

MORE ON LAZY RULES: Remarks at the Investiture of Ira Mark Ellman, March 25, 2003

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I am honored and privileged to be here today to join in this recognition of Ira Ellman as a distinguished scholar. I have worked closely with Ira, both as an author on the second edition of his family law casebook, and more recently as co-reporter for the American Law Institute's *Principles of Family Dissolution*. These have been extremely rewarding, challenging collaborations. Ira works hard, and works others hard, he gets to the bottom of things, he develops his own positions only after having thought about the problem from every angle, he defends those positions well, and he presses others hard to defend their own positions, from every possible angle. Once he decides, he does not equivocate. Perhaps this is the Arizona way. This past Tuesday, Justice Sandra Day O'Connor, interviewed at Duke by Walter Dellinger, explained that the only thing you get from sitting on the fence is a sore crotch.

Quality in scholarship is a difficult thing to define. I find the familiar metaphor of digging as helpful as any other. The best scholars are excavators who dig deeper and deeper into a problem; as the digging gets deeper, they *expect* it to get harder. An issue that is easy for one scholar may be, to a better scholar, much harder, *because* he or she has dug further below the surface, eschewing the easy definition of the problem and the easy answers that follow, and taking on the more complex reality with the harder work that entails. Sometimes this digging requires multiple tools: one might be able to get away with a simple large kitchen spoon to get through the softest layers of earth, but a shovel might be necessary to get deeper down, and maybe even a pick or dynamite to get into the core. In the case of Ira's legal scholarship, the tools have included not only rigorous legal analysis, but also economics, statistics, and other social sciences.

For me, Ira Ellman exemplifies the scholar who digs deeper, even when it gets hard, even when from time to time it means falling into your own ditch. It's no wonder he finds a subject hard that many assume to be easy. No one has dug deeper to try to figure out the best of many imperfect

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solutions to the problems of support by one spouse of another at divorce (with the possible exception of Rod Stewart, who is reported to have said: “Instead of getting married again, I’m going to find a woman I don’t like and just give her a house.”).

No one has been more thoughtful in articulating why parties who don’t formally marry may be required, nonetheless, to share with each other some of the tangible economic benefits of their long-term, marriage-like relationship after they separate, or have other rights and privileges. (Except perhaps someone named Bob Ettinger, who is quoted at the website proverb.taiwan.online.org: “Relationships are hard. It’s like a full-time job, and we should treat it like one. If your boyfriend or girlfriend wants to leave you, they should give you two weeks’ notice. There should be severance pay, and before they leave you, they should have to find you a temp.”)

No one has been more rigorous than Ira in challenging the claims of those who have blamed high divorce rates on no-fault divorce, or in dispelling other justifications for restoring fault to divorce law. He seems prepared to show that declining marriage rates, as well, are due less to the ALI and so-called liberal state law reformers than to other factors such as poverty that so many of the “pro-marriage” and welfare reformers seem determined to ignore. I hope to see more from Ira on this question.

No one has been more creative in working across the different issues of family law to achieve *coherence* in family law reform. The paper Ira has presented today illustrates his effort to connect different developments and reform projects in family law in order to advance thinking and understanding about one family law topic in relation to another. I find useful in this paper the distinction between the law’s instrumental, prospective function and its judgmental, retrospective function. As always, Ira is precise about the analytical purposes for which the distinction is offered, and its limitations.

My response today to Ira’s paper is to extend just slightly the insight implied in his title, “Why Making Family Law Is Hard.” Family law tends to be treated as a marginal subject. It is marginal not only because of its subject matter—the ordinary detail of people’s lives, which is not perceived to be as important as multi-national commercial transactions, corporate finance, sexy constitutional rights or tax— but also because it is perceived to be a less rigorous, less challenging area of the law. This perception has been, in some measure, a self-fulfilling prophecy. People assume family law does not require deep thinking, and then don’t think very deeply about it.

It may be this myth of simplicity that accounts for some of the lazy rules Ira points out in his paper—property at divorce should be divided *equitably*; custody should be determined according to the *best interests of the child*. In these examples, rulemakers have not bothered to make rules; they have simply stated the general policy objectives and left it up to judges to determine how these objectives should be accomplished in individual cases.

In contract law, property law, criminal law, and all other areas, we seem to realize that general aspirations of fairness or equity make really lousy rules. We would never think of resolving contract or property disputes by saying: just do what's *fair*, or what best serves the interests of the most deserving party, on a case-by-case basis. We seem to understand in these fields of law that open-ended, aspiration-based standards would produce results that would be, in fact, *less* fair or otherwise desirable than more concrete, determinate rules.

The use of lazy rules in family law has undesirable consequences. To use the example that I know best, the best-interests rule is well known to produce results in custody cases that are subject to factors that are subjective, emotional, and even political. At best, these results turn on what individual judges believe about how children ought to turn out, and what they think works best in having them turn out that way—judgments clearly having more to do with values, in many cases, than science.

The best-interests test is often counterpoised with the parental-rights rule, as if the two results were contrary alternatives. Thus, for example, in the Elian Gonzales case, the rights of the father who wanted Elian returned to Cuba were seen as legalistic impediments to doing what was “best” for Elian. The call to protect Elian’s “best interests,” as if this clearly meant that he should remain in the United States and not be returned to his father, represents the sort of simplistic thinking that is encouraged when the best-interests aspiration is equated with a best-interests legal standard.

In the context of a highly emotional and politically loaded case like that of Elian Gonzales, it is easy to forget that the “rights” we give to parents, defined carefully and appropriately in advance, are a way to discipline and improve judicial decisionmaking for children *in order to best serve their interests*. Parental rights reflect the view of our society that children’s interests are best served most often when we leave decisions about their rearing up to their parents, subject only to certain detailed limits which we set forth carefully and specifically in advance, in our abuse and neglect laws.

To appreciate how a best-interests legal standard may be counterproductive of the best interests of children, imagine a society in which a child’s caretaker was chosen in the initial instance by a judge trying

to figure out what was in the child's best interests. Or where one could always appeal to a judge to second-guess a parent's decision about where a child goes to school, how late he stays up, what books he reads, what church he attends, what chores he is assigned, or what vacations he takes. We don't allow such challenges because we think that giving autonomy for those choices to parents does the most to encourage them to want what is best for their children, and to do their best to provide it. In other words, the rights we give to parents are the best way we know to serve children's best interests. Similarly, with respect to other rules proposed by the ALI with respect to the economic rights of people whose family relationship is dissolving, concrete rules that take into account our best thinking about people's expectations and intentions are designed to mediate the economic rights of the adult parties and to achieve greater fairness than a "fairness" standard alone could produce.

Both fairness and a child's best interests are important guideposts in deciding how various types of cases should come out and thus what the rules ought to be. But these rules—real rules—must precede the resolutions of individual cases. Case-by-case decisionmaking that is guided only by open-ended aspirations is too prone to the sway of emotion, the quality of lawyering, moralistic posturing, and politics. The better, if harder, approach is for the necessary trade-offs to be made in advance of the individual case, in administrable rules enacted by appropriate, accountable lawmakers.

Ira Ellman's work shows us the difference that more complex thinking about family law can make. It shows us that family law is not easy and that, as with other difficult areas of law, we should not try to get away with loose, lazy standards. It shows us that common sense is good, but that common sense informed by deep, rigorous scholarship is better.