

Revisioning Family Law

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Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. New York: Routledge, 1995. ix +239 pp. \$59.95 cloth; \$16.95 paper.

In 1976 Adrienne Rich published *Of Woman Born*, her stunning reflection on motherhood as an institution and set of social practices. She argued that motherhood has two meanings in our culture, one superimposed on the other: “the potential relationship of any woman to her powers of reproduction and to children; and the institution, which aims at ensuring that that potential—and all women—shall remain under male control” (Rich 1986:13). In *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, Martha Fineman continues the work of exposing the ways in which patriarchal practices have shaped our understanding of motherhood. She extends that project to new ground, however, analyzing the rules that define the *legal* relationship between mothers and their children, and setting herself no less a task than revisioning the foundations of U.S. family law. *The Neutered Mother* is important both for what it tells us about the need to rethink and reform family law and as a spur to debate the most appropriate way to remedy current injustices and establish caretaking as a central value of American society and law.

Yet despite our deep admiration for and agreement with Fineman’s analysis of the wrongs inflicted on women by patriarchal family law and her espousal of caretaking as a central cultural value, we find her innovative alternative grounding of family law in the Mother/Child dyad to be problematic. Her approach runs the risks both of essentializing “Mother” and of limiting the number of persons who feel themselves to have, and

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are regarded by the law as having, permanent responsibility for a child or other dependent person.

Fineman's title reflects what she sees as two "tragedies" in the development of recent family law. One concerns the relationship between parents and children, which Fineman sees as the tragedy of "the neutered mother." The other concerns the relationship between parents themselves, which she regards as the tragedy of "the sexual family." The legal treatment of these two sets of relationships has historically been closely connected. For example, under the common law, which set the terms for much of family law well into the 19th century, the legal relationship of a man to a woman determined the legal relationship of parent to child. The child of an unmarried woman was *fillius nulli*, the child of no one, while the child of a married woman was presumed to be the child of her husband, regardless of whether he was the biological father. A man's legal relationship to a child's mother thus determined who the law would regard as that child's parents. A somewhat different conflation of parental and spousal status is reflected in the commonly used term "single mother," which suggests that "real" motherhood—"motherhood unmodified"—can be attributed to a woman when she is legally married to a man, not to every woman who bears a child.

These legal constructions of family relationships that begin with the relationship of man and woman and then proceed to their relationship with children, approach the matter the wrong way around, says Fineman. Analysis of family life should begin not with marriage—the horizontal relationship between man and woman—but rather with the vertical relationship between generations. At the core of family life is human intimacy and care, and the primary caretaking unit is that of mother and child. The "intergenerational, nonsexual organization of intimacy" should be the protected and privileged relationship in law and social policy, and is best represented by "the metaphor of Mother/Child" (pp. 6, 8). "Abolish[ing] marriage as a legal institution" and recognizing "the mother-child formation" as "the 'natural' or core family unit" would alter the way intimacy and caretaking are understood and valued in our society and legal culture (pp. 5–6). Refocusing family law on the relationship of caretaking would give proper recognition to the work entailed in providing for the needs of children and other dependent persons. Caretaking has often failed to receive proper recognition, in part because it has been regarded as "women's work" and therefore of less importance than other kinds of labor, in part because it has largely been unremunerated rather than waged labor.

Those familiar with Fineman's earlier work will understand her preoccupation with caretaking activity and her anger that the work involved in caring for children is often ignored, underval-

ued, or trivialized. In her first book, *The Illusion of Equality*, Fineman analyzed the devastating effects of gender-neutral divorce laws on many women and children. The reforms in family law based on an “equality model” of spousal and parental relationships, Fineman argued, did not represent “beneficial challenges to traditional family structures on behalf of women and children,” but instead “reinforced men’s control within the family both before and after divorce” (Fineman 1991:3). The new rules required both divorced women and men to assume sole economic responsibility for themselves and joint economic responsibility for their children, but they assumed these equal responsibilities under radically different circumstances: In most cases they did not have equal wage-earning potential or other financial resources, and in most cases it was women who continued to take daily care of their children.

It was not surprising, Fineman asserted, that fathers’ rights advocates supported an “equality model” that cast family law in gender-neutral terms. Under the equality model, men could claim that an equal division of marital property at divorce should replace ongoing obligations of alimony and child support and could also argue that a father should have an equal claim to custody with his ex-wife. Ironically, the brand of liberal feminism that espoused formal equality of rights instead of looking at the actual economic and social situation of women and children before and after divorce gave men increased leverage in custody battles and postdivorce financial arrangements. Behind equality rhetoric, cautioned Fineman, “lies the stark reality that, after the ‘equality revolution,’ women and children continue to suffer at divorce” (ibid., p. 7). Sameness of treatment will not do in a world riven by gender differences that create actual social inequalities.

In *The Neutered Mother* Fineman asserts that “feminist theory that focuses on law must take the unequal position of women as a present given and must incorporate gendered differences as an explicit part of its analysis” (p. 12). Toward that end she proposes that feminists reclaim “motherhood” and “mothering,” and make caretaking activities the foundation of any parental—particularly custodial—claims. “Motherhood has unrealized power,” she asserts, “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 for so long to control its meaning” (p. 234). She believes that feminists can reclaim control of the meaning of family and can insist that it depend first of all not on marriage but on a caretaking relationship like that between parent and child. Making caretaking, traditionally a woman’s task, central to our cultural values would lead to a more humane society where all, young and old, would receive more and better care.

Replacing the horizontal sexual bond with a vertical caretaker-dependent bond by “reclaiming motherhood” will not be easy, however, because motherhood as an institution and practice has evolved within the context of patriarchy. “Motherhood” is a patriarchal creation defined as the complement of “fatherhood” and does not have a clearly defined meaning outside of this construct. As Fineman observes, “When one considers the relationship between motherhood and patriarchy, it seems that motherhood has always been, and continues to be, a colonized concept—an event physically practiced and experienced by women but occupied and defined, given content and value, by the core concepts of patriarchal ideology” (pp. 124–25). Two of the core patriarchal concepts involved in the historical colonization of motherhood were the denigration of women and their work as caretakers, and the acceptance of fathers’ exclusive legal authority over children under the common law. In the early 20th century the common law presumption about who should have custody of children was reversed and children of “tender years” were often placed with their mothers. But the gender-neutral guidelines and preference for joint custody produced by the divorce law reforms of the latter half of the 20th century continued to undervalue actual caretaking and wrested authority from women who provided care to children. Fineman’s proposal that the Mother/Child dyad be substituted for the horizontal marital bond as the paradigmatic representation of a familial relationship responds to this denigration of caretaking itself and the diminution of caretakers’ (that is, women’s) power.

Despite the fact that we agree wholeheartedly with Fineman that caretaking should be a central value of our society and that gender-neutral rules applied in circumstances of social and economic inequality reintroduce patriarchal power by the back door, we are less sanguine than Fineman that grounding family law in the Mother/Child dyad can dispel the effects of this colonization and create new forms of caretaking free from patriarchal influences.

Fineman herself suggests the extensive social and economic, as well as legal, changes that would have to occur before our society adequately supported caretaking. Fineman’s criticism of unsophisticated egalitarianism and gender neutrality stems from her understanding of the all-pervasive and insidious influence of patriarchal structures not only on family law but also on other social, economic, and political structures. Providing “a protected space for nurturing and caretaking” would require a transformation of structures of work, the level of women’s wages, and modes of public support for families. Most women are denied economic opportunities equal to those of men, and Fineman’s proposed “intergenerational, nonsexual organization of intimacy” underscores the necessity for new economic and social structures to

support caretakers. The Mother/Child family would be “protected and subsidized by state policy and law” (p. 6) in order that women and children would not be forced into dependency on individual men. Constant vigilance would, of course, be necessary to retain the autonomy of the Mother and avoid the intervention of social service and child-care “experts” once the state began to provide social services and direct financial support to caretakers. As Fineman showed in *The Illusion of Equality*, the intervention of “experts” in child custody decisions often deprived women of decisional autonomy. Fineman’s vision of a high level of social services combined with a high level of caretaker autonomy would also require vast changes and extended political debate over what, in fact, are family “needs” (Fraser 1990; see also Tronto 1993). The viability of an approach that replaces support from a male breadwinner with socially provided services would depend on the willingness of the society to provide for human need. Fineman’s work shows how far we as a nation are from supporting the efforts of those who work at supplying such necessities and care.

Another difficulty with adopting the Mother/Child dyad as a metaphor for caretaking relationships is that it is unclear how someone would become a Mother in the eyes of the law. A often-voiced concern about Fineman’s proposal, as she notes, is that a conceptualization of caretaking based on the Mother/Child dyad might exclude men from custody and care of their children (p. 5). The text of *The Neutered Mother* gives ambiguous signals as to whether “Mother” might refer to anyone, male or female, who is the primary caretaker of a child or other dependent, or only to the *female* parent or caretaker. At times, Fineman writes that both “Mother” and “Child” are symbolic terms, the one standing for those who provide care, the other for those whose “inevitable dependency” puts them in need of care (p. 8). The Mother/Child metaphor “was deliberately chosen because as a cultural symbol . . . it exemplifies caretaking” (p. 9). It represents not necessarily a woman and a young person but “a specific practice of social and emotional responsibility. The strength of the image is in its redistributive potential” (p. 234). Fineman on occasion suggests that if a man assumes the responsibility for the physical and psychological as well as the financial care of a child, he may be the adult in the Mother/Child dyad whose relationship will be sustained and protected by public policy and law, and in the concluding chapter she asserts that “men can and should be Mothers” (ibid.). The notion that either a male or female might be a Mother seems consonant with Fineman’s position in *The Illusion of Equality* (1991), where she proposed that custody law incorporate a preference for the “primary caretaker” without regard to sex. Yet in *The Neutered Mother* Fineman is so unrelenting in her criticism of men’s efforts to fashion a legal presumption in

favor of joint custody, and emphasizes so often that it is women who historically have defined the role and activities of “mothering,” that one wonders under what conditions a man might be designated a child’s “Mother.”

Our concern about taking the Mother/Child dyad as a basis for legally recognized parental rights and responsibilities arises not simply from what might be dismissed as oversolicitude for men, but from a belief that neither the well-being of children or adults nor societal respect for care would be likely to increase if the law were to contract the universe of those it recognizes as parents. Fineman’s dyadic bond between Mother and Child would designate one adult as the custodial parent. Since the first person who provides physical care to a child is the gestational mother, it appears to us that in practice Fineman’s proposal would entail a legal presumption that would make every gestational mother in the first instance the legal Mother of her child. While some occasions would arise in which an adult other than the gestational mother would be the primary caretaker of a child (for example, if a woman decided to have her partner perform most of the work of child rearing, or if she placed the child for adoption), those would be exceptional cases. Fineman does think that a Mother could involve other adults in caretaking and shared custody by permitting them “to develop and maintain significant connections with . . . her children.” A Mother may create a two- (or multiple-)parent family—whether heterosexual, lesbian, or gay—“if she agrees to such affiliation.” She alone, it appears, has the authority to expand the dyadic relationship (p. 5). In lieu of marriage, a Mother could create and enforce obligations among adults by use of contract, property, tort and criminal law; but whether such contracts would create legal obligations between adults and the child is not clear (pp. 229–30). We do not find the presumption of a sole custodial Mother, even if she may create responsibilities for others by contract, to be a satisfactory grounding of familial responsibilities. Contract, developed to deal with market transactions among supposedly disinterested and autonomous rational individuals, does not seem a device well suited for conceptualizing or dealing with family relationships meant to reflect nonmarket values of interdependency and trust. Just as Fineman seems to think that “Mother” can be dissociated from its colonized past, so she seems to think “contract” can be used without bringing the baggage of the market into the realm of caretaking. One of the most pressing needs facing those working in the area of family law is to develop an understanding of family that depends neither on an ascriptive status bestowed by biological or genetic tie alone nor on contract alone (Minow & Shanley 1996). Fineman energetically wrestles with this issue and certainly advances the discussion, but the search for a way to ground family law that will conceptualize family relationships

neither as essentially biological or genetic nor as essentially contractual must continue.

A study by Barbara Yngvesson (1995) of both birth parents' and adoptive parents' efforts to create new understandings of parenthood through open adoptions illustrates the kinds of difficulties that might arise from using a Mother/Child dyad as the metaphor for the caretaking bond. Yngvesson chronicles the efforts of several birthmothers to define "what it means to be a 'mother' " to the children they have placed for adoption. She finds their task is shaped by "the exclusions and silences of the patriarchal discourse of family in which there is no place for an emotionally charged connection of mother to child that is not already prefigured by a 'moral' law in which a woman's husband has a key place" (p. 44). Both adoptive mother and birth mother, the one who lacks a husband and so is regarded as unfit to parent and the other who is incapable of giving birth to her own and her husband's child, "are 'mothers in name only' (Kunzel 1993:130) and each provides what the other 'needs' to become a 'real' mother under patriarchy" (Yngvesson 1995:46). Yngvesson's study suggests that the notion that every child can only have one "mother" stands in the way of the recognition of the various maternal roles involved in open adoption. What is needed in order that both birth and adoptive mothers be recognized as "real" and not "mothers in name only," she argues, is a "more radical approach to motherhood, one that does not insist on exclusivity" (ibid., p. 52).

Kate Harrison (1995) has observed the limitations of using the term "mother" to encompass new caretaking relationships: "With lesbian mothers, there is no word in the language that accurately describes the role of the woman who does not give birth to the child—other than the word *mother*, which is seen both legally and socially as applying exclusively to a birth or adoptive mother. Without a recognized word to describe the position of the nonbiological mother, her position lacks clarity and certainty, even rendering her role invisible" (ibid., p. 172). Also reflecting the limitations of considering each child as having only one mother, recent cases brought by lesbian couples have argued that custody should not reside in the biological mother alone but jointly in the partners who share a household and take joint responsibility for raising a child. Reflecting on these cases, Ruthann Robson remarks that she does not think that "lesbians (either singly or in pairs) . . . can enter the state-defined parent role and transform it," and calls for a way of conceptualizing caretaking relationships that would be less "stifling for our lesbian imaginations and relationships" (1995:115).

Patricia Hill Collins's (1991) work also points out the limitations of both genetic and dyadic understandings of what it means to be a "mother" to a child. She uses the term "othermothers" to

describe the women, particularly in black communities, who assume caretaking roles to help biological mothers in raising children, or sometimes to assume full responsibility for those children; in many instances, several “othermothers” rear a child (ibid., pp. 167–73). Dorothy Roberts (1995:272) comments that these black families with multiple caretakers constitute “a ‘self-defined sisterhood,’ united by shared experiences, culture, and politics, not genes, that challenges the dominant conceptions of kinship bonds and women’s roles.” In line with such reflections, Adrienne Rich remarked (p. xxiv) in the 1986 edition of *Of Woman Born* that in the original text she had not given due consideration to “the different understandings of family and motherhood” of American Indian and black communities in the United States, and had not sufficiently considered the possibility of motherhood that included “the shared concern of many members of a group for all its young.”

While Fineman is absolutely right that the work of “mothering” has been grossly devalued, and that the premature move to gender-neutral legal norms governing divorce and child custody subjected many women to injustice, it is not clear that using the Mother/Child dyad to “reclaim motherhood” will have the transformative potential to move us toward a future in which caretaking has a preeminent place among our social values. How to construct social practices and institutional structures that will guarantee as far as possible that children and other dependents are cared for by deeply committed adults, and that all people—men as well as women, gays and lesbians as well as heterosexuals—assume the responsibilities of providing care and receive social support in fulfilling those responsibilities remains a pressing issue. The problem of transition, of what road will bring us to a future in which caretaking is a primary personal and social value, poses a very real dilemma. Fineman has convincingly demonstrated that adopting gender-neutral laws or procedures in the context of present patriarchal structures will not lead to such a desired state of affairs. It is not clear, however, that giving Mothers (the great preponderance of whom will be women) exclusive custody of children will either redistribute human activities across traditional gender lines or change and expand the ways in which people define and render care. Fineman has performed an immensely valuable service by her forceful presentation of the irrefutable claim that caretaking must be a central value for any humane and just society. Her spirited and accessible text invites debate on the roads most likely to bring that society into being.

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