



1-1-1993

Book Review [The Illusion of Equality: The Rhetoric and Reality of Divorce Reform]

Santa Clara Law Review

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Santa Clara Law Review, Book Review, *Book Review [The Illusion of Equality: The Rhetoric and Reality of Divorce Reform]*, 33 SANTA CLARA L. REV. 271 (1993).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol33/iss1/8>

This Book Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

BOOK REVIEW

THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM, By Martha A. Fineman. Chicago: University of Chicago Press. 1991. Pp. 240. Hardcover. \$27.00.

*Reviewed by Judge LaDoris Cordell**

FINEMAN vs. KRAMER

A story once circulated about Clare Booth Luce, the onetime playwright, wife of Henry Luce, and ambassador to Italy. The Pope, it was reported, had agreed to give an audience to Ms. Luce, a fervent Catholic convert. Ms. Luce appeared at the Vatican as scheduled and presented herself to the Assistant Pope (hereinafter AP), who escorted her into the Pope's chambers. The AP then resumed his post outside the Pope's quarters. An hour passed, and Ms. Luce did not emerge. After yet another hour without sign of Ms. Luce, the AP's curiosity could no longer be contained. He inched open the door. There stood Ms. Luce facing the pontiff, his arms spread-eagle, his back flattened against the wall. "But Mrs. Luce," intoned the Pope desperately, "I *am* a Catholic!"?

This anecdote came frequently to my mind as I labored through Martha Fineman's *The Illusion of Equality*. Throughout the book the author clearly asserts her commitment to policies that ensure that a woman's station in life not be reduced after divorce. Moreover, she believes that in those instances where mothers have assumed the role of primary caretaker and have been found to be fit parents, custody of minor children should most logically be given to them. Over and over and over again, Fineman takes the purveyors of divorce to task for their mistreatment of women and children. "But Professor Fineman," the reader desperately intones, "I am a believer in women and children." Rather than enlisting the reader to engage in the good fight against a system admittedly fraught with problems,

* Judge, Superior Court of Santa Clara County; B.A., 1971, Antioch College; J.D., 1974, Stanford University.

the nakedness of Fineman's anger serves to keep the reader distracted and distanced.

This being said, Fineman does make some good points. She presents a cogent and clear discussion of the recent history of divorce reform. She demonstrates, in convincing fashion, that no-fault divorce unexpectedly undermined women's power to negotiate reasonable divorce settlements. "A wife typically had leverage under a fault system because a husband seeking divorce needed the wife's cooperation to go through the motions of showing fault in court. The innocent spouse could withhold cooperation until a satisfactory settlement was offered." Thus were the good intentions that underlay the divorce reform movement transformed into bad outcomes for women.

I found the distinctions Fineman draws between "rule," or formal equality, and result-equality to be particularly useful. Professor Fineman is concerned that in their attempt to render the law gender-neutral, feminists have promoted rule-equality, which purports to render men and women equal bargaining partners in divorce court. However, as she points out, "To understand why a rule-equality approach is inappropriate, we must consider three related factors: women's unequal social and economic position in society, the ways in which marriage and family decisions are affected by these and other economic and social circumstances, and the impact of divorce on women with dependent children."

The author endorses rules that focus on result-equality.

Such rules are constituted to take into account the different structural positions of women and men in our society and seek to achieve parity in position between individuals. Result-equality is a more instrumental approach to restructuring the relationships between men and women and may require that these groups be treated differently in order that they end up on the same level.

As an aside, I was struck by the parallels between Professor Fineman's framing of this issue and the development of civil rights law. The doctrine of separate but equal was a rule-equality based solution to past inequity. Having proved itself to be a bankrupt concept, it was replaced by affirmative action, a result-based model. Unfortunately, in the political struggle now surrounding affirmative action with regard both to race and sex, the distinction between rule-equality and result-equality has been too frequently blurred.

On another subject, Professor Fineman reminds us that, like legal rules, all social science data is not created equal, and that care must be taken in interpreting even the most serious studies. She

takes social scientists to task for implying that their work is objective and free of bias, when, at the very least, what is studied and how it is studied, is immediately affected by the researchers' biases. It is unfortunate, as she points out, that the scientific naivete of the legal profession results in the implementation of policy predicated on an unexamined acceptance of questionable research.

Another of Fineman's concerns is the institution of mediation, about which she writes at considerable length. Not only does she register her concern about the process of mediating domestic disputes, she goes one step further and details how the introduction of mental health professionals into family law has transformed the way in which we conceptualize divorce. Prior to its reform, she notes, divorce was understood to be simply the termination of a contract. The function of the legal system was to finalize the mop up and preside at the demise of a marriage. With the introduction of psychology, divorce developed into an ongoing process, with no end in sight.

Currently, the language of the helping professions portrays divorce as an "emotional crisis" that must be treated but can also provide some "unique opportunities for growth". . . . The goal of the helping professional is to bring the parties to the recognition that the "structural dimensions" of their former marital system have not disappeared, but must be reshaped into a new, though limited, "post-dissolution organization." This new organization is based on the relationship between the parents—now ex-spouses—with parent-child relationships as "sub-systems" within this paradigm.

An outgrowth of this "new organization," has been the adoption by the courts of the presumption of joint custody, a presumption Professor Fineman deplors, and for good cause. It has been my experience as a family court judge, that for those parents for whom cooperative parenting is feasible, joint custody orders are unnecessary. And for those couples whose disaffection impinges on their ability to agree on issues of child rearing, joint custody becomes the basis for ongoing strife. Parental harmony is a mandate which simply cannot be implemented. Hence the paradox of joint custody—they for whom it works, don't need it; while them for whom it don't, do. Mercifully, the State of California has seen the light and eliminated the joint custody presumption.

Having convinced us that divorce American style is a dark, unremitting morass, Professor Fineman disappoints us with superficial suggestions for change. Immediately the reader is struck by the fact

that of the 200 pages in this book, only 16 are devoted to proposals for reform, and these suggestions are skimpy. The changes she promotes include (1) reinstating the primary caretaker presumption in custody cases, (2) redefining the role of the child advocate, (3) viewing social science data with a healthy degree of skepticism, and (4) moving away from dispute resolution procedure with a return to the adversarial model.

In contrast to the insightful and considered criticisms she levels at divorce reform, her proposed solutions are prosaic and ill-conceived. As an example, I have concerns about the changes she proposes in the role of the child advocate. She suggests that the advocate "could perform a public function by lobbying for the replacement of the best interest test with a more determinative substantive rule" By so doing, the advocate becomes a legislator, a function completely inappropriate in the family court setting. Moreover, it is my view that to enlarge the number of protagonists in the theatre of divorce frequently serves to obscure already muddied waters. Routinely introducing child advocates into these proceedings not only increases litigation expenses, but it further crowds the courtroom.

In arguing for a return to the adversarial model, Professor Fineman writes, "[R]epresentation by competing adversaries is the most reliable method of establishing the necessary facts upon which to base subsequent decision making." This assertion ignores the many travesties engendered by the adversarial system in the family courts. For example, Fineman rails at length against the abuse of social science data in divorce court. Yet, the most grievous abuse of social science data is a by-product of this adversarial system, in which each side presents the findings of a mental health expert, and, *mirabile dictu*, the husband's hired gun supports the husband, while the wife's hired gun supports the wife!

It has been open season on social workers since time immemorial. H.L. Mencken, that acerbic journalist, feasted on them. Woody Allen, in the movie "Sleeper," described his worst nightmare—a monster with the body of a crab and the head of a social worker. It is the case that the work of mediators, who are most frequently social workers, warrants careful monitoring by family court judges, lest its influence becomes overreaching. But Professor Fineman's churlish and vitriolic diatribe against all social workers diminishes the seriousness of her work. Among many other charges she claims that "[s]ocial workers are not neutral; they have a professional bias in favor of a specific substantive result—shared parenting. That result benefits their profession by creating the need for mediation and

counseling." My view from the bench has afforded me the opportunity to observe that just as there are good attorneys and bad attorneys, there are good social workers and bad social workers. No profession has the corner on the market of self-interest.

The *verso* of the title page informs us that this book is a compilation of individual articles, and it certainly reads as such. What this book needs is a good editor. Professor Fineman's writings are repetitive and her language frequently convoluted, *viz*:

Perhaps ironically, equality has been a piercing and potent battle cry for male reactionaries who would lead us round once again to the preservation of basic patriarchal power. Used both to attack the existing rules governing divorce and to demonstrate the need for reforms, the ideology of equality supplied the theoretical underpinnings that shaped the formal content of the ultimately reformed rules. As a legal concept, equality gave the reform rules legitimacy, while it was simultaneously employed to remove legitimacy from the 'unequal' rules that were to be replaced. Because of this, the new substantive rules are viewed both as unbiased and as conferring equality before the law.

Only the most ardent devotee of divorce law is likely to slog through this prose. And that's a pity, because the issues that Professor Fineman raises merit our attention.

