

HEEDING CASSANDRA: THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES

*John Vagelatos**

Cassandra, the daughter of King Priam and Queen Hecuba of Troy, was so beautiful that in an attempt to woo her, the God Apollo granted her the gift of vision to foresee the future. However, when she spurned his sexual advances, he cursed her in turn, so that no one would ever believe in her visions or heed her warnings. Consequently, although she foresaw the fall of Troy, she was powerless to prevent it. The character of Cassandra resounds powerfully for feminist visionaries. Cassandra was the product of a patriarchal culture which privileged the voices of her brothers and fathers. She benefitted from her class, but was separated by her gender. She was granted a powerful alternative vision, but could not convince the male power structure to acknowledge it. The royal patriarchy's disbelief of and failure to listen to Cassandra's prophecies led to its own destruction.

In her latest work *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* ("The Neutered Mother"), Martha Albertson Fineman¹ confronts Cassandra's dilemma. She conceptualizes an alternative vision of the family, while acknowledging the difficulty in making people hear, understand, and heed her message. In *The Neutered Mother*, Professor Fineman proposes the legal abolition of marriage and a reconceptualization of our basic understanding of the family. Linked with images of neutered mothers and sexual families, her theories are sure to jar traditional sensibilities, but Fineman settles for nothing short of the extreme. She brings to us a fresh perspective, attempting to break away from even "core" feminist perspectives. Fineman sees the family as the key construct by which patriarchy has continually reproduced itself. However, she does not accept current limited conceptions of the family as an ideological institution. She argues that our basic understanding of the family limits both what change can be accomplished within that unit, and

* The author is currently studying for the New York State Bar and the Massachusetts State Bar. B.A. 1992, Columbia College; J.D. 1995, Columbia University School of Law.

¹ Martha Albertson Fineman is the Maurice T. Moore Professor of Law at Columbia University School of Law. She is the co-editor of *At the Boundaries of Law: Feminism and Legal Theory*, and *The Public Nature of Private Violence*. She is also the author of *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*.

what feminist goals can be achieved in society. Rather than seeking to redefine gendered relations within the construct of the family (a historical goal of feminist legalists), and therefore be coopted by the limits of the model, Martha Fineman unravels the institution and weaves an alternative norm. She exposes the basic unit of the traditional model: the horizontal sexual relationship between husband and wife. By stepping outside of the traditional model, she is able to reveal the various threads which tightly tie together to keep the model intact: governmental attacks on single motherhood, the rise of father's rights discourse, and the failure of the egalitarian family. She is also able to locate the Gordian knot: the inherent inability of current family conceptions to adequately address dependency or gender equality. Ultimately, however, Fineman is aware of the limits of her power to reweave the family unit into a new fabric, and we are forced to examine the utility of her formulations.

An examination of Fineman's work must start with her conscious choice to target the family as an area of feminist legal study. Part I of this Article will examine this choice, and the concept of "gendered lives" as a theoretical framework for uniting women politically. In Part II, I will review Fineman's conception of the traditional 'sexual family,' the nature of dependency, the failure of current conceptions of the family, and her proposed alternative model. In Part III, I will detail how the current attacks on single welfare mothers are rooted in the dominant patriarchal ideology, and how these attacks allow the government to avoid responsibility for modern social problems. In Part IV, I will highlight Fineman's responses to two of the most obvious critiques of her work: the absence of men in her reformulation of the family and the viability of her reforms.

I. FEMINISTS AND THE FAMILY

As a feminist, Fineman situates her scholarship in an underexamined aspect of the law: the family. She does acknowledge that the family has sometimes been the focus of feminist revision, but notes that the great majority of modern feminist legalists have located their study in other areas.² She sees the dearth in this area of study as significant, and

² "Liberal legal feminists, the most obvious potential source for an articulation of the alternative, non-patriarchal legal discourse about Mother, seem disinterested in the undertaking, perhaps even in the subject. Legal feminists have for the most part centered their attention on non-family circumstances and have expressed ambivalence about challenging concepts of family relationships except insofar as they are viewed as hindering or assisting market and economic equality for women." Martha Albertson Fineman, *The Neutered Mother*, 46 U. Miami L. Rev. 653, 660 (1992). See also

detrimental because motherhood and the family are particularly powerful focal points for women to unite and make positive changes.

Feminism as a theoretical movement, and particularly legal feminism, has often concentrated on the issue of difference. In social and legal systems, the debate over difference has served as a proxy for whether differential treatment of women and men is justifiable.³ Feminists have also focused on whether the source of difference arises from biology or social construction. Fineman criticizes these debates as a luxury legal feminists do not have. Whether innately biological, or culturally constructed, powerful differences do exist. To debate the origins of difference "will only siphon energy needed for tasks of more immediate or practical concern for law and legal theory."⁴ As a self-identified 'post-egalitarian feminist,' Fineman seeks to:

move well beyond biological differences. We urge a theoretical focus on the role of law in maintaining the existing unequal allocations of societal and economic power between women and men. The argument is that legal theory must recognize the reality of existing systemic and persistent inequality and move beyond the simplistic equality paradigm, establishing an affirmative feminist theory of difference.⁵

Despite the systemic gendered division of labor within the home, little feminist legal theory has examined how the family, perpetuates patriarchy and inequality. "Rather, the focus has been on prematernal or extramaternal concerns such as employment discrimination or gathering political power."⁶ Fineman finds the scarcity of feminist legal theory about the family and motherhood problematic on several levels.⁷ Current

Martha Albertson Fineman, *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies* 25-28 (1995) [hereinafter *Fineman*].

³ Fineman, *supra* note 2, at 37.

⁴ *Id.* at 35.

⁵ *Id.* at 41. This is not to say that difference is not important. Fineman recognizes that differences exist, that they affect women's lives, and that they matter. However, she is not willing to waste time and resources in the search for their origins. Rather, she seeks to move forward by concentrating upon the ramifications of difference in social policies. As differences "are manifest and harmful to women," they are also rationalized by legal rhetoric which casts public policy as neutral and rational. The agenda for legal feminists should be unpacking the underlying "neutral" assumptions, exposing the subjective links between difference and policy, and seeking "legal redress and remedy." *Id.* at 35.

⁶ *Id.* at 26.

⁷ *Id.* at 27. Rather than criticizing the scholarship choices of other feminist scholars, Fineman simply highlights the absence of works in these areas. In recent attempts to construct "a canon of so-called basic feminist jurisprudential works," she

conceptions of the family undercut feminist legal reforms in other areas. For example, while we may have egalitarian family models, they operate within a gendered social context. The allocation of burdens within the home reflects gendered conceptions of traditional family structures.⁸ Fineman argues that feminist legal theory should respond first, by critically revealing the underlying societal conceptions of the family⁹ and second, by abandoning traditional family conceptions and re-imagining the core family unit,¹⁰ both central themes of *The Neutered Mother*.

One of the strengths of Fineman's choice of motherhood as a vehicle for feminist coalition is its pervasiveness throughout society. Both motherhood and the family are uniquely situated to overcome some of the divisions which have hindered a truly comprehensive feminist agenda. For example, in attempts to avoid essentialism, feminists have been increasingly hampered by questions of representation. The debate has separated women, eviscerated similarities, and minimized the ability of any individual theorist to speak with authority.¹¹ While many other areas for feminist reform may suffer from division by multiple perspectives among women, Fineman appropriately designates the family and motherhood as unifying principles in women's lives.

As critiques of essentialism and representation divide women, Professor Fineman is quick to point out that society, with its myriad institutions, reproduces "universalized, totalizing cultural representations of women and women's experiences."¹² Whether real or not, these media images are put forth as representative of an essential 'woman.' To overcome divisions of class, race, sexual orientation, and religion, Fineman introduces the concept of a "gendered life" in response to the societal imposition of essentialized constructions of women. Whether divided by color or class, all "women's existences are constituted by a variety of experiences—material, psychological, physical, social, and cultural."¹³

notes the absence of scholarship regarding the family. In defining core concepts, boundaries are created, areas are minimized and silenced, and assumptions are made. By neglecting the family, feminist legal scholarship privileges current legal constructions which are both patriarchal and harmful to women and children. *Id.* at 27.

⁸ *Id.* at 26–27.

⁹ *Id.* at 35.

¹⁰ *Id.* at 27.

¹¹ Fineman is "concerned that recent developments seem to have paralyzed many—silencing or restricting voices as women determine that they cannot speak for anyone other than those women with whom they share major nongender characteristics such as class, sexual preference, or race." *Id.* at 44.

¹² *Id.* at 44.

¹³ *Id.* at 48.

[R]egardless of the differences among us, all women must care about social and legal constructions of motherhood. Although we may make individual choices not to become mothers, social construction and its legal ramifications operate independent of individual choice. As is demonstrated in everyday existence, as well as in legal doctrines and political language, women *will* be treated as mothers (or potential mothers) because "Woman" as a cultural and legal category inevitably encompasses and incorporates socially constructed notions of motherhood in its definition. . . . Motherhood is a totalizing, culturally defined institution that applies across race and class lines. The mother is objectified—heterosexual, married, chaste, self-sacrificing—a rather statistically improbable and oppressive construct.¹⁴

The notion of 'gendered lives' is rooted in the real life-experiences of women, circumventing the debate over difference. "It is an affirmative position, poised for the demand for remedies, for differentiated treatment to rectify existing pervasive and legal inequity."¹⁵

II. THE SEXUAL FAMILY

Feminists and feminist legal theorists continue to struggle to reform marriage and marital roles. They have contested issues of equality within marital roles, economic valuations of domestic labor, and antenuptial custody claims. All of these critiques, however, accept a traditional image of the family constructed around marriage. Fineman critically reveals the ideological construct of a horizontal, heterosexual relationship around which society defines the family. This construct is implicitly and explicitly sexual. It is privileged by various social institutions as ideal. Families are based, Fineman argues, upon the concept of providing a social space for sexual relations. Because this sexual relationship is central to traditional concepts of the family, Fineman has coined the term: Sexual Family.

In addition to the social approval it garners, marriage confers upon individuals a legal bundle of rights, privileges, and subsidies.¹⁶ The concept of marriage is strictly defined in our society as a union between a man and a woman.¹⁷ This strict, conservative definition of marriage is

¹⁴ Id. at 51.

¹⁵ Id. at 48-49.

¹⁶ "The institution of marriage represents a substantial package of rights to its participants. Upon marriage, couples accede to government protections including tax benefits, employment benefits, probate designations, property rights, dissolution guidelines, and most significantly, special treatment under the United States Constitution." Family, Marriage, and the Same-Sex Couple, 12 Cardozo L. Rev. 681, 681 (1990).

¹⁷ Baker v. Nelson, 191 N.W.2d 185, 185-86 (Minn. 1971); "Washington statutes,

rational if we apply Fineman's analysis. If sexual relations are traditionally conceived of as monogamous and heterosexual, and if the family exists to provide a social space for condoned sexual relations, then the family exists to provide a social space for a monogamous, heterosexual pair: one man and one woman. Therefore, by privileging the horizontal, heterosexual relationship, society and its institutions ensure certain outcomes and reproduce embedded societal values and images: "[M]en are perceived as central to the family."¹⁸ Likewise, by relegating societally approved sexual relations to the Sexual Family, the natural outcome of those relations, reproduction and motherhood, are also societally embedded. Motherhood is therefore linked to traditional conceptions of the family and gender roles.¹⁹

Professor Fineman points out how traditional images of the family, with their embedded conception of motherhood, have impeded any transformation of women's roles.²⁰ As long as society accepts the nuclear family as the preferred configuration of the family, notions of motherhood (and of women) are constrained. "The dominance of the idealized sexual family in social and legal thought has restricted real reform and doomed us to recreate patriarchy."²¹ Feminists have struggled to reform the relationship between men and women within marriage and the family and to establish an egalitarian structure which addresses the valuations of labor within the home. However, regardless of these struggles, modern reports on the family continue to display gendered splits in the division of labor, post-marital division of assets and child custody, and societal approval of women's choices between motherhood and the workplace.

Understanding the failure of feminist reforms, and Fineman's criticisms of the traditional family, requires a critical examination of the societal role of the family and the nature of dependency. Fineman argues

specifically those relating to marriage . . . and marital (community) property . . . are clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman who are otherwise qualified to enter that relationship. (In this regard, we are aided by the rule of statutory construction that words of a statute must be understood in their usual and ordinary sense in the absence of a statutory definition to the contrary. . . . We need not resort to the quotation of dictionary definitions to establish that 'marriage' in the usual and ordinary sense refers to the legal union of one man and one woman." *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash. App. 1974).

¹⁸ Fineman, *supra* note 2, at 146.

¹⁹ Specifically, the concept of motherhood becomes embedded, in that society comes to view the traditional family as the only proper location for motherhood and reproduction.

²⁰ Fineman, *supra* note 2, at 143.

²¹ *Id.* at 147.

that gendered divisions and inequities throughout society are inevitable, because even the proposals for reform have been unable to move beyond traditional concepts of family.

While the egalitarian family [that feminist reformers] envisioned may have radical potential, the societal context in which it was launched ensured it would offer little hope for more than symbolic, rhetorical changes. We must go further and consider the *structural* position of the family—the role it plays within the larger society—which influences us even today in our reform efforts. (emphasis in text).²²

The family is structured within society to serve a number of purposes. Fineman argues that the family functions as a private repository for inevitable dependency. Inevitable dependency is the natural biological dependency of the young, the elderly, and the ill. In all of these stages of need, individuals are unable to fully care for themselves. Any civilized society must create means to care for these dependents. Having accepted that dependency is inevitable and must be subsidized, our society has placed responsibility for its dependents with the natural family.²³ Beyond allocating this burden to the private sphere, society also constructs images of how the family should function. The idealized version of the family construct is "a self-contained and self-sufficient unit in accomplishing those tasks—located within the larger society, complementing the state that protects it, but not demanding public resources to do so."²⁴

Fineman critically examines the allocation of dependency to the family and uncovers three flaws. First, "the construct of the 'independent' family masks the universal and inevitable nature of dependency."²⁵ By ideologically defining a proper family as one which is private and self-sufficient without public aid, society masks the inevitable nature of dependency and public subsidy. It conceals the large amount of aid provided to certain families, such as mortgage subsidies and college loans. However, the same limited understanding of dependency and public subsidy stigmatizes those families which must rely on outside institutions for more visible forms of support, such as Aid to Families with Dependent Children ("AFDC") and food stamps. This shallow conception of dependency also

²² Id. at 160.

²³ "[T]he family operates as a complementary institution to the state on an ideological and a functional level. In our individualistic society, the state relies on the family—allocating to it the care and protection of society's weaker members and the production and education of its future citizens." Id. at 226.

²⁴ Id. at 161.

²⁵ Id. at 227.

limits society's ability to directly address the problem and properly allocate resources.²⁶

Second, inevitable dependency and caretaking creates derivative dependency. The individual caretaker is dependent on others to subsidize her care; "she needs some social structure to provide the means to care for others."²⁷ Current allocations of direct dependency—supervision, time, physical handling—render the caretaker unable to obtain secondary resources such as food, shelter, and financial resources. The caretaker who stays home to care for others is unable to work outside the home and earn money to pay for food and shelter. She is derivatively dependent on another source—spouse, partner, family, welfare—to provide her with secondary resources. In cases where the caretaker is caring for a child, she will probably need an outside source of support. To avoid social stigma, she must marry. Alternatively, if she is willing to risk societal censure and prejudice, she may rely on an extended family, a community, or governmental subsidy (such as AFDC).

Third, "[w]ithin the family, this dependency is further directed by continued gendered role division."²⁸ Where one family member must be the primary caretaker, and another the financial provider, these allocations of burden occur within a gendered society. "Equality rhetoric and family law reforms aside, the burdens associated with intimacy and its maintenance have always been and continue to be disproportionately allocated to women."²⁹ The working wage differential between men and women was constructed on the idea that men had to work to support a family. Jobs thus have gendered constructions in their expectations and rewards.³⁰ The burden allocated "to a family as the private repository of inevitable dependence necessitates a two-parent family unit with role differentiation and division of labor."³¹ Considering the greater societal premium paid for a man's labor, economically rational choices alone would inevitably result in a traditional division of roles.³² Further, factoring in the societal

²⁶ See *infra* pp. 135–38.

²⁷ Fineman, *supra* note 2, at 163.

²⁸ *Id.* at 228.

²⁹ *Id.* at 162.

³⁰ "Most jobs in fact require that the person, gender neutral, who is qualified for them will be someone who is not the primary caretaker of a preschool child [or an elderly parent, or a sick partner]. Pointing out that this raises a concern of sex in a society in which women are expected to care for the children [and others] is taken as day one of taking gender into account in the structuring of jobs." Catherine MacKinnon, *Feminism Unmodified* (1987).

³¹ Fineman, *supra* note 2, at 165.

³² *Id.*

devaluing of domestic labor, the traditional family structure leads to a perpetual devaluing of women and their work.³³

Therefore, examining "this institution from a functional perspective, as a complement to the state designed to care for dependencies . . . the natural family [is] a failure."³⁴ The 'natural' family is insufficient to "handle both the demands for equality and the contemporary manifestations of inevitable and derivative dependency."³⁵ For all these reasons, Fineman finds current conceptions of the family and marriage inadequate.

In response to the failings of marriage and the husband-wife horizontal sexual dyad, Professor Fineman reconceptualizes the basic unit of the family. She proposes the legal abolition of marriage and submits the Mother/Child dyad as a vertical, non-sexual alternative core unit. The Mother/Child dyad is actually a metaphor for the Caretaker/Dependent relationship. By reconceptualizing the basic unit of the family, Fineman proposes that we can expose and address the societal inevitability of both direct and derivative dependency. Society and the government could then directly subsidize these dependencies without stigma to the caretaker.³⁶ Caretaking responsibilities and domestic labor could be reconceived as having costs and value. Reconceptualizing the core family unit would also alter our understanding of what is natural and what is aberrant, and would extend protection and support to family structures that have consistently been labeled as deviant and targeted for social control and persecution.

III. DEVIANT FAMILIES

Currently, the Sexual Family possesses exclusive legitimacy as society's foundational institution. All families which do not contain this core unit are therefore defined as deviant. Furthermore, institutional allocations of dependency sanction family structures which are self-

³³ Fineman also discusses some of the other negative repercussions for equality resulting from this gendered division of caretaking. For example, when women forego having children, hiring outside caretakers shifts the burden to minority women and/or women of a lower class. Additionally, she points out mothers are blamed when any family failure does occur, especially if they were not present because of employment outside the home.

³⁴ Fineman, *supra* note 2, at 228.

³⁵ *Id.*

³⁶ Such reconceptualization would also shift the veil of family privacy and autonomy to cover subsidized alternative families. Instead of premising aid upon state review and supervision, a reconceptualization of the core dyad would extend family privacy to these families, and alter the nature of their subsidy from reviewable to presumptive. See *infra* pp. 137-38.

contained and self-supporting.³⁷ These ideological valuations doubly stigmatize those families which do not replicate the traditional family. As reproducers of ideology, the law and the government target these 'deviant' families for stigmatization and eradication.

Fineman's latest work comes into the academic discourse at a time when the political debate is rife with contention over welfare reform and the Personal Responsibility Act. The battle over welfare highlights the issue of single motherhood, as policy makers like Newt Gingrich seek to prove their political virility by sacrificing welfare recipients upon the altar of a New America. The manuscript for *The Neutered Mother* was actually prepared before the November 1994 elections and the Personal Responsibility Act,³⁸ which makes Professor Fineman's writing even more apocalyptic. In *The Neutered Mother*, Professor Fineman deconstructs governmental policies towards single-mothers and their families. Her analysis of the historical role and social positioning of these welfare dependent, single-parents, prepared before Newt Gingrich's proposals, clearly predicted the targeting of these most vulnerable of Americans for social censure and political attacks.

The Sexual Family privileges one conception of the family. By creating this baseline, however, society also defines what is deviant. Families that do not resemble the two-parent nuclear family are labeled as aberrant. "Single motherhood . . . is deviant simply because it represents the rejection of the primacy of the sexual connection as the core organizing familial concept."³⁹ Within a patriarchal framework, "the existence of unstigmatized mothers successfully mothering outside of the traditional heterosexual family calls into question some of the basic components of patriarchal ideology."⁴⁰ Instead, the government stigmatizes single-mothers to discourage that choice. Fineman claims that "while many single mothers in both the divorced and never-married categories are also poor and this contributes to the societal designation of them as 'deviant,' their real offense—the true' indicia of their pathology—is their singleness."⁴¹ Their singleness is not only correlated with social ills, but is also blamed as the cause.

³⁷ See *infra* pp. 133.

³⁸ Tape of Presentation on *The Neutered Mother* and the Sexual Family, held by the Institute for Research on Women and Gender Feminist Legal Theory Series (Apr. 27, 1995) (on file with author).

³⁹ Fineman, *supra* note 2, at 147–48.

⁴⁰ *Id.* at 101.

⁴¹ *Id.* However, Fineman concedes that issues of stigma stem not only from marital status and class, but also race.

Single-motherhood is labeled in poverty and welfare discourses as the source of other public afflictions, such as poverty, drug use, crime, illiteracy, and homelessness.⁴² As single-motherhood is demonized as the source of all societal evils, the goal of public policy becomes the restoration of the traditional family, rather than providing aid for the poor.⁴³ Rather than examining the true social sources of the problems of our society, or attempting to create solutions that actually target the needs of single welfare mothers (such as childcare), the government villainizes these mothers as 'welfare queens,' blames their behavior for their poverty, and calls for personal responsibility.⁴⁴

As a critical legal theorist, Fineman has explained that in the Personal Responsibility Act and other welfare reforms, "[w]e're sacrificing certain realities to symbol and myth."⁴⁵ Those social groups which least duplicate current ideological ideals, and which are thus most stigmatized, are also the most politically powerless. It is therefore easy to place political blame on these groups, shifting public attention away from larger issues, and immolating them to popular unrest about welfare and the poor.⁴⁶ The Personal Responsibility Act and other current welfare reforms divert attention away from real social problems and their sources, and scapegoat those without a voice in our society. Newt Gingrich and other welfare reformers, including Bill Clinton, have approached reform as if welfare is a major drain on our society's economy. They have blamed poverty on learned helplessness and laziness, caused by welfare and AFDC, and called for personal responsibility for individual's economic situation. Fineman neatly skewers this rhetorical shell game:

Individual responsibility rhetoric neatly sidesteps the devastating impact of forces beyond individual control such as the global recession, the withdrawal of many businesses from the urban communities, and the restructuring or 'downsizing' resulting in lost employment and downward mobility that is occurring in our contemporary economy.⁴⁷

Professor Fineman has a final criticism of both current and proposed welfare reform: the government's intrusion into welfare families. Current

⁴² Id. at 114.

⁴³ Id. at 104.

⁴⁴ Id. at 110-18.

⁴⁵ Tape of Presentation, *supra* note 38.

⁴⁶ "Quite often the weaker, underrepresented members of society—women, children, and the poor—are those whose interests are sacrificed to the symbolic." Fineman, *supra* note 2, at 219.

⁴⁷ Id. at 215.

single-mother families which are derivatively dependent on the government for financial support become 'public families.' Fineman explains how government aid becomes conditioned on the government's supervision of, and intervention into, the family. While the natural, traditional family is shielded in law behind veils of privacy and autonomy, families receiving government aid are fully exposed to the scrutiny and manipulation of the state. This intervention is justified by the fact that these families are not financially independent, are not headed by two parents, but by mothers who have chosen (wrong) not to marry the fathers of their children. This deviancy subjects them to continuous "state supervision in making decisions about their families."⁴⁸ Fineman argues that this intervention is invasive and unjustified, serving only to allow the dominant ideology to further control these non traditional families. Under Fineman's reconceptualization of the family around the Mother/Child dyad, the constitutional veils of privacy and autonomy that now protect the Sexual Family would presumptively also protect single-mother families.⁴⁹ Once we shift our understanding of the family and the inevitability of derivative dependency, the state could stop demonizing single-mothers based on their need. Government would then be in a position to actually start providing some support for the families that need it.⁵⁰

IV. PREEMPTING THE CRITICS: MAN AS MOTHER, THEORY AS VISION

Any radical rethinking of the status quo is sure to draw fire from those who support it. Fineman's critical examination of motherhood, dependency, and families is truly radical, both in its vision and its call for reform. It is not surprising, therefore, that there are critics. In this section, I set out to address two of the more simplistic critiques of *The Neutered Mother*, in hopes that later debate can shift to more complex issues.

Radically altering our conception of the base unit of the family from Husband/Wife to Mother/Child necessitates the shift of many presumptions. Privileging the Mother/Child dyad as the ideal, natural, or normal familial

⁴⁸ Id. at 189, 190.

⁴⁹ Fineman preempts her critics by allowing for laws outlawing incest or child abuse to exist. The burden of presumption (which already exists for two-parent households) would simply be shifted to include any Caretaker/Dependent relationship in a family setting.

⁵⁰ Fineman, *supra* note 2, at 216.

form forces a re-examination of the role of fathers and of men.⁵¹ Fineman has stated that every time she proposes the Mother/Child dyad, she is immediately beset "at least 30 times each presentation" by critics who wish to know where men fit in this new utopia.⁵²

Fineman speaks to this concern early in her work. She explains that the Mother/Child dyad is used metaphorically for any Caretaker/Dependent relationship. The "Mother" is a metaphor for any direct caretaker, male or female. Fineman purposefully leaves it as a gendered term, rather than using a neutered term such as 'Parent,' because mothering has historically and culturally been a gendered concept, and is thus heir to powerful rhetoric and symbolism. Critics who misunderstand Fineman's equality analysis may find this move confusing. She is not seeking to reconceptualize the family in order to free women from motherhood or to banish men from the family unit. Rather, she is trying to free motherhood and caretaking from traditional conceptions and family structures which devalue the work of caretaking. If society deconstructs the family, reconfigures it around the Mother/Child, and recognizes inevitable dependency, then 'women's work' as caretakers can be valued, and women can be free to choose between roles as caretakers or financial providers.

Along the same lines, the Child is a metaphor for "all forms of inevitable dependency . . . of the ill, the elderly, the disabled, as well as actual children. The child is an embodied concept, exemplifying the need for physical caretaking."⁵³ Therefore, an adult caring for an elderly parent is the "Mother" to the parent's "Child." Likewise, a man could be "Mother" to his actual, biological child. Fineman addresses this point directly at the end of her work, and briefly calls for a rethinking of fatherhood and masculinity.⁵⁴ She stresses that real fathers *should and must* be Mothers to their children, in that they should be actively participating in caretaking.⁵⁵ Fineman's theory neither excludes men nor forces them to change. Instead, it envisions a broader conceptualization of family relationships which would allow more latitude to all members, moving beyond confining views of traditional masculinity and fatherhood.

A second, perhaps more fundamental critique of *The Neutered Mother* questions the likelihood of Fineman's shift actually being implemented on any level. Fineman acknowledges that "[w]e can be sure that change will

⁵¹ Id. at 191.

⁵² Tape of Presentation, *supra* note 38.

⁵³ Fineman, *supra* note 2, at 235.

⁵⁴ Id. at 204-208.

⁵⁵ Id. at 234-35.

not occur any time soon (if at all)."⁵⁶ If such a radical shift in the way society and government envisions families is not likely to occur, what is the utility of Professor Fineman's work, short of an interesting mental exercise? It is the metaphoric power of Cassandra's vision. Exploring an alternative vision, employing a critical eye, is a powerful tool for forcing society to unpack its deepest presumptions and expose them to light. Reformulating the family forces a reexamination of the allocation of dependency within government and the family, and the difficulties which women must face in striving for egalitarian family relationships. Furthermore, while change may not come in the form which Fineman advocates, its radical nature makes it difficult to be coopted by the dominant ideology, forcing discourse outside of traditional boundaries. It compels a reexamination of the goals and effects of welfare reforms and governmental policies. Finally, the very character of her analysis and critical vision allows future feminists and critics to chart their courses with greater knowledge.

I invoke the metaphor of Cassandra because of the limits feminist and critical legal theorists face in their scholarship. Articles and books by feminist critical theorists are criticized by traditional legalists as inconsequential and impractical. Feminist theorists are repeatedly criticized for the absence of a solution step in their articles. Outside of academia, feminists struggle repeatedly to garner the slightest victory for women, and then find they must refight battles they thought they had won. It is difficult to effect actual change in a society where the dominant ideology coopts change and uses it to reinforce its own power. Like Cassandra, feminist legal theorists have powerful visions, but have difficulty in having their theories acknowledged by the dominant class. Radical, alternative visions which are criticized as revolutionary are unlikely to be realized. However, there is power in vision. Feminist and critical legal theorists now have forums and audiences for their ideas that did not exist in the past. Each generation views demands for equality as less radical and more just.

The Neutered Mother presents a fresh feminist legal viewpoint which explores an underexamined area of culture and develops innovative perspectives on the failure of family-based reform for women. Fineman's vision has powerful ramifications in the modern debate over welfare and single mothers. *The Neutered Mother* will undoubtedly draw hostile criticism for being "too radical" or "too theoretical." However, it is the power of Cassandra's visions that time proves true. It is likely that many of Fineman's visions will gain recognition as later feminist legal theorists use them as a springboard for their own theories and scholarship.

⁵⁶ Id. at 232.

THE UNREALIZED POWER OF MOTHER

*Dorothy E. Roberts**

In *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, Martha Fineman dares to assert that motherhood has an "unrealized power."¹ "It is essential," she declares, for feminists to "reclaim the term."² Her admonition could not be more timely. As Fineman powerfully demonstrates throughout the book, contemporary political discourses about single mothers, especially in the contexts of welfare and divorce, increasingly cast women's independent mothering as pathological.³ At the same time, policies that reinforce the norm of the private nuclear family leave women with the burdens of caretaking while denying them both needed public support and privacy from government intrusion.⁴ Fineman's analysis helps to explain the key elements of current welfare reform proposals—the vilification of single mothers as the cause of poverty and social degeneracy; stepped-up government regulation of their intimate lives; and imposition of private measures such as paternal child support and marriage as the solution to children's poverty. *The Neutered Mother* shifts attention from the marital couple to mothers and their children as the family unit that merits social assistance and legal protection, and as the center of feminist inquiry and activism. It is a long-overdue demand for society to value concretely the roles that women undertake and to compensate them for the hard work that they perform.

This essay takes Fineman's notion of motherhood's unrealized power as a starting point. First, I discuss how Fineman uses this concept to challenge both welfare reformers and feminists who devalue the role that mothers serve. Then I explore Fineman's further indication that motherhood holds more positive potential for addressing women's social inequality. I problematize the notion of motherhood's unrealized power by examining some of the complexities inherent in viewing Mother as a transformative metaphor or as a role that unifies women.

* Fellow, Harvard University Program in Ethics & The Professions; Professor of Law, Rutgers University School of Law-Newark. B.A. 1977, Yale College; J.D. 1980, Harvard Law School.

¹ Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 234 (1995).

² Id.

³ See id. at 101–25.

⁴ See id. at 161–66, 177–93.

I. FINEMAN'S CHALLENGE TO WELFARE REFORMERS AND FEMINISTS

The conservative assault on single mothers has escalated since the book's publication. Declaring marriage "the foundation of a successful society" and "an essential social institution which promotes the interests of children and society at large," the House Republicans' Personal Responsibility Act⁵ contains numerous measures designed to penalize unwed mothers and their children. Most onerous is its denial of benefits to teenage mothers for children born out of wedlock, regardless of when aid is sought.⁶ This provision not only attempts to deter out-of-wedlock births, but punishes children by barring them from receiving public assistance because of the status of their birth. The Act also denies benefits to children whose paternity has not been established.⁷

Fineman brilliantly challenges the very foundations of these punitive welfare policies in two critical ways. First, she reveals the patriarchal premises of their assumption of the norm of the sexually-affiliated couple as the center of the family. Fineman situates welfare reform discourse in the context of the historic control of fathers over children, buttressed by a rhetoric that portrays single motherhood as deviant. Second, she demonstrates how these policies obscure the inevitable dependency of children by assigning its management to the traditional private family. Of course, it is mothers—the typical caretakers—who have always paid the price. Returning the missing male to the nuclear family is a way of privatizing dependency and avoiding society's collective obligation to support children.

The Neutered Mother is also a challenge to feminists. As Fineman recognizes, the assertion that motherhood has unrealized power is controversial among feminists. Fineman notes that in the past some feminists, including Simone de Beauvoir, either totally disavowed the gendered role of mother or cast it as a threat to women's sense of individuality.⁸ Liberal legal feminists, Fineman argues, have borrowed some of these themes in their advocacy of policies, such as shared parenting, designed to leave women unencumbered.

Fineman is correct that the feminist project of understanding and addressing women's inequality must incorporate the material and social

⁵ H.R. 4, 104th Cong., 1st Sess. (1994).

⁶ Id. § 405(a)(4).

⁷ Id. §§ 405(a)(7), (9).

⁸ Fineman, *supra* note 1, at 72-74.

implications of mothering. But the feminist task of analyzing motherhood is complicated by a dilemma: it is difficult to explain motherhood, as an institution and an experience, in a way that grasps both its affirming and oppressive aspects. Celebrating mothers sometimes lapses into defining women according to our biological nature.⁹ Condemning the subordinating features of motherhood sometimes turns into the total rejection of motherhood as an "annihilation" of women.¹⁰ Or it may result in the reformist "neutering" of mothers that attempts to achieve a gender-neutral notion of parents. I have struggled in my own writing to express motherhood's "fascinating paradox: although it is devalued, exhausting, confining, and a principal way in which women are shackled to an inferior status, for many women motherhood is life's greatest joy."¹¹

Motherhood is neither a natural source of women's power nor an inherently or entirely oppressive occupation. How then should we describe it? Fineman resolves this tension between glorifying mothers and neutering them with two constructive concepts. First, she avoids an essentialist view of motherhood by proposing the concept of a "gendered life." This concept is based on the premise that women's varied experiences "provide the occasion for women to develop an identifiable perspective that is rooted in their appreciation of, and reaction to, the gendered nature of our social world."¹² It recognizes the gendered implications of women's lives without assuming that all women's experiences and responses are the same. Although Fineman uses this concept primarily in response to concerns about women's differences, I think it also provides a useful way of recognizing that women's diverse experiences as mothers are indeed gendered while rejecting a naturalistic understanding of motherhood.

Second, Fineman avoids the renunciation of a gendered role of mother by distinguishing between the *burdens* that mothers undertake when they care for children and the *oppression* of women. Fineman defines burdens as "the costs associated with what women typically do as caretakers in society."¹³ This enables her to acknowledge that women's domestic labor may provide joy while at the same time entailing material costs and consequences. Demanding that mothers' caretaking be acknowledged and

⁹ See Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 28-42 (1988) (comparing cultural and radical feminist views of motherhood).

¹⁰ See Jeffner Allen, *Motherhood: The Annihilation of Women*, in *Mothering: Essays in Feminist Theory* 315, 316 (Joyce Trebilcot ed., 1984) ("I am endangered by motherhood. In evacuation from motherhood, I claim my life, body, world, as an end in itself.").

¹¹ Dorothy E. Roberts, *Motherhood and Crime*, 42 Soc. Text 99, 100 (1995).

¹² See Fineman, *supra* note 1, at 48.

¹³ *Id.* at 162.

compensated need not mean denouncing this work as oppressive. I would argue, however, that women's attachment to and care for their children are related to women's oppression: they are often used by a patriarchal state and fathers as a means of securing mothers' compliance with their demands.¹⁴

II. DEFINING MOTHERHOOD'S UNREALIZED POWER

Fineman very successfully refutes both the stigma attached by policymakers to single mothers, as well as the criticism by some feminists of the focus on motherhood. By calling motherhood an "unrealized power," however, Fineman seems to imply more than a defensive move. Throughout the book there is the suggestion that motherhood is a positive force, perhaps even a liberating occupation, for women. Although Fineman astutely observes that physical dependency is inevitable, "in that it flows from the status and situation of being a child and often accompanies aging, illness, or disability,"¹⁵ she barely questions whether or not it is inevitable that women be caretakers. Fineman does not critique women's role as mother as she does women's role as wife. In her chapter on the sexual family, for example, Fineman notes that most of the girls interviewed for a survey were far less committed than boys to the idea of getting married. More than half of the girls stated that they would consider becoming a single parent. Fineman quotes one sixteen-year old's response: "If I weren't married, I could imagine being a single mother. I know it's hard, but it's worth it. I just know I want children."¹⁶ Fineman emphasizes the gender differences in the teenagers' expectations for marriage, but does not question the girls' assumption that they will become mothers. Moreover, Fineman is firm in her selection of the Mother/Child dyad as the central intimate connection, although she explains that men may fulfill the role of Mother in this metaphorical unit.¹⁷ Indeed, as I noted above¹⁸ (and as the book's title highlights), Fineman is quite critical of feminists who have deleted gender from the role of mother.¹⁹

Fineman's sense of the affirmative "power" that motherhood holds remains somewhat mysterious. Fineman suggests that one aspect of

¹⁴ See Roberts, *supra* note 11, at 110-13 (explaining how patriarchy takes children hostage, both literally and symbolically, to secure women's obedience).

¹⁵ Fineman, *supra* note 1, at 162.

¹⁶ *Id.* at 150.

¹⁷ See *id.* at 234-35.

¹⁸ See *supra* note 10 and accompanying text.

¹⁹ See Fineman, *supra* note 1, at 73-75.

motherhood's power is its metaphorical capacity to redefine the meaning of family in a way that shatters the traditional fixation on sexual affiliation.²⁰ Another possibility might be the power of unifying women around their role as mother. I want to explore the complexities of harnessing this potential power of motherhood.

III. MOTHER AS METAPHOR

Fineman explains that she deliberately chose the device of the Mother/Child metaphor because of its power as a cultural symbol.²¹ She argues that the Mother/Child metaphor has the potential of displacing the hegemony of the sexual-natural family as the basic family unit.²² It is in her defense of the Mother/Child dyad that Fineman comes closest to revealing the "unrealized power" of motherhood. As she elaborates:

The most vivid and shared image of connection is the Mother/Child dyad. This is the prototypical nurturing unit, a fitting substitute for the Husband/Wife dyad that forms the basic unit of the sexual family. . . .

The need for a positive societal vision is the reason the Mother/Child metaphor is appropriate. In excavating the image, I want to pull in the powerful resonances it has across a variety of discourses. . . . Mother is an embodied concept with biological, anthropological, theological, and social implications that give it strength in the public sphere. . . .

. . . . Motherhood has unrealized power—the power to challenge the hold of sexuality on our thinking about intimacy; the power to redefine our concept of the family, which may be why men have tried so long to control its meaning. The Mother/Child metaphor represents a specific practice of social and emotional responsibility.²³

Thus, despite the popular discourses condemning single mothers as deviant and pathological, Fineman concludes that the image of mother and child retains tremendous positive symbolic value. When I try to conjure up this cultural symbol of Mother/Child, however, it is hard for me to divorce it from negative racial imagery. The positive, as well as the negative, aspects of Mother as metaphor are steeped in America's racist history.

²⁰ See *id.* at 234.

²¹ See *id.*

²² See *id.* at 233–34.

²³ *Id.*

American culture has cultivated very powerful images of unfit and dangerous Black mothers.²⁴ These images are particular to Black women and are perpetuated at every level of American popular culture. The ideal Black mother figure, Mammy, selflessly nurtured white children, while under her white mistress's supervision. At the same time, whites portrayed slave women as careless mothers of their own children. Later, the emasculating Black matriarch was held responsible for the disintegration of the Black family. Today, the dominant popular image of Black mothers is the teenage girl who recklessly bears more children in order to collect another welfare check.

The cherished icon of the mother nurturing her child is also imbued with racial imagery. Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care. White Americans have long demanded that Black mothers leave their children at home in order to work at menial, low-wage jobs. As I recently noted elsewhere, "Americans expected Black mothers to look like Aunt Jemima, working in somebody else's kitchen. . . . American culture reveres no Black madonna; it upholds no popular image of a Black mother nurturing her child."²⁵

It makes a profound difference that Black children are not valued as much as white children, no matter what kind of family structure produces them. This devaluation of Black-childbearing contrasts sharply with the historic promotion of white motherhood that serves the national good by producing white children. Both policies are patriarchal, but they are just as fundamentally racist. And they produce radically distinct cultural symbols of Mother. The most extreme welfare reform proposals aimed at discouraging women receiving Aid to Families with Dependent Children (AFDC) from having children—some even conditioning benefits on Norplant insertion—rely on this racist devaluation of Black motherhood as much as on the patriarchal castigation of maternal independence.

The difficulties that racism poses for employing the symbol of Mother do not negate the importance of investigating the unrealized power in motherhood. I have suggested, for example, that the very experience of Black mothers may aid feminists in developing a complex political

²⁴ See generally Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* 67-90 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and The Right of Privacy*, 104 Harv. L. Rev. 1419, 1436-44 (1991).

²⁵ Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 Conn. L. Rev. 871, 875 (1994).

interpretation of motherhood that includes the view of mothering as a radical vocation.²⁶ Black women historically have experienced motherhood as an empowering denial of the racist denigration of their humanity. They have often practiced mothering for political ends and in a communal fashion that suggests the potential for collective transformative action by mothers.²⁷ My point is that I do not think there exists a usable cultural symbol of Mother we can excavate. Rather, we must create her from our diverse and common experiences of mothering and from our political vision of what a just institution of motherhood would be.

IV. THE LIMITS OF PATRIARCHY IN THE SOCIAL CONSTRUCTION OF MOTHER

Although Fineman acknowledges differences among single mothers based on race and class, her primary interest is in identifying the ideology and rhetoric that links single mothers from diverse backgrounds. Fineman shows how patriarchal ideology that defines single mothers as pathological cuts across race and class boundaries. She observes similarities in the discourses that stigmatize both middle-class divorced mothers and never-married poor mothers. Fineman notes that, "despite these differences, the core and common problem facing mothers within each group is identified as the missing male."²⁸ Fineman calls this phenomenon "cross-over discourses," which she defines as "the propensity for rhetorical images associated with being female in our culture, which are generated and perpetuated in one context, to spill over and define our understanding of women in other contexts."²⁹

In what sense does "'Mother,' as a socially defined and symbolic institution, [have] trans-substantive implications," as Fineman claims?³⁰ True, the concept of Mother defined in the context of poverty discourses shares features with the concept of Mother defined in the context of divorce, both of which, in turn, help to define a broader social understanding of Mother. But this is very different from saying that these mothers are defined or treated in the same way. Motherhood has very different meanings in different contexts of race, class, sexual orientation, and so on. Indeed, it is *in their role as mothers* that women are most differentiated by race, class, and sexual orientation.

²⁶ Roberts, *supra* note 11, at 115-16.

²⁷ *Id.* at 116-17.

²⁸ Fineman, *supra* note 1, at 102.

²⁹ *Id.* at 102-03.

³⁰ *Id.* at 103.

Interrogating more specifically the role that race plays in these patriarchal ideologies helps to clarify Fineman's notion of Mother's trans-substantive quality. Ironically, it is the *distinctive* image of Black mothers in poverty discourses that helps to define all mothers. The condemnation of Black mothers works as a warning to the rest of society—a way of disciplining all deviant women. Black mothers serve as what Patricia Hill Collins calls the "point from which other groups define their normality."³¹ Black single mothers are a powerful cultural symbol not only of all that ails Black people, but also all that ails the family. Castigating Black single mothers sends a message to other defiant mothers who dare to raise their children independently of men. Fineman asks, "Why has this casting of single motherhood as pathological, as a social disease, and as one of the core explanations of poverty, been so readily accepted?"³² Part of the answer is the popular association of single motherhood with Black women. Welfare policy penalizes Black single mothers not only because they depart from the norm of the father-headed family, but also because they represent rebellious Black culture. To some extent, then, welfare policy punishes white single mothers because they act too much like Black women.

Class differences also shape the meaning of motherhood. Although contemporary politicians may condemn single motherhood across the board, they can impose the requirement of marriage on mothers who rely on welfare to survive. Reliance on government assistance subjects poor mothers to a far greater degree of government regulation than that experienced by wealthier women. Poor families are "public" families because they depend on government aid. Courts view their dependency as a waiver of privacy which subjects them to numerous indignities that would be illegal to impose on affluent women. (I am not sure that the private/public family dichotomy applies at all to Black families; they are viewed as always in need of supervision.) Moreover, poor women's reproduction is stigmatized not only when it occurs out of wedlock, but also because it is considered morally irresponsible to have children at the public's expense.³³

In the end, I consider Fineman's work and mine to have a symbiotic relationship. While she sees the ideology of patriarchy as the primary force in the creation and acceptance of these discourses about mothers, I tend to

³¹ Collins, *supra* note 24, at 68.

³² Fineman, *supra* note 1, at 102.

³³ As Fineman shows, part of the reason that childbearing at the public's expense is considered immoral is because the costs of dependency have been allocated to the private nuclear family. *Id.* at 161–66. But affluent single mothers can avoid the stigma associated with dependence on public aid, if not that associated with unwed motherhood.

see the ideology of white supremacy as the primary force in their creation and acceptance. It is probably not helpful to try to determine the predominant influence in the condemnation of single mothers, whether racism or patriarchy. Rather, these observations make it clear that both racist and patriarchal ideology work together to construct the meaning of motherhood. I credit Fineman's analysis with helping me to understand more clearly the relationship between racism and patriarchy in the social construction of motherhood.

V. THE UNIFYING POWER OF MOTHER

The Neutered Mother suggests that the shared interests of mothers offer a common ground for women's political solidarity.³⁴ Some feminists have faulted women's organizations for their silence in the welfare reform debate and have called on women to form alliances based on their common interests as mothers, especially regarding the needs of working mothers.³⁵ During the Progressive Era, a network of activist women exploited maternalist rhetoric to mobilize disenfranchised women and convince American legislatures to implement America's first public assistance programs for single mothers.³⁶ Contemporary women, Lucie White suggests, could replace the progressives' focus on "pensions to protect poor women from the workforce" with "reforms for all parents in the workplace itself."³⁷ Johanna Brenner similarly argues that the time is especially ripe for organizing around working women's needs:

The entry of women into the labor force and the increasing influence of women trade unionists, the impact of feminism on the perception of women's family roles, and the increasing organization of professionals and grass-roots constituencies around family/work issues, make it possible for the first time since the emergence of industrial capitalism to challenge women's assignment to unpaid caring work.³⁸

³⁴ Id. at 52.

³⁵ See, e.g., Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 Yale J.L. & Feminism 99, 127-29 (1989); Lucie E. White, *On the "Consensus" to End Welfare: Where Are the Women's Voices?*, 26 Conn. L. Rev. 843, 851, 855 (1994).

³⁶ See Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare 1890-1935*, at 37-108 (1994); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* 427-28, 439-65 (1992).

³⁷ White, *supra* note 35, at 853.

³⁸ Brenner, *supra* note 35, at 129.

Mothers from all backgrounds share an interest in transforming the gendered division of labor which assigns unpaid caretaking tasks to women without public support and structures the workplace around men's needs.

Fineman's thesis might suggest instead the unifying theme of valuing mothers' work in the home. Fineman argues compellingly that women have shouldered the inevitable costs of dependency and should be compensated for it.³⁹ Her focus on the mother/child dyad appears to be different from some feminists' focus on the workplace. Brenner, for example, argues that "[i]n a period where the vast majority of women with young children work for wages, a welfare policy that pays women to stay home is anachronistic."⁴⁰ Brenner contends that it is women's increasing access to paid work that has freed women from depending on men for economic support, thereby enabling the feminist challenge to traditional gender ideology.⁴¹ She therefore advocates "a strategy centered on providing working mothers with support rather than demanding payments for women to stay home with their children."⁴² In using motherhood's power for political ends, feminists will have to explore further the value of mothers' work in the home and its relationship to women's wage labor.

Despite the unifying experience of motherhood, working mothers are divided by divergent—and even conflicting—interests. Elite and middle-class reformers have tended, because of their social position and education, to see themselves on a moral mission to save their less fortunate sisters. They have a vested interest in explaining poverty in terms of cultural and personal weakness rather than focusing on the structure of economic opportunity and racial privilege.⁴³ The Progressive Era reformers' exclusion of poor single mothers and women of color from their white, privileged network dramatically limited their vision of welfare.⁴⁴ Their fear that welfare was an incentive to "pauperism" and family breakdown limited the generosity of the programs they created. Moreover, a defining aspect of their programs was the social control of poor immigrant families and the total neglect of Black single mothers. The nineteenth-century women lost an important opportunity to form coalitions with Black women activists who at the same time were advocating universal programs,

³⁹ Fineman, *supra* note 1, at 230–33.

⁴⁰ Brenner, *supra* note 35, at 118.

⁴¹ *Id.* at 119.

⁴² *Id.* at 126.

⁴³ See *id.* at 120.

⁴⁴ Gordon, *supra* note 36, at 67–108.

assistance for working mothers, and the linking of welfare to racial justice.⁴⁵

Affluent white mothers have in other ways sacrificed the interests of poor white and Black women in their pursuit of gender equality. For example, many gained entry to the male-dominated workplace by assigning female domestic tasks to Black women, rather than by demanding a fundamental change in the sexual division of labor.⁴⁶ Fineman faults the "egalitarian family" for requiring this "solution" to inherent flaws in the concept of the sexual-natural family.⁴⁷ She notes that "[t]he tasks assigned to this family as the private repository of inevitable dependency necessitates a two-parent family unit with role differentiation and division of labor."⁴⁸ Hence, women in the egalitarian couple family who join the work force either forgo having children or hire someone to care for them.

In this time of mounting state repression against poor single mothers, we urgently need to identify and wield motherhood's unrealized power. *The Neutered Mother* begins this exploration of ways in which Mother can serve both as a transformative metaphor and as a basis for progressive coalition building among women. Unleashing the power of motherhood will require resisting white supremacy and economic injustice as much as abolishing patriarchal family norms. Otherwise, the unrealized power of Mother will just as easily be exploited for repressive ends.

⁴⁵ Id. at 111-43.

⁴⁶ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 154 n.35.

⁴⁷ See Fineman, *supra* note 1, at 165.

⁴⁸ Id.

INEVITABLE DEPENDENCIES: A COMMENT ON MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES*

Jonathan Simon^{*}

I. THE INEVITABLE DEPENDENCIES OF POLITICS

We already know what the sound byte version of this book¹ will be. “Martha Fineman wants to outlaw the nuclear family.” “Martha Fineman would define fatherhood out of legal existence.” “Martha Fineman would create a legal obligation for taxpayers to subsidize mothers and their illegitimate children.” Indeed, the arguments in this book stand in rather stark contradiction to what we are constantly assured is the consensus of our time. That Dan Quayle was right.² That the patriarchal family must be strengthened. That illegitimacy is a major causal force in the social and economic decline of the United States. What the sound bytes will miss, unfortunately, is perhaps the most radical element of Fineman’s analysis, her discussion of dependency.³

A. The Politics of Dependency

It is clear that dependency is a particularly bad term these days. A broad swath of mainstream opinion insists that America’s malaise stems in no small part from its dependence on drugs, on welfare, on borrowed capital, on big government solutions to social problems. This, of course, is hardly a new invention of the present age. You do not have to look very deeply to discover that “independent” is an important thing to be in this

^{*} Associate Professor of Law, University of Miami, School of Law. A.B. 1982, University of California at Berkeley; J.D. 1987, University of California at Berkeley; Ph.D. 1990, Jurisprudence and Social Policy, University of California at Berkeley.

¹ Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (1995).

² Barbara Dafoe Whitehead, Dan Quayle was Right, *The Atlantic*, Apr. 1993, at 47.

³ Radical not because it speaks from far away on the edges of some political spectrum, but radical because it speaks from so close to where Americans all over that spectrum imagine themselves to dwell.

culture and has been for a long time. At the same time, advanced industrial societies (including this one) have been experiencing a deepening crisis in the legitimacy of most forms of dependence for at least the last thirty years. Attacked by forces on the left, as well as on the right, it has become harder and harder to exercise power over people in the name of caring for them and others, institutionalized in families, schools, prisons, and welfare systems.⁴ The struggles within each institutional setting have been driven by their own highly specific motives (many of them ones with which this author sympathizes).

Fineman challenges the cultural associations of "dependency" from the outset by preceding it with the word "inevitable." "Inevitable dependency" describes the way in which periods of intense and (in the short term) unreciprocal need are embedded in human existence, i.e., "the status of the need for caretaking embodied in the young, many of the elderly and disabled, as well as the ill."⁵ Few in our culture could deny the appropriateness, indeed the nobility, of all of these forms of dependency and the caretaking they require. Likewise, the role of government in facilitating the meeting of these needs, which Fineman calls "derivative dependency,"⁶ has been grudgingly conceded by most conservatives since the Eisenhower era. Making sure that the young get raised and educated, that disabled and elderly adults are not left to fend for themselves, were recognized as challenges meriting government intervention well before the triumph of welfarism, or even liberalism itself.⁷ It is possible that urban societies can survive prolonged periods in which these functions are in crisis, but at least in the modern industrialized West, decreasing tolerances for disorder have led to policies aimed at making sure that the vast bulk of the population is able to manage its dependencies.⁸

⁴ At its broadest this has been deemed a crisis of the legitimacy of government, see Jurgen Habermas, *Legitimation Crisis* (Thomas McCarthy trans., 1975).

⁵ Fineman, *supra* note 1, at 8. One might also add forms of dependency that are made inevitable by the modernization process, which has rendered people far less capable of assuring the reproduction of society through local processes. Such dependencies include physical disabilities brought on by accidents with technology (either while producing or consuming it), pollution, as well as functional disability through unemployment, crime, and other "social pathologies."

⁶ *Id.*

⁷ Michel Foucault, *Governmentality*, in *The Foucault Effect: Studies in Governmentality: With Two Lectures By and An Interview with Michel Foucault* 87 (Graham Burchell et al. eds., 1991).

⁸ For discussions of the growing taste for order in American cities, see Roger Lane, *Violent Death in the City: Suicide, Accident, and Murder in Nineteenth-Century Philadelphia* (1979); Eric H. Monkkonen, *America Becomes Urban: The Development of U.S. Cities and Towns, 1780-1980* (1988). In American political culture the preferred mode of assuring the management of dependencies has been through

But to a degree unique among modernized societies the United States has also experienced a cultural loathing for dependency, born long before the birth of the republic and still surviving. It is the *Declaration of "Independence,"* after all. During and after the Revolution, the stigma associated with "dependence" on King George, and on Great Britain, could hardly be kept from influencing social practices. This stigma raised the level of criticism of the family, slavery, and the estate of women.⁹ Succeeding generations have renewed this line of attack, including the Radical Republicans in the 1860s, the conservative business elite in the Gilded Age, and more recently the civil rights struggle, the counter-culture, feminism, etc. These moments have in common not the internal coherence of an ideological code, but instead a rhetoric rich in the language and images of anti-dependency. Rather than a sign system that determines what Americans can believe or desire, anti-dependency ideology in this sense is an enabling resource that makes it possible to do certain kinds of political work much more easily than others, one of which has been dismantling policies that address inevitable dependency.

Caretaking as a primary social function might take different forms in imaginable cultures. In the predominant cultures within the United States (primarily European) and in most of the less dominant ones, caretaking is gendered. The dominant cultural picture of caretaker is of Mother. Acknowledging the risk that some will read her as an essentialist, Fineman chooses to use that very term to describe the general role of caretaking. That risk is worth taking because the opposite risk, of ignoring the historic gendering of caretaking relationships, is greater still. It may be liberating to be reminded that social roles are not determined by biology or natural law, but it does not mean we can simply wish or "word" the gendering of our culture away.

It would be possible to describe caretaking in the language of functionalist social science, but by referring to all caretakers as Mother, Fineman makes sure that we cannot avoid appreciating the ways in which the larger subordination of women in our culture has added to the vulnerability of Mother. Even for elite caretakers, the cultural stigma of dependency and its gendering means that receiving facilitation from institutions becomes problematic. At the same time, Mother reminds us that the powerful cultural associations linked to the caretaking of inevitable dependency provide opportunities to empower women that should not be

quasi-private networks of insurance, mortgage loans, and consumer credit, bolstered by a quasi-public system of tax deductions, legal immunities (like insurance from anti-trust law), and sometimes monetary policy. Where those fail, we much less generously address dependencies through various forms of income transfer from tax revenues.

⁹ Gordon S. Wood, *The Radicalism of the American Revolution* (1992).

suppressed in the name of a gender-blind society that does not exist. Nor should a gender-blind term be used to affirm an argument for the social construction of gender identities which does not need its support. This ambiguous status of Mother is embedded in laws which amplify and reproduce it. Mother is a location highly marked out and charged by laws which accord it significant recognition, but only under conditions set by the requirements of patriarchal ideology, primarily Mother's linkage to the male dominated sexual family.

This means Mother is a very dangerous formation to bring into play:

In its various configurations, Mother is a pivotal factor in defining our understanding of our own familial, sexual, and social circumstances. In this way, Mother is also significant in our construction of universal meanings, defining the general qualities of life for us. Mother is an ambiguous symbol—one about which there is social and cultural contest. For that reason, focusing on Mother may be considered too dangerous: Mother is neither fixed nor containable.¹⁰

The political complexity of raising Mother is well illustrated by the on-going attack on welfare mothers. "Welfare" in this context refers to the social programs that support caretaking among the poor, primarily poor women and their children, who receive cash assistance and a variety of services and goods from federal and state programs like AFDC and Food Stamps. Welfare combines multiple layers of dependency. First, it recognizes the dependency of children on parents (mostly mothers). Second, welfare acknowledges the dependency of some mothers on the government (and here racist ideology has been particularly key in picturing the African-American mother as the welfare mother). Ultimately, welfare also admits the dependency of state governments on the federal government. Opposition to welfare as a political issue benefits from the ease with which anti-dependency ideology can attach at any and all of these levels.

To justify dismantling the legal and financial support for this caretaking, Mother must be discredited by her association with the word "welfare." Mother as the caretaker of inevitable dependency is dangerous to attack straight on. No doubt part of the explanation for how welfare has been delegitimized is attributable to race ideology in the United States.¹¹ Fineman's analysis of the rhetoric of the welfare debate shows that the recent popularity of "reforms" aimed at encouraging work and establishing paternity are operating against an image of deviant motherhood. This

¹⁰ Fineman, *supra* note 1, at 72.

¹¹ *Id.* at 107.

deviance is defined by patriarchal ideology in contrast to caretaking in the context of a father-dominated household.¹²

Fear of what mothers would do to their children and to society if they were allowed to support themselves and their children outside of such discipline has been a central theme in the political imagination for decades now. Exemplary among these ideas is the misogynist work of Philip Wylie, whose book *Generation of Vipers* was first published in 1942 and went through multiple printings throughout the late 1960s.¹³ Wylie attributed many of the nation's problems to the increased political power of mothers, a condition he termed "momism."

Meanwhile, megaloid momworship has got completely out of hand. Our land, subjectively mapped, would have more silver cords and apron strings crisscrossing it than railroads and telephone wires. Mom is everywhere and everything and damned near everybody, and from her depends all the rest of the U.S. Disguised as good old mom, dear old mom, sweet old mom, your loving mom, and so on, she is the bride at every funeral and the corpse at every wedding.¹⁴

The current mainstream consensus on welfare reform stresses connecting children to fathers, and mothers to the labor market.¹⁵ Increased enforcement of child support payments promises to decrease the state's fiscal burden (speculative) and presumably to create incentives for fathers to reassert themselves in the caretaking of their children (even more speculative). Another reform strategy is to force welfare recipients into the workforce where, it is widely assumed, they will be subject to the disciplines and normative influence of mainstream society. This replaces the direct reinsertion of the father with the more abstracted force of the "name of the father" as embodied in the world of business and responsibility.

The new Republican majority in the House has now pushed the reform debate in an even more extreme direction than the programs and proposals that Fineman analyzes in her book, but they further confirm her cultural and ideological insights.¹⁶ Maternal deviancy is intensified in the mother who not only goes about caretaking within abnormal contexts, but actually manipulates the inevitable dependency of childhood to advance her own less

¹² Id. at 112.

¹³ Philip Wylie, *Generation of Vipers* (1942).

¹⁴ Id. at 185.

¹⁵ For a summary of the basic positions, see Mickey Kaus, *They Blew It!: Welfare Reform, Clinton and the Future*, *The New Republic*, Dec. 5, 1994, at 14.

¹⁶ Fineman, *supra* note 1, at 110-18.

than inevitable dependency on the government. Republican proposals have a decidedly more coercive quality, aimed at eliminating the fact of single motherhood by directly discouraging pregnancy and threatening to take children away from the youngest single mothers.¹⁷

What is left of a liberal stand on welfare generally argues that the social problems of the poor are mainly to be blamed on the conditions of the economy. The view propounded by most academic experts attributes existence of a long-term, welfare-receiving population to de-industrialization, which has stripped many unskilled jobs from the inner cities, and to a spatial mismatch between the location of entry level jobs and concentrations of the urban poor.¹⁸ Fineman's re-visioning of family law would leap over this analysis. By arguing that the law should provide direct legal recognition of Mother independent of the sexual bond between adults (which should be protected from state interference but not accorded state institutional support, at least not at the expense of caretaking inevitable dependencies), Fineman provides a basis on which to reconfigure the entire debate over issues like welfare. The current institutions would almost certainly be under attack, but primarily for their failure to create adequate support for Mother.

B. Welfare Sons

Mother as functional social practice and Mother as gendered archetype come together in Fineman's analysis so that we can recognize that the effects of social and legal change on Mother are not limited to poor and minority women. Because inevitable dependencies are so crucial to the maintenance of the social order, the vicissitudes of Mother are of tremendous consequence for most other relationships. Thus the failure to institutionally support Mother has potentially disastrous effects for those that depend on Mother and others who form partnerships with her. Men, as partners and sons of Mothers (as well as potentially Mothers themselves) have much at stake.

The current cultural weakness of Mother is reflected in another social problem which has been frequently identified as the flip side of the welfare-Mother problem, the crisis of young males growing up in America's zones of hardened urban poverty (what we used to call Ghettos). The

¹⁷ See Kaus, *supra* note 15 (describing the infamous orphanage solution bandied about by triumphant House Republicans in December of 1994).

¹⁸ William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* (1987); John D. Kasarda, *Jobs, Migration, and Emerging Urban Mismatches*, in *Urban Change and Poverty* 148 (Michael G.H. McGeary & Laurence E. Lynn, Jr., eds., 1988).

criminalization and criminal victimization of these youth over the last half-century together represent one of the most dramatic examples of the deterioration of the civil status of a citizen population in U.S. history (words like genocide are not as inappropriate here as one might hope). Crime, especially violent crime among African-American youth, has reached a truly horrific level in recent years.¹⁹ The odds of dying violently if you are a young African-American male are more than ten times the rate for young White males.²⁰ Approximately one out of every thousand young African-American males in the United States (between the ages of 14–17) was convicted of a criminal homicide or its juvenile equivalent in 1991.²¹ Most of this violence is being perpetrated by people who are demographically the same as their victims.²²

The toll this cycle of escalating violence has taken on young African-American males and their communities has been matched in a very real sense by the grasp of an expansive “justice juggernaut”²³ which has committed itself to punitive responses. It is not an exaggeration to say that the criminal justice system has become the main institutional space to which a large percentage of underclass youth are now condemned. An analysis conducted in the late 1980s showed that one in four young African-American men were in the custody of the criminal justice system.²⁴ When large cities are singled out the figure is closer to one in two.²⁵

It is controversial to talk about the meaning of the massive relationship between crime, punishment, and minority youth in America. One way to finesse this difficulty is to focus on discrimination. The evidence of a historic pattern of dual justice systems for Blacks and Whites in most parts of the country is overwhelming.²⁶ Despite intensive efforts to limit

¹⁹ In many respects our current obsession with crime in the United States is almost a purely ideological reaction with little to support it in the statistics. While crime rates in the United States remain high as compared with the experience of other industrialized societies and with our own experience before 1960, they are no higher now than they were twenty years ago and in many crime categories, the numbers are considerably better than they were a decade ago. U.S. Dep’t of Justice, *Criminal Victimization in the United States, 1973–92 Trends 1–4* (1993).

²⁰ Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* 385 (Kathleen Majurre et al. eds., 1992).

²¹ *Id.* at 392.

²² *Id.*

²³ Diana Gordon, *Justice Juggernaut: Fighting Street Crime, Controlling Citizens* (1991).

²⁴ Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* (1990).

²⁵ See William Raspberry, *The Making of Certified Criminals*, *Wash. Post*, Dec. 20, 1992, at A19.

²⁶ Daniel E. Georges-Abeyie, *Race, Ethnicity, and the Spatial Dynamic: Toward*

discretion in the assignment of punishments, and despite a wealth of high quality research on sentencing over the last ten years, few criminologists are prepared to find that the roots and branches of the dual system have been eradicated.²⁷

In some way evidence of discrimination would be oddly comforting. We know a little something at this point, about how to use government to police discrimination.²⁸ It is more disturbing to think about the accumulation of young minority men in the criminal justice system even without discrimination. Imagine that discrimination accounts for half of the African-American men in the custody of the criminal justice system (which is likely to be an overstatement). We would still be condemning a quarter of the men in a community to a lifetime of membership in a separate political society with different living standards and different rules of government. Most people in prison or on parole or probation are not protected by the Fourth and Fifth Amendments as ordinary citizens. For too many, periods of criminal justice custody run into each other, creating a semi-permanent deprivation of legal rights. Even when custody has ended, those convicted of a felony may find themselves deprived of suffrage.

The crisis of youth violence has frequently been blamed on the demoralizing influence of welfare and the "culture of poverty." From this perspective, institutionalized dependency is the problem. The rising prominence of this view contrasts sharply with the received wisdom of social policy for much of the 20th century, which linked the problems of juvenile crime to the pathologies of industrial society. The juvenile court was invented to institutionally address the new forms of dependency that urban life was creating for youth. The juvenile court spread from one state in 1899 to all but three by 1917, making it one of the most rapidly developed legal institutions in American history.²⁹ The court, with its

a Realistic Study of "Black Crime," *Crime Victimization, and Criminal Justice Processing of Blacks*, 16:4 *Social Justice* 35 (1989); Coramae Richey Mann, *Unequal Justice: A Question of Color* (1993); Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 24 *J. of Res. in Crime and Delinq.* 69 (1987); Patrick Horan et al., *Prior Record and Court Processes: The Role of Latent Theory in Criminology Research*, 67 *Sociology and Soc. Res.* 40 (1982); Marjorie S. Zatz, *Race, Ethnicity, and Determinate Sentencing*, 22 *Criminology* 147 (1984); Marjorie S. Zatz & John Hagan, *Crime, Time and Punishment: An Exploration of Selection Bias in Sentencing Research*, 1 *J. of Quantitative Criminology* 103 (1985).

²⁷ For the most sophisticated study to suggest that there has been improvement but that discrimination probably remains, see Stephen Klein et al., *Race and Imprisonment Decisions in California*, 247 *Sci.* 812 (1990).

²⁸ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

²⁹ Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 10 (2d ed.

legal justification of *parens patriae* (or "parent of the nation"), recognized the government's obligation to address the growing gap between youth needs and the capacity of private caretaking in modern societies.³⁰ Its major supporters were leading feminists among the Progressive era reformers, including Jane Addams and Julia Lathrop. Indeed, one of the leading historians of the juvenile court describes its origins as "maternal justice."³¹ For all its naive optimism, this vision constituted a recognition of the way modern society had expanded the space of child dependency by removing children from the labor force and ghettoizing them in youth environments like schools, where their interactions could be defined as problems for new professions like social work, educational psychology, and juvenile justice.³²

The hubris of the juvenile court often led to petty and not so petty tyrannies.³³ Scientific expertise about child development was often used as a cover for class and ethnic prejudices.³⁴ In response, the liberal Warren Court led the charge in delegitimizing the juvenile court in the 1960s in the name of individual rights for juvenile defendants. Federal policy in the 1970s followed this lead by encouraging states to reduce the jurisdiction of the courts. In more recent years that jurisdiction has been further reduced by placing juveniles accused of violent crimes directly into adult courts.³⁵

For more than thirty years now, an unintended coalition of left and right political movements has stripped much of the legitimacy from the overtly paternalistic and maternalistic foundations of juvenile justice.³⁶ Instead, with little disagreement among the political parties and virtually no

1977); David J. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* 207 (1980).

³⁰ The legal theory of the juvenile court is discussed at greater length in Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 *Cardozo L. Rev.* 2501 (1995).

³¹ Platt, *supra* note 29, at 75-100.

³² The youth social control problems of the urban poor are also found in their more privileged brethren but are masked by the quality of the detention centers we have set up for them and called colleges. For a description of the delinquent aspects of undergraduate life, see Helen L. Horowitz, *Campus Life: Undergraduate Cultures from the End of the Eighteenth Century to the Present* (1987).

³³ The facts of *In re Gault*, 387 U.S. 1 (1967), are exemplary.

³⁴ Platt, *supra* note 29, at xx-xxii.

³⁵ See Cynthia R. Noon, "Waiving" Good-bye to Juvenile Defendants: Getting Tough vs. Getting Smart, ___ U. Miami. L. Rev. ___ (1995) (forthcoming).

³⁶ See Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 *Notre Dame J.L. Ethics & Pub. Pol'y* 323 (1991).

public debate, we have engaged in a massive strategy of incarcerating poor youth, an urban policy that has cost America more tax dollars than Lyndon Johnson could have dreamed of spending on the poor. The protection of juvenile status for many young offenders has been severely cut back in many states as fourteen and fifteen-year olds are moved directly to adult court, where they face terms as severe as life without parole.³⁷

Ironically, the juvenile court is being marginalized at the very moment that the young generation is experiencing just the sort of social disorganization that the Court's promoters bewailed. This young generation is being abandoned to lives of criminalization and criminal victimization due to a lack of real institutional links to the mainstream of economic and social opportunities.

The condemnation of minority youth to lives of incarceration and criminalization is a product, in large part, of anti-dependency ideology and the cultural struggle against Mother.³⁸ The explosive growth of incarceration has been accompanied by an explicitly patriarchal ideology that decries the supposed permissiveness and leniency of social policy toward the young urban poor in the 1960s and 1970s.³⁹ The popularity of recent penal programs like curfews and boot-camps for young offenders seem to promise that the state will forcibly reassert the power of the father to control and discipline the sons of the urban poor.

We are facing a broad-based crisis of parenting in which some children lose parents to an economy that increasingly demands high-skilled labor, and in which others lose parents to the illicit, underground economy of drugs and violence. Moral panics about sexually perverse day-care workers and video games mask a profound quiescence in the face of major reductions in the quality of childhood for individuals in all classes.⁴⁰ Poor mothers and their children are simply the preferred targets (for reasons of class and race) for a much more general cultural repudiation of caretaking responsibilities.

³⁷ Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. Rev. 821, 842-47 (1988).

³⁸ The decline of the juvenile court, or really its restructuring into a more punitive instrument, has been driven by a number of factors including the increasing minority make-up of the system, the politicization of crime policy and the shifting cultural image of adolescence. Ideology plays a role that is rarely determinative but always can be discerned after the fact, in the moves of the victors. See generally Simon, *supra* note 30, for a discussion of the evidence.

³⁹ See e.g., James Q. Wilson, *Thinking About Crime* (2d ed. 1986).

⁴⁰ Laura Shapiro et al., *Rush to Judgment*, *Newsweek*, Apr. 19, 1993, at 54.

C. Strengthening Mother

According to Fineman's legal genealogy of Mother, the development of modern domestic law has entrapped Mother within the structure of a formally egalitarian heterosexual dyad between a man and a woman to which children are attached in the problematic ways that preoccupy a good deal of family law.⁴¹ The current political struggle is oriented around the issue of how far to broaden the boundaries of this sexual family.⁴² Should it include gay men and lesbian women? How should we work the relationship of children into the complex set of broken sexual families that serial monogamy often means? Fineman's proposal would reorient the whole structure of law around the axis of the Mother-Caretaker and the Child-inevitable dependent. The legal protection of the state would advantage whomever undertook with appropriate commitment to be Mother and accept responsibility for a broad range of inevitable dependencies.⁴³

Fineman's analysis of the vicissitudes of Mother in our culture is timely not only because its predictions about the politics involving single mothers are so rapidly proving true, but also because of its robust practical applicability. Her legal genealogy of Mother and her "re-visioning" of the family are not tied to any particular reform strategy. They do not address any one branch or level of government. Nor are their essential appeals tied strongly to any particular political ideology. Because Mother and the Sexual Couple are such deeply embedded formations in our culture, the call to strengthen Mother has implications which move the discussion beyond any type of political, religious, or gender-related dividing line.

This is especially attractive now when even questions of where policy will be made, let alone what policy will be made, is in spin. If the center of law and government shifts back to the states, or into "private" law altogether, new kinds of arguments and alliances are going to have to be made. Although Fineman focuses on law as a central field in which Mother is constructed and reconstructed, her analysis does not assume a specific path for legal change or even insist that a transformation in the position of Mother must come from law. Her scholarship has no set interlocutor. If her proposed legal changes are utopian because they are not likely to be adopted by legislatures or courts (any time soon) this does not mean that they will not shape arguments that can be taken seriously in both arenas. On the contrary, by illuminating Mother in American law and politics,

⁴¹ Fineman, *supra* note 1, at 74.

⁴² *Id.* at 4.

⁴³ *Id.* at 234.

Fineman opens up the possibility of many different engagements within the political field.

Democratic societies have always struggled with a paradox. The key to establishing a population capable of self-government, i.e., one which rules itself through democratic forms, is to establish and maintain practices which subject individuals to a government of the self, i.e., to the exercise of power over the self. This problem was already evident to monarchical critics of Parliament during the British Civil War. How can a society be said to have consented to anything when its very being is constantly shifting, and when examples abound of those incapable of governing themselves in the affairs of life?⁴⁴ Liberals like John Locke ducked the question and responded with their own withering critique of Monarchical social theory.⁴⁵ They could do so because of the existence of many seemingly settled power relationships which promised to bridge the paradox of self-government and government of the self—the power of fathers, and of father analogs like Masters and Magistrates—and because they contemplated nothing like universal suffrage.⁴⁶

That space has narrowed considerably in the last three centuries. There is virtually no relationship of power that is not subject to some aspect of anti-dependency critique. This has been the product of a great increase in democratization, but it has heightened the contradiction that liberalism has always embedded, the inevitable dependency of our own freedom on the maintenance of crucial modes of unfreedom.⁴⁷

Democratic politics is inevitably dependent on effective means of caretaking that ensure the reproduction of social order without irreparably damaging the capacity of self government. The stigma associated with dependence and the caretaking of dependency has now reached terminal levels with respect to the leading institutions undertaking the social support of caretaking. In raising the question of inevitable dependency at this time, Fineman's book may offer a concrete cultural path out of the increasingly self-destructive logic of anti-dependency ideology.

⁴⁴ Gordon J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (1975).

⁴⁵ Most famously in John Locke, *The Second Treatise of Government* (Thomas P. Peardon ed., 1952, n.p. 1690).

⁴⁶ Notwithstanding the relatively unproblematic nature of these power relationships for 17th century liberals, Locke worried tremendously about the actual forms that such power might take, so much so that he wrote a lengthy treatise on child-rearing for gentlemen.

⁴⁷ See Roberto M. Unger, *Knowledge and Politics* (1984).

II. THE INEVITABLE DEPENDENCIES OF KNOWLEDGE

What does law do? That was the question propounded by Roscoe Pound and the first generation of legal realists in American law schools in the first decade of the 20th century.⁴⁸ Studying the law-in-action has remained a worthy goal of legal scholarship since that time. Yet, with important exceptions, including Wisconsin, UCLA, Berkeley, SUNY Buffalo, and the University of Miami, most sociological jurisprudence, in Pound's sense, has gone on outside American law schools, among the anthropologists, historians, political scientists, and sociologists who make up the Law & Society movement. The popularity of economics, analytic philosophy, and semiotics in law schools makes them appear intellectually diverse, but all tend to share common academic methodologies with classic doctrinal scholarship, especially the thoughtful reading of texts and the spelling out of conceptual intuitions. The law-in-action may be deemed worthy of study, but all too often, it is studied just like law-in-the-books. Studying the law as a social practice remains rare.

Because the voices asking what law does as a social practice have only intermittently been accorded much of a hearing in law, the considerable following that Martha Fineman's scholarship has developed both in and out of law schools would be noteworthy to those of us interested in the sociology of legal knowledge. This is so particularly because Fineman's scholarship brings important innovations to the empirical tradition. Too often the goal of studying the law-in-action has meant a narrow commitment to quantifiable data which has often limited the reach of its best practitioners⁴⁹ and led its lesser lights into a sterile numerology. The Law & Society movement that developed in the 1960s grew out of the rapid growth in the prestige of the social (or, as they were then called, "behavioral") sciences and for a long time has remained largely wedded to the paradigm of "middle range" research established by the leaders of that era. Perhaps the most important of these is Robert K. Merton whose powerful methodological writings have influenced two or three generations of social scientists.

For Merton, commitment to the middle range meant steering a course between:

The minor working hypotheses evolved in abundance during the day-by-day routines of research, and the all-inclusive speculations comprising a master conceptual scheme from which it is hoped

⁴⁸ Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454 (1909).

⁴⁹ See Jonathan Simon, "The Long Walk Home" to Politics: Review of Gerald Rosenberg, *The Hollow Hope*, 26 Law & Soc'y Rev. 923 (1993).

to derive a very large number of empirically observed uniformities of social behavior.⁵⁰

Merton believed that sociology was in an early stage of scientific development where only the slow accumulation of observations combined with provisional conceptualization, closely tied to specific ranges of data, would support significant progress. However, Merton in no way abandoned the positivist goal of a comprehensive and integrated theory of social life.

In her earlier study of divorce reform,⁵¹ Fineman identified with Merton's approach:

In my opinion, one significant distinction between my feminist approach to legal theory and the more traditional varieties is my belief in the desirability of basing law on what is concrete rather than on what is abstract. Such an emphasis on context also has had rather honorable nonfeminist adherents. For example, Robert Merton coined the term *theory of the middle range* to describe work that mediated between "stories" and "grand" theory.⁵²

Elsewhere I have argued that it is time to renew the tradition of middle range theory by developing a variety of postmodern (and thus inevitably post-Merton) middle range research practices.⁵³ These research practices might be called postmodern in several senses. First, they confront the implications of constructivist epistemology, i.e., the recognition that the interpretive and the ideological run through in even the "hardest" features of social life. The modern sociological tradition has generally taken terms like "society," "nation," and "class" as essentially unproblematic parameters for analysis.

Merton turns to the French sociologist Emile Durkheim, whose studies of suicide and law have been among the most influential models of sociological method, as an example of well crafted middle-range theory. But almost all of Durkheim's work presupposed as its underlying subject, France, as a coherent and singular society defined by common language, racial composition, and autonomous economy. It is difficult to imagine how Durkheim would even locate "France" today, with its economy determined by German bankers, and its increasingly multicultural and multilinguistic population. A postmodern middle range then, takes seriously the concrete features of lived experience, but without the previous

⁵⁰ Robert K. Merton, *Social Theory and Social Structure* 5-6 (1968).

⁵¹ Martha A. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991).

⁵² Id. at 7.

⁵³ Jonathan Simon, *Between Power and Knowledge: Foucault, Habermas, and the Future of Legal Studies*, 28 *Law & Soc'y Rev.* 947 (1995).

assumption of a fixed frame of analysis that will be progressively filled in by an advancing normal science of the concrete. Second, postmodern middle range research would internalize the insights of modernist schools like critical theory and the study of the social construction of reality so as to see research itself as contiguous with other forms of self-interpreting activity. The work produced is itself inevitably ideological, in the sense that it becomes part of the available material for the interpretive strategies of other people.⁵⁴

The Neutered Mother moves beyond the modernist understanding of middle range in both of these senses. The formations Fineman analyzes are concrete and immediately recognizable to anyone with minimal competence in the culture as distinct figures (albeit ones constantly intertwined with others like constellations in the night sky). The deviant mothers discussed in chapter five are all figures of popular as well as expert discourses. What Fineman succeeds in doing is making visible the elements of a cultural system that we already recognize and use. They are products of ideology, but not in the sense that they are derived from some generative grammar reproducing the structures of domination from on high.

We speak of the "broken" family, the "disintegration" of the family . . . and, perhaps inevitably from some perspectives, the "death" of the family. Underlying such labels is the specter of single motherhood—statistically on the upswing—pathological and disease-like, contaminating society, contributing to its destruction and degeneration.⁵⁵

Fineman can talk about Mother and her fate without resolving fundamental issues of social ontology (difference vs. domination) or committing herself to particular ways of producing or testing the truth of social realities. "Patriarchal ideology" is described sometimes as a determinative force but rarely one which dictates terms. Motherhood is a "colonized" concept,⁵⁶ but in the sense that its content is given by the power of patriarchy to describe, give meaning, and attach consequences. There is room in this account for agency and politics.⁵⁷ The term

⁵⁴ We recognize the "unintended consequences" of thought rather more easily today, but even that expression codifies a questionable distinction between intended and unintended.

⁵⁵ Fineman, *supra* note 1, at 124.

⁵⁶ *Id.* at 124–25.

⁵⁷ Patriarchy, after all, has often been the target of anti-dependency ideology. In this sense it would be a mistake to take away from a reading of *The Neutered Mother* the assumption that the current attack on welfare is simply a product of patriarchy. At that level of abstraction it would be equally easy to argue that patriarchy requires welfare.

"utopian," with which Fineman self-identifies her vision of a whole new basis for family law, is in this sense not an alternative to pragmatism but a consequence of it. Because *Mother* encompasses so much social history and meaning, only a brand of scholarship fluently conversant with existing social institutions holds any promise of illuminating her fate. But that is to acknowledge the inevitable dependency of knowledge on the very ideologies it attacks. In doing so, *The Neutered Mother* points to a new model of scholarship.

CONCLUSION

The Mother-child dyad, which Fineman offers as the key representation of inevitable dependencies and the central social institution for addressing it, exemplifies the seriousness about practices and the self-consciously political nature of her work. Fineman acknowledges the risks of helping to essentialize the gender role of mothering but she chooses to accept that risk.⁵⁸ Social construction, after all, is no guarantee of liberty (and, of course, no endorsement of anarchy). Rationally informed strategic action is possible, but always under the constraints of a world where the embeddedness of power and knowledge make it extraordinarily difficult to fathom how particular strategies of resistance will "feedback" into the popular perceptions of reality. These may not be the ideal conditions for scholarship or politics, but they are conditions on which we are inevitably dependent. Providing a model of how to respond to those dependencies may be Fineman's most significant contribution.

⁵⁸ Perhaps this book marks the beginning of the end of the social construction debate which seems to have so preoccupied academicians in the social sciences and humanities of late. It is late in such an exhausting century to be treated to a whole new round of debates about relativism, nihilism, and the politicization of knowledge most which were hashed out more eloquently fifty or seventy-five years ago.

