Re-visioning the Dependency Crisis and the Negotiator's Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad

Clark Freshman

MARTHA ALBERTSON FINEMAN. *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. New York: Routledge, 1995. Pp. ix+239. $16.95 paper.

In keeping with the "perspective scholarship," including feminist methods, that Fineman's *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* both describes and practices, I begin with my perspective. Before I set out to *write* about *The Neutered Mother*, the book helped organize my life to care for my mother in the months before she died. When I described that experience at a panel discussion some months later, Fineman told the audience I was the kind of "Mother" her book described.

Beginning sometime in 1993, my then 74-year-old mother grew increasingly unable to care for herself. Over the next two years, she needed other people to drive her around, then to fix her meals, then to help clean her and remind her to take medicine, and finally to begin to carry the spoons of food to her lips.

In what later we called her last months, she needed more than just some abstract-fungible "people" to help feed her.[1] She seemed only to eat

---

1. Compare Posner (1995a, 146), who suggested that older persons choose whether to live at home, with children, or in a nursing home much as consumers might choose between

97

when I or a close friend came and fed her each spoonful. She took less food from abstracted-fungible people, often called "home health care workers" or "nurse's aides."[2] Her doctors labeled her, as doctors label so many of the old, particularly older women, as "demented" and "depressed." She ate less and less frequently, and she dropped from 110 to maybe 80 pounds.

I was then employed by a 100-something lawyer firm in Los Angeles, and the firm's response was interesting. I could not find any stated policy on flexible time schedules or caring for relatives; the firm had only recently adopted a formal policy for leave to care for children. When I saw one of the firm's top partners, he spoke quietly of his own ill parents. "Do what you have to do," he said.

About the same time, I read a draft of *The Neutered Mother*. I began thinking how it made sense of events around me. I do not know what the partner meant by "do what you have to do," but I answered that question in large part with Fineman's work in mind. I don't think that I systematically employed her vocabulary, although it would have been straight-forward enough. As sketched out more thoroughly below, Fineman discusses those who are "inevitably dependent" such as the very young and many of the very old, as well as the needs of those who care for the inevitably dependent. My mother's decline could be seen as inevitable in any number of ways: inevitable because of her declining years, inevitable because of her presence in a society that provided few socially approved roles for older women, and so on. But I do recall feeling more that my role in feeding her, listening to her, reading to her, and talking to her doctors on her behalf was a worthy and important one.

Over the next several months, what I "had to do" increasingly took time. Maybe I spent more time with her, "doing what I had to do," because of her changing physical state: her struggling lungs, her diminished ability to talk when gasping for air or breathing through an oxygen mask. This physical explanation explains only part: Many others might have thought of themselves not as a caregiver or surrogate parent (or "caretaker" and "Mother," as Fineman would put it) but as a kind of manager or, to be legalistic, a "health care surrogate" or an "attorney in fact." Indeed, another partner said only, "Of course, it's the hardest thing to accept: you have to

---

any market substitutes. If older parents do not live with their adult children, this must be because the older parents "must not want to live with their children badly enough to pay the price that would make the children indifferent between coresidence and independent living."

2. See, e.g., Breggin (1994, 217), who states, "Increasingly the elderly are being treated for depression with drugs and shock treatment, despite their obvious needs for a place of greater meaning in our society." The need to give a sense of meaning is particularly acute for those who grow old or who develop disabilities in a society that pervasively values physical vitality. At whatever age, however, many depressed people react better to the company of loved ones rather than fungible commercial caretakers. A member of British parliament recently stated publicly that he feared his "peripatetic life and long hours in the House" contributed to his daughter's depression. Stuffaford (1996, 16).

put your parents in a home." Rather than "accepting" that I should hire someone who could/should care for my mother in those last months, however, I did much of her care myself. In part, Fineman's work showed me a different way to see what I had to do by showing me a different way of seeing myself, my firm, and my society. Had I not been exposed to her work, and instead surrounded only by those who "accepted" the necessary, my mother would have been more likely every day to see a different stranger setting a tray down before her. And I would have been more likely to simply hear that she would not eat. ("It's difficult to accept," I would no doubt be told, "but older people sometimes stop eating").[3]

I want to try to think about my experience as an example of the way conceptual scholarship like Fineman's affects the negotiations that often determine whether individuals like my mother get the care they need and deserve. Many individuals may already have the formal right to certain benefits, such as parental or family leave, as a matter of law[4] or contract that would help them care for others, but they do not take these benefits.[5] Those who do not have access to Fineman's framework and vocabulary of caring— including the idea of caretaking, the inevitably dependent, the derivatively dependent, and the mother-child metaphor—may find themselves conceptually impoverished and unable to see a more involved role with loved ones. Often, there is even a conscious internalized discipline: the individuals tell themselves that they should really "let go" and "accept" their limited role.[6] When these employees hear, "Do what you have to do," they may believe this means surrendering a child, parent, or friend to a nursing home or other caretaker for hire. This same kind of internalized discipline may explain

---

3. Horan (1992, 11, 15) notes that "ageism" in our society includes the "assumption that all the changes seen in old age are due to being old and are therefore irremediable."

4. The Family Medical and Leave Act requires many employers to give employees unpaid leave from work if they are ill or need to care for a family member. For general background, see U.S. Commission on Family and Medical Leave (1996a, 201-6; 1996b).

5. Numerous studies show that relatively few male employees take time off to care for their children, even when they are formally entitled to paid leave to do so (Essex and Klien 1991, 394).

6. One study of persons who care for elderly relatives includes many experiences similar to mine. One woman who cared for her mother herself likewise reported that others thought she should send her mother to a nursing home:

> One of my closest friends really would like me to put my mother in a rest home. She just really thinks that it's too much to ask of anyone. She just sees it as sacrificing your life for someone else. And she's been pretty clear in saying she was really sorry I decided to do it. She'll still call me up and say, "Oh, I saw something on PBS about how older people really are much happier in a rest home, they're entertained, and they have activities for them." (Abel 1991, 159)

The study also is consistent in other ways with this essay's argument that people do not take care of others in part because they internalize norms about what their appropriate role is in caring for others. Abel (p. 179) reports that many women who cared for older parents "were initially reluctant" to participate in her study "because they did not define themselves as 'caregivers.'" Indeed, many stated "it was improper to rely on others" for help in their care for others (p. 163).

why so few couples sign up for domestic partner benefits from organizations that offer them.[7] In part, few couples may register as domestic partners even when they fit the definition because they internalize a strict notion of what constitutes a real family. An employer may define a domestic partner as someone an employee could and would marry but for practices denying same-sex marriage; an employee, however, may not register because she thinks only families with children deserve such benefits.

The remainder of this essay moves out from my experience of Fineman's book to explore more thoroughly how conceptual scholarship like hers lets individuals see different roles for themselves and helps them enact such different roles. It first outlines in greater detail Fineman's assessment of the need for more help for people who cannot care for themselves, an assessment with rich theoretical dimensions. The essay then traces out how Fineman's vision might inform negotiations, very broadly defined, in a hypothetical university, and situates these negotiations in the context of our everyday and scholarly understandings of negotiation. I then consider how various individuals might work with others to make more caretaking possible, and I suggest that we resist the temptation to speak of "coalitions." Finally, the essay revisits two questions about the exact contours of how we think about providing more care for those who cannot care for themselves. Should we speak only of caretakers and dependents or should we adopt Fineman's metaphorical vocabulary of the Mother and Child? Can we and/ or should we draw a sharp distinction, as Fineman does (p. 235), between physical dependency, which Fineman would subsidize, and emotional and/or psychological dependency, which she would not?

THE DEPENDENCY CRISIS IN PERSPECTIVE

Many readers of *The Neutered Mother* would see my mother and me as part of a public policy crisis at the core of the book: many people (including not just the ill but also the very young and the people of any age with disabilities) cannot care for themselves, and many of the people who would like to care for them (children like me, other loved ones, and friends) may not feel we have the resources to give them the care they need and deserve. Fineman names the ones who need care as "the inevitably dependent" (pp. 161–63). Fineman names those like me who need support for caring for such inevitably dependent persons as "derivatively dependent" (pp. 162–63) or "caretakers" (p. 9). Fineman prefers the term "caretaker" rather than the more familiar "caregiver" because "[n]urturing work should not be assumed

---

7. Generally, only 1% or fewer of a workforce sign up as domestic partners at employers that offer such benefits only to same-sex couples (Hewitt Associates 1994, 7; Winfeld and Spielman, 1995, 100). The rate is typically less than 3% when unmarried opposite-sex couples are also eligible (Hewitt Associates 1994, 7).

to be 'given' as a gift, to either the dependent or the society that benefits from the 'caregivers'' sacrifices. Taking care of someone . . . is work, represents a major contribution to the society, and should be explicitly recognized as such" (p. 9). Fineman also refers to the caretaker-dependent relationship as "Mother-Child," although she emphasizes the metaphor includes Mothers like me, who are men. The Mother is a metaphor for anyone "engaged in caretaking," including men, and the Child signifies "all forms of inevitable dependency—the dependency of the ill, the elderly, the disabled, as well as actual children" (pp. 234–35).[8] Although Fineman refers to the Mother-Child as a metaphor, she insists on the terminology rather than something gendered neutral, such as caretaking. "I have deliberately (even defiantly) chosen not to make my alternative vision gender neutral by substituting terms such as 'caretaker' and 'dependent' for 'Mother' and 'Child'" (p. 234). She recognizes that this may invite disagreement (p. 8).[9]

Fineman resists the temptation to respond to the crisis merely with a policy perspective addressed to incumbent legislatures or courts. She does not simply suggest that we spend more money or that we craft more formal laws to help the inevitably and derivatively dependent. Instead, she connects the very way that we approach such policy proposals and "law reform" with a rich understanding of ideology, which both reflects law and confines legal imagination. Fineman sees that the forces that limit individuals' lives do not include merely formal law but also ideas—"metanarratives"—that draw on many sources and impinge on individuals in many ways. "Our individual experiences are structured and reinforced by discursive structures (including law) that surround us, defining the contours of our everyday lives" (p. 7).[10] Law is one of those structures, but not the most salient and—she is carefully tentative here and elsewhere in this book—"perhaps" not the most important:

> Religion, group identification, even fads and the media, seem equally or more compelling than formal legal rules in shaping behaviors in many instances. Perhaps the postmodern message is that, on this more generalized level, law is nothing special, merely one of multiple discursive systems, each of which expresses a variety of images that together convey or express the "imagination" of our society, law should be realistically understood as both enmeshed within and constrained by the

---

8. There is one notable exception: "The more amorphous, socially encouraged, emotional dependency, so widely discussed in pop-psychology books, and socially constructed and maintained economic dependency are not included" (p. 234). The book devotes only one paragraph to this exception, but the last section of this essay argues that this exception deserves more consideration.

9. This is a point to which I return in the final section. Because of some of the ambivalence I express there, I usually use "caretaker" rather than "Mother."

10. As Fineman (1995, 2204 n.56) has elaborated elsewhere, such metanarratives "assume . . . some sort of hierarchy of cultural representation and values" and "encourag[e] . . . a linear and narrow interpretation of history."

overarching normative systems that reflect dominant cultural and social ideologies. (P. 16)

The belief that law is but one source of shaping the way we view the world and "in shaping behaviors" leads to a deep skepticism about the limits of law reform.[11]

At a profound level, law reform has limited effect because of how the reformers themselves imagine law is limited. "Existing beliefs and assumptions shape knowledge and understandings, including those about law and law reform. Therefore law reform cannot, in and of itself, be effective as a catalyst for more generalized reforms" (p. 17). Even if one could somehow disentangle oneself long enough and well enough to propose meaningful legal reform, and even if one could disentangle enough others to cause the reform to be adopted as a formal matter, Fineman also identifies a "set of problems" with "implementation" (ibid.). In particular, she fears that reform of doctrine will not change those charged with applying doctrine. "Even when changes are successfully made on a doctrinal level, they can and will fail if judges or others charged with the application of new laws revert to interpretations that merely replicate old results" (ibid.). This is an important insight that Fineman continues from her study of the ways in which courts and the "helping professions" that dominate family law mediation undermined the ideals of divorce law reform (Fineman 1991, 144–69).

Applying this approach to the family, she locates the dependency crisis not just within particular laws but in far more pervasive understandings of family. We filter not just our laws but our everyday experiences through the metanarrative of the "sexual family": "an institution of primarily 'horizontal' intimacy, founded on the romantic sexual affiliation between one man and one woman" (Neutered Mother, p. 145).

> I use the term "sexual" to modify "family" to emphasize that our societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and woman. . . . The sexual family is considered the "natural" form for the social organization of intimacy, its form ordained by divine prescription and perpetuated by opinion polls. (P. 143)

---

11. A recent study of how smoking has been eliminated from many public areas concludes that mere rules or laws against public smoking would not have affected who smoked in public without changes in social attitudes:

> Law, of course, cannot do this alone. The same regulations, if promulgated twenty-five years ago, might have been flouted and contested. Like surfers, legislators and corporate officials who wish to change everyday social norms must wait for signs of a rising wave of cultural support, catching it at just the right time. Legislate too soon and they will be swamped by the swells of popular resistance. Legislate too late and they will be irrelevant. Legislate at the right moment and an emerging cultural norm, still tentatively struggling for authority—such as that condemning involuntary exposure to tobacco smoke—acquires greater moral force. (Kagan and Skolnick 1993, 85)

As she reads it, the metanarrative of the sexual family dictates that deviations from the essential one-man–one-woman link ("dyad" she calls it) be only temporary. Children grow up, and "Parents are shipped to nursing homes or eventually die." (p. 145). In a footnote, Fineman notes how such a "natural" progression "is reinforced in subtle ways as well, for example in mother-in-law jokes that convey the message that parents should not interfere with the sexual family" (pp. 166–67 n.1).

After reading *The Neutered Mother* and living through my mother's illness and death, I noticed such reinforcements in work that aspired to more "high art" than most mother-in-law jokes. Recall the haunting images of the critically acclaimed film *Like Water for Chocolate*: the hideously cruel mother insists that her youngest daughter never marry and instead tend to her personally. The daughter flees to the United States to escape, but the mother's ghost still haunts her. It is a fantastical story, but it perpetuates what many of us take as "natural" or, as my former colleague put it, how we must "accept" that our parents must go to nursing homes. The fantastical story and the everyday tale—the metanarrative of the sexual family—present a world of cramped choices. We may surrender the whole of our life—alone, forgoing even the romantic loves of our life—or we must separate, fleeing to a distant land or sending our parents to a distancing institution. The fantastical story and the everyday metanarrative leave unexamined other possibilities: other possibilities of organizing our lives apart from totalizing roles, such as thinking about flexible workplaces or romantic affiliations that do not consume all of one's nonwork life.

Fineman connects her particular concern with dependency here with part of her own broader project to understand what she calls perspective scholarship. Perspective scholarship includes work that tries to understand the experiences of those historically categorized as Other, such as women, African Americans, Latinos, Native Americans, gays and lesbians, and people with disabilities. Many people who have thought hard about the situations of such individuals and groups have challenged the received image of scholarship, law, and legal scholarship as neutral and detached; instead such scholars locate the way in which law appears neutral but actually reflects the needs of relatively powerful persons in society. The workplace, for example, may employ rules that do not by their express terms distinguish between men and women, but the standard of what a typical employee is may be based on the needs and experiences of men. Many scholars sharing similar insights have been describing themselves as, for example, "FemCrits" or "LatCrits" or "Women of Color" and their work as "Critical Race Theory" or "LatCrit" scholarship.[12] Fineman tries to connect these sometimes differ-

12. See, e.g., Menkel-Meadow (1988, 71), who writes: "specific hierarchies in the law and legal education develop out of pairs of false dichotomies (rational-irrational, soft-hard, intellectual-emotional) in which what is tied to the 'female' is usually viewed as inferior to or

ent movements by naming them all as varieties of "perspective scholarship," which "is based on the premise that certain groups historically have been unrepresented (or under represented) in law and that their exclusion has led to biases—an incompleteness or deficit in contemporary legal analysis and legal institutions" (p. 25). Fineman recognizes that this kind of scholarship is far less tidy than much of what dominates the academy, particularly the legal academy. She notes that perspective scholarship "adds the possibility of color and texture to the legal palette by introducing *diverse and often divergent* viewpoints based on the social and cultural experiences of race, gender, class, religion, and sexual orientation, for example" (p. 25; emphasis added).

The naming of various scholars work as part of a similar "perspective scholarship" is helpful but may obscure a key point for such scholarship, including Fineman's: All scholarship has a perspective, but those within preferred groups, particularly white males in the academy and law, imagine their perspective is "reality" or "truth" (p. 18).

> If law is understood to be enmeshed in society, also problematic are some of the prevalent notions about the neutrality and objectivity of law with which policy makers and politicians, judges, and attorneys drape their processes. Once the ideas of neutrality and objectivity are exposed as myths rather than attainable and maintainable goals, the law is put into perpetual contest. . . . Societal norms shift, new "truths" appear. If law is not based on extrasocietal realities, it must constantly relegitimate itself. (*Ibid.*)

One illustration of this phenomenon arose in my discussion of *The Neutered Mother* with colleagues. Several middle-aged white men mentioned how the ideas in the book, such as the importance of mothering, relate to (what they assumed to be) details of Fineman's own private life. The idea that some feature of their own life—the state's recognition of their marriages as legal, the privileges of their maleness or their whiteness—might be embedded in the usual account of family or in their criticism of Fineman went largely unexamined.[13]

Despite some of the common features of various perspective scholars, Fineman also addresses the serious divisions among them. Many women scholars claim some feminist theory reflects only how white, middle-class

---

subordinated to that which is labeled 'male'"; Stanford Law Review (1991). The naming of a set of LatCrit scholarship is a relatively recent phenomenon. For an introduction to the field, see the forthcoming *California Law Review* (1997) symposium on LatCrit theory.

13. I have argued elsewhere (Freshman 1995, 1592) that criticisms of scholars who are not identified as members of historically preferred group often seek to understand the scholarship of outsiders as the product of some personal pathology rather than a different scholarly perspective. I wrote there, "It is, in short, as if Posner believed that only women authors have psychological—or perhaps emotional—lives."

heterosexual women live; it treats such experiences as the essence of women's experience and concerns (Mahoney 1993; Harris 1990). The same kind of anti-essentialism that says that "the law" cannot speak for men and women, black and white, gay and straight, also questions, for example, whether white women can speak for black women. This same kind of thinking also is implicitly in tension with Fineman's project to think about dependency: If people who call themselves women of color doubt whether those they call white women can speak for them, why should we believe that men who care for older parents can understand much about women who give birth to children? If the anti-essentialist instinct is taken to an extreme, one may worry about the hope of any meaningful connection between persons: If every group neglects some aspect of some of its members, then every attempt at connecting with others is doomed at best and even grotesquely insulting. (A widely cited article on comparing "isms" relates how one of the authors was vomiting from chemotherapy when a nurse said she understood because she had had morning sickness; Grillo and Wildman 1996, 85, 204 n.23.)

Ultimately, Fineman brings together her concerns with the dependency crisis and with differences among various perspective scholars—and particularly among scholars concerned with women. She does not do this with a nicely packaged policy proposal addressed to some third-party observer, like a judge, legislator, or mediator. Rather, she characterizes her ideas as a "re-visioning" and freely acknowledges that they may be "utopian" and unlikely to be formally adopted any time soon (p. 228). This re-visioning involves two principal ideas: "the abolition of legal supports for the sexual family and the construction of protections for the nurturing unit of caretaker and dependent exemplified by the Mother/Child dyad" (p. 238). Fineman knows these are radical ideas. "[R]ethinking on this scale is a quite grandiose objective, requiring massive reconsideration of many assumed roles and institutions on an ideological level as well as a structural one. . . . We can be sure that change will not occur any time soon (if at all)" (p. 232). It is important to remember that Fineman's proposals are meant not as a draft court order or legislation for some judge or senator but as part of a process. "These proposals are intended to direct policy discussions toward support for caretaking" (p. 228).

The proposal should be of particular interest to anti-essentialist critics of feminist legal studies, including many women of color, although the book does not always emphasize this connection explicitly.[14] (This makes good sense, since to emphasize the "particular" connection would imply that there was some essential family experience that could disregard the lives of

---

14. Fineman treats such questions explicitly in part 1, "Concepts and Constructs." In later chapters, however, the book also returns to the way that race affects the lives of many caretakers and dependents (pp. 102, 107, 116, and 128 n.15).

women of color.) The notion of individuals caring for others who may not be their biological children conforms to the experiences of many who were not within the preferred group of white, middle-class, heterosexuals: African Americans whose ancestors typically had no opportunity to live with birth parents when slave owners separated families; persons with AIDS caring for each other in a cooperative when birth relatives shunned them; or people of color who were too dark for their lighter-skinned relatives to accept. Some of this is reminiscent of the history of the "extended family" recounted in *Moore v. East Cleveland*[15]—an "extension" only if one thinks of something like the sexual family as the natural unit of caring.[16]

Another part of her re-visioning—one marked by a marked tentative-ness—is a re-visioning of how individuals think about themselves, what the more philosophically inclined might call the "self."

> I'm interested in exploring whether it is possible to have an affirmative politics of difference that defines groups and classifications tenuously, whereby group identification is recognized as politically necessary but is also seen, in the words of Iris Marion Young as "ambiguous, rela-tional, shifting," without "clear borders" that bind people in all circum-stances for all time. Women need not be considered to be inevitably

---

15. *Moore v. East Cleveland*, 431 U.S. 194 (1977); see also *Hertzler v. Hertzler*, 908 P.2d 946, 950 (Wyo. Sup. Ct 1996) ("We are not, however, inclined towards exclusion in defining the family unit, particularly where the care and nurturing of children is at issue") (citing *Moore* but holding that it was in the best interests of a child to separate her from her lesbian mother not because she was a lesbian but because the particular child acted out sexually after seeing her); *Hill v. Community of Damien of Molokai*, 911 P.2d 861 (New Mexico 1996), which held that a group home for persons with AIDS qualified as residential for purposes of covenant restricting property to single family residences. The court noted that the group home "is designed to provide the four individuals who live in the house with a traditional family structure, setting and atmosphere, and the individuals who reside there use the home much as would any family with a disabled family member. The four residents share communal meals. They provide support for each other socially, emotionally, and financially. They also receive spiritual guidance together from religious leaders who visit them on Tuesday evenings."

Outside the courts, the definition of family remains sharply contested. In a 1991 survey, only 22% of persons surveyed described family as "a group of peoples related by blood, mar-riage, or adoption" and nearly 75% picked "a group of people who love and care for each other" (Seligman 1991).

16. In a recent study of intimacy between persons identified as members of different races, Rachel Moran (1996, 3) noted that a child born from such a relationship "relied on non-traditional caretaking arrangements" and that "traditional family structures [often] can not meet the challenge of racial difference." Similarly, Jack Forbes's (1990, 41) study of Na-tive Americans emphasizes that "[t]o understand Native American identity one must . . . begin with the extended family. . . . Very often these families are not localized, but by means of clan relationships extend outward sometimes to groups speaking totally different languages, and sometimes even to 'enemy' groups." Fineman also notes that 1990 census figures show that African Americans are much more likely to live in families with a single parent (19.2% of whites vs. 54.8% of African Americans) and that of such families, African Americans and Hispanics are much more likely to live in a family with a never-married parent (22% of white single-parent families; 53% of African American single-parent families and 37% of Hispanic single parent families). Fineman 1995, 2188 n.17.

either in opposition to or having little in common with other women because of nongender group differences. Women can and should converge to organize around overlapping experiences. (P. 54)

This re-visioning of identity has powerful potential, not all of which Fineman explicitly traces out. The implication Fineman does trace out—indeed part of what seems to draw her to this tentative notion in the text—is that scholars with different perspectives can retain a common commitment to perspective scholarship, particularly feminist scholarship, but also elsewhere and at other times pay particular attention to other roles and perspectives, including identities as women of color. An equally important implication has to do with various "caretakers": the notion of provisional and shifting identities means that caretakers need not make all-or-nothing commitments (no more ties that "bind people in all circumstances for all times"); it frees us from the stark choices given the children in *Like Water for Chocolate*. We can be children and spouses, sisters and workers; to return to Fineman's preferred vocabulary, we can be Mothers &. Of course, one hopes this does not so much mean that we are all free to be Super Mothers but that we re-vision a society in which totalizing, maximizing demands relax to allow these multiple commitments; this involves a re-visioning of the workplace, the home, and many other features now characterized by a totalizing all-or-nothing mind set.

THE HYPOTHETICAL UNIVERSITY

I think one of the best ways to explore the range of implications and applications of Fineman's ideas is to see how Fineman's book would affect individuals at a hypothetical university:

1. Paul, an able-bodied university administrator in his early 30s, is married to Laura, an able-bodied commercial real estate broker. Laura pays $100 a month for health insurance until she notices that she can get free health coverage just by signing up with Paul's university health care plan.
2. Tony, a gay professor, wants to get university health coverage for his male partner. They have lived together five years, pay their bills together, and hold themselves out to colleagues as a couple. Their state does not recognize same-sex marriages.
3. Jane and Lucy met in graduate school, lived together for ten years, pooled all of their finances, nursed each other through winter's colds, literally and metaphorically, and almost always went with each other to faculty events. They always maintained to even their closest friends that they had hugged but had no more involved

contact.[17] Jane dies, and Lucy wants to stay in their home, which is partly owned by the university.

4. John, a middle-aged male professor, is disabled from an accident in his car. He lives with Dawn, who cares for him and supervises various nurses and attendants who also help John. John wants her to be able to use the university athletic center and get books from the university library. They would like to get married, which would qualify her for such privileges, but their state does not allow the marriage of persons who cannot sexually consummate their marriage.

5. Tom, a male tenure-track professor, and his wife adopt an infant. His wife thinks that it would be good for their new child if he took time off work—all at once or by reducing his hours—so that he could spend time with his child. The university policy allows any parent to extend the pre–tenure probationary period to care for a child. Tom has no doubt that he would fall within the letter of the policy. "I'm not sure it would be right," he tells his wife. "Maybe this policy is for men only if they don't have someone else to care for the child."

6. Mary, a university administrator has an elderly friend—she calls her "aunt"—who helped raise her with her biological mother. Her aunt gets very upset if she is not around people, so much so that one doctor diagnosed her with dementia (senility); a psychiatric social worker, however, diagnosed her with depression. After months of talking with a therapist each week, the aunt began volunteering at local charities and no longer seemed depressed or even odd to those around her. Mary would like to let her aging aunt use university facilities, including the medical center and libraries. The university grants such privileges to "parents." In order to get the card that admits her to such facilities, she need only go to the ID office and say that the woman is her "parent."

Fineman no doubt would predict the university would sort out these various claims based on the metanarrative of the Sexual Family. The university would almost certainly let Laura save $100 by signing up for Paul's health plan even though she does not have any particular need for the plan, and there may not be any need for society to subsidize the relationship. The next most viable claim would be health coverage for the gay professor's

---

17. Such intimate relationships between women that did not involve physical intimacy have been referred to as "Boston Marriages" because of their perceived prevalence in the Boston area earlier this century. See generally Eskridge 1996, 37. Note that many such relationships, including the one described, are hardly transparent. Did the couple in fact have physical contact but not disclose that fact to others? If so, did the couple fear negative consequences of telling others? Did they just think, or assume, it was "inappropriate" to discuss? Or perhaps did the couple think that, as a matter of principle, the status of how the public treated their relationship should not depend on how the couple either led their private, erotic life or described their private, erotic life? If the couple did not have physical contact, did either or both of them think about such contact? Did either or both of them think about something else that could be interpreted by others as thinking about such contact?

lover; already hundreds of organizations provide such "domestic partner" or "spousal equivalent" plans, and some others provide them in response to individual requests.[18] As Fineman would re-vision things, of course, these two Sexual Families are less deserving than the others, who need the help to bolster their caretaking.[19] "Boston marriages" of two women like Jane and Lucy would probably also qualify under a domestic partner policy, even though it, too, does not involve dependency and does not even involve the kind of Sexual Family that Fineman thinks society values most. (The complication is that the metanarrative of the worthy homosexual couple may not mirror that of the worthy heterosexual couple: as the (in)famous "Don't Ask, Don't Tell" policy suggests, perhaps the homosexual couple that society values most is the one that denies any sexual intimacy.[20]) Fineman's dependency analysis would value most the claims of Dawn who is derivatively dependent because she needs resources to care for John, who is physically dependent. Of course, the dependency analysis would also be sympathetic to the plight of Tom because his child is physically dependent on someone for care, and Tom could be that someone. Aunt Mary's case is problematic for Fineman because she draws a sharp distinction between physical and emotional dependency. It is not clear on which side of this divide "Aunt" Mary falls, a problem I examine more fully in the final section of this essay.

For lawyers drilled with hypotheticals in law school, it may seem natural to analyze these examples by asking how a court might confront and resolve them; it may seem natural to play with how books like Fineman's inform such *adjudication*.[21] This essay instead looks at Fineman's work from the perspective of *negotiation:* How might Fineman's work affect the efforts to help Laura, Tony, Jane, Tom, and Mary through *negotiation?*[22] I mean to

18. See note 7 above; Cooper 1990 (reporting that prior to its publicly announced policy to provide housing to same-sex domestic partners, Stanford "extended such benefits on a case by case basis"); Lambda Legal Defense and Education Fund, Inc. 1995.

19. Others, however, have argued that recognition of same-sex couples is a valuable expression of tolerance for gays and lesbians, even though very few gays and lesbians may sign up for such domestic partner policies. Fried 1994, 3.

20. Compare Coombs (1996, 19), who suggests, "We must confront and overcome the argument that, even if children have homosexual tendencies, they should remain in the closet."

21. Just as a draft of Fineman's book helped me in what I am calling an aspect of negotiation, the shaping of my identity, recent research suggests that drafts of another prominent feminist author helped shape how individuals approached litigation. One of the first attorneys to bring a claim for what MacKinnon called "sexual harassment" cited a paper MacKinnon wrote while still in law school in 1974. Marshall 1996, 11 n.9, reported that a lawyer said she used MacKinnon's manuscript in a brief: "You know, we were crazy for something to cite." The analogy remains imperfect: the litigator had an idea and needed something to cite, which happened to be MacKinnon; I had a vague sense of my responsibilities, and Fineman's book helped shape them.

22. This negotiation process may still be intimately informed by the adjudication process. Like many other parties to a negotiation, the hypothetical university may decide how to treat various claims by considering how a court would treat them, either (or both) because the

construe negotiation broadly to include all efforts other than litigation that would alter the benefits and burdens affecting them, including their decisions about how to behave (such as whether Tom takes parental leave or whether Mary registers her "aunt" as her "parent"), how to seek particular arrangements for particular individuals (such as whether the university gives Tony's partner benefits, without changing its overall written policy), and decisions about how to seek changes in policy (such as whether the university adopts a policy that recognizes all relationships like Tony's and Jane's).

What I am calling "negotiation" is atypical enough to warrant a preview here. Many people who study "negotiation" or "disputing" or "alternative dispute resolution" note that the way individuals view and name a situation will affect how they behave (see, e.g., Miller and Sarat 1980–81; see also Mahoney 1991, 6). Before individuals decide to sue someone, they have a sense that there is a problem and that someone else is to blame for it. Those who name a situation "malpractice" wind up in court more often than those who name a situation a "tragedy." One important aspect to Fineman's work is how an individual names a situation. "Do what you have to do" could mean "you need to figure out how to manage your parent's situation." Fineman's framework of caretaking lets it mean, "You have work to do which is worthwhile to you and to society."

There is also another aspect to how Fineman's work affects negotiations: how it affects our sense of self. "Do what you have to do" depends on a notion of "you." In our hypothetical university, who is Tom? Is he just a professor or is he also a father? A caretaker? A Mother? The more Tom thinks of himself as a father, the more he may feel the need for personal involvement with his children. And the more he thinks of himself as a metaphorical Mother, the more he may feel he has to do some of the work traditionally thought of as Mothering or more generally coded as feminine. If Tom thinks of himself as a Mother, he may not just toss baseballs to the adolescent Tom, Jr., but also change his diapers and perhaps show adolescent Tom, Jr., how to change his younger brother's diapers as well.

RE-VISIONING NEGOTIATION AND THE NEGOTIATOR'S DILEMMA

The hypothetical university invites a new focus for negotiation scholarship. Negotiation scholarship usually focuses on how an individual selects means to achieve an individual's ends.[23] The paradigm case is an employ-

---

university would value such information as a substantive norm or because, instrumentally, a court decision might be its alternative if it does not resolve the claims. See generally Mnookin and Kornhauser (1979, 968).

23. See, e.g., Blasi (1995, 320) (limiting "here the notion of lawyering expertise to extraordinary competence in the instrumental solving of the problems of clients" although rec-

ment negotiation: How does Tom get his best deal from the hypothetical university? The usual focus assumes that we know what Tom wants and that the question is only how best he achieves it.[24] One vision of negotiation assumes that negotiators necessarily have similar ends so that negotiation is mostly about "claiming value" or "splitting the pie."[25] Such a vision would emphasize the ways in which every dollar that Tom gets in a higher salary is a dollar that the university does not get. In contrast, others emphasize that parties to a negotiation may sometimes "create value" or "expand the pie." This is the problem-solving vision of negotiation (see Menkel-Meadow 1984; Fisher, Ury, and Patton 1991; Raiffa 1982, 131–32). For example, over some relevant range, both Tom and the hypothetical university may be better off if some of his compensation consists of health coverage because the government will not tax such compensation: the university can spend less cash on Tom's salary and use some of the money it saves to give Tom health insurance on which he pays no tax.[26] Many who study negotiation

---

ognizing that "all lawyering practice is political and is thoroughly suffused with questions, often unasked of ethics, morality, and justice"). Many take issue with the frequent emphasis in negotiation literature, as in economics, on the implicit assumption that individual ends concern the individual rather than some larger unit such as the family. See, e.g., Mahony (1995, 33), who says, "Stories . . . about women negotiating for their *families* and in their *families* come to us from ancient times and recent times, from all over the world" (emphasis added).

24. The last part of this section traces out how many economists and many scholars who study negotiation using economic tools and/or vocabulary make assumptions about what individuals want—their tastes—but do not explore how these tastes form or evolve.

25. An example of this understanding of negotiation is the received wisdom of labor negotiations: one essential group called "labor" bargains with one essential group called "management" about incremental divisions of a relatively finite set of issues, principally the amount of wages. See Walton, Cutcher-Gershenfeld, and McKersie (1994, viii): "In an earlier era, labor-management relations had become routinized around formal periodic bilateral interactions, followed by predictable patterns of contract administration". For an example of a recent economic study that presumes teachers and school districts bargain primarily about salary, see Babcock, Wang, and Loewenstein (1996, 2), discussing "public sector contract negotiations" and "salary negotiations" interchangeably in one paragraph.

26. As the example suggests, negotiations such as these often depend not only on how private parties like Tom and the university negotiate but also on government policy. For example, many gay and lesbian couples find that the government may not tax Tom on the value of insurance that the university provides his wife, but it will sometimes tax Tony on the value of insurance it provides to his same-sex partner, unless his partner qualifies as his "dependent" under relevant tax law. See Winfeld and Spielman (1995, 104–7) for a practical guide to such tax consequences and Brown (1995, 782) for a more academic critique of the way in which existing practices that do not allow people like Tony and his partner to marry limit the ability of people like them to get the same benefits as different-sex couples who can marry.

Apart from the effects on people who cannot marry under existing practices, a number of interesting questions about exactly how employers and caretakers could create value, how much cost, if any, might remain, and how such cost would be paid is beyond the scope of any review essay such as this. The May 1996 report of the congressionally created Commission on Leave reported that between 89.12% and 98.5% of employers reported no costs or small costs in several broad areas. Executive Summary of Report to Congress by Commission on Leave, 1996 DLR 85 d24, at 8 (available on LEXIS). Some employers testified before Congress that they found compliance with the Family and Medical Leave Act (FMLA) difficult, but they did not offer any evidence that such difficulties were any less rare than the commission found (Bureau of National Affairs 1996). This cost information, however, is in the context of the

try to synthesize these two visions by naming a tension between "claiming value" and "creating value" that they call "the negotiator's dilemma."[27] The way that *The Neutered Mother*'s caretaker framework affects the hypothetical university suggests two re-visions to our understanding of negotiation. First, it suggests that problem-solving may also involve rethinking how parties to a negotiation think about themselves and their own identity. Second, as a result, Fineman's framework also suggests we re-vision the negotiator's dilemma: the identity vision of negotiation suggests there is not just a conflict between creating value and claiming value between Tom and the university but also between different Toms: Tom the professor, Tom the son, Tom the caretaker, and perhaps Tom the metaphorical Mother.[28]

The key to all of this re-visioning of negotiation as identity is that negotiation should consider not just different ways that individuals can see a "problem" or a "dispute" but also how they see themselves. The idea that individuals may see themselves in different ways, as in the relatively recent identities as "people of color" or "women of color," also coincide with certain ideas of the self associated with postmodernism and pragmatism. Richard Rorty's notion of "moral identity," an identity that individual chooses and creates, illustrates this well:

> To find one's moral identify in being an X means being able to do the following sort of thing: make your X-ness salient in your justification of important uncoerced choices, make your X-ness an important part of the story you tell yourself when you need to recover your self-confidence, make your relations with other X's central to your claim to be a responsible person. These are all things men have usually been able to do by reminding themselves, that they are, come what may, *men*. (Rorty 1994, 19, 24)

FMLA requiring, among other things, flexible work schedules and/or unpaid leaves for the ill and for caretakers. More comprehensive treatment of caretaking might involve different costs, although whether increased efficiency would outweigh these costs is an empirical question. In any event, if there are any costs, then who bears them (on conventional economic accounts) would depend on the overall structure of market and government forces, such as the competition for employees and the competition for a particular producer's goods or services.

27. There are various formulations of the negotiator's dilemma. One often used version is the general tension between trying to create value and trying to claim value. See, e.g., Gilson and Mnookin 1995, 10. Another much cited version is the more particular way in which the dilemma affects a negotiator's willingness to share certain kinds of information. See, e.g., Lax and Sebenius (1986, 39–40 & 39 n.2), describing both the general "tension between cooperative moves to create value and competitive moves to claim it individually" and the more specific way in which this may encourage individuals to withhold information when that information might allow them to create value with another party.

28. Compare Parfit (1984, 290–91), considering the idea that one has different identities over time. Posner (1995, 84–95) applies a version of the idea of a person consisting of multiple selves in time (Tom at age 12, Tom at age 20, etc.) to suggest that it might be wise to protect the older Toms from decisions made by the younger Toms that could hurt the older Toms.

This sounds remarkably like Fineman's perspective that women, whatever their other differences unrelated to gender, might organize sometimes as *women* (p. 54). It also resembles Fineman's less explicit invitation to caretakers to organize their moral identities as caretakers, whatever other differences may divide them. The move to caretaker, however, rests more on the premise that individuals may not just appeal to existing categories of experience, such as Rorty's men or Fineman's women, but also new categories of experience, new identities. The communitarian philosopher Michael Sandel draws on that kind of sentiment when he characterizes Deweyan liberalism as an approach "unequivocally committed to progress and the *expansion* of human tastes, needs, and interests" (Sandel 1966, 38; emphasis added). In other words, just as the problem-solving vision showed how negotiators could not just settle cases but solve problems, the identity vision of negotiation shows how individuals can enrich their lives by thinking of their lives in different ways.

This kind of identity vision of negotiation helps us understand how Fineman's book helped me care for my mother and how it could similarly help individuals in our hypothetical university. The identity vision would suggest that many of the persons described in the hypothetical university do not get the benefits that would enable further caretaking for at least two related reasons: First, the individuals do not take advantage of benefits that they could obtain because they exercise internal discipline over themselves not to seek policies that authorize such benefits or not to seek benefits to which they are entitled. In such instances, individuals fail at negotiations because they never realize they had an opportunity to negotiate.[29] Second, individuals exercise such internal discipline in significant part because they cannot explain to themselves why they are entitled to such benefits. Rhona Mahony identifies this as an everyday obstacle for women negotiators. "Occasionally, we briefly consider doing something (moving to St. Louis, applying for a union apprenticeship) but don't do it because it seems foreign, because we're afraid other people will make fun of us, or because it doesn't fit somehow with the rest of what we are" (Mahony 1995, 67). They are conceptually impoverished: they suffer just as wives who did not share a concept of spousal rape might seek no redress against husbands who abused them, and just as working women might tolerate demands for sexual favors when such women did not frame their experiences as sexual harassment. Fineman herself explored another example of what I am calling conceptual

---

29. I emphasize I mean to explain only a substantial part of the puzzle of unclaimed benefits by these reasons; individuals also might decline to take benefits because, despite their own sense of entitlement, they fear that they will face de facto sanctions, such as diminished probability of promotion. Describing how he viewed such caretaker-friendly policies as flexible schedules, one lawyer said, "The firm feels it 'must have' a part-time policy for recruiting purposes, but does not take it seriously. No part time attorney has ever made partner." Weidlich and Lawrence 1993, 24.

impoverishment in the case of custody mediations. In her study, even when the formal law contemplated that a single parent could have primary custody of a child, many women "consented" to joint custody with their former husband. Women often consented to such arrangements because mediators were able to label—to "pathologize"—women who wanted sole custody: mediators suggested they had not accepted their romantic breakup (they had not made an "emotional divorce") or that they were using their children as weapons to get back at the ex-husband who rejected them (Fineman 1991, 156). The corollary of this point is that scholarship which supplies concepts, by eliminating conceptual impoverishment, may let individuals see how they might rightfully be entitled to certain benefits. This, in turn, may tame the internal discipline long enough for individuals to seek the benefits to which new concepts might entitle them: often to seek to reform public law, of course, but also to seek to change private benefits policies or to take advantage of benefits policies for which they are already eligible.

In our hypothetical university, this means Tom may decide not to take leave as a faculty member to care for his child because he organizes his identity as a professor and as a husband rather than as a father or as a caretaking father. The sources of that identity and expectation are complex, and it would be a bold claim to believe that a single book like Fineman's could dislodge all those forces on its own in a large number of cases.[30] The notion of fatherhood and masculinity that constrain Tom flow from metanarratives, which Fineman says "define[e] . . . the contours of everyday lives" (p. 7) The metanarrative of the father and the man as "breadwinner," but not caretaker, impinges on his life in many real and imaginable encounters. Tom may reasonably fear that his faculty colleagues will not appreciate why he wants to care for his child himself. ("How committed is that Tom to the academic enterprise when he's always running around with one of his little ones? It's not as if he doesn't have a wife who could be handling that.")[31] Tom may not even always get enough encouragement from his children. Research suggests that children expect their mothers to care for them, and children are not grateful to mothers when they care for them, but only to fathers (Maccoby and Mnookin 1992, 36). Tom may be glad that his children will appreciate his help, but if they do not expect such help, and if his

---

30. On the other hand, one should not overestimate the difficulty that individuals may have in forming different senses of group identity. Compare E. Posner (1996, 190), who suggests that Carol Rose exaggerates how easy it would be for women to form solidarity. He suggests (pp. 190–91) that somehow group identification is a product of circumstances that "naturally" lead individuals to think of themselves as a group: "Immigrants have been successful at forming solidary institutions . . . not only because they are victims of discrimination, but also because they live close together, know each other well, interact frequently, share cultural backgrounds, jointly suffer (in some cases) from ignorance of the dominant language, and so on."

31. Not surprisingly, many fathers report that they fear employers will penalize them for taking paternity leave even when laws prohibit such retaliation. Ziegler and Frank 1988, 187.

colleagues will not understand why he provides it, then Tom may very well tend to meet his colleagues' expectations and forgo the extra appreciation his children might offer.

To speak of coercion and punishment, however, may not capture the full subtlety—the pernicious subtlety—of the ways metanarratives of masculinity and fatherhood may operate. In the hypothetical university, Tom may never name his "experience" as coercive. When he hires a sitter, or drops his child at daycare, he may just think he is doing what a father has to do; he may even congratulate himself that he works for a university that supplies particularly good day care. He may very well never imagine that he might care for the child himself, that the child might respond more to the attentions of his own father than those of a hired caretaker. Consider one man's remark in a study of lawyers and family life: "I am the breadwinner in my family and feel that I must maintain a position that will provide a relatively affluent lifestyle. Therefore, I think that many potentially rewarding career options were closed to me" (Chambers 1989, 270). But if Tom had read Fineman's book, or heard about caretaker support groups, or seen other fathers doing more work at home where they could be near their children, then Tom might begin to take steps to become more like those fathers.

Fineman's framework might also motivate individuals not only to seek changes in policies, and not merely to take advantage of existing policies, but to help themselves beyond existing rules. In our hypothetical university, Mary might tell the librarian that her "aunt" is her mother so that the librarian lets her "aunt" use the facilities. But such a phenomenon is a predictable if not necessary feature of any powerful ideas or rhetoric. Fineman notes that Mother may be "dangerous" because "[a]ny concept potent enough to be useful in attempting social and cultural change is bound to have the capacity to be dangerous. . . . The symbolic potential of Mother is greatly enhanced on both individual and societal levels by the very ambiguity that lends to it this aura of danger" (p. 72).

One way to see the value of the identity vision of negotiation I have been sketching out is to compare its insight with the story that economics can tell us about the hypothetical university. As judged by many of its applications, economics cannot tell us much about why Tom would want to take care of his child himself rather than hire someone else to look after him; many economists who study negotiation cling to the neoclassical assumption that individuals' "tastes" cannot be examined (they are "exogenous" to the model) and that such tastes are fixed. Economists might assume, to return to our hypothetical university, that Tom's taste for how much he values work versus leisure is fixed and external to the negotiation process. Economists might also deploy an additional simplifying assumption: All of Tom's tastes can be reduced to money; more money will let him fulfill his various interests in the market. Tom wants the commodity of child care,

and he may be indifferent whether he changes the diapers of Tom Junior or whether he pays a local adolescent to do it. Operating under such assumptions, many leading economists describe individuals as if individuals know what they want, and individuals always try to get the most of what they want; this is true even of decisions involving such things as how one cares for one's children.[32] With some frequency, economist muse that individual's "tastes" might change and express occasional skepticism about whether individual tastes stay the same and/or whether individuals act to maximize their tastes.[33] One particularly interesting example of this is an article by Lawrence Lessig (1995, 1003). Lessig asks us to consider whether it would be efficient for a racist to take a pill that would make him a nonracist. One might suggest, he notes, that the racist himself would be happier if he took the pill, but Lessig adds, "it is not incoherent to imagine the racists saying that *he* just doesn't want to become a nonracist. That he, for example, would not be himself if he were forced to become a racist" (*ibid.*). Lessig says that resolving such questions is fundamental, but nonetheless assumes (for that particular work) that one's identity does not change. This methodology is similar to the economist's usual approach: economists make assumptions to make models, and economists make models to make predictions about aggregate behavior. Therefore, economists embrace models that predict aggregate behavior, such as the rate of inflation, even if they doubt whether the models accurately portray how individuals make the decisions that get

---

32. Three examples from three of the most prominent members of the Chicago school of law and economics: Richard Posner (1989, 1317), in his analysis of sex discrimination laws, assumes that discrimination against women would be largely compensated if all women were married because "while wives' wages would be lower than in a nondiscriminatory regime, wives would benefit dollar for dollar from the correspondingly higher wages of their husbands." (Posner quickly notes, however, that his "assumption" that a world of married women would not care about sex discrimination is "too strong" and "ignore[s] the fact a woman's earning power may affect her influence over household expenditure decisions.") Epstein (1989) similarly assumes that parents will "naturally" want to "invest" in their children. At a more abstract level, Becker (1976) assumes that heterosexuals invest in heterosexual unions because they value having their own biological children. He wrote: "The *obvious* explanation for marriages between men and women lies in the desire to raise own children and the physical and emotional attraction between sexes" (p. 210; emphasis supplied).

33. See, e.g., Ulen (1994, 512): "Far from coming to the choices facing them with well-defined, stable, transitive preferences, as current [economic] theory assumes, most economic decision makers construct their preferences in the course of exercising judgment and choice." See also, e.g., Dau-Schmidt (1990, 17): "It is becoming increasingly apparent that the failure to address the malleability of preferences seriously limits the explanatory power of economic analysis."

This essay does not include a full inventory of critics and defenders of the neoclassical economic assumption that preferences remain constant over time. One might say that the criticism of the assumption of constant preferences is associated with "crit" scholars or with "Critical Legal Studies." See, e.g., Kelman 1979, 781. Likewise, this essay does not explore two very recent publications that discuss how economics might address how individuals form their "tastes." See Becker (1996); University of Pennsylvania Law Review (1996). Finally, the essay does not discuss those who consider themselves economists but part with certain necoclassical assumptions and methods, such as the new institutional economists. See, e.g., Coase (1984, 230); Williamson (1979).

aggregated. When focusing on such aggregate predictions, economists may acknowledge the oddity of assumptions such as the fixed nature of tastes and identity but still retain such odd assumptions in their models.[34]

For those of us, however, who want more than just aggregate predictions, the re-visioning of negotiation as identity is worth further exploration. At least for this essay, my claim for such re-visionings of negotiation is modest. How much of the dependency crisis stems from the kind of conceptual impoverishment that Fineman's work may tame is difficult to measure—just as it is difficult to resolve the question when the problem-solving or value-claiming vision make sense.[35] For one thing, individuals might express their reasons for not seeking caretaking help in different ways, such as blaming external factors like work policies (Haas 1991, 394). I offer my account here as an antidote to the temptation to discount Fineman's work here only as a work of theory, of scholarship for scholarship's sake, rather than for the way in which it may help others. Or, perhaps in offering this account, I am again, at least in part, "doing what I have to do."

AFTER COALITION-TALK

The last section explored the dilemma an individual faces in trying to think about his own identity: Does an individual think of himself as a worker, a father, a parent, a caretaker, or something else? I argued that conceptual scholarship may supply an understanding of self, such as the identity as caretaker, that gives, say, a father a reason to take advantage of an institution's existing leave policy or to ask to have a more flexible schedule to care for his child. What then? Often, an individual may find that he will need to negotiate help with caretaking: he needs an institution to adopt a formal policy; even if a formal policy purports to grant certain rights, he wants to be treated fairly compared with individuals who do not take advantage of such policies, and so on. To accomplish these things an individual will often want others to lend him their support. Many would say he should form an "alliance" or a "coalition." Often such an individual will make an identity-related claim: Tom will ask others to help him as a parent or caretaker by appealing to them as fellow parents or caretakers. ("You've got to help; you are one of us!") Thus, the question arises: Of what *group* does an individual see himself a part? Is an individual part of the community of

---

34. For a classic economist's defense of the notion that preferences are difficult to change, see Stigler and Becker (1977), which Becker reproduces and revisits in *Accounting for Tastes* (1996); see also Posner (1995b), describing how economists model behavior "as if" individuals reason and behave in certain ways without trying to prove that individuals do in every instance behave in certain ways.

35. Compare Menkel-Meadow (1984), who assumes that most negotiations involve a large area of potential value creation, with White (1984), who assumes that most negotiations just involve fighting over the same goods, primarily money.

mother? Fathers? Caretakers? (Metaphorical) Mothers? Just as some visions of negotiation leave unexamined why Tom wants daycare versus something else, many would leave unexamined why Tom thinks of himself as a father or a caretaker or a professor or something else. A typical account might assume, to return to our hypothetical university, that John wants to know about library privileges, and Tom wants to know about child-care leave for fathers; perhaps they should form a coalition.[36] Such an account would then weigh the costs and benefits of some kind of coalition to negotiate with the university; it would posit a negotiator's dilemma between these two potential members of a coalition: they might create value by pooling their lobbying resources, but what if they have to claim value by competing with each other for limited university resources? Again, the identity vision of negotiation instead sees that the real difficulty lies not just in how individuals deal with "other groups" with "similar" problems but in how individuals identify themselves and name their own group in the first place.

Whether one speaks of "coalitions" or of identities, one is still speaking about power, how power facilitates certain identities for individuals and constrains others. Every moral identity is problematic: It recognizes certain interests and values rather than others; it enables some action and constrains others. To call oneself a woman enables both the argument, "You're a woman: you can't do that!" and arguments like, "You're a woman; you have to do that!" To put it in more general terms, every sense of identity is a form of power. As Fineman observes, this is particularly true of identities involving construction of the family:

> Our societal sense of what constitutes justice for families as social entities . . . are formulated in the context of existing, historically legitimated relations of power. Our definition and acceptance of the family . . . reflect[s] the contemporary (and temporal) resolution of struggles of power and dominance. (P. 235).

---

36. This same principle of attempting to organize groups of individuals by insisting that we can simply discover some "natural" group based on some "natural" characteristic is also a limitation of some with theoretical literature on the formation of coalitions involving different governments:

> With strongly asymmetric groups, the process of identifying such characteristics will be difficult and contestable. When agents possess *many* varying characteristics, more or less conspicuous or relevant to their participation, each agent has an interest in maximizing others' perception that characteristics that *they* share (but she does not) are the "natural" bases for forming cooperative groups. With many overlapping stable coalitions, some characteristics will come to seem more salient and relevant than others, perhaps due to arbitrary artifacts of language, history, and context. (Parson and Zeckhauser 1995, 226; emphasis supplied)

Like every form of power, it is potentially dangerous, making some courses of action more likely, and others less likely, tending to distribute resources in one set of ways rather than various other sets of ways.[37]

Look at the dangers that some might see if individuals in our hypothetical university organized their lives as Fineman suggested. In many settings, folks like Paul & Laura, Tony & his male partner, and Jane & Lucy might already see themselves as couples; in other settings, Paul & Laura might wonder whether Tony & and Jane & are in "analogous relationships," a discourse consistent with those who speak of spouses and "spousal equivalents." Suppose, however, that John & Dawn embraced Fineman's caretaker sense of identity because Dawn must tend to John's physical dependency. Perhaps the Sexual Families (Paul &; Tony &, and Jane &) would see this only as a threat to their real interests, like managers might regard employees' request for more salary. And perhaps it might be: if our hypothetical university could treat only so many people at its clinics or allocated only so much money to health care, then offering insurance to Finemanesque dependents might mean offering fewer benefits to Sexual Families. Perhaps, though, something more: perhaps some in the Sexual Families would remember the needs of the physically dependent that they knew. Perhaps Paul would remember that, like Mary, he had an older friend or biological relative who needed care. Paul's wife, Laura, however, might view this as inappropriate, even as a betrayal, because he might then be in a position to provide less for her. Indeed, what of Paul? Will Paul the caretaker in some meaningful way have killed Paul the husband in the way that Lessig (1995) mused that a racist might not take a pill to cure his racism because that would destroy the racist in some way?

We should resist the temptation to view such questions through the coalition-talk paradigm that would simply ask whether, say, those who care for children should form a coalition with those who care for older parents. Such coalition-talk raises two related problems that both grow from the implicit assumption that the relationship between some potential negotiators is natural ("We all have children so, of course, we're all parents") but between others is something of a stretch ("They're not parents, they're children who have to take care of their parents."). The first problem is that such coalition-talk undervalues the way that those who embrace Fineman's notion of caretaking may feel connected with each other. Suppose, for example, John's spouse and Tom and Mary all take Fineman's account of caretaking seriously. They may all think of themselves as caretakers: caretakers who perform worthy social functions and who are justified in seeking social support for these functions. If John's spouse and Tom and Mary deeply share

---

37. Winter (1994, 1132) has written: "My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do."

Fineman's perspective, then the additional information that John's spouse cares for him because of his disability, Tom cares for an infant because of the infant's youth, and Mary cares for an elderly person who helped raise her may be far less important to them than their common mission in caring for others who need help caring for themselves. They may even adopt Fineman's vision so completely and so profoundly that they would view such details in the same way that parents may view the hair color, eyes, and other details of their children: they are interesting to talk about, but they do not change the fundamental commitment to them. Parents of blonde children and redheads can talk about the need for better books without even thinking about the hair color of a particular child. Perhaps at some times parents of young children, children of ill parents, and friends of people with disabilities can speak of the needs of caretakers for, say, flexible work schedules in the same way.

The second problem is that coalition-talk may also neglect potential conflicts. Just as coalition-talk does not recognize how "parents" and "friends of the disabled" may all be caretakers, it may not recognize how there may be important differences between "parents." There may be differences based on the predictability of needs; there may be differences based on the kind of needs, such as the need for insurance versus the need for education. For different institutions, and for different individuals within institutions, this may mean different kinds of costs. The hypothetical university may find it easier to let a young professor like Tom write at home and watch over his children and might find it harder to care for the complex medical needs of Mary's "aunt."

Ultimately, as Fineman's invitation to explore provisional/shifting identities suggests, these conflicts within and between individuals may rarely be so harsh. The costs of many means to accommodate caretakers will be trivial at most, and they may not be borne by other employees. Paul will still be able to have a meaningful relationship with Laura. But in a hypothetical university animated by the caretaking ethic, Paul might sometimes feel "what he has to do" is care for a dependent rather than spend time with Laura. (And the money Laura saved by riding on insurance by the hypothetical university might have to come from somewhere else.) Perhaps this would all sound rather daunting to Paul, but it is the kind of balancing of roles that has been part of the gendered life[38] shared by many American women for generations.

Nevertheless, once we recognize the importance of defining the kinds of roles we want to value, we must be prepared to defend the way those roles

---

38. Fineman (p. 48) uses the concept of a "gendered life" to describe the different ways in which women as a group "are constituted by a variety of experiences—material, psychological, physical, social, and cultural—some of which may be described as biologically based while others seem more rooted in culture and custom."

are defined. Coalition-talk makes this both look too hard (by not recognizing how caretakers may have very similar needs and similar moral claims to support) and too easy (by not recognizing how there may be different needs or moral claims of different caretakers). *The Neutered Mother* is a valuable improvement on this kind of paradigm because it both exposes the weaknesses in our existing paradigm of the Sexual Family and offers an alternative vision that may help dislodge the pervasive power of the Sexual Family. The vision of caretaking, however, still leaves open the question of how we define caretaking, which involves the kind of choices the next section explores.

OTHER PERSPECTIVES ON DEPENDENCY AND CARETAKING

Thus far this essay has explored how Fineman's vision of caretaking helped me re-vision my life, how, largely regardless of how courts treat it, it may affect how others act in workplaces like the hypothetical university, and how all this relates to the way we think about "negotiations" and "coalitions." Fineman's vocabulary—inevitable and derivative dependency, caretaking, and the Mother-Child metaphor—are powerful and often empowering. Because of its potential to shape our lives, some of the ways it defines caretaking, and how it suggests we value different types of activities and commitments, this vocabulary deserves some additional attention. I want to address two issues in particular: Should the concept of dependency draw a sharp distinction, as Fineman's does, on physical dependency versus emotional and psychological dependency? Should we try to name caretaking as "Mothering" and the relationship between caretaker and dependent as "Mother and Child"?

We should look hard at the sharp dichotomy between physical dependency, which Fineman includes in her definition of dependency, and emotional/psychological dependency, which she excludes. This kind of line drawing is hardly idiosyncratic. Indeed, the sharp distinction between the emotional world and the physical or biological world is as much a metanarrative as the concept of the Sexual Family. Insurance companies often provide far fewer and more closely monitored benefits for illnesses labeled as mental rather than otherwise. Even within the realm of emotional and mental illness, insurers often provide fewer benefits for treatment by talk therapy by psychologists and psychiatric social workers and more benefits for doctors who prescribe mood-altering drugs as the core, and often entirety, of their treatment (see, e.g., Hymowitz and Pollock 1995). Even without the additional bias toward biological explanations that a purely "physical" definition of dependency would introduce, doctors' bias for physical explanations may force patients with such problems as depression to

endure extensive testing for physical illnesses such as brain tumors or anemia (Nechas and Foley 1971, 134–35).

Some greater attention to this problematic physical versus emotional dichotomy would fit nicely into the concern with gender otherwise developed so well in *The Neutered Mother*. At the patient/dependent end, women are much more likely to have their behavior classified as pathological when it is interpreted as fitting diagnoses that sound much like stereotypes of gendered behavior, such as histrionic personality disorder, borderline personality disorder, and once proposed diagnoses such as self-defeating personality disorder (Laurence and Weinhouse 1994, 266–69). Many of these disorders sound very much like stereotypes of how men view women, but stereotypes of how women view men, such as needlessly aggressive, do not get translated as, say, John Wayne Disorder (Laurence and Weinhouse 1994, 268; Japenga 1994). There is also a gendered link at the provider end: women are much more likely to be social workers than doctors, and the kind of talk therapy they use may be coded far more as feminine than masculine (Case 1995, 33).

But the danger of a bias that bisects "physical" from "psychological and emotional" is not merely a problem for women. Evidence suggests that more than one in ten older persons who are diagnosed with dementia from irreversible brain damage—a classic case of physical dependency—in fact have depression that is improperly diagnosed.[39] The phenomenon is so pervasive that it has been named "psuedo-dementia" or, in language that masks the insensitivity or incompetence of those who attach the false diagnosis, "reversible dementia." The labeling may lead to disastrous results. The fixation on damage to the structure of the brain may mean abandoning a patient as hopeless. Or the biological fixation may lead to an obsessive focus on a succession of medications with toxic side effects rather than more humanistic therapies such as a variety of other therapies (see Breggin 1994).

As it stands, the emotional versus physical border is not necessary to Fineman's work. Although she draws a similar line in some of her other work,[40] it receives remarkably little discussion. Those who further develop

---

39. The tendency to see every change in an older person as dementia reflects a cognitive bias that affects the way many doctors diagnose older patients:

The aging person often reports less change in mood and attitude and more of the somatic complaints such as constipation, headaches and fatigue. Moreover, the elderly depressed patient may appear confused, have memory loss and be agitated, and the deficits in mental functioning may be ascribed too quickly to dementia. Because doctors expect to see dementia in this age group, there is a tendency to over diagnose it. (Papolos and Papolos 1987, 130–31).

But see Weytingh, Bossuyt, and van Crevel (1995), who claim that recent studies show that the incidence of reversible dementia is closer to 1% of all patients initially diagnosed with dementia.

40. Fineman (1996, 311 n.12) believes that "psychological and economic dependencies . . . may accompany the kind of biological and developmental dependency that I am trying to describe, but I do not view them as inevitable and universal."

her work on dependency, both in the academy and in the practice of implementing notions of dependency in how they order their own lives (within the academy and outside it), will have ample opportunity to benefit from Fineman's work and to explore questions about "physical" and "emotional" in greater depth.

The second question that the discussion of dependency raises, however, is far more fundamental to Fineman's project: How much do we want to think of dependency in terms of the Mother-Child metaphor? One predictable response will be from individuals who do not think caretaking should be called mothering. Some of these individuals may be caretakers, particularly men,[41] who themselves do not feel comfortable with the label; others may be individuals who themselves say they do not mind the mothering-caretaking link but fear that other individuals will be less likely to think of themselves as caretakers if they also have to label themselves as Mothers.

This raises serious questions about which reasonable persons, including reasonable feminists, may disagree. On the one hand, part of the point of a label may be to make individuals think through the initial discomfort they may feel. Men and women who dislike the association with mothering or the association with the feminine perhaps should reflect on that discomfort. Real mothering may only be acceptable and incorporated into the norms of our lives and institutions when we work past any initial resistance or discomfort. Mary Anne Case (1995) has recently made a related argument about the role of many who are labeled "effeminate" within feminist theory and feminist concerns. Case argues persuasively that much of our dislike of effeminate men is not because they defy gender stereotypes but because they act like women; we discount not just men who act like women but also women who act like women.[42] To take but one instance, studies show we value all individuals for having more "male" voices whether they are men or women (Case 1995, 28). In a quite similar way, many individuals have tried to make space for a variety of consensual sexual practices and sexual identities by adopting the term "queer," giving birth to "queer theory" in the academy and to "queer nation" in activist politics. Queer theorists and activists seek to replace the often negative connotations of "queer" with a positive embrace of difference (see generally, e.g., Warner 1993, xxvi–xxviii). By comparison, Fineman's attempt to build on current positive

---

41. Some women will share this discomfort as well if they believe that there should be gender-neutral language *now*.

42. Other feminist legal scholars and teachers have observed how law generally dichotomizes the world into "male" and "female" and privileges the half gendered as male. See, e.g, Menkel-Meadow (1988, 71), who has stated that "specific hierarchies in the law and legal education develop out of pairs of false dichotomies (rational-irrational, soft-hard, intellectual-emotional) in which what is tied to the 'female' is usually viewed as inferior to or subordinated to that which is labeled 'male.'"

associations with motherhood and recapture some from the past may be quite modest:

> I realize that affirmatively introducing Mother into a feminist debate will be considered by many to be too dangerous, but I believe it is essential that we reclaim the term. Motherhood has unrealized power. . . . The strength of the image is in its redistributive potential, grounded on empirical evidence ("reality") about the need for and the assumption of caretaking. (P. 234)

On the other hand, the association with feminine labels at least in the short run may mean less caretaking. Indeed, so pervasive is the prejudice against men caring for children that many fathers prefer to take time off as "sick leave" or something else rather than use something labeled "paternity leave" (Pleck 1988, 186). Such consequences are also not far from Fineman's own concerns. She observes early in her book that some constructions of women situate women only within the framework of oppression, such as battered women's syndrome, because "[t]here is a need for the development of theoretical language to express women's experiences so as not to alienate women who live some aspects of traditional lives" (p. 53).

CONCLUSION

Questions about the exact contours of dependency that I raised in the previous section illustrate some of the process that "perspective scholarship" invites and accepts. Perspective scholarship is about diversity of viewpoints, and diversity of viewpoints and experiences invites dialogs about how to work through the implications and possibilities of these differences. Fineman notes that this diversity and divergence enrich and complicate matters. She is correct that such matters include questions like What is law? and What are the roles and functions of law in our society? (P. 52) What I have tried to sketch out here, however, is that the diversity and divergence also operate in other ways, such as within what we now understand as groups (What does it mean to be a feminist or a woman?) and even, at least to some extent, within individuals (Am I a caretaker, a Mother, a feminist, or something else?).

At the end of the day, the contribution of a particular form of conceptual scholarship includes how it informs individuals' sense of identity and the consequences of that identity. The definition of identity has important consequences. "Do what you have to do," as my former supervisor told me, is the instruction that many potential caretakers are given by others and give to themselves. The individuals in our hypothetical university are representative of a large number of individuals and institutions that must resolve

questions of their identity in the process of considering how they structure their lives, their work, and their institutions. The task is also unavoidable because the decision not to redefine identity, to stay with the default category of what Fineman calls the Sexual Family, is itself a decision with important distributive consequences.

I suspect many will find, as I did, that Fineman's framework helps them make sense of their lives. More individuals may care for children, older people, and persons with disabilities. In this sense, the book is an unqualified good even if skeptics are correct that it will not inform many court decisions, particularly in its strong version of seeking the abolition of all legal status for marriage. At the same time, Fineman's book also leaves a rich set of questions still to address: What will be the contours of dependency? And how will commitment to caretaking be balanced against other commitments?

* * *

I began this essay by mentioning how *The Neutered Mother* made it more likely that I would care for my mother myself rather than devoting myself to other pursuits and delegating her to some caretaker-for-hire. I also mentioned that, when I described that experience on a panel, Fineman herself told that same panel that I was the kind of "Mother" she had in mind. I confess I winced inside when I heard myself called a Mother, and I suspect I may have visibly betrayed some discomfort as well. After I was asked to expand on my remarks there in what became this essay, I put that wincing aside for a long time. When it intruded on my thoughts, I often imagined it was not important, that it was not "central" to my perspective; perhaps it was even "tangential." In the year that I worked on this essay, I flirted with other perspectives. I very soon thought that there must be something suspect about the way that I would not embrace the term "Mother," very likely having to do with its association with the feminine. But almost as quickly as I had these thoughts, I would remember that this Mother versus Caretaker discussion was not "central" to my argument. Much later, this way of avoiding this question, this thinking about some kind of a "center" that included "important" questions (such as consideration of "hard" perspectives like economic models of bargaining) versus some "peripheral" consideration of Mother as a gendered concept began to feel too much like the way we may undervalue feminist and other outsider scholarship: it is peripheral, not central; it is soft rhetoric, not hard science.[43] And so I wondered again and

---

43. As Margaret Radin (1991, 139) has shown, however, these notions of "soft" and "hard" represent a break with earlier understandings of what was "soft" and "hard" that valued far more the kinds of reasoning and approach we now associate with feminist theory. For the pragmatist James, as Radin explains, the "tender-minded are those who need the reassurance of a systematic, all-encompassing ideal structure," and the "tough-minded have the temperamental wherewithal to live with incompleteness, openness, uncertainty, skepticism, and the nonideal."

again whether I could reconcile my commitment to feminism, which made me want to adopt "Mother" to describe myself and to inform this essay, with my deep skepticism that Fineman was correct that many would find the positive associations with "Mother" as something to motivate them and order their lives.

When I discussed this with a friend, she asked, "What do you think your own mother would say?" I didn't hesitate. She'd say, "Don't worry. You've done enough already." I'm not so sure. *The Neutered Mother* is not a book about "enough," and ultimately not merely a book about what one "has to do." Instead, it is a challenge: "Imagine, envision, what you *could* do. Imagine who you could be." It is a challenge well worth taking for those of us individually who have to make sense of how we lead our lives and for all of us as a society who must address the dependency crisis all around us.

REFERENCES

Abel, Emily K. 1991. *Who Cares for the Elderly? Public Policy and the Experiences of Adult Daughters*. Philadelphia: Temple University Press.

Babcock, Linda, Xianghong Wang, and George Loewenstein. 1996. Choosing the Wrong Pond: Social Comparisons in Negotiations That Reflect a Self-Serving Bias. *Quarterly Journal of Economics* 111:1–20.

Becker, Gary S. 1976. *The Economic Approach to Human Behavior*. Chicago: University of Chicago Press.

——— 1996. *Accounting for Tastes*. Cambridge: Harvard University Press.

Blasi, Gary L. 1995. What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory. *Journal of Legal Education* 45:313–97.

Breggin, Peter R. 1994. *Talking Back to Prozac*. New York: St. Martin's Press.

Brown, Jennifer Gerarda. 1995. Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage. *Southern California Law Review* 68:745–839.

Bureau of National Affairs. 1996. Family and Medical Leave Act Compliance Difficult, Employers Say. *BNA, Fair Employment Practices*, 20 May, 58.

California Law Review. 1997. Symposium on Lat Crit Theory. *California Law Review* (forthcoming).

Case, Mary Anne C. 1995. Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence. *Yale Law Journal* 105:1–105.

Chambers, David L. 1989. Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family. *Law and Social Inquiry* 14:251–87.

Coase, R. H. 1984. The New Institutional Economics. *Journal of Institutional and Theoretical Economics* 140:229–31.

Coombs, Mary. 1996. Sameness or Difference? Racial and Sexual Orientation Issues in the Family Law Context. University of Miami School of Law. MS. on file with author.

Cooper, Kenneth J. 1990. Stanford Provides Housing for Unmarried Couples. *Washington Post*, 12 October, A7.

Dau-Schmidt, Kenneth G. 1990. An Economic Analysis of the Criminal Law as a Preference-Shaping Policy. *Duke Law Journal* 1990:10–38.

Epstein, Richard A. 1989. Justice across the Generations. *Texas Law Review* 67:1465–89.

Eskridge, William N., Jr. 1996. *The Case for Same-Sex Marriage*. New York: Free Press.

Essex, Marilyn J., and Marjorie H. Klien. 1991. The Wisconsin Parental Leave Study: The Roles of Fathers. In Hyde and Essex 1991.

Fineman, Martha Albertson. 1991. *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*. Chicago: University of Chicago Press.

———. 1995. Masking Dependency: The Political Role of Family Rhetoric. *Virginia Law Review* 81:2181–2215.

———. 1996. The Nature of Dependencies and Welfare Reform. *Santa Clara Law Review* 36:287–311.

Fisher, Roger, William Ury, and Bruce Patton. 1991. *Getting to Yes: Negotiating Agreement without Giving in*. 2d ed. New York: Penguin.

Forbes, Jack D. 1990. The Manipulation of Race, Caste and Identity: Classifying Afroamericans, Native Americans and Red-Black people. *Journal of Ethnic Studies* 17:1–51.

Freshman, Clark, 1995. Were Patricia Williams and Ronald Dworkin Separated at Birth? *Columbia Law Review* 95:1568–1609.

Fried, Barbara, Principal Author. 1994. *Domestic Partner Benefits: A Case Study*. Washington, D.C.: College and University Personnel Association.

Gilson, Ronald J., and Robert H. Mnookin. 1995. Foreword: Business Lawyers and Value Creation for Clients. *Oregon Law Review* 74:1–14.

Grillo, Trina, and Stephanie M. Wildman. 1996. Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms). In *Privilege Revealed: How Invisible Preference Undermines America*, edited by Stephanie Wildman. New York: New York University Press.

Haas, Linda. 1991. Equal Parenthood and Social Policy: Lessons from a Study of Parental Leave in Sweden. In Hyde and Essex 1991.

Harris, Angela. 1990. Race and Essentialism in Feminist Legal Theory. *Stanford Law Review* 42:581–616.

Hewitt Associates. 1994. *Domestic Partners and Employee Benefits*. Lincolnshire, IL: Hewitt Associates.

Horan, Michael. 1992. Difficult Choices in Treating and Feeding the Debilitated Elderly. In *The Dependent Elderly: Autonomy, Justice, and Quality of Care*, edited by Luke Gormally. Cambridge: Cambridge University Press.

Hyde, Janet Shibley, and Marilyn J. Essex, eds. 1991. *Parental Leave and Child Care: Setting a Research and Policy Agenda*. Philadelphia: Temple University Press.

Hymowitz, Carol, and Ellen Joan Pollock. 1995. The New Economics of Mental Health; Side Effect: Managed Care's Focus on Psychiatric Drugs Alarms Many Doctors; They Say Effort to Gut Costs Leads to Overuse, Misuse of Pills for Mental Illness. *Wall Street Journal*, 1 December, 1.

Japenga, Ann. 1994. Rewriting the Dictionary of Madness. *Los Angeles Times Magazine*, 5 June, 18.

Kagan, Robert A., and Jerome H. Skolnick. 1993. Banning Smoking: Compliance without Enforcement. In *Smoking Policy: Law, Politics, and Culture*, edited by Robert L. Rabin and Stephen D. Sugarman. New York: Oxford University Press.

Kelman, Mark. 1979. Choice and Utility. *Wisconsin Law Review* 1979:769–97.

Lambda Legal Defense and Education Fund, Inc. 1995. National Overview of Jurisdictions That Recognize and/or Provide Employee Benefits for Employees' Partners. 22 May. MS. on file with author.

Laurence, Leslie, and Beth Weinhouse. 1994. *Outrageous Practices: The Alarming Truth about How Medicine Mistreats Women*. New York: Fawcett Columbine.

Lax, David A., and James K. Sebenius. 1986. *The Manager as Negotiator*. New York: Free Press.

Lessig, Lawrence. 1995. The Regulation of Social Meaning. *University of Chicago Law Review* 62:943–1045.

Maccoby, Eleanor E., and Robert H. Mnookin. 1992. *Dividing the Child: Social and Legal Dilemmas of Custody*. Cambridge: Harvard University Press.

Mahoney, Martha. 1991. Legal Images of Battered Women: Redefining the Issue of Separation. *Michigan Law Review* 90:1–94.

———. 1993. Whiteness and Women, in Practice and Theory: A Reply to Catherine MacKinnon. *Yale Journal of Law and Feminism* 5:217–51.

Mahony, Rhona. 1995. *Kidding Ourselves: Breadwinning, Babies, and Bargaining Power*. New York: Basic Books.

Marshall, Anna-Maria. 1996. The Political Dimensions of Rights Consciousness: Women Confronting Sexual Harassment. Northwestern University, July. MS. on file with author.

Menkel-Meadow, Carrie. 1984. Toward Another View of Legal Negotiation: The Structure of Problem Solving. *U.C.L.A. Law Review* 31:754–842.

———. 1988. The Fem-Crits Go to Law School. *Journal of Legal Education* 38:61–85.

Miller, Richard E., and Austin Sarat. 1980–81. Grievances, Claims and Disputes: Assessing the Adversary Culture. *Law & Society Review* 15:525–65.

Mnookin, Robert H., and Lewis Kornhauser. 1979. Bargaining in the Shadow of the Law: The Case of Divorce. *Yale Law Journal* 88:950–97.

Moran, Rachel. 1996. Interracial Intimacy. Boalt School of Law, University of California at Berkeley. Typescript.

Nechas, Eileen, and Denise Foley. 1971. Unequal Treatment: What You Don't Know about How Women Are Mistreated by the Medical Community. New York: Simon & Schuster.

Papolos, Demitri F., and Janice Papolos. 1987. *Overcoming Depression*. New York: Harper & Row.

Parfit, Derek. 1984. *Reasons and Persons*. New York: Oxford University Press, Clarendon Press.

Parson, Edward A., and Richard J. Zeckhauser. 1995. Cooperation in the Unbalanced Commons. In *Barriers to Conflict Resolution*, edited by Kenneth J. Arrow et al. New York: Norton.

Pleck, Joseph H. 1988. Fathers and Infant Leave Crisis. In Ziegler and Frank 1988.

Posner, Eric. 1996. The Regulation of Groups. *University of Chicago Law Review* 63:133–97.

Posner, Richard A. 1989. An Economic Analysis of Sex Discrimination Laws. *University of Chicago Law Review* 56:1311–35.

———. 1995a. *Aging and Old Age*. Cambridge: Harvard University Press.

———. 1995b. *Overcoming Law*. Cambridge: Harvard University Press.

Radin, Margaret Jane. 1991. The Feminist and the Pragmatist. In *Pragmatism in Law and Society*, edited by Michael Brint and William Weaver. Boulder, Colo.: Westview Press.

Raiffa, Howard. 1982. *The Art and Science of Negotiation*. Cambridge: Harvard University Press, Belknap Press.

Rorty, Richard. 1994. Feminism and Pragmatism. In *Postmodernism and Law*, edited by Daniel Peterson. New York: New York University Press.

Sandel, Michael J. 1996. Dewey Rides Again. *New York Review of Books*, 9 May, 38 (book review).

Seligman, Jean. 1991. Variations on a Theme. *Newsweek*, Special Issue, Spring 1991, 38.

Stanford Law Review. 1991. Symposium, Women of Color at the Center: Selections from the Third National Conference on Women of Color and the Law. *Stanford Law Review* 43:1175–1368.

Stigler, George, and Gary Becker. 1977. De Gustibus Non Est Disputandum. *American Economic Review* 67:76–90.

Stuffaford, Dr. Thomas. 1996. Tell Tale Sign of Depression. *Times* (London), 9 July, 16.

Ulen, Thomas S. 1994. Rational Choice and the Economic Analysis of Law. *Law and Social Inquiry* 19:487–522.

U.S. Commission on Family and Medical Leave. 1996a. *A Workable Balance: Report to Congress on Family and Medical Leave Policies*. Washington, D.C.: U.S. Department of Labor, 1996.

———. 1996b. Executive Summary of Report to Congress by Commission on Leave, 1996 DLR 85 d24 (available on LEXIS).

University of Pennsylvania Law Review. 1996. Symposium on Law, Economics, and Norms. *University of Pennsylvania Law Review* 144:1643–2339.

Walton, Richard E. Joel E. Cutcher-Gershenfeld, and Robert B. McKersie. 1994. *Strategic Negotiations: A Theory of Change in Labor-Management Relations*. Boston: Harvard Business School Press.

Warner, Michael, ed. 1993. *Fear of a Queer Planet: Queer Politics and Social Theory*. Minneapolis: University of Minnesota Press.

Weidlich, Thom, & Charise K. Lawrence. 1993. Sex and the Firms: A Progress Report. *National Law Journal*, 20 December, 1, 22–23.

Weytingh, M. O., P. M. M. Bossuyt, and H. van Crevel. 1995. Reversible Dementia: More than 10% or Less than 1%? A Quantititative Review. *Journal of Neurology* 242:466–71.

White, James J. 1984. Essay Review: The Pros and Cons of Getting to Yes. *Journal of Legal Education* 34:115–24.

Williamson, Oliver E. 1979. *Markets and Hierarchies*. New York: Free Press.

Winfeld, Liz, and Susan Spielman. 1995. *Straight Talk about Gays in the Workplace: Creating an Inclusive, Productive Environment for Everyone in Your Organization*. New York: American Management Association.

Winter, Steven L. 1994. Cursing the Darkness. *University of Miami Law Review* 48:1115–32.

Ziegler, Edward F., and Meryl Frank, eds. 1988. *The Parental Leave Crisis: Toward a National Policy*. New Haven, Conn.: Yale University Press.