

Chicago-Kent College of Law

## Scholarly Commons @ IIT Chicago-Kent College of Law

---

All Faculty Scholarship

Faculty Scholarship

---

January 1997

### Taking Care of Our Daughters, a book review of Martha Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies

Katharine K. Baker

IIT Chicago-Kent College of Law, kbaker@kentlaw.iit.edu

Follow this and additional works at: [https://scholarship.kentlaw.iit.edu/fac\\_schol](https://scholarship.kentlaw.iit.edu/fac_schol)



Part of the [Family Law Commons](#), and the [Law and Gender Commons](#)

---

#### Recommended Citation

Katharine K. Baker, *Taking Care of Our Daughters, a book review of Martha Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, 18 Cardozo L. Rev. 1495 (1997). Available at: [https://scholarship.kentlaw.iit.edu/fac\\_schol/61](https://scholarship.kentlaw.iit.edu/fac_schol/61)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

## BOOK REVIEW

### TAKING CARE OF OUR DAUGHTERS

The Neutered Mother, The Sexual Family And Other  
Twentieth Century Tragedies

By Martha Albertson Fineman

Routledge

New York, New York 1995

Pp. 239; \$16.95

*Katharine K. Baker\**

#### I. INTRODUCTION

In *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, Martha Fineman gives a powerful critique of the traditional family and proposes an innovative model for change. In the course of her critique, Fineman reveals a number of important truths. Primary among these truths are (1) that dependency begets dependency; (2) that equality rhetoric and practice are vacuous vehicles for justice in a world in which differing degrees of dependency beget different ability; (3) that the privacy and silence of dependency is crucial to patriarchy's construction of the family. Dependencies are created every time a baby is born, an adult grows old, or a person cries for help. When women answer these cries of dependency by taking care of those in need, women become dependent themselves. The legitimacy of a woman's dependent status, however, turns on a man's economic decision to sponsor her. The male family role, as constructed in a primarily wage-earning, industrial, and patriarchal economy, is to meet the financial needs created by caretaking. The woman's role in this political economy is to take care of dependents. The only potential compensation for those who caretake is the security (if it exists), lifestyle (if it can be achieved), and commitment (if it is forthcom-

---

\* Assistant Professor, Chicago-Kent College of Law, Illinois Institute of Technology. A.B., Harvard-Radcliffe College; J.D., University of Chicago Law School. I would like to thank Lori Andrews, Anita Bernstein, Ellen Bublick, Michelle Oberman, and Peggie Smith for very helpful comments on an earlier draft. I am also very indebted to Rochelle Klaskin for invaluable research assistance. This is for Hanna.

ing) that a man is willing to share. For women who love children, value relationships, and are trained—if not hardwired—to caretake, this world leaves much to be desired.

Fineman desires to abandon this unjust configuration of relationships by restructuring the family. She wants to redefine the family as an institution centered around the essence of that which families provide, *i.e.*, care, and render irrelevant the all too illusive idea of male sponsorship. Thus she proposes a family definition rooted in the vertical relationship between caretaker and dependent, as opposed to a family definition rooted in the horizontal link between woman and man. Noncaretaker adults may or may not be a part of a caretaker's life,<sup>1</sup> but it will be the presence of caretaker and dependent that defines family. State support, in both its financial and symbolic manifestations, should enure to the caretaker-dependent dyad, regardless of any other adult presence.

Fineman's proposal has much to be said for it. Most importantly, it will free women from financial dependence on men and thereby empower women to leave abusive, controlling, or simply inadequate relationships, without risking their own or their children's financial and physical well-being.<sup>2</sup> This proposal will also help promote an understanding of the importance of caretaking and it may well encourage those men who do want to ensure lasting relationships with their children to invest more of themselves in vertical caretaking relationships.<sup>3</sup> Restructuring the definition of

---

<sup>1</sup> Fineman proposes that all relationships between adults be private, non-privileged agreements through which adults can structure their economic, sexual, and practical arrangements as they wish. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 5 (1995).

<sup>2</sup> Divorce and separation are often economically disastrous for women and children. Unfortunately, many of the different studies on the economic effects of divorce and separation are not broken down by the presence of dependents. Nonetheless, the findings are instructive. One study found between a 20-26% drop in the standard of living for white women who got divorced. African-American women experienced between a 28-31% drop. White men's standard of living *rose* between 26% and 44% after divorce and African-American men's standard of living *rose* between 22% and 35%. See Annemette Sorenson, *Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale from the United States*, in *ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE* 278-79 (Lenore J. Weitzman & Mavis Maclean eds., 1992). A different study that factored in the effect of remarriage found a 13% drop in white women's standard of living if they did not remarry and a 29% drop for African-American women who did not remarry. Men, on the other hand, whether they remarried or not, averaged a 13% increase in their standard of living. Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 *DEMOGRAPHY* 485, 490 (1985).

<sup>3</sup> Fineman emphatically states that "men can and should be Mothers [*i.e.*, caretakers]. In fact, if men are interested in acquiring legal rights of access to children (or other dependents), I argue they *must* be." FINEMAN, *supra* note 1, at 234-35. Nonetheless, she links women's relationship to caretaking with physiological realities (pregnancy, childbirth, nurs-

family will help improve the status quo for women, but as this Review will argue, it is not clear Fineman's proposal leads women in the optimal direction. More specifically, although Fineman does propose a radical evaluation and transformation of the definition of family, she does not propose any significant evaluation or transformation of the institution of caretaking, particularly child caretaking. Instead, she assumes the propriety and importance of a private, primary caretaker. If dependence requires a primary caretaker, Fineman's solution may well be the most just way of incorporating caretaking into our social structure, but as the people who will almost certainly be the primary caretakers, women should seriously consider whether we want the world of caretaking to be the solitary one that Fineman envisions.

I will argue that in attempts to free ourselves from the vacuity of legal equality rhetoric, women should not abandon an evaluation of the institution of privatized caretaking itself. As Fineman makes clear, equality rhetoric fails women because caretaking is a profoundly gendered institution,<sup>4</sup> but combating the gendered nature of caretaking may be critical for women who want to define themselves by and through something other than their caretaking roles.

After an explication of Fineman's argument in Part II, Part III of this Review will explore how the modern notion of a primary caretaker is a recent, white, and Western construction. Accepting primary caretaking as inevitable is both historically inaccurate and potentially restrictive to women. Part III also explores the work of primary caretaking. Caretaking is a job. It is a hard job and often a monotonous one. That men currently do not do the work of caretaking despite the prevalence of equality rhetoric may speak more to the power that men retain to escape this oppressive work than to the inevitability of women being caretakers. Part IV evaluates why we must be wary of women's "decisions" to do the work of primary caretaking. Women may rather caretake themselves than have it done poorly or not at all; they may even believe that parents are the only legitimate caretakers; but women might most prefer the option that is not realistically available to them—to share the job of caretaking with someone(s) else. Fineman's solution does nothing to make that option viable.

---

ing) that are inherently gendered (at least until new reproductive technologies replace the need and/or desire for pregnancy, childbirth and nursing. See generally LORI B. ANDREWS, *NEW REPRODUCTIVE TECHNOLOGIES* 55-56, 86-87).

<sup>4</sup> The term "gendered" is explored more fully *infra* note 12.

Drawing on evidence from Western Europe and current job segregation patterns in this country, Part V explains the real danger with Fineman's utopian vision. In Fineman's world, as in our own, noncaretakers will invest their time in public work. It will be the noncaretakers who become Presidents, astronauts, and CEOs. Children born into one of Fineman's families will see caretaking being valued and sponsored by the state and they will see women free to liberate themselves from oppressive relationships with men, but it is unlikely that they will see a woman President, an astronaut mother, or a chairwoman of General Motors. Ironically, the question that Fineman ends up asking and answering is the Freudian one, "what do women want?"<sup>5</sup> The question she does not ask or answer is the much more complex one posed by Adrienne Rich: "What do we want for our sons?"<sup>6</sup> Or, perhaps more importantly, "What do we want for our daughters?" If we are envisioning utopias here,<sup>7</sup> might not feminists want their sons and daughters to grow up in a world in which the CEO Mom is not an oxymoron?

## II. THE IDEOLOGY THAT MAKES DEPENDENCY DEVIANT

Fineman's book, divided into four parts, starts out with what Fineman calls an "abbreviated primer" on feminist jurisprudence (p. 11). In this, Fineman explains the inescapable limitations of jurisprudential analysis. As she candidly states "[l]aw is a crude and limited device and is circumscribed by the dominant ideologies of the society in which it is produced" (p. 17). Law's crudeness is in large measure based on its comprehensive reliance on classification, an analytical device that is under- and overinclusive and dangerously prone to stereotype (p. 19). The ideologies that circumscribe categorizations further limit whatever transformative potential the law might have. "A dominant ideology is one that is transmitted through everyday discourse," with a complementary collection of symbols, beliefs and assumptions (p. 22). Patriarchy is one such dominant ideology and the family, with its assumed role as the province of intimacy and caretaking, is integral to a patriarchal belief system.

---

<sup>5</sup> "The great question . . . which I have not been able to answer, despite my thirty years of research into the feminine soul, is 'What does a women want?'" Sigmund Freud, *quoted in* PSYCHIATRY IN AMERICAN LIFE 70-71 (Charles Rolo ed., 1963).

<sup>6</sup> ADRIENNE RICH, *OF WOMEN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 214 (1976).

<sup>7</sup> Fineman entitles Part 4 of her book "Other Tragedies and Utopian Visions." FINEMAN, *supra* note 1, at 199.

Although feminist theory has worked very hard to recognize and deconstruct some aspects of patriarchal ideology, feminists, according to Fineman, have been all too willing to accept the inevitability of the patriarchal family (pp. 26-27). The discussion of women and law by feminist legal theorists has focused on work, sexuality, and violence. In so doing, feminists have forsaken the caretaking reality of most women's lives and left essentially undisturbed the law's construction of family. When feminist theorists have addressed the patriarchal family, they have sought to reform its role allocation, not question its (patriarchal) foundation (p. 27).<sup>8</sup>

In chapter 3, Fineman implores feminist theory to start deconstructing the family's foundation, but not with the ineffective tools provided by legal equality rhetoric. Fineman counts herself in the class of "postegalitarian feminists" who implore legal theorists to "recognize the reality of existing systemic and persistent inequality and move beyond the simplistic equality paradigm, establishing an affirmative feminist theory of difference" (p. 41). Fineman's recognition of equality's ineffectiveness is not novel. Catharine MacKinnon's trailblazing proposals to reject reliance on equality and instead focus on dominance and subordination are over a decade old.<sup>9</sup> Nonetheless, Fineman opts against MacKinnon's dominance/subordination paradigm because of what Fineman sees as MacKinnon's tendency toward abstraction and "negative characterizations of women's subjective realities" (p. 43). Fineman proposes instead a model of a "gendered" life "in order to give content to, and legitimate, a legal concern for difference" (p. 47). "This concept of a gendered life begins with the observation that women's existences are constituted by a variety of experiences— material, psychologi-

---

<sup>8</sup> Here Fineman refers to Susan Moller Okin's *Justice, Gender, and the Family* (and almost nothing else). There is a notable absence of any discussion about many of the most important works on parenthood by feminist legal theorists. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1594-1634 (1991). Nonetheless, Fineman's assertion that the bulk of this work focuses on re-allocating roles within the legal family instead of restructuring the family itself is fair. Non-legal feminists have been arguing for a fundamental restructuring of the family for some time, however. See generally EMMA GOLDMAN, *Marriage and Love*, in RED EMMA SPEAKS (Alix Kates Shulman ed., 1972); SHALUMITH FIRESTONE, *THE DIALECTIC OF SEX* (1970).

<sup>9</sup> CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 101-41 (1979); CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32 (1987). See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

cal, physical, social, and cultural—some of which may be described as biologically based while others seem more rooted in culture and custom”<sup>10</sup> (p. 47). Fineman believes that her gendered model<sup>11</sup> is better able to incorporate differences among women while at the same time capturing those differences that distinguish women’s lives on the basis of their shared experiences as women.<sup>12</sup> By analyzing where and how our lives are gendered, we can better escape the law’s tendency to assume comprehensive categories that do not exist.

Fineman details how the law’s tendency to lump men and women together in the same category and its corresponding invocation of equality rhetoric has often been a disaster for women. Most important, recent legal changes have neutered the role of mother by rhetorically (though not actually) erasing the gendered nature of mothering. Fineman explains how the historical treatment of the mother symbolically elevated the role of mother to a position of respect. Significantly, it was a respect engendered by the difference of gender. The mother’s bond was special and the law ac-

---

<sup>10</sup> Thus, Fineman’s feminism focuses on motherhood, whereas MacKinnon’s work is notably bereft of any analysis of motherhood or the satisfactions that women get from caretaking. See MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 9; MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 9; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989). The absence of caretaking in MacKinnon’s analysis is particularly noteworthy, given that, for many women, mothering is a profoundly positive experience and the forum through which they experience their greatest sense of mission and personal fulfillment. See RICH, *supra* note 6, at 21-22. LOUIS GENEVIE & EVA MARGOLIES, *THE MOTHERHOOD REPORT: HOW WOMEN FEEL ABOUT BEING MOTHERS* 56-58 (1987); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 142-53 (1992); Czapanskiy, *supra* note 8, at 1464-65. Indeed, MacKinnon’s failure to incorporate many positive aspects of mothering into her theory can make the pejorative connotations of the dominance/subordination paradigm ring hollow to many women’s ears.

<sup>11</sup> Fineman’s adherence to her “gendered model” is quite similar to Carol Gilligan’s praise for women’s different moral voice. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982). Strangely, Fineman mentions Gilligan only once, in a footnote in chapter 3. FINEMAN, *supra* note 1, at 66.

<sup>12</sup> Fineman’s replacement of a dominance/subordination model with a model of genderedness hardly seems to overcome the tendency toward abstraction. As she herself suggests, the term gendered “is an abstracted term with built-in complexity, just like the idea of women’s lives.” FINEMAN, *supra* note 1, at 53. The genderedness model helps incorporate the positive aspects of women’s difference, but it may suffer from exactly what MacKinnon tries to combat, that is, an acceptance of the oppressive conditions generated by difference. MacKinnon looks beyond difference to see whether difference is a result of domination. Fineman incorporates difference and celebrates women’s distinctive roles. Both propositions fall somewhat short. MacKinnon fails to acknowledge the subjective pleasures that women experience within the roles that patriarchal ideologies have assigned. Fineman fails to acknowledge that the subjective pleasures that some women experience within their patriarchal roles may not adequately compensate for the burdens associated with those prescribed roles.

knowledgeled that distinction by awarding child custody to women.<sup>13</sup> In the last thirty years, however, the law's reverence for motherhood has been eviscerated by what Fineman calls a "gender-neutral fetish" fueled by the work of liberal feminist and Neo-Freudian theorists (p. 88).<sup>14</sup> Together, according to Fineman, these theorists have demonized, denied, and demeaned a calling which for many women is at the core of their self-definition. Moreover, by neutering the concept of motherhood, gender-neutrality has devalued and at times abandoned the goal of caretaking. Meanwhile, fathers have escaped rhetorically unscathed and their legal privileges as parents have expanded.<sup>15</sup>

The elevation of the father's role corresponds to women's advances elsewhere. As Fineman pointedly illustrates, a patriarchal ideology concerned with men maintaining relative control demands

---

<sup>13</sup> It is worth noting, as Fineman has elsewhere, how recent is the privilege of woman's presumptive custody. Although some courts and activists started addressing the importance of the maternal bond in the nineteenth century, *see generally* MICHAEL GROSSBERG, *GOVERNING THE HEARTH* ch. 7 (1985), it was not until the turn of the twentieth century that most courts adopted a maternal preference standard. *See* MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 82 (1991).

<sup>14</sup> Fineman's list of Neo-Freudians includes NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); CAROLE KLEIN, *MOTHERS AND SONS* (1984); DAVID M. LEVY, *MATERNAL OVERPROTECTION* (1943). Her liberal feminist list includes FIRESTONE, *supra* note 8; Jeffner Allen, *Motherhood: The Annihilation of Women*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 315 (Joyce Trebilcot ed., 1983) [hereinafter *MOTHERING*]; SIMONE DE BEAUVOIR, *The Mother*, in *THE SECOND SEX* 484 (H.M. Parshley ed. & trans., Vintage Books 1989) (1952).

<sup>15</sup> Joint custody rules, now enacted in at least thirty-four states, Doris Jones Freed & Timothy B. Walker, *Family Law in the Fifty States*, 22 FAM. L.Q. 367, 467 (1989), clearly give fathers a legal advantage that they lacked with a maternal preference, or even a "best interest of the child" standard. The presumption that men are entitled to joint custody works to women's considerable disadvantage, *see* Becker, *supra* note 10, at 184-88; Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986), as do indeterminate rules such as a "best interest of the child" standard that allows men to bargain for a lesser child support obligation by using the threat of a custody fight. *Id.* at 14. In addition, unwed fathers who have shown any minor interest in parenting now enjoy constitutional protection. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645 (1972); Lehr v. Robertson, 463 U.S. 248 (1983). Meanwhile, mothers' behavior is subject to rigid judicial review in custody decisions. Mothers who are sexually active after divorce, working mothers, and lesbian mothers often lose custody to fathers who demonstrate precious few "fathering" skills during the course of the marriage. *See, e.g.,* Jarrett v. Jarrett, 400 N.E.2d 421 (Ill. 1980), *cert. denied*, 449 U.S. 927 (1990) (sexually active mother loses custody because she would not marry her new sexual partner); Friederwitzer v. Friederwitzer, 432 N.E.2d 765 (N.Y. 1982) (change of custody after mother had boyfriend spend the night occasionally); *see also* G.A. v. D.A., 745 S.W.2d 726, 729 (Mo. Ct. App. 1987) (Lowenstein, J., dissenting) (lesbian mother lost custody to father who "was pictured leering at a girly magazine").



that women lose in one sphere that which they can gain in another. Thus, as women gained power in the public sphere they lost the power they previously enjoyed in the private realm. Patriarchal ideology therefore now supports the idea of gender-neutral parenting because it gives men a share of what had been exclusively female power in the private sphere. Feminists who endorse gender-neutral parenting as a movement toward equality are complicit in this divestment of maternal power. Moreover, these overtures to equality rhetoric are completely inattentive to the needs of women who parent without men, however. The "single" mother is subject to ever greater attack. She is no longer considered a real mother: she is, as Fineman entitles chapter 5, the "Deviant Mother." "The very fact of [a mother's] singleness is central to the construction of deviant mothers" (p. 101).<sup>16</sup> A mother's deviance label has nothing to do with the quality or quantity of her child-rearing ability and everything to do with the presence of a horizontal and heterosexual relationship in her life.

In Part III, Fineman explains how the law makes horizontal intimacy "foundational and fundamental" (p. 145) through the doctrine of illegitimacy and laws proscribing physically intimate behavior outside of marriage (p. 146). Although the ramifications of illegitimacy are becoming decreasingly important<sup>17</sup> and the laws against fornication and adultery are ever more rarely enforced, the "alternative" constructions of family that have emerged in recent years still "retain[ ] the centrality of sexual affiliation to the organization and understanding of intimacy" (p. 147).<sup>18</sup>

What this means is that as long as intimacy is assigned to the realm of the private and as long as the private is defined by the

---

<sup>16</sup> This construction of deviance is perpetrated through both poverty and political discourses that condemn single motherhood as a cause of poverty—as if underemployment, inadequate education, and lack of opportunity would all be eliminated if the women currently receiving AFDC got married. FINEMAN, *supra* note 1, at 108-10. Fineman also maintains, with less force, that popular rhetoric demonizes divorced mothers and disproportionately saddles women with unsubstantiated abuse charges. *Id.* at 110-12.

<sup>17</sup> *Lalli v. Lalli*, 439 U.S. 259 (1978) (an illegitimate child can inherit under probate statutes if there has been a formal declaration of paternity); *Clark v. Jeter*, 486 U.S. 456 (1988) (six-year statute of limitations for paternity actions violates Equal Protection Clause).

<sup>18</sup> This sexually focused—as opposed to dependency focused—understanding of intimacy has led constitutional law to draw its protective veil of privacy around the sexual bond, not the dependency bond. Fineman acknowledges that this protective veil has been pierced somewhat as feminist scholarship has revealed the violence and abuse that often flourish behind that veil. FINEMAN, *supra* note 1, at 156. These feminist efforts also reveal that even if there is not abuse, the traditional family often fails to perform the social and psychological roles that justify its privileged position. *Id.* at 157.

male/female bond, women will do the work of intimacy without being recognized for it. The work of intimacy, *i.e.*, caretaking, is gendered. Women do it.<sup>19</sup> At present, the only place women can do that work legitimately is within the confines of a heterosexual horizontal dyad. The critical problem with this, as Fineman cogently points out, is that by taking care of others, women become dependent. Caretaking relationships inevitably involve dependency because the person in need of care (due to youth, age, or disability) commands the time and energy of she who would otherwise provide for herself. In a world in which there are very limited markets for caretaking, rarely can one take care of oneself and others at the same time.<sup>20</sup> Thus, caretaking, the work of intimacy, prevents independence (p. 163).

This seemingly tautological point is the central insight of Fineman's book. Its importance cannot be overstated, however, because only by recognizing that dependency begets dependency can we see how the nuclear family as currently structured prevents women from being independent of men. In the idealized nuclear family, the women caretake, thereby rendering them dependent on "independent" men who function as wage-earners in the public world. In these "nondeviant" relationships, the dependencies themselves are hidden; all caretaking needs are met without turning to either a market or the state.<sup>21</sup>

Traditionally, the law protected the hidden nature of these dependencies. At both common law and within constitutional doctrine, the private world of the family was shielded from state interference.<sup>22</sup> However, the traditional respect for privacy af-

---

<sup>19</sup> "[T]he burdens associated with intimacy and its maintenance have always been and continue to be disproportionately allocated to women." FINEMAN, *supra* note 1, at 162. Fineman states that "[i]f we were really serious about redistributing the burdens of intimacy or family maintenance, it would require an ideological and structural reorientation of society, the rewriting of academic disciplines, and a major reallocation of social resources, none of which seem likely anytime within the near future." *Id.* In this one relatively submerged sentence Fineman appears to give up on her espoused radicalism. Radical change always requires ideological and structural reorientation, new understandings of academic disciplines, and reallocations of social resources. The enormity of the task is what makes transformative changes radical. Fineman argues for change that will empower women but leave the burdens of intimacy and family maintenance gendered.

<sup>20</sup> Home daycare providers are an example of the exception.

<sup>21</sup> In other words, the man acts as the conduit to the public world.

<sup>22</sup> Blackstone wrote: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is . . . incorporated and consolidated into the husband." 1 WILLIAM BLACKSTONE, COMMENTARIES \*442. For reasons that are transparent at this point, this common law tradition has been soundly criticized by feminists. Women and children, as distinct entities with distinct needs for justice, often get lost in the family unit rooted in the unity of the man. Lee E. Teitelbaum, *Family History and Family*

forded to the family as a unit evaporates when the traditional family form disappears. If the male is not present—because he never was, or because he decided to leave, or because the adults divorce—the state feels free to dispense with all regular deference to family privacy. In divorce proceedings, judges decide how children should be raised, what is in children's best interest,<sup>23</sup> and whether the parent is behaving appropriately.<sup>24</sup> For single mothers who are forced to go public with their inevitable financial dependence because there is no male conduit to the public sphere, the constitutional rights to sexual privacy<sup>25</sup> and home protection<sup>26</sup> are also eviscerated.

The justification for affording single mothers less protection—*i.e.*, that their individual claims to privacy are diminished by their dependence on the state—cannot withstand scrutiny. The welfare recipient or divorced mother waiting for child support is no more dependent than any other caretaker; her dependency is merely public. Her existence lays bare the truth about the inevitability of dependency. She can not hide her dependence (and patriarchy cannot hide her) behind her husband's independence because he is not there. Unfortunately, as the poverty levels and statistics regarding standards of living for divorced mothers show,<sup>27</sup> women who initially hide themselves in their husband's cloak of indepen-

---

Law, 1985 WIS. L. REV. 1135, 1174-78. See also Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (S.I. Benn & Gerald F. Gaus eds., 1983); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); OKIN, *supra* note 8. For constitutional protection afforded families, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>23</sup> When the heterosexual family is "intact," there is a constitutional presumption that parents will act in their children's best interest. See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979). When that heterosexual family ceases to exist, courts determine what is in the child's best interest. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 19.4 (2d ed. 1988).

<sup>24</sup> See scrutiny under which custodial mothers are judged, *supra* note 15.

<sup>25</sup> Pursuant to the Family Support Act of 1988 and many comparable pieces of state legislation, mothers receiving state aid are often forced to reveal the names of sexual partners who might be the biological father of a dependent child. FINEMAN, *supra* note 1, at 212-13.

<sup>26</sup> *Wyman v. James*, 400 U.S. 309 (1971) (a social worker's "visit" to an AFDC recipient's home is not a search for Fourth Amendment purposes, but even if it was it would not be unreasonable).

<sup>27</sup> 32.4% of the 6,183,000 divorced, female-headed households are below the poverty line. Only 13.2% of the only 1,411,000 divorced, male-headed household are below the poverty line. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P60-185, *POVERTY IN THE US: 1992*, at 79 (1993). See also the statistics on the effects of divorce on women's standard of living, *supra* note 2.

dence all too often are left unclothed and feeling very dependent before their caretaking tasks are over.

In the last section of her book, Fineman reveals her solution to these injustices. She wants to acknowledge publicly the hidden dependencies that have been relegated to families, recapture or legitimately claim the importance of privacy for those families, and define the family unit around the core of dependency that actually defines the intimacy work done in families. Fineman would eliminate the legal category of marriage and dispense with all privilege afforded to horizontal relationships between adults (pp. 228-230). Why, she implicitly asks, give legal privilege and protection to a relationship between two adults who, at least as equality rhetoric would have it, are perfectly capable of taking care of themselves?<sup>28</sup> It would make far more sense to afford legal privilege to a relationship that needs help, not because it has failed in some way, but because it inevitably involves dependency.

State support, both financial and symbolic, should affirm quality caretaking as an integral part of a functioning polity and the law should recognize that the ability to give effective care has nothing to do with the presence of noncaretakers. Fineman leaves to abstraction just what this state support would look like. Presumably, Fineman envisions a form of child allowance policy like those currently in place in much of Western Europe. Most of these policies involve some sort of state subsidy, given regardless of need, and lasting for the first several years of the child's life.<sup>29</sup> This financial support must be accompanied, one can surmise, by a transformative system of discourse, symbols and assumptions that values caretaking. Effective care will follow when we have an "unsubjugated motherhood . . . [that is] . . . given privacy (without paternity), subsidy (without strings), [and] space (to make mistakes)." (p. 233).

To be sure, there are many advantages to Fineman's model, the most obvious of which is that it gives mothers money. The in-

---

<sup>28</sup> Implicit in Fineman's dismissal of marriage is another backhanded indictment of equality doctrine. Marriage is unnecessary if, in fact, the parties to the agreement operate from positions of parity. There is no need to afford special legal privilege (like marriage) to a private arrangement between equals. If, however, one accepts the more traditional view that marriage is a status relationship in part designed to protect the less empowered spouse, see *Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich., ND 1940) ("[M]arriage . . . creates a status in which the state is vitally interested and under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties."), then one should also be readily willing to dispense with equality rhetoric and the sham of gender neutrality.

<sup>29</sup> See SHIELA B. KAMERMAN & ALFRED J. KAHN, *MOTHERS ALONE: STRATEGIES FOR A TIME OF CHANGE* 86-91 (1988).

adequacy of the child support system, which is now contingent either on men paying it<sup>30</sup> or the state deeming it worthy and necessary,<sup>31</sup> is a significant, if not the most important factor in accounting for the relative poverty of women and children.<sup>32</sup> Fineman does not explain where her family subsidy would come from, but it is likely that if such a government subsidy were seen as a natural part of family life and not a charitable response to dependency, its cultural acceptance and support would be substantially greater than is the current support for AFDC benefits. Government benefits like Fineman's proposed child allowance, when they are distributed to middle and upper income constituencies, are regarded far more favorably by the electorate.<sup>33</sup> This has both practical and

---

<sup>30</sup> The Bureau of the Census statistics indicate that only approximately half of all women awarded child support payments receive full payment. 24.9% receive partial payment and 23.9% receive no payment at all. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 167, CHILD SUPPORT AND ALIMONY: 1987, at 4 (1990). There is some indication that this is getting better. Driver's license revocation and federal wage garnishment legislation are increasing the rates at which child support is paid. However, 41% of the 9.4 million mothers of children with absent fathers never received any award at all, either because the father could not be located, was unable to pay, or because the woman opted against seeking support. *Id.* Fineman's system holds a distinct advantage over any of the variety of new child support enforcement mechanisms because it makes the identity, knowledge, income, and cooperation of the absent father irrelevant. Fineman's mothers will get a child subsidy regardless of who the father is, where the father is, and what he may or may not be reporting as income to the court.

<sup>31</sup> Welfare reform is a hot topic. In the last fifteen years, three predominant pieces of legislation have attempted to reform the federal welfare system: Ronald Reagan's Omnibus Budget Reconciliation Act of 1984, Pub. L. No. 97-35, 95 Stat. 357 (1981) ("OBRA"), George Bush's Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) ("FSA"), and Bill Clinton's Bipartisan Welfare Reform Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). OBRA cut funds given to the states, decentralized the federal program by allocating more responsibilities to the states, and began the shift toward requiring that mothers who received welfare benefits do waged work. JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 170-71 (1991). FSA required every state to establish a Job Opportunities and Basic Skill Training Program (JOBS) as a mandatory course for all able-bodied recipients, including mothers whose children were over three years of age. JOEL HANDLER, *THE POVERTY OF WELFARE REFORM* 76 (1995). This job program, like OBRA's before it, largely failed (only 20% of AFDC recipients are currently in JOBS) due to lack of funding. *Id.* The most recent welfare reform bill ends the individual-based federal entitlement to welfare and distributes block grants to the states to allocate as they wish, subject to a five-year lifetime limit on recipients. Pub. L. No. 104-193, 110 Stat. 2105 (1996). The block grants budget a specific amount regardless of fluctuation in the number of people eligible. *Id.*

<sup>32</sup> See *supra* note 27.

<sup>33</sup> Compare, for instance, the electorate's hostility to AFDC payments with its unwavering defense of Social Security payments, even those going to children who have not contributed anything to the social security system. For a discussion of how the Social Security system fails to value caretaking, see Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 276-85 (1989).

symbolic advantages. At the most practical level, it allows women to do the caretaking that they want to do.<sup>34</sup> At a symbolic level it demonstrates a cultural respect for the value of caretaking and a cultural recognition that caretakers deserve support based on the importance of their task—not on the fortuity of their sexual relationships.

This empowerment will enable women both to leave relationships and to restructure relationships in which they are doing a disproportionate amount of the total work. The less economically dependent caretakers are on noncaretakers, the less absolute economic need they will have to stay in abusive relationships.<sup>35</sup> At a more subtle level, the relative economic need that caretakers often feel once they have invested in caretaking at the expense of their own career advancement will be reduced. Currently, caretakers often feel financially beholden to noncaretakers. This financial inequality leads to disparity in bargaining power within relationships.<sup>36</sup> Caretakers' decreased bargaining position in turn results in noncaretaking men doing less than the term "partnership" suggests that they should and it adversely affects women's sense of their own worth. The former problem is well documented;<sup>37</sup> the latter problem is one about which all women should be concerned.

---

<sup>34</sup> Economist Victor Fuchs writes, "many different kinds of evidence suggest that *on average* women feel a stronger desire for children than men do and a greater concern for their welfare after they are born." VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 4 (1988). Single women are choosing to have children over remaining single even when they have to go to considerable cost to do so. *See infra* text accompanying notes 75-77. Women fight desperately for custody (or, perhaps more often, give up claim for money in return for certain custody) because they want to be the parent who does the work of caretaking. *See generally* FINEMAN, *supra* note 13; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 541-44 (1984); *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-57 (1979) (the authors use gender-neutral language, but it is clear that women are more likely to be the more risk neutral parties who are less willing to engage in strategic behavior and thereby risk losing custody). In contrast, an *Esquire* survey in the UK revealed that most men say they have children only because their partners want them. *See* SHERE HITE, *THE HITE REPORT ON THE FAMILY: GROWING UP UNDER PATRIARCHY* 355 (1994).

<sup>35</sup> For a discussion of how the mutuality of a relationship can be measured by the relative abilities of the parties to leave that relationship and their corresponding ability to assert their wants and needs within that relationship, *see* ALBERT O. HIRSHMAN, *EXIT, VOICE, AND LOYALTY* (1970); *see also* OKIN, *supra* note 8, at 134-69.

<sup>36</sup> *See* RHONA MAHONY, *KIDDING OURSELVES: BREADWINNING, BABIES, AND BARGAINING POWER* 44-45 (1995).

<sup>37</sup> The average American woman spends 11 1/2 years of her working life caretaking. The average man spends 6 months. Tamar Lewin, *Aging Parents: Women's Burden Grows*, N.Y. TIMES, Nov. 14, 1989, at A1, B12; Cindy Skrzycki, *Family Blessings, Burdens: Employees Struggle to Balance Work With Care of Aging Relatives as Well as Children*, WASH. POST, Dec. 24, 1989, at H1; Carol Kleiman, *Child Care a Key Cause of Women Leaving*

By taking care of dependents, a woman becomes dependent, and as a dependent her sense of self is left vulnerable both to manipulation by others and to her own self-doubt. When women lose their self-esteem they lose their ability to fight for what they want—be it respect for caretaking, equal pay, or help with the dishes. They also may lose their ability to question whether they are happy doing what they are doing because their economic dependency makes the answer to such a question too frightening. By providing public economic support to women who do the work of caretaking, society can meet caretakers' economic needs and send a symbolic message with regard to caretaking. When the rest of her culture values what she does, it is much easier for a woman to maintain her self-esteem and thereby bargain for what she wants. If relationships between adults of different sexes are to continue, the importance of equalizing bargaining power within such relationships must not be minimized. We cannot stay blind to the ways in which, within our current structure, caretaking erodes the bargaining power of the caretaker and the integrity of the horizontal relationship itself.

The most important advantage of Fineman's proposal, however, may well be the elimination of the demonized welfare mother.<sup>38</sup> Fineman's solution would end welfare as we know it—not by forcing caretakers to earn wages, but by forcing society to pay caretakers for heretofore uncompensated work. Welfare as we currently understand it would be eliminated because we would fundamentally change what we "know" about caretaking. What patriarchal culture "knows" now is that the only kind of permissible dependency is that which happens outside of the public sphere and inside the context of a heterosexual union. What our culture should come to "know" is that dependencies born of caretaking are inevitable and fundamentally nondeviant, regardless of a male presence. Once we eliminate the notion that dependencies must be hidden, we eliminate the stigmatization associated with being de-

---

*Jobs*, CHI. TRIB., Jan. 14, 1991, at C3. These articles make clear that women take care of aging adults as well as children. Women are the ones who are likely to stay home with a sick child, to care the most about day care arrangements, and to shift to part-time work in order to balance the demands of caretaking with the demands of a job. See generally ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

<sup>38</sup> For further explication of the demonization of AFDC recipients, or "welfare queens," see Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996); NANCY FRASER, *Women, Welfare and the Politics of Need Interpretation*, in UN-RULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY (1989); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995).

pendent. A society that claims to celebrate its children must celebrate the inevitable dependencies that those children produce. A child support subsidy awarded regardless of economic position or horizontal relationship enables such a celebration.

### III. WHAT ARE WE CELEBRATING?

#### A. *Wherefore the Primary Caretaker?*

Fineman, in the company of many other feminist scholars, repeatedly asserts that we must celebrate caretaking because it is inherently good.<sup>39</sup> Before we restructure our world to better support primary caretakers, however, it behooves us to analyze what it is we are valuing. The modern job of caretaking, especially as it pertains to children, has changed significantly in the last one hundred years and not necessarily for the better. Fineman is quick to criticize both the Neo-Freudians and the liberal feminists<sup>40</sup> for assuming the ubiquity of the nuclear family, but she can just as readily be criticized for presuming the ubiquity of a primary caretaker. As Joan Williams succinctly points out, "[t]he contemporary American conviction that children are best raised by one isolated woman is mystifying."<sup>41</sup> For centuries, caring for children has been a job performed by people who have had extensive noncaretaking workloads. Nancy Cott describes the typical duties of a woman with children in the late eighteenth century as including food preparation and preservation (no easy task at this time in history), dairying, gardening, cleaning, laundering, soap making, candle making, knitting, and textile and clothing manufacture.<sup>42</sup> Fitting the kind of individualized, attentive childcare that we currently label "mothering" into that schedule would have been an anathema.<sup>43</sup> Fathers used to be the parents primarily responsible for both comforting

<sup>39</sup> See generally GILLIGAN, *supra* note 11; Czapanskiy, *supra* note 8, at 1463-66; Dowd, *supra* note 38, at 77; Bartlett, *Re-Expressing Parenthood*, *supra* note 8, at 301-05.

<sup>40</sup> See Fineman's list of liberal feminists, *supra* note 14.

<sup>41</sup> Williams, *supra* note 8, at 1628.

<sup>42</sup> NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 26 (1977).

<sup>43</sup> We have an even less clear picture of what parenting looked like at earlier points in history. Some have argued that children were seen as little adults, who had no special need for caretaking. See, e.g., PHILLIPE ARIES, *CENTURIES OF CHILDHOOD* (Robert Baldick trans., 1962). Evidence suggests that children were often neglected by modern standards. See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* (1977). Others have painted a positive picture of parenting, see KEITH WRIGHTSON, *ENGLISH SOCIETY 1580-1680* (1982); RALPH A. HOULBROOKE, *THE ENGLISH FAMILY 1450-1700* (1984), but it is clear that earlier societies simply did not take care of children in ways that we now consider essential.



and socializing their children.<sup>44</sup> Only when household production declined and textile production moved into factories did the cult of domesticity and the elevation of woman's special role as mother assume its place in American popular culture. It was this domesticity ideology that assigned to women the role of molding the mind and character of American youth.<sup>45</sup> Importantly, as Sarah Eisenstein has researched, many of the women who took factory jobs in order to provide themselves and their families with a home resented a cult of domesticity that pressured them to stay in that home.<sup>46</sup> Female factory workers of the nineteenth century resented an ideology of domesticity that labeled their waged work as deviant, just as working mothers today resent an ideology of motherhood that labels their waged work as selfish. Indeed, today's working-class women and women without parenting partners who can work, often do so as a means of caring for their children.<sup>47</sup>

Primary caretaking, as much of popular American culture tries to construct it, is also far from a universal concept. Thomas Weisner and Ronald Gallimore found that only one-fifth of 1,876 societies studied assigned primary responsibility for caretaking after infancy to the birth mother.<sup>48</sup> As Dorothy Roberts notes, African-American women have shared parenting responsibilities with each other at least since slavery.<sup>49</sup> In large part because white culture did everything it could to destroy connections within African-American families, the black community as a whole has often taken collective responsibility for parenting.<sup>50</sup> This kind of community-based caretaking is not unusual. Mariella Doumanis finds a somewhat different, but comparably collective, approach in rural Greece.<sup>51</sup> On many Israeli kibbutzim children live in separate

---

<sup>44</sup> See MARY FRANCES BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* 46-47, 50 (1993).

<sup>45</sup> COTT, *supra* note 42, at 46-48. See also Ann Ferguson, *On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach*, in *MOTHERING*, *supra* note 14, at 153, 168. As Ferguson notes, the power of the domesticity ideology began to decline with the growth of new, expert (male) industries in education, health, and psychology. *Id.* at 172.

<sup>46</sup> SARAH EISENSTEIN, *GIVE US BREAD BUT GIVE US ROSES: WORKING WOMEN'S CONSCIOUSNESS IN THE UNITED STATES, 1890 TO THE FIRST WORLD WAR* 23 (1983). See also Martha Minow, *'Forming Underneath Everything That Grows': Toward a History of Family Law*, 1985 WIS. L. REV. 819, 874-77 (1985).

<sup>47</sup> Joan Williams points out that many working class women may view work in the public sphere as part of their mothering obligation. See Williams, *supra* note 8, at 1610.

<sup>48</sup> Thomas S. Weisner & Ronald Gallimore, *My Brother's Keeper: Child and Sibling Caretaking*, 18 CURRENT ANTHROPOLOGY 169, 170 (1977).

<sup>49</sup> Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 270-72 (1995).

<sup>50</sup> *Id.* at 270. See ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES* 29-30 (1992).

<sup>51</sup> Doumanis describes the following episode in the day of rural Greek women:

quarters from their parents and the emotional and physical work of caretaking from infancy onward is shared by parents and a "professional" *metapelet*, or caretaker.<sup>52</sup>

Recognizing that children have been and continue to be raised in a variety of ways is important, not because by looking at other times and cultures we will find the right way to caretake, but because if we are to embark on what Fineman touts as a radical restructuring of patriarchal institutions, we must remind ourselves just how rare the concept of a primary caretaker is. As Faye Crosby notes, for most of the world it is not "normal and natural for an individual adult to spend more than three hours a day solely in charge of children."<sup>53</sup>

### B. Work

There is a reason why most cultures do not assign one individual the isolated job of caring for children. Caretaking involves a tremendous amount of monotonous, physically draining, intellectually vacuous, and emotionally taxing work.<sup>54</sup> M. Rivka Polatnick writes: "It is to men's advantage that women are assigned childrearing responsibility, and it is in men's interest to keep things that way."<sup>55</sup> In a 1985 study of a cross-section of American mothers, "[a]lmost half reported that day-to-day responsibilities of motherhood were more drudgery than pleasure."<sup>56</sup> Rich women who can afford to do so have always employed nannies and babysitters. According to one *Newsweek* poll, seventy-one percent of at-home mothers report wanting to work and seventy-five percent of working mothers said they would work even if they did not need

---

[A] young mother would be seen to drop in on the yard where other women were gathered, bringing along her toddler and his food. Without any explanation she would just sit down and start feeding him. Should the toddler object, the mother would insist and then stop. Another woman would then take over with the same food, or food from another house . . . would be brought forward and offered to the youngster.

MARIELLA DOUMANIS, *MOTHERING IN GREECE: FROM COLLECTIVISM TO INDIVIDUALISM* 42 (1983).

<sup>52</sup> MENACHEM GERSON, *FAMILY, WOMEN, AND SOCIALIZATION IN THE KIBBUTZ* 48-57, 71-75 (1978).

<sup>53</sup> FAYE J. CROSBY, *JUGGLING* 53 (1991).

<sup>54</sup> "Why is it," writes Lucia Valeska, when you ask for childcare volunteers, "that everybody in the room contemplates their bootlaces?" Lucia Valeska, *If All Else Fails, I'm Still A Mother*, in *MOTHERING*, *supra* note 14, at 70, 71.

<sup>55</sup> M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in *MOTHERING*, *supra* note 14, at 23.

<sup>56</sup> GENEVIE & MARGOLIES, *supra* note 10, at 16.

the money.<sup>57</sup> Mothers who work only part-time have been found to experience higher levels of stress than women who work full-time.<sup>58</sup>

As one father who assumed the role of primary caretaker explains, "[c]hildren are greed machines; they're inhuman, amoral; they're monsters. . . . You give and give all day long, and they take and take . . . [you] take care of children who either need or want something every minute of the day, who interrupt your thinking, your conversations, your work, your life . . . ."<sup>59</sup> Doumanis found primary caretakers who had been "active, intelligent and creative women, overwhelmed by the tasks [of caretaking] . . . irritable and empty-hearted at the end of [the] day."<sup>60</sup> "Loving an infant," writes Louise Erdich, "is uncomfortably close to self-erasure."<sup>61</sup> One of the reasons men may do less caretaking than women is that the prospect of such self-erasure does not appeal to them.<sup>62</sup>

Fathers in two-earner families, who ostensibly have the same opportunities and responsibilities to take care of children, still do overwhelmingly less of the childcare work.<sup>63</sup> There are numerous theories explaining why men do not do this work. The work is dif-

---

<sup>57</sup> Barbara Kantrowitz, *A Mother's Choice*, NEWSWEEK, Mar. 31, 1986, at 46, 47.

<sup>58</sup> Caryl Rivers & Rosalind C. Barnett, *Are Dual-Income Families Walking Time Bombs?*, CHI. TRIB., July 9, 1996, at 11.

<sup>59</sup> JANE SWIGART, *THE MYTH OF THE BAD MOTHER* 118 (1991) (quoting unidentified father).

<sup>60</sup> DOUMANIS, *supra* note 51, at 3.

<sup>61</sup> LOUISE ERDICH, *THE BLUE JAY'S DANCE* (1995).

<sup>62</sup> Men do not take paternity leave at anywhere near the rate that women take maternity leave. See generally CATALYST, REPORT ON A NATIONAL STUDY OF PARENTAL LEAVES (1986), reprinted in *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. 151 (1986). A more recent study found that the paternity leave rate at AT&T was 6%. At Eastman Kodak, the rate was 7.4%. Paula Span & Jennifer Downey, *A Man Can Take "Maternity" Leave . . . And Love It*, REDBOOK, May 1995, at 51. As one father who did take paternity leave pondered, "On some level, it's easier to say 'I can't do this because we can't afford it' or 'I can't take leave because it will hurt my career' than it is to say 'I can't do this because housework is beneath me, dear.'" *Id.* See also Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049-52 (1994).

<sup>63</sup> There are numerous studies documenting how partners allocate domestic chores, including caretaking. Without exception, each study shows that women, on average, do vastly more caretaking than do men, regardless of whether the woman works outside of the home. For a discussion of many of these reports, see HOCHSCHILD, *supra* note 37, at 271-78. Hochschild and Machung conclude that women who work outside the home work approximately one full month of twenty-four hour days a year more than their wage earning spouse. See *id.* at 3. A different study found that fathers spend as much time as mothers do "playing" with children, but a far greater percentage of the mother's time is spent attending to the monotonous chores of caretaking. John P. Robinson, *Caring for Kids*, AM. DEMOGRAPHICS, July 1989, at 52. See also Becker, *supra* note 10, at 153-58.

ficult, demeaning, and undervalued. Men, who have the social power to say no, do so. In addition, a man's sense of self and manhood often depends on the material and social reaffirmation that he gets from the public world around him.<sup>64</sup> By contrast, a woman's sense of self and womanhood often depends on her sense of her own mothering ability.<sup>65</sup>

Men are also more likely to delegate childcare responsibilities. This may stem from man's lesser emotional attachment to children.<sup>66</sup> One is less likely to delegate childcare when one is more emotionally attached to the child.<sup>67</sup> The physical and emotional burden of childbirth is highly likely to make women more emotionally attached than nonchildbearing partners.<sup>68</sup> So is the social construction of mothering. As one mother wrote to the *New York Times*, "[w]hen my husband and I walk out the door in the morning and hear a child cry, the reason I want to turn back and he does not is that society tells me I am a bad mother if I work outside the home."<sup>69</sup> Thus men do not caretake because fatherhood allows an emotional distance which enables them to delegate that which women cannot.

In 1906, Charlotte Perkins Gilman wrote that "[i]t should always be held in mind that the phrase 'domestic industry' does not apply to a special kind of work, but to a certain grade of work, a stage of development through which all kinds pass."<sup>70</sup> In 1963, in an extreme but much celebrated analogy, Betty Friedan compared American motherhood to Nazi concentration camps, suggesting that women "have become dependent, passive, childlike; they live

<sup>64</sup> HOCHSCHILD, *supra* note 37, at 112. See also SUSAN FALUDI, BACKLASH 63 (1991).

<sup>65</sup> "To be so urgently needed and to be able to satisfy an infant's demands for love can bring a woman a sense of fulfillment that no other relationship provides." SWIGART, *supra* note 59, at 45.

<sup>66</sup> See DIANE EHRENSAFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN 96 (1990); Williams, *supra* note 8, at 1620 ("Traditional fatherhood rests on the assumption that virtually all of parenting is delegable; traditional motherhood does not."); MAHONY, *supra* note 36, at 107-08.

<sup>67</sup> EHRENSAFT, *supra* note 66, at 96.

<sup>68</sup> Becker, *supra* note 10, at 142-46.

<sup>69</sup> Letter from Peggy Tarvin to the Editor, N.Y. TIMES, Aug. 28, 1995, at A14. Also consider the numerous stories of how the father who regularly picks his children up from daycare is considered a "good father," while the mother who regularly picks up her children is just doing her job. A mother who happens to be raising her children with a father who picks up the children from daycare is "lucky to have him." By contrast, the man married to a woman who makes as much money as he does is rarely considered "lucky to have her."

<sup>70</sup> DOLORES HAYDEN, THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN HOMES, NEIGHBORHOODS, AND CITIES 195 (1981) (quoting Charlotte Perkins Gilman).

at the lower human level of food and things.”<sup>71</sup> In 1971, Juliet Mitchell wrote that “the most elementary demand is not the right to work or receive equal pay for work . . . but the right to equal work itself.”<sup>72</sup> Fineman criticizes these attacks on motherhood, labeling them “liberal feminism,” but she dismisses without analyzing the voices of the feminists who have decried the burdens of motherhood. Fineman’s dismissal of the feminist attack on motherhood seems particularly unfair because the women who warned against the burdens of motherhood were vitally concerned with improving the lot of all women.<sup>73</sup> They believed a critique of the ideology of motherhood and the work of caretaking to be not just important, but critical to an analysis of patriarchy. The relative rarity of primary caretaking and the amount of difficult and devalued work it involves clearly argues for such a critique. Fineman seems strangely unwilling to even entertain the questioning of primary caretaking.<sup>74</sup>

#### IV. CHOICE

One reason that Fineman may find a critique of caretaking unnecessary is the abundant evidence demonstrating that, despite its burdens, women choose to caretake. Women demonstrate a stronger desire to have and care for children than do men.<sup>75</sup> Single women now often choose to raise children on their own.<sup>76</sup> Nonetheless, numerous examples demonstrate that a woman’s ultimate decision to jeopardize her potential economic independence for the sake of her family often comes only after long and painstaking,

---

<sup>71</sup> BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 296 (1974).

<sup>72</sup> JULIET MITCHELL, *WOMAN’S ESTATE* 149 (1971) (emphasis omitted).

<sup>73</sup> Friedan’s work and observations focuses on middle and upper middle class American women, but Gilman and Mitchell included extensive class and gender analysis in their critiques of motherhood. See also generally EMMA GOLDMAN, *THE TRAFFIC IN WOMEN AND OTHER ESSAYS ON FEMINISM* (Alix Kates Shulman ed., 1970) (1917); FIRESTONE, *supra* note 8.

<sup>74</sup> In another review of Fineman’s book, M.M. Slaughter argues that because the public sphere is the place for ideological and moral debate, Fineman’s willingness to privatize sexual relations is problematic because of the need to examine and critique our construction of sexuality. M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156, 2191 (1995) (reviewing MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES*). Comparably, we must continue and, in some places start, critiquing our construction of caretaking.

<sup>75</sup> See *supra* note 34.

<sup>76</sup> The most dramatic growth in single motherhood in the last fifteen years has been among educated, middle class women. See McClain, *supra* note 38, at 384.

but ultimately ineffective negotiations with her male partner.<sup>77</sup> Some of these women also feel guilty about asking or wanting their husbands to do more caretaking. As Rhona Mahony skillfully points out with her use of game theory, it is not easy to negotiate for less caretaking responsibility in a culture that breeds and constantly reinforces a gendered division of labor with regard to caretaking.<sup>78</sup> People have a very difficult time asking for something that runs counter to the prevailing culture. Often it is both practically and emotionally easier to follow the status quo. Thus, women often just "choose" to do the caretaking work themselves. Mary Becker writes that "[i]n a world of inequality, focusing on women's hedonic lives may be inconsistent with implementing necessary change . . . . For women as a group, avoiding stress can mean accepting the status quo rather than pushing for change even, or especially, when it hurts."<sup>79</sup>

Moreover, the cost of asking for more help may be far too high for women who want to maintain their relationship with a parenting partner for reasons other than the economic and (albeit occasional) childcare support that a partner provides.<sup>80</sup> After all, the noncaretaking partner probably still provides more caretaking than would no partner at all. More importantly, many women may well want to retain their romantic and sexual bonds with their parenting partners for both their own and their children's sake. If asking for more caretaking help from their partner puts the relationship at risk, women may "choose" not to ask. In these situations women may feel confident that they made the appropriate "choice" in choosing to do the work of caretaking, but they might have much preferred a world that offered them more options. They might also wish for a world in which their partners felt the same tension between work and caretaking that they do.<sup>81</sup>

---

<sup>77</sup> See HOCHSCHILD, *supra* note 37; MAHONY, *supra* note 36. See *supra* note 34. Fineman herself seems to think that a challenge to this division of labor is either pointless or insurmountably difficult. See *supra* note 19.

<sup>78</sup> MAHONY, *supra* note 36, at 51-56.

<sup>79</sup> Becker, *supra* note 10, at 161.

<sup>80</sup> HOCHSCHILD, *supra* note 37, at 86-88. Mahony adopts the language of negotiation strategists, explaining that working a second shift (doing the necessary caretaking) is a better alternative than single life for many women who cannot negotiate more equitable caretaking responsibilities from their spouses. MAHONY, *supra* note 36, at 37-64.

<sup>81</sup> Hochschild describes one mother's feelings this way. "Jessica [the mother] badly wanted Seth [the father] to get more emotionally involved with the children and with her. Even if he couldn't be home, she wanted him to *want* to be. In the meantime, she felt oppressed by his dominating absence." HOCHSCHILD, *supra* note 37, at 116-17.

Fineman's economic subsidy will not help women who cultivate and sustain a horizontal relationship for nonfinancial reasons.

In the employment context, feminist scholars have been quick to point out the limitations of viewing women's decisions to enter lower-paying yet traditionally female jobs as choice. Vicky Schultz explains that judicial opinions characterizing women's decisions to enter low paying work as a "choice" insupportably juxtapose "choice" and "coercion" as mutually exclusive options, based on "a common assumption that women form their choices about work, independently of employer action or coercion, in private pre-work realms."<sup>82</sup> Comparably, we should not assume that women form their choices about caretaking independently of the realistic options available to them. Just as we should be suspect of women's choices not to enter higher-paying commissioned work routinely awarded to men,<sup>83</sup> we should be suspect of women's decisions to caretake. As Joan Williams points out, arguments that celebrate women's decisions to "choose" less lucrative paths that permit concurrent caretaking, "encourage[] women to 'choose' economic marginalization and celebrate that choice as a badge of virtue."<sup>84</sup> Choices are made within a social context and, as Fineman readily admits, "patriarchy is a shared cultural construct [that] effects us all." (p. 24). If Polatnick is right that "it is in men's interest" that women caretake,<sup>85</sup> then there are obvious reasons why a patriarchal world would structure women's options with regards to caretaking responsibilities as a choice of a Hobsonian nature.<sup>86</sup>

This is not to say that women do not regard their decisions to spend time caretaking as essentially positive, meaningful, and autonomous acts.<sup>87</sup> But men could make that choice also. As Katha-

---

<sup>82</sup> Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1769 (1990).

<sup>83</sup> See *E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). The Court found that even though women constituted only 21% of Sears' newly hired full-time commission salesworkers, the company did not discriminate against women because women preferred the lower-paying noncommission jobs. Indeed, women comprised 75% of Sears' noncommissioned labor force. See Shultz, *supra* note 82, at 1752.

<sup>84</sup> Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 819 (1989).

<sup>85</sup> See Polatnick, *supra* note 55, at 23.

<sup>86</sup> For more on how "[t]he rhetoric of choice [in this area] deflects our gaze from the inhumanity of a society . . . that offers [too few] choices," see Williams, *supra* note 8, at 1564.

<sup>87</sup> For an analysis of the different strategies employed by those who attribute greater and lesser degrees of agency to individual women within a world of scripted gender ideology, *i.e.*, patriarchy, see Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV.

rine Bartlett explains, choosing to accept responsibility connotes a degree of freedom to choose a particular form of self-expression.<sup>88</sup> That women make this choice, given the intensity of their feelings for their children,<sup>89</sup> makes sense. Because women feel intensely for their children, they want to be with them. Some of the intensity that women feel for their children stems from the process of childbirth and is necessarily gendered,<sup>90</sup> but men who spend significant amounts of time caretaking develop similarly intense relationships with their children.<sup>91</sup> If emotional intensity does not have to be gendered, might we not want to spread some of the intensity around? There are real costs to the intensity of women's feelings. The indisputable fact remains that when one person invests in caretaking, for whatever reason, she significantly weakens her ability to compete publicly with one who has not so invested.<sup>92</sup>

The heavily emotionally invested primary caretaker may also be doing damage to both herself and her children. Pauline Bart has documented the tendency of "housewives" toward depression once their children have left the home.<sup>93</sup> This kind of depression is hardly surprising in women who have devoted a significant portion of their lives to loving and caring for children who once grown, no longer need a parent's care and often do not want very much parental love. As time goes on, children are presented with many new opportunities for relationships, development, and independence. Accordingly, they grow out of a desire for intense intimacy

---

761 (1990); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

<sup>88</sup> Bartlett, *Re-Expressing Parenthood*, *supra* note 8, at 300.

<sup>89</sup> See Becker, *supra* note 10, at 142-52.

<sup>90</sup> *Id.* at 142-43 ("There are emotional consequences of the reproductive labor—pregnancy, labor, nursing—done only by women. As a result of these physical experiences, most women learn to identify with and value deeply the beings for whom they have endured so much.")

<sup>91</sup> MAHONY, *supra* note 36, at 118-29, 182-89; Kyle D. Pruett, *Infants of Primary Nurturing Fathers*, in 38 THE PSYCHOANALYTIC STUDY OF THE CHILD 257 (Albert J. Solnit et al. eds., 1983); Kyle D. Pruett, *Oedipal Configurations in Young Father-Raised Children*, in 40 THE PSYCHOANALYTIC STUDY OF THE CHILD 435 (Albert J. Solnit et al. eds., 1985).

<sup>92</sup> This disparity in bargaining power might be lessened if the government gave preference to caretakers in the same manner that it gives preference to veterans, thus helping to lessen the cost of investing in caretaking. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 1001 (1989). Even with such reforms, however, it is unlikely that preferential treatment in hiring and/or payment will be able to compensate for the time lost to mothering.

<sup>93</sup> Pauline B. Bart, *Depression in Middle-Aged Women: Some Sociocultural Factors* (1967) (unpublished Ph.D. dissertation, Univ. of California (Los Angeles)) (on file with author).



with their caretakers.<sup>94</sup> Their caretakers, on the other hand, may want to maintain the parent-child intimacy because there is little to fill the caretakers' void when children leave. There are serious long term emotional costs associated with a substantial investment in primary caretaking. Older, underinvested in other potential interests, and often having been isolated in the private world of caretaking, caretakers are left to go it alone. In contrast, various studies of mothers who work outside the home indicate that work acts as a buffer against the stresses and anxieties of parenting.<sup>95</sup>

Furthermore, it is unclear that the investments made by women who choose to caretake and forego outside work opportunities benefit children. Doumanis reports that the children of urban mothers who caretake without the communitarian caretaking institutions of a rural community are more demanding of their caretakers.<sup>96</sup> In cultures where children are more integrated into alternatives to nuclear family life, they enjoy more casual, but healthy relationships with their mothers.<sup>97</sup> A recent study by the National Institute of Child Health and Development found that infant day care does not adversely affect the mother-child bond.<sup>98</sup> Studies of children raised in the collectivism of the kibbutz show strong moral development and ability to navigate new environments.<sup>99</sup> Family studies expert Arlene Skolnick writes that "although nobody advocates . . . returning to the era of childhood exploitation, there is a growing recognition that the roles of self-denying adult and irresponsible child are frustrating for both parties."<sup>100</sup> Psychologists, sociologists, and anthropologists have all suggested that isolating children in their dependence, away from the productive life of the public sphere, can lead them to be overly invested in their caretakers and underinvested in the world around them.<sup>101</sup> Thus, the choices women make to invest heavily in care-

---

<sup>94</sup> The Puritans sent their children off to be apprentices specifically to prevent them from developing dangerously close parental attachments. Ferguson, *supra* note 45, at 167.

<sup>95</sup> Mothers who work outside the home tend to fare better emotionally as life goes on. ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS, HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF* 56-59 (1996).

<sup>96</sup> DOUMANIS, *supra* note 51, at 95.

<sup>97</sup> Valeska, *supra* note 54, at 72.

<sup>98</sup> Rivers & Barnett, *supra* note 58, at 11.

<sup>99</sup> See Ron Shouval et al., *Anomalous Reactions to Social Pressure of Israeli and Soviet Children Raised in Family Versus Collective Settings*, 32 J. PERSONALITY & SOC. PSYCHOL. 477 (1975); URIE BRONFENBRENNER, *TWO WORLDS OF CHILDHOOD: U.S. AND U.S.S.R.* (1970).

<sup>100</sup> ARLENE SKOLNICK, *THE INTIMATE ENVIRONMENT* 331 (1978).

<sup>101</sup> See Sarane Spence Boocock, *Children in Contemporary Society*, in *RETHINKING CHILDHOOD* 434 (Arlene Skolnick ed., 1976); Mary Engel et al., *Children Who Work and*

taking may not be ultimately beneficial to either the dependent or the caretaker.

Fineman's willingness to leave unchallenged the choices and divisions of labor within a culture that she indicts for its patriarchal ideology is worrisome. As Mary Becker has poignantly articulated, the powerful taboos operating to prevent honest discussions of the pains and pleasures of mothering have stifled dialogue for a very long time.<sup>102</sup> Fineman's seemingly unequivocal acceptance of women's decision to caretake may be an example of that taboo in operation.

There are indications that what many mothers actually want is not so much help from the state as help from other individuals, either as caretaking partners or as members of a supportive community. Estimates from The Gay and Lesbian Parents Coalition International suggest that eighty percent of gay men and lesbian women who choose, from the outset, to parent outside of the context of a heterosexual relationship,<sup>103</sup> nonetheless have someone else to coparent with them. Very few people want to parent alone.<sup>104</sup> Many African-Americans who end up being single mothers did not start out wanting or expecting to do the job alone.<sup>105</sup> Many of the growing class of educated, economically secure women who are choosing to parent on their own readily acknowledge that their first choice is to parent with someone else.<sup>106</sup> These women "choose" parenting alone over not parenting at all. What these women most want is an opportunity to share the job of caretaking with other people.<sup>107</sup>

---

*the Concept of Work Style*, in 30 *PSYCHIATRY* 392 (1967); Jerome Kagan, *The Child in the Family*, *DAEDALUS*, Spring 1977, at 44; BEATRICE B. WHITING & JOHN W.M. WHITING, *CHILDREN OF SIX CULTURES* 106 (1975).

<sup>102</sup> Becker, *supra* note 10, at 159-65.

<sup>103</sup> That is, these couples do not enter their gay or lesbian relationships with children from previous heterosexual relationships, but decide to raise children knowing that they will do so as gay or lesbian parents. They choose to be parents however, not parent. Telephone interview with Tim Fisher, Gay and Lesbian Parents Coalition International (Aug. 2, 1996).

<sup>104</sup> Even people who do decide to have a child on their own often do so hoping that they will find someone to share the task with. *Id.*

<sup>105</sup> BARBARA OMOLADE, *THE RISING SONG OF AFRICAN AMERICAN WOMEN* 88, 89 (1994).

<sup>106</sup> KAMERMAN & KAHN, *supra* note 29, at 136-37.

<sup>107</sup> I recognize that many women may actively desire to do most of the caretaking work and allocate the waged work role to a noncaretaker. Often this kind of arrangement is infinitely more efficient than alternatives, given gender discrimination against women in the workplace and the significant cultural resistance to male caretaking. (Ironically, cultural resistance to male caretaking often takes the form of praise. When our culture deifies the father who does even minor caretaking tasks, it reinforces the notion that men who

## V. UTOPIA?

Julia Wood, after a decade of caring for her own parents, wrote that to “encourag[e] women to continue caring for others because it is good, it needs to be done, and no one else will do it, [encourages women] to participate—or to continue participating—in their own subordination.”<sup>108</sup> If women continue to do the work of caretaking outside of the world of men, men will continue “to rely on women and excuse themselves from the responsibilities of caring for others.”<sup>109</sup> “No matter how important, it can be extremely costly, even self-negating, if only some people are expected to care for others and if they do so in the context of a culture that does not value caring.”<sup>110</sup>

In assessing the potential desirability of Fineman’s scheme, it is important to ask whether it will be likely, or even possible, for our culture to value caretaking if we fail to integrate men into the process. There are important lessons to be learned from Europe in this regard. France, Hungary, Austria, West Germany, and Finland all provide subsidies on a per child basis to families with children, regardless of how many parents are in the household and regardless of the household’s income.<sup>111</sup> Most of these countries also provide additional, needs-based support for single parents.<sup>112</sup> All of these countries thereby support children and caretaking in a far more comprehensive manner than does this country. But the

---

caretake are doing something special, *see supra* note 69.) Moreover, many women are resistant to men taking on too much caretaking responsibility because those women want to be the parent to whom the child turns for help; their self-esteem depends in part on them being the primary caretaker. These women are particularly likely to demonstrate the kind of “gatekeeping” behavior that prevents men from gaining expertise in caretaking and from developing emotional connection to their children. Thus, many women do not want to let men share the job because they are either afraid men will do it badly, or that they as mothers will have failed by not being the primary caretaker. *See MAHONY, supra* note 36, at 77-78, 108-09. Nonetheless, many people who originally desired traditional allocations of labor often come to regret it if the partnership does not work out. Recall the statistics on the effects of divorce on women and children, *supra* note 2, and the statistics on women-headed households in poverty, *supra* note 27. In addition, women making short-term investments in primary caretaking may not fully appreciate what they are sacrificing in terms of potential long term fulfillment. The opportunity costs incurred by women who “chose” primary caretaking have increased as some women have broken down barriers in the public sphere. *See also* text accompanying notes 93-95 (discussing emotional cost of investment). Most women have not been encouraged to assess the long term opportunity costs associated with caretaking.

<sup>108</sup> JULIA WOOD, WHO CARES? WOMEN CARE AND CULTURE 1, 167 (1994).

<sup>109</sup> *Id.* at 163.

<sup>110</sup> *Id.* at 167.

<sup>111</sup> KAMERMAN & KAHN, *supra* note 29, at 86-95. Most of these countries also provide extra support for single mothers. *Id.*

<sup>112</sup> *Id.*

changes that one might expect to follow from this kind of support have not materialized. Nancy Dowd analyzed both the Swedish and the French systems.<sup>113</sup> Sweden, motivated by equality policy, designed a system to achieve parity between men and women by helping alleviate the economic burdens of caretaking.<sup>114</sup> In contrast, France, motivated by a desire to celebrate women's difference, designed a women-focused system: in France, "[w]omen are perceived as special and different, with unique needs, tied not only to their role as childbearers, but also to their role as primary caregivers."<sup>115</sup> Nonetheless, as Dowd explains: "[t]he position of French women is remarkably similar to the position of Swedish women. Women are paid less, on the whole, than men, are concentrated in a small number of occupations, and are at the bottom of the occupational and managerial hierarchies."<sup>116</sup> In both countries, women are economically free to caretake but they are not free from the burdens associated with removing themselves from the public sphere.

The limitations of these policies reveal the foreseeable limitations of Fineman's vision. Supporting the idea of gendered caretaking, without striving to integrate the needs to caretake into the world of public work will do nothing to tear down the divide between the caretakers and the noncaretakers. The caretakers, despite the support they may receive from the state, will still not be able to compete with those that do not caretake. The caretaker who leaves the workforce for a period of time, or switches to part-time work, or opts temporarily against the more high-powered promotion, will be losing ground to the noncaretaker who does not make the same choices. Economic support can lessen the economic hardship of this lost ground while the dependents are still dependent, and Fineman's dependency-based redefinition of family may ensure that people who invest in vertical relationships can feel secure in those relationships, but when the dependency has run its course or when the caretaker wants to choose a less caretaking-intensive lifestyle, her options are going to be severely limited.<sup>117</sup>

---

<sup>113</sup> Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989).

<sup>114</sup> *Id.* at 316-28.

<sup>115</sup> *Id.* at 343. One would presume that of these two, Fineman would prefer the French policy because it seems to abandon equality principles and instead "give context to and legitimate a legal concern for difference." FINEMAN, *supra* note 1, at 47.

<sup>116</sup> Dowd, *supra* note 113, at 336.

<sup>117</sup> Fineman's proposal may also inadvertently penalize women who choose non-traditional amounts (*i.e.*, less) of an investment in their caretaking relationships. As others have analyzed, under an ostensibly gender neutral primary caretaker standard women are

She opted out of the noncaretaking world, and by doing so she seriously compromised her ability to integrate herself back into a more public life.

To be sure, the woman who currently receives AFDC benefits will fare better under Fineman's system because she will have more money for a longer period of time, but the world open to her after her caretaking work is done will be just as desolate as the one she currently contemplates. She will have no job skills, no seniority and no work experience to rely on. Moreover, as the evidence from Norway suggests, relative poverty matters as much as absolute poverty for purposes of women's subjective well-being.<sup>118</sup> Norwegian mothers who receive a subsidy that allows them to caretake full time still feel that "they are constantly having to deprive their children of what other children take for granted."<sup>119</sup> Single mothers will always be poorer than caretakers who pool economic resources with noncaretakers. The opportunity to pool resources provides an incentive for caretakers to form horizontal relationships with noncaretakers. As a result, women will still feel dependent on their horizontal relationships and the woman caretaking on her own will still feel relatively deprived.

Fineman's vision, therefore, is likely to result in a world not significantly different from the one we have now with regard to gender segregation and power dynamics. Those with money and prestige will be those who have not invested time in caretaking.

---

judged more harshly than men. NANCY D. POLIKOFF, GENDER AND CHILD-CUSTODY DETERMINATIONS: EXPLODING THE MYTHS IN FAMILIES, POLITICS AND PUBLIC POLICY 143, 191 (1983); Becker, *supra* note 10, at 195. A man is often awarded custody as long as he did more caretaking than the average man, regardless of how much caretaking his wife did, *see, e.g.*, T.S.K. v. K.B.K., 371 S.E.2d 362 (W. Va. 1988) (custody awarded to husband who had been physically present with children while mother worked, but had not given emotional support of caretaking); Graham v. Graham, 326 S.E.2d 189 (W. Va. 1984) (father, who worked full-time, attended night school and local sports events but who helped take care of a child's daily needs when he was home awarded custody over mother who was home all day with child); Hemingsen v. Hemingsen, 393 N.W.2d 414, 416 (Minn. Ct. App. 1986) (joint custody awarded to both parents because father helped in caretaking although he admitted he was not the primary caretaker), and men are often awarded custody regardless of how much caretaking they did if their wives behaved outside of the traditional mother/wife norms, *see, e.g.*, David M. v. Margaret M., 385 S.E.2d 912 (W. Va. 1989) (trial court awarded custody to father over primary-caretaker mother based on evidence of three incidents of mother's sexual misconduct); Efaw v. Efaw, 400 S.E.2d 599 (W. Va. 1990) (primary-caretaker mother who temporarily relinquished custody to paternal grandparents in order to enable herself to find permanent employment lost custody to father who returned home from military duty).

<sup>118</sup> KAMMERMAN & KAHN, *supra* note 29, at 82-83.

<sup>119</sup> *Id.* at 83. There are also indications that these single mothers have more health problems and tend to exist in a permanent state of exhaustion. *Id.*

Those who do caretake will try to merge with those who have more money and prestige. Given the biological facts of pregnancy,<sup>120</sup> the overwhelming evidence proving that any initial significant division of caretaking labor solidifies with time,<sup>121</sup> and the indisputable social pressure on women to caretake,<sup>122</sup> women will caretake and when they do try to engage in public work they will remain confined to pink collar ghettos<sup>123</sup> because the noncaretakers will have taken the more prestigious jobs. The more women who "choose" to caretake, the fewer women available to break down sex segregation barriers and the harder it will be for those few women who do want to be astronauts or CEO Moms.

Thus we are left with Adrienne Rich's questions. Is this the world we want for our daughters or our sons? "[W]hether we are childed or childless, married, divorced, lesbian, celibate, token women, feminists, or separatists, the question [of what we want for our children] is still with us."<sup>124</sup> Answering that question requires us to address not only what children need as children but what they

---

<sup>120</sup> There is growing evidence of a physiological basis for a mother-child bond that begins to develop during pregnancy. See Charles H. Zeanah et al., *Do Women Grieve After Terminating Pregnancies Because of Fetal Anomalies: A Controlled Investigation*, 82 OBSTETRICS & GYNECOLOGY 270-75 (1993).

<sup>121</sup> This is particularly true for childcare. Once one caretaker spends time with a child, that caretaker develops knowledge and expertise about caretaking in general, and about the particular child being cared for. It soon becomes a simple matter of efficiency to allocate the caretaking responsibilities to that person who can meet them most effectively. See Malin, *supra* note 62, at 1055. See also MAHONY, *supra* note 36, at 105. Mahony describes the following scenario: during Gloria's maternity leave, she takes care of newborn Molly and learns the tricks of how to comfort a newborn, particularly Molly. Phil comes home early during the maternity leave and takes over the caretaking at night, but he has not had the opportunity to learn what Gloria has. When the child cries for more than several minutes, Phil hands Molly to Gloria because Gloria is "the crying expert."

By the end of Gloria's maternity leave, she is much better at comforting, amusing, and caring for the baby. Phil feels like a lowly, superfluous assistant. That irks him a little. It irks Gloria a lot. On the day the baby was born, they were equally ignorant and equally in charge. Now the baby care is slipping into *her* lap.

*Id.*

<sup>122</sup> MAHONY, *supra* note 36, at 53-55. See also Tarvin, *supra* note 69, at A14 ("When the baby is crying . . . society tells me I am a bad mother.").

<sup>123</sup> This phrase was originally coined by Louise Kapp Howe in 1975, when she documented the extent of gender segregation in the workplace and the concentration of women in low-paying, service-oriented jobs. LOUISE K. HOWE, *PINK COLLAR WORKERS* (1977). There has been little progress since then. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 411 (1995). Elaine Sorensen estimates that 60% of women will have to change occupations before we can eliminate pink collar ghettos. Elaine Sorensen, *The Wage Effects of Occupational Sex Composition: A Review and New Findings*, in *COMPARABLE WORTH: ANALYSIS AND EVIDENCE* (M. Anne Hill & Mark R. Killingsworth eds., 1989).

<sup>124</sup> RICH, *supra* note 6, at 214-15.

want as adults. Can we say that what we want for our daughters is a world in which women do all the caretaking? Can we even say that such a world is what we want for our sons? Rich writes:

If I could have one wish for my own sons, it is that they should have the courage of women. . . . We infantilize men and deceive ourselves when we try to make these changes easy and unthreatening for them. We are going to have to put down the grown-up male children we have carried in our arms, against our breasts and move on, trusting ourselves and them enough to do so. . . . [We must] begin to expect of men, as we do of women, that they can behave like our equals without being applauded for it or singled out as "exceptional"; and . . . we [must] refuse them the traditional separation between "love" and "work."<sup>125</sup>

In the end, Fineman's vision allows men the luxury of that separation. In doing so, it may well harness the dreams of our daughters while retarding the growth of our sons. Fineman states that "men can and should be Mothers" (*i.e.*, caretakers) (p. 234), but her vision incorporates nothing to encourage or demand that men invest in caretaking. Her vision does nothing to degender caretaking.

## VI. CONCLUSION

What path would our daughters prefer us to travel down? Until we break through the taboos that have prevented substantive evaluation of the institution of motherhood, we may not even know which directions are available to us. It may be that ultimately the physiological facts of women's connectedness<sup>126</sup> means that caretaking is an integral part of what women want to celebrate in themselves, notwithstanding the attendant costs of doing so. It may be that ultimately caretaking cannot be integrated into lives that also involve demanding and economically remunerative work. It may be that caretaking will always be essentially gendered. If that is the case, Fineman's solution may be the best one.

Fineman's may also be a necessary or at least highly effective short-term solution. Granting women the power to leave horizontal relationships will free women from the economic pressure that the law's conflation of vertical and horizontal relationships places upon them. Fineman's proposed empowerment will increase wo-

---

<sup>125</sup> *Id.* at 215-17.

<sup>126</sup> For an evaluation of the "connection thesis" and a discussion of its potential physiological and cultural roots, see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-16 (1988).

men's bargaining power within relationships, strengthen women's sense of their own well-being, and hence enhance women's ability to demand more of what they want. Yet many, if not most, women still want horizontal relationships and they want much of the caretaking to be done within the parameters of that relationship.

Thus, it seems premature to label a world of female primary caretakers as a utopia. There are too many questions remaining about the extent to which we can or want to degender caretaking. Extensive and state-subsidized caretaking markets,<sup>127</sup> mandatory paternity leave,<sup>128</sup> and painful but rigid negotiation tactics could all help begin the process of degendering caretaking. Given the powerful forces, both physiological and cultural, that gender caretaking, this will not be an easy task, but we may owe it to our daughters to try. To return to Fineman's truths, dependency begets dependency, but our daughters may deserve a world in which the begotten dependency is shared among adults. Equality rhetoric is dangerous and fundamentally unjust in a world that does not reflect lived equality, but our daughters may want to try to forge a world of lived equality into existence. Envision a world, for instance, in which under a primary caretaker standard, the only necessary adjudicatory tool is a coin. Our daughters do not want a world in which the legitimacy of their caretaking relationships turns on the presence of a man, but our daughters may want a world in which a partner is present because society demands of him, as it does of her, the responsibility for caretaking.

---

<sup>127</sup> Both Sweden and France have more extensive child care systems than does the United States, but again, there are lessons to be learned from how those programs are not helping to alleviate women's disproportionate caretaking roles. In Sweden, although there is comprehensive daycare after age two, the absence of daycare for very young children means that at least one parent has to take allotted leave—that parent is usually the woman. Dowd, *supra* note 113, at 324-26. In France, daycare for the very young is financed and administered by municipalities and subject to local politics. Enrollment is often limited. *Id.* at 334.

<sup>128</sup> Karen Czapanskiy has similarly argued for mandatory visitation by fathers. See Czapanskiy, *supra* note 8, at 1437.



