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THE ABUSES OF SOCIAL SCIENCE: A RESPONSE TO FINEMAN AND OPIE

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Martha Fineman and Anne Opie have written an article on the misuses of social science research by those who are recommending policies for the placement of children after divorce.1 The subject is important. When Professor Fineman told me that she and Opie were using an article I wrote about child custody2 as an example of some of the problems they discussed, I anticipated a useful exchange on the subject. Having read their article, I have decided against an exchange on the merits of the larger issues they raise. I have so decided because their article, which refers extensively to my own, so persistently misrepresents what I said that I need to use this brief opportunity simply to make clear what I did say in fact.

Fineman and Opie first claim that my article is "an example of the way in which social science data have been used by a legal policy-maker to enhance the custody position of the father."3 They then assert that I have distorted the findings of psychologists and social scientists to support the fathers' position. Finally, they believe that, whatever I intended, my article will be used by others to promote inappropriate rules favoring fathers. They are wrong about my motives, they misrepresent my descriptions of the research of others and, given what I actually say, they are almost certainly incorrect in their forecasts of the ways others will use what I have said.

I believe that those who have read my article will recognize their errors. To those who have not read my article, I would simply say: Please do not believe any statement Fineman and Opie make about an alleged shortcoming in my article—my motives or purposes, my alleged statements about the research of others, my conclusions—without reading my article for yourself.

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3. Fineman & Opie, supra note 1, at 132. This is the heart of their opening sentence in the part of their essay that focuses on my article.
I should probably stop here, but I worry nonetheless about those who will rely on Fineman’s and Opie’s claims.

Here’s a bit more about what I say. The core of my article is an attempt to develop acceptable ways of defining children’s “best interests” in a society committed to diversity and then to review the research that bears on appropriate rules for resolving custody disputes in divorce. In the review, I repeatedly caution about the methodological limitations of the research that has been conducted. At the end, I make only five policy recommendations. Although offered tentatively, all five of them, in their effects, favor women’s interests, not men’s. Favoring women’s interests because they were women’s interests was not my goal, but that is what the recommendations happen to do in fact. (If one or more of them had happened to benefit men, well, that would have been all right too.) My central recommendation is that, in cases involving preschool children, states should abandon the current open-ended “best-interests” test and replace it with a preference for placement with the primary caretaker, a preference that can be overcome only by clear and convincing evidence that the child will be better off with the other parent. A preference for primary caretakers would favor women, because the overwhelming majority of primary caretakers in our society are women.

Despite my recommendations, Fineman and Opie believe that I paint a bleaker picture of mothers as custodians and a rosier picture of fathers as custodians than the evidence justifies. They relate the alleged defects of my article at some length. In my article, I do report some recent disquieting research about children with single mothers after divorce. I do report some research with a generally positive tone about children with fathers. On the other hand, I also discuss the serious methodological problems of both sorts of research. Nowhere, despite

4. I propose an approach to a definition through the child’s expected subjective experience in the placement. Chambers, supra note 2, at 487-499.
5. I recommend discontinuing the current rules that simply direct courts to place children with the parent that best serves the child’s interests, a rule that many critics believe has indirectly led to the higher incidence of court decisions favoring men; I recommend placement of young children with primary caretakers for the sake of children; I recommend taking into account in framing general rules the greater emotional harms that may come to primary caretakers themselves in depriving them of their children; I recommend curtailing the use courts make of the comparative economic positions of the parents; and I recommend that courts be deprived of the power to impose joint physical custody over the objections of either parent, a position that women’s groups and many others also favor because it will deprive men of the opportunity to demand joint custody simply to gain advantage in the bargaining over economic issues.
7. Id. at 563.
8. See id. at 506, 509 (discussing the shortcomings of studies by Hetherington and by Wallerstein and Kelly); id. at 513 (discussing methodological problems with the Santrock and Warshak study); id. at 510 (discussing the methodological problems of other studies of children in the custody of fathers).
Fineman and Opie's claims, do I assume that fathers have been shown as capable as mothers as caretakers of children. In the end, I can think of no better way to convey the substance—as well as the tone—of my article than to quote the last few paragraphs of my review of the recent research. You can draw your own conclusions about whether I have used data “to enhance the custody position of the father” and whether others are likely to use my writing to enhance the position of fathers in an inappropriate manner:

As we have seen, however, the past fifteen years have not been wholly unproductive. Researchers have increased our knowledge of children in the custody of mothers and offered the first view of children in the custody of fathers. For our purposes, however, the recent research provides little more basis for rules than did the research available to Ellsworth and Levy [fifteen years before, in 1969]. There is even a danger that the recent research could deceive us into inappropriate conclusions. The measured, sober tones of Hetherington and of Wallerstein in their studies of children with mothers, when compared with the generally optimistic tone of the studies of children placed with fathers might lead one to believe that children, and especially boys, are in general likely to be at least as well off with their secondary-caretaking fathers. This, of course, would be a wholly unjustified conclusion.

We have pointed out many of the shortcomings of the research on children with fathers, including the nearly complete absence of information about fathers with infants, the group for whom there might be the greatest concern and about whom there is some evidence that men are less likely to be responsive than women. Even as to older children, we must remember that some of the studies of fathers with custody were conducted by persons who seemed predisposed toward fathers, and all of the studies may have stressed the most positive findings because surprising findings arouse the most interest.

Moreover, even if the father-custody studies could have determined that the children studied were happier and more secure than Wallerstein’s or Hetherington’s children with their mothers, there would be many possible explanations for the differences other than that father custody is beneficial. The studies reported in this section all suffer sampling problems,

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9. See, e.g., Fineman & Opie, supra note 1, at 145: “The father custody studies are nonetheless a keystone of his [Chambers’] assumption that fathers are of equal capability in regard to the custody of their children.”
but they are problems of differing sorts. Wallerstein, because her sample came from volunteers for counselling, seems highly likely to have studied a disproportionate number of families in which the custodial mothers felt their children were troubled while the father-custody studies were likely to have included a disproportionate number of cases in which the fathers who volunteered to participate did so because they thought they were doing well and could foresee that they were going to be compared to custodial mothers.

In the end, the only safe conclusion to be drawn from the current research on children living with fathers who had been secondary caretakers is that substantial numbers of individual children are reported to be faring well on a day-to-day basis. That isn't much. The limits on our knowledge make clear why as much or more reliance needs to be placed on the growing body of research about men and women in general in relation to children and about mothers and fathers in relation to their children in intact families.10

I had expected that the portion of my article quoted above, as well as my recommendations, would appeal to people with Fineman and Opie's views.11 Fineman and Opie nonetheless fear that my review of the father research—as well, for example, as my discussion of the relevance to custody decisions of the comparative economic positions of parents12—will lead some readers to advocate positions that would inappropriately favor men even when I explicitly reject those positions. I don't know quite what to say to this claim. It is true that people may not read all of what I say or may take parts out of context. Fineman and Opie themselves take much of what I say out of context. They do

11. Representatives of two feminist legal groups have asked me to distribute copies of the article to persons considering changes in custody laws.
12. Despite Fineman and Opie's implications, nowhere in my article do I recommend (or suggest that I believe) that the parent with the greater resources should receive custody of children. I do take seriously the issue of economic resources and its bearing on custody. And I should. For a decade, women's groups have argued that economic resources make a difference in the quality of life for children. They (and I) have made those arguments with considerable effect in state legislatures and Congress in the course of seeking laws to require more aggressive enforcement of child support orders after divorce. (After the publication of a book I wrote on the subject of child support (Making Fathers Pay: The Enforcement of Child Support (1979)), I helped draft legislation in Michigan that imposes wage deductions on all parents behind in child support payments. See Mich. Comp. Laws Ann. §§ 552.601-.685 (West. Supp. 1986).) In the custody article, I argue that a parent's economic resources probably do affect children's welfare in ways that are relevant to issues of custody, but that, to protect women from the consequences of long-term economic discrimination, states should "direct courts in individual cases to consider financial resources of the parties only if one parent is unlikely to be able to meet the child's most basic needs." Chambers, supra note 2, at 541.
so, egregiously, when they quote from the very paragraphs I have set forth above. I only hope that others will read my article more carefully and more charitably than they do.

13. Please reread the first paragraph in the passage quoted above on page 161, especially its last three sentences. Here is what Fineman and Opie do with that passage:

Chambers, for example, prefaced his extensive use of such studies [of children in the custody of father] with the comment that "[o]ne would be inclined not to report their findings at all except that they share a remarkable surface similarity." Nevertheless, a few pages further on, he appears to have forgotten his earlier injunctions, and offers for consideration the view that "the generally optimistic tone of the studies of children placed with fathers might lead one to believe that children . . . are in general likely to be at least as well off with their secondary-caretaking fathers." Although this is one of the propositions he makes, and subsequently partially retracts, the father custody studies are nonetheless a keystone of his assumption that fathers are of equal capability in regard to the custody of their children." Fineman & Opie, supra note 1 at 144-45.

The sentence in my article that immediately precedes the italicized passage above warns that the recent research "could deceive us into inappropriate conclusions" and the sentence immediately afterwards says, "This, of course, would be a wholly unjustified conclusion." Chambers, supra note 2, at 514.