the participation creates a potentially disadvantageous risk of dependency.

Although the argument I have just outlined may accurately describe our view of families and their responsibilities in the past, I would not personally favor the argument as a normative principle for assigning post-divorce responsibility in modern times. And yet some such normative principle is needed to justify property distributions based on need.

There are other possibilities. To the extent the post-divorce needs of women are influenced by their adherence to traditional gender roles, the law might assign responsibility to those persons who benefit from those roles. Thus, for example, it would be just to transfer property from husbands to wives in order to compensate wives for their lower wage-earning capacity if this could be traced to the wife's many years as a housewife—years of fulfilling a gender role that presumably benefitted her husband. On the other hand, this principle would not necessarily support a wealth transfer from husband to wife if the sole reason for the lower wage-earning capacity was that societal discrimination generally caused women to make less than men.

This, then, is the crux of the matter: Equality provides a strong principle for valuing contributions over need in making property distribution decisions at divorce. Yet we cannot ignore the very real existence of need, a need that becomes apparent at divorce because losses caused by divorce fall disproportionately on women. Is it always just to take property from the divorced husband to mitigate the needs of the wife? This question must be answered before we

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74. I certainly do not subscribe to the view that the family should be the solitary institution to resolve problems of need that arise within the family. Need for child care arises within the family, and yet I view child care as a need that ought to be addressed by society as a whole.


76. Overall, divorce is a losing proposition. At divorce an efficiently operating family unit is divided into two less efficient units. With no increase in income, the post-divorce parents nonetheless experience higher living costs because they now need two homes rather than one. Thus, their combined standard of living must necessarily decline. See LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA, at xii (1985) (showing that one year after divorce the male's standard of living has increased 42%, whereas the female with minor children experiences a decline of 73%, and that the combined "loss" is a 31% decline in standard of living, a loss which is borne exclusively by the ex-wife).
can justify trumping rule equality and the principle of desert with need. Fineman presumes the answer to this question is yes. Although she may well be right, I would prefer a more developed discussion about why her answer is yes.

IV. Conclusion

Martha Fineman's *The Illusion of Equality* is an important contribution to feminist literature on divorce reform. She argues, with valuable practical insight, that equality has not served the interests of women in divorce proceedings. She concludes that the rhetoric of equality has so tainted the discourse that we must explore new ways to talk about the issues and problems raised. Although she calls for us to abandon the concept of equality as a normative standard, I have suggested that we ought to develop an alternative normative theory before we feel free to abandon the concept of equality completely. Fineman and I agree that we need to address the concrete needs of post-divorce women and children upon whom the economic loss of divorce disproportionately falls. Because the rhetoric of equality is not well-suited to this endeavor, we need to develop alternate theories that ask the following questions: What produces the loss at divorce? Who is responsible for the loss? Who has benefitted from the factors that contribute to the loss? Some theorists have begun addressing these questions.

77 Martha Fineman's fine critique of equality ought to encourage others to continue the process.

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77. See Smith, supra note 54, at 739-42 (arguing for a theory of "enterprise liability" that could be applied to property division at divorce); Stephen D. Sugarman, *Dividing Financial Interest on Divorce, in Divorce Reform At the Crossroads* 130, 148-63 (Stephen D. Sugarman & Herm H. Kay eds., 1990) (suggested "fairness considerations" that include recognition of "necessity-based rights," "expectations of the parties," and "unjust enrichment."); Rhode & Minow, supra note 30 (supporting property divisions that reward "sharing behavior" and calling for more state responsibility in reducing the economic inequalities caused by gender relations that have historically favored men).