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Martha Albertson Fineman

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The Neutered Mother

MARTHA ALBERTSON FINEMAN*

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I. INTRODUCTION

- A. *Definitions*: *Mother*; a female who has borne offspring
Female; of or pertaining to the sex that brings
forth young
Neutered; neither masculine nor feminine in
gender
Gender; the quality of being male or female

B. *Mother as Symbol*

I use the term “Neutered Mother” because it represents conflict and contradiction—words in contraposition to each other, incompatible when placed together. The Neutered Mother presents a gendered noun, degendered by the adjective that precedes it—an opposition of meaning that mirrors the conflicts in culture and in law over the significance and potency of the symbol of Mother.

In this Article, I will assess the evolution of the symbolic aspects of “Mother” in modern family law reform and offer an argument for revitalization of the powerful and positive aspects of changes in law for real life mothers.¹ Focusing on Mother in any context is dangerous. Mother is a universally possessed symbol (although its meaning may vary across and within cultures). We all have a mother—some

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1. My arguments in this paper are fairly abstract. In earlier work I provided the details that inform the theoretical stance taken here. I see no need to repeat them, though, when they are appropriately summarized in the text. For further information on the specifics of family law reform, see MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

of us are mothers. As a lived experience, Mother is virtually universally shared in our culture and, therefore, more intimately and intensely personalized than many other symbols. Mother, however, is an ambiguous symbol—one about which there is contest. For that reason, the importance of Mother as a symbol is greatly enhanced on both an individual and a societal level. In its various configurations, Mother is a significant factor in defining our understanding of our own familial, sexual, and social circumstances. In this way, it is also significant in our construction of universal meanings—defining the general qualities of life for us.²

In terms of contemporary society, Mother has accumulated negative as well as positive content. Two major twentieth century contributors to the construction and perpetuation of negative images of motherhood have been neo-Freudians (very loosely defined) and contemporary liberal feminists. These two particular discourses have been so significant due to the coherency and comprehension of their articulations of the negative aspects of Mother. These two groups, for different purposes and in different contexts, have typically constructed Mother as a problem-laden social and cultural institution. In both discourses, the symbol of Mother is negatively implicated by the specter of her dependence on husband and child. In both, she is married by burdens of obligation and intimacy in an era where personal liberation and individual autonomy are viewed as both mature and essential. However, the focus of the discourses is different. Neo-Freudians seem more concerned with the ability of the child to extricate himself (and I do mean *himself*) from the clutches of Mother,³ while liberal feminists are concerned with the ability of women to avoid the psychological and material burdens Mother has placed on them through the generations.⁴

2. MURRAY EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* 8 (1988). While this particular idea is based on statements in the cited work, I am deeply indebted to Murray's work in general for educating me about the significance and power of analyzing rhetoric and symbolism in political thought.

3. See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1977); CAROLE KLEIN, *MOTHERS AND SONS* 121-40 (1984); DAVID M. LEVY, *MATERNAL OVERPROTECTION* (1966).

4. The concern with the burdens of motherhood appeared most vividly in the feminist literature of the 1970's. See, e.g., SIMONE DE BEAUVOIR, *The Mother*, in *THE SECOND SEX* 586 (1974), where the author extols the popular view among feminists of the day that too much Mother, that is too much self sacrifice, makes for inferior mothering:

The woman who works . . . is the one who undergoes pregnancy most easily . . . ; the woman who enjoys the richest individual life will have the most to give her children and will demand the least from them; she who acquires in effort and struggle a sense of true human values will be best able to bring them up properly.

My particular focus in this Article will be on those law reform activities which are consistent with the stated position of liberal legal feminists. In their increasingly important role of effecting changes in law and legal institutions, liberal legal feminists have represented women's issues and concerns as though they are due in part to pathology in the traditional institution of motherhood. The result is that their rhetoric surrounding issues of potential law reform constantly reaffirms the notion that Mother must be overcome—refashioned so that the individual woman is left unencumbered. To a great extent the law and legal language have begun to incorporate the liberal legal feminist notion that Mother is an institution which must be reformed—that is, contained and neutralized. In law, this has been accomplished through the transfiguration of the symbolically positive cultural and social components of parenting typically associated with the institution of motherhood into the degendered components of the neutered institution of “parenthood.”

II. THE LAW OF THE MOTHER

It is important to position the discussion of the neutering or degendering of Mother within the confines of traditional family law discourse. Family law is that area of law whereby the state regulates certain intimate relationships by defining a legal family relationship and assigning formal legal consequences and obligations within the context of that definition. Family law both reflects and contributes to our cultural understandings of the traditional family roles of mother, father, husband, wife, and child.

A. *Early Law*

Early and well-defined references to Mother are found in the

To Beauvoir, a “rich individual life” does not consist entirely or even primarily of mothering, and demanding the least from one's child is an ideal.

More recently there has been a trend in feminist writing not to totally disavow the role of mother but to simultaneously praise and reject it. Mother is seen as a desirable status at the same time that it is viewed as a threat to one's personal autonomy. For an illustration of this ambivalence, see, e.g., NANCY RUBIN, *THE MOTHER MIRROR* 263 (1984) (“Mother isn't forever. It's a limited altruistic and narcissistic endeavor, albeit one of the most important experiences a woman can have Somehow we have to maintain a balance between our feelings of empathy, devotion, love, and identification with our children without losing the whole of ourselves to it.”).

The idea of Mother as a gendered concept seems particularly threatening and feminists continue to contribute to the neutering of Mother. See BARBARA K. ROTHMAN, *RECREATING MOTHERHOOD* 260 (1989) (“I would like us to get rid of our ‘mommy’ and ‘daddy’ language. We are individuals, in individual relationships with our children, and not the embodiment of gender-based parental roles.”).

Anglo-American rules regulating custody decisions at divorce. Mother was clearly designated the "inferior" parent and it was a battle getting her established in law as a contender with respect to the custody of her children. Under English common law, fathers had an absolute right to ownership and control over their children, as if they held title, and a corresponding duty to support them. Mothers, according to Blackstone, were entitled to "no power, but only reverence and respect."⁵ Early American custody law operated in a relatively simple and straightforward manner. Judicial decisionmaking was limited to determining if a particular set of circumstances constituted one of the exceptional cases which required deviation from the stated standard of father custody and control.

It was not until the latter part of the nineteenth century that the notion of paternal possession was successfully challenged. Invoking the powerful cultural Mother imagery of the day, domestically oriented feminists stressed the importance of the mother's special nurturing and caregiving roles to the welfare of her children.⁶ This feminist agitation coupled with the efforts of turn-of-the-century welfare state do-gooders was instrumental in shifting the focus of custody law towards concern for the child's right to the best custodial situation, and away from the property interest of the father.⁷

The move away from automatic paternal right came with the adoption of the "best interest of the child" standard as the governing substantive principle in custody adjudications. Instead of merely implementing a father's right to custody, the courts were directed to select the best custodial placement for the child.⁸ The indeterminacy of this test created problems for the legal system, however, as it required judges to assess a multitude of factors in making substantive comparisons and judgments on a case-by-case basis. Many jurisdictions developed subsidiary rules to give coherence (from their perspective) and content to the best-interest standard. One such rule was the presumption in favor of maternal custody based on the belief that in most instances it would be in a child's best interest to continue to be nurtured by its mother. This rule became known as the "tender

5. See WILLIAM BLACKSTONE, COMMENTARIES *452. In modern practice, this support obligation is fulfilled through child support payments without the father having actual physical custody of the children. JAMES SCHOUER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 61, 233 (1870).

6. See MICHAEL GROSSBERG, GOVERNING THE HEARTH 244-47 (1985).

7. See, e.g., Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235, 239, 246, 254-55 (1983).

8. For a general description of the development of state supervision of parental duties, see GROSSBERG, *supra* note 6, at 289-91.

years" doctrine. It incorporated the positive symbolic aspects of Mother, favoring and fostering mother custody, by implementing the best-interest rule.⁹

The movement away from the father's absolute right incorporated the notion of custody as a legal companion to domestic ideology that recognized a mother's socially productive labor in raising future citizens. Although the custody rules were predicated on positive perceptions about Mother, they were not problem-free when viewed from a contemporary feminist perspective.¹⁰ The revised custody rules were premised on the middle-class gendered assumptions and assertions of the late nineteenth and early twentieth centuries. Contemporary norms sanctioned women's exclusion from the public or market aspects of life under the guise of protecting or sheltering women so they could fulfill their true roles as bearers and nurturers of the species.

In addition, even the gains in the family arena for women were ambiguous. Both social and legal systems conditioned women's enjoyment of their newly found custodial rights on their submission to patriarchal norms such as fidelity, temperance, and so on. For that reason these apparent gains may be better understood as consistent with the dominant paternalistic rhetoric of the time.¹¹ While the wave of domestic feminist ideology that raised Mother as a powerful symbol initially challenged patriarchy, its more radical implications were absorbed and deflected, illustrating the elastic nature of patriarchal ideology.¹² Individual men had to relinquish some control over the private or domestic sphere, in that they did not retain an absolute right to their child's custody, but the basic structures as well as the ideological underpinnings of the system remained patriarchal.

9. For a discussion of the origins of the tender years doctrine, see Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1072-74 (1979).

10. *Id.* at 237-53; see also Robert J. Levy, *Custody Investigation in Divorce Cases*, 1985 AM. B. FOUND. RES. J. 713.

11. This focus on conduct within the context of custody determinations endures in some jurisdictions today, even though there has been a retreat from fault-based divorce. Some of the states with express statutory grounds require that denial of custody on the grounds of conduct be based on a finding that the child is adversely affected by the behavior in question. For data supporting the proposition that women are treated more harshly than men in such instances, see Linda K. Girdner, *Child Custody Determination: Ideological Dimensions of a Social Problem*, in REDEFINING SOCIAL PROBLEMS, 165, 175-76 (Edward Seidman & Julian Rappaport eds., 1986).

12. NORMA BASCH, IN THE EYES OF THE LAW 179-80 (1982); see also Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1530-35 (1983). It is also relevant to note that, at this time, there were few divorces, particularly among middle and upper-class couples, those most likely to be concerned with the content of family laws.

Women's role within the private sphere did not alter and codes of wifely conduct could be enforced through a custody doctrine that denied deviant mothers custody of their children. Mothers received custody of young children unless they were "unfit" to provide care for them. Sexual indiscretions in particular provided grounds upon which to base a finding of unfitness and to deny mothers custody under the tender years doctrine. Common bases upon which to establish unfitness determinations included adultery, cohabitation, and sexual orientation.

In spite of its limitations, this early law of Mother had unrealized radical potential to empower mothers within the family. Once this potential was complemented by the economic gains women made during the last half of this century, it became apparent that women could practice motherhood independent of men. This potential necessitated that Mother be explicitly controlled and reconfined—hence, the direction of modern reforms in family law.

B. *Modern Trends*

The maternal preference embodied in the tender years doctrine stood relatively unchallenged for decades. However, as the incidence of divorce increased in the early 1970s, so did conflicts over the law governing child custody determinations. The conflicts were generated in part by the formation of gendered interest groups with family law as their focus. For example, stringent state and federal provisions for the collection of past due child support fostered the formation of fathers' rights groups which expressed resentment that men were not equal parents in regard to child custody. To a great extent these groups represented a backlash to some of the successes of the feminist movement, such as the impetus to take child support awards seriously.

The fathers' groups advocated reforms in the family law area which had as their subtext the perceived inequality in the family law process.¹³ In efforts to exonerate "deadbeat dads," for example, the widespread nonpayment of child support was justified by images of beleaguered fathers victimized by a court system which consistently awarded mothers custody and treated fathers as nothing more than "walking wallets."¹⁴

13. See Nancy D. Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support* (1989) (unpublished manuscript, on file with author).

14. See, e.g., Michael Raschick, *Wisconsin Non-Custodial Parents' Groups* (May 16, 1985) (unpublished manuscript, on file with author). For a discussion of the various ideological strains within the men's movement, see Michael Shiffman, *The Men's Movement: An Exploratory Empirical Investigation* 3, 4 (August 26-30, 1985) (paper prepared for

Predating the fathers' groups assertion of their interest in achieving equality within the family, mainstream liberal feminists were attacking gender-specific legal tests in the public sphere as inherently discriminatory. They also articulated the ideal of an egalitarian, genderless family where child care and household responsibilities were equally shared by husband and wife. The fathers' rights movement picked up on the idea of gender neutrality and turned it to their rhetorical advantage in the custody area. They effectively criticized child custody rules and decisionmaking for manifesting what they perceived to be a "pro-mother" bias.¹⁵ Their attacks seemed all the more forceful because of the equality reforms that were being implemented in response to the economic consequences of divorce.

Male backlash to family law economic reforms and liberal feminist equality and the gender neutral rhetoric it appropriated helped to set the stage for challenges to custody rules and processes of decisionmaking that relied on the positive aspects of Mother.¹⁶ Both the liberal feminists and the fathers' rights groups undermined the earlier acceptance of Mother as being something distinct, separate, and, perhaps, superior to the generic term "parent." Some commentators even went so far as to assert that gender neutrality requires that considerations of "typically Motherly" characteristics be eliminated from judicial consideration.¹⁷ In place of the maternal presumption, custody arrangements that formally equated parents, such as joint custody, were proposed and defended on the grounds of furthering equality between the sexes.¹⁸

presentation at the 80th Annual Meetings of the American Sociological Association, Washington, D.C.) (draft 2.1 on file with author).

15. See Jay Folberg, *Custody Overview*, in JOINT CUSTODY AND SHARED PARENTING 3-10 (Jay Folberg ed., 1984); see also Letter from Neal Skrenes, Secretary, Custodial Parents' Rights Coalition, Inc., to Wis. Rep. Jeannette Bell, Chair, Special Legislative Committee, Custody Arrangements (on file with the author).

16. For an analysis of the tender years doctrine under the Equal Protection Clause, see *Ex parte Divine*, 398 So. 2d 686 (Ala. 1981), which held that the doctrine constituted unconstitutional gender discrimination. Most state statutes now specifically provide that both parents are "equal," thus forbidding consideration of gender in custody cases. See *State Divorce Statutes Chart and Summary Sheet Introduction*, FAM. L. REP. (BNA) 5-6 (Mar. 25, 1986). For example, the relevant Wisconsin statute reads: "In making a custody determination, the court . . . shall not prefer one potential custodian over the other on the basis of the sex of the custodian." WIS. STAT. ANN. § 767.24(2) (West 1981).

17. See, e.g., William J. Everett, *Shared Parenthood in Divorce: The Parental Covenant and Custody Law*, 2 J.L. & REL. 85, 85-89 (1984).

18. Several commentators extended this equality goal to its most extreme limits in their suggestions that custody disputes be resolved by a toss of the dice. See John Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289-91 (1975).

Liberal legal feminists, the most obvious potential source for an articulation of the alternative, non-patriarchal legal discourse about Mother, seem disinterested in the undertaking, perhaps even in the subject. Legal feminists have for the most part centered their attention on non-family circumstances and have expressed ambivalence about challenging concepts of family relationships except insofar as they are viewed as hindering or assisting market and economic equality for women. The existence of women in law, as practitioners, judges, and teachers, and the fledgling movement among some female legal academics to develop feminist legal theory have yet to substantially alter the nature of legal discourse or the dominant legal concepts and constructs.

Liberal legal feminists constantly reaffirm their commitment to gender neutrality in the family context. Gender neutrality is the paradigmatic expression of the values and norms of the dominant legal concept of equality which, even if—perhaps, especially if—rephrased in feminist terms, precludes the consideration of Mother as something different or distinct from father. In legal texts, statutes, and cases, Mother is collapsed into the legal generic category of “Parent” and is suppressed. However, Mother has only disappeared rhetorically. In social and extra-legal institutions that embody cultural expectations—idealized and practical—Mother continues to exist and to function. It is the legal discourse, not society, that is now formally Mother-purged.

III. A RETURN TO THE LAW OF THE FATHER: NEUTERING MOTHER

As a result of the push to gender neutrality, Mother as an explicitly positive symbol with unique connotations and significance in regard to her relationship with her child has been moved out of the text and into the margins of family law discourse. Mother is neutered into Parent and is, at the same time, transformed into “Wife”—a role considered to be more appropriate as it connotes an equal or full partner in the family and extra-family contexts. This emphasis on adult roles and relationships facilitates the tendency to perceive the family as peripheral to the public arena. The focus in that arena is on women as economic actors, a role that requires a degree of independence that is difficult, if not impossible, to reconcile with the demands of “traditional” motherhood. Changes in family law will be justified by the need to refashion Mother, manipulating her to permit the construction of an appropriate egalitarian legal position for women in the market and public sphere.

Furthermore, one consequence of this emphasis has been the alteration of women's relationship to the market. Women and wives as equal partners are expected to work—to be self-sufficient and to assume equal financial responsibility for their children. This is now true at divorce. However, the implications of neutering Mother are not confined to custody questions or to the re-ordering of families that takes place when “private,” middle-class families encounter the divorce system. Liberal legal feminist arguments for gender neutrality and family structuring to facilitate market participation have had an impact on “public” family law as well.¹⁹ The way we have refashioned Mother has created significant consequences in areas of law and policymaking outside of the traditional family. It is the neutering of Mother that has paved the way for acceptance of workfare solutions to the persistent poverty of many mother-child families in this country. Requiring single mothers, or any mothers, to engage in market work or to train for work is viewed as compatible and complementary to their status as mothers, not in conflict with it.

The liberal feminist valuing of market work for women has been broadened from its initial conception as an ideal *option* for middle class and professional women. The current rhetoric on the appropriate relationship between women and market work establishes it as a universal and *mandatory requirement* for all women, mothers or not. The image of women as independent, economic equals is the mainstay of public and private family policy. The question that arises, of course, is what is the harm in that?

Needless to say, the shift in policy has operated to harm the most disadvantaged and defenseless mothers. The unanticipated byproduct of earlier liberal feminist attempts to achieve economic equality has been that the new images of Mother operate to disadvantage many women encountering the law in the context of nonmarket circumstances. Such women are caretakers, nurturers who live lives of dependency—their child's and their own—which is generated by their roles as Mother. The institutions with which they have to deal, the worlds of work and market, are places in which there are no mothers. Workers are motherless, neither having nor being a mother. The very gendered and Mothered lives most women live are not accommodated in the liberal legal concept of gender equality.

The boundary between gender-neutral legal discourse and the gendered operation of society cannot be maintained. The significance

19. I develop these concepts of “private” and “public” families in Martha A. Fineman, *Intimacy Outside the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991); see also Martha A. Fineman, *Images of Mothers in Poverty Discourse*, 1991 DUKE L.J. 955.

of Mother as an institution and cultural symbol continues to have a shadowed impact on law; it cannot be erased. Equality rhetoric successfully employed to neuter Mother as a unique legal construct has failed to erase Mother on the societal level, nor has it removed the material manifestations of the institution of Motherhood. The disparity between the experience of Mother and its neutered legal presentation is potentially threatening to the maintenance of the legal system's commitment to gender neutrality. If Mother is and continues to be experienced as different, legal accommodations for Mother will be demanded even within a formally neutral family law system.

Women who are Mothers are not well represented in the political process. It is essential, however, that their perspectives be articulated in the context of law and policy proposals. Yet liberal feminists have been reluctant to make Mother a legislative agenda. An overriding commitment to the equality objective seems to preclude these feminists from conceptualizing and becoming proponents of a gendered analysis of the policy and politics of families in the United States. This is an essentially assimilationist stance which does not challenge existing structures of dominance and control. The liberal legal feminist position on family reforms, which is exemplified in the paradigm of gender neutrality, makes it likely that equality will remain the ideological medium for the construction of legal images—a medium that threatens further destruction of Mother.

Even if a demand for re-examination of the legal implications of the institution of motherhood from a feminist perspective were generated, it is not clear how successful it would be. The nature of law is conservative. It tends to reformulate, not render obsolete, the core tenets of our society, and challenges that are too radical or extreme are typically deflected. In the family context, the basic ideological construct is patriarchy—a decidedly anti-Mother perspective reflecting power relationships in which *pater* consistently trumps *mater* and the law assists in this endeavor.

IV. THE SEXUAL FAMILY

The reflection of the family presented in family law doctrine may be distorted or fragmented, but it constitutes a "reality" and forms the basis for the regulation of actual lives. Because the legally constructed image of the family expresses what is appropriately considered family, it also constitutes the normal and defines the deviant. The designation of some intimate relationships as deviant legitimates state intervention and regulation.

Our continued adherence to patriarchy is inevitable given the

tenacity and singularity of our prevalent conception of the family as an institution of horizontal intimacy, based on the romantic sexual affiliation between a man and a woman. The idealized "nuclear family" is a sexual family and its dominance in social and legal thought has restricted real reform and doomed us to recreate patriarchy.

The basic familial connection in our society is the sexual bond. For example, one of the central assumptions underpinning our conceptualization of family is that the entity is dependent upon a heterosexual relationship between a man and a woman.²⁰ This form of affiliation, romanticized in the glorification of the nuclear family, is central to traditional family law ideology. Politicians as well as religious leaders extol this relationship (if it is sanctified) as the core of the family.²¹ While it is true that there is a great deal of emotionally charged rhetoric directed at children, it seems clear that its primary focus is on the traditional family model. Under this rhetoric, children's problems are created, to a large extent by the fact that they are trapped in a deviant family situation.

Historically, in order to qualify as the foundational family relationship, a heterosexual union had to be legally privileged through marriage. There is a great deal of current agitation to eliminate this formality. "Liberals" seek to expand the traditional nuclear family model, urging the recognition of informal heterosexual unions within the definition of family. There are also calls for acceptance and legal legitimation of same-sex relationships in the form of proposed domestic partnership laws.

Even in the context of the proposed liberalized definitions of family, the adult sexual affiliation remains central. The very existence of a sexual relationship is what provides the basis for arguing that these nontraditional unions should be included within the formal legal category of family. The form of argument is by analogy. Nontraditional unions are equated with the paradigmatic relationship of heterosexual marriage.

Formal, legal, heterosexual marriage continues to dominate our

20. This view was explicitly and forcefully expressed recently in a speech by California Governor Pete Wilson. Speaking over a chorus of chants protesting his veto of a bill outlawing employment discrimination against homosexuals, the Governor made a plea for a return to the values more common in the 1950s—a time he characterized as when the family was cherished as a "sacred union born from romantic love" and "hard work was rewarded." Daniel M. Weintraub & Scott Harris, *Gay Rights Protest Disrupts Wilson Speech*, L.A. TIMES, Oct. 2, 1991, at 1A.

21. In a speech explaining his veto of an antidiscrimination-in-employment bill designed to protect homosexuals, Governor Pete Wilson warned young people against a "headlong rush into mindless hedonism," and praised "the sacred union born from romantic love." Richard L. Berke, *AIDS Battle Reverting to Us Against Them*, N.Y. TIMES, Oct. 6, 1991, at 4-1.

imagination when we confront the possibilities of intimacy and family. This domination is evident in the language we use to describe the effect of the end of the relationship through divorce when we speak of the "broken" family. It is also evident in the way we characterize the growth of unwed mother-child units as constituting a threat to the family.

In contrast to the construction of family around a sexual affiliation, a nonsexual construction would not categorize families based on the relationship of men and women (or its adult members). Instead, it might begin with the premise that the basic family unit consists of mother and child. Although this is the family form experienced for significant time periods by many women and children in our society, it has never been accepted as a positive ideological or rhetorical alternative to the sexual family. A woman and her children "alone" are considered an *incomplete*, and thus a deviant unit. They are identified as a source of pathology, the generators of problems such as poverty and crime.²²

That the relationship between men and women has been at the core of our perception of family is also evident when we see how it has defined other family members. For example, the historic characterization of children as legitimate or illegitimate depended on whether or not their parents were married. The significant reference in defining the status of the child was the nature of its parents' relationship. While such children today are more apt to be labeled "nonmarital," the focus is still the same—the child is defined by the relationship between the parents.

The problem with a notion of family that is culturally and legally dependent upon the formal (or informal) relationship between adults is the inevitable focus on "doing justice" between the adults in public policy and political discussions. Of course, the conclusion that something is just heavily depends upon the articulation of the problem and the context in which any solution is considered. As with all systems of rules, family law cannot help but reflect society's values and choices. When codified as legal standards, the privileging of the sex-

22. For a particularly potent example of the persistence of this idea it is illuminating to trace these assertions of pathology in single parent families over the 20-year period from the issuance of the Moynihan Report to the 1986 presentation of the problems of the black family in Bill Moyers' documentary, "The Vanishing Family: Crisis in Black America." See Daniel P. Moynihan, *The Negro Family: The Case for National Action*, in THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 41 (Lee Rainwater & William L. Yancey eds., 1967); *The Vanishing Family: Crisis in Black America* (CBS television broadcast, Jan. 25, 1986) (transcript on file at *University of Miami Law Review*); see also DANIEL P. MOYNIHAN, FAMILY AND NATION (1986).

ual tie stands as an eloquent, and potentially coercive, statement about our understanding of the nature of family. Given the contemporary hostility between the sexes and the status of equality as the dominant legal framework for discussions about fairness and justice, the potential negative effects of this codification are apparent. With high divorce rates and the organization of women and men into gendered interest groups when confronted with family issues, we should not be surprised that assets of the family, including children, are considered prizes, providing an arena for competition between women and men when their relationships fail.

In fact, the coalescence of interests along gendered lines is inevitable. The family represents the most gendered of our social institutions and this remains true even after decades of an organized women's movement. While other, nonfamily transformations have fostered male-female competitiveness, the family is the one area where tensions generated by perceived changes in the position of women seem most clearly visible. Historically, the family was the "private sphere" to which women were assigned in their roles as wife and mother. In recent decades, more and more women have escaped the exclusivity of this assignment and theoretically have more options available now.

To the extent that today's society has developed a system of easy access to divorce and provided some economic security for women, women now can combine private and public roles or reject the imposition of an historically defined role altogether. A woman may choose both work and family or decide to become a mother *without* being a wife. Women can choose to end a marital relationship or never formally establish one, and need not fear that their own or their children's futures in such circumstances will involve total impoverishment and social ostracization. Such changes have not come without costs, however. Some women feel the changes have been expensive for all women while benefiting only a few. Others question whether such changes actually have been advances or whether they operate to further disadvantage many women. In earlier work, I asserted that in our response to changing behavior on the part of women in the evolution of family law, we only reassert, in different forms, the power men implicitly enjoyed within the context of indissoluble marriage and traditional patriarchy.²³

While Mother has become potentially empowered by these changes, patriarchy has not been displaced. And its beneficiaries (female as well as male) are displeased. Its norm of the male-defined

23. See FINEMAN, *supra* note 1.

and male-headed family, with heterosexual union at its core, is threatened by the changes that have occurred. Consequently, the desire to contain and undo the reform. Part of the contemporary attack or backlash, against the changes in women's options is found in the neutering of Mother evident in contemporary family law rhetoric.

V. THE LEGACY OF THE NEUTERED MOTHER

Consistent with the feminist commitment to gender neutrality, parenthood, like personhood, has become the preferred designation because it encompasses both father and Mother without the idealized distinctions associated with the terms. The desire to have only gender-neutral rules represented an important symbolic component of the legal feminists' battle to demonstrate that there were no relevant differences between the sexes and thus no basis for treating them unequally in law. Certain feminists even anticipated that the rise of these egalitarian expectations in language would have concrete effects on behavior patterns in marriage and divorce situations.

Consistent with the goal of gender neutrality, the legal system had to eliminate any preferences based on a gendered concept of Motherhood.²⁴ This had to be accomplished for important symbolic reasons, regardless of whether a gendered rule accurately conformed to either intuitive or empirical evidence as to which parent actually was most likely to systematically and continuously invest time and effort into child care.²⁵

The law's reluctance to recognize and accommodate the uniqueness of Mothers' role in child rearing conforms to the popular gender-neutral fetish at the expense of considerations for mothers' material and psychological circumstances. Even if the *ultimate* goal is gender neutrality, the immediate imposition of rules embodying such neutrality within the family law context is disingenuous. The effect is detrimental to those who have constructed their lives around gendered roles. In this regard, reformed divorce laws impose the risk of significant emotional as well as economic costs for such Mothers. For example, shifting custody policy creates an increased threat that mothers will potentially lose their children at divorce. To Mother, this risk is too great to contemplate. As a result, many mothers

24. For an extensive discussion of this point regarding the reform of divorce and property division laws, see Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change; A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 851, 852.

25. For an illustration of the gap between these reform efforts and reality in contemporary custody practice, see Girdner, *supra* note 11, at 174-75.

exchange a bargained-down property settlement to avoid a custody contest because they tend, in contrast to fathers, to consider custody a nonnegotiable issue.

VI. CONCLUSION

As with all symbols about which there is context, some positive components can be extracted from the negative and neutered construction of Mother. Certainly, the power of Mother is conceded in the very recognition that it must be contained. The strands for weaving a feminist legal theory of Mother may even hide in the discourse of patriarchy itself. The question is how to shift contemporary legal discourse, feminist and otherwise, in such a way as to empower Mother. Legal discourse, even in its feminist forms and even in the family law area, continues to be guided by the normative male and confined by concepts such as equality. To those who believe any recognition of differences between men and women will inevitably lead to the designation of an inferior status for women, this is good news. However, for those who believe that acceptance and accommodation of differences are necessary (whether they are viewed as essential and inherent or as socially constructed), the marginalization of Mother in law and in legal theory is cause for concern.²⁶

One lesson feminists must learn from the neutered Mother is to be wary of equality. The dominant ideology of equality carries with it a powerful interpretive history which defines and limits the context for change. Liberal legal ideology is rarely compatible with different or "special" treatment. It assumes that the ideal must be equality of circumstances or at least of opportunity. This legal context has made it difficult for reform to take into account the persistent, far-reaching, unequal, and different circumstances that many women experience as a result of Motherhood and the dependency of children.

Equality ideology may resolve some of the problems revealed by focusing on the political and public interaction between men and women. However, this does not mean that it is the inevitable legal context for the entire endeavor of restructuring the legal position of women in the family or in their roles as Mother. Within the family, women are not only wives or partners, but also Mothers, and it is this

26. The opportunity to define the significance of difference should be a welcomed one. The traditional legal discourse about motherhood exemplified and reinforced patriarchal values—it was the patriarch who initially defined Mother. Removal of the patriarchal definition is necessary, but the institution must then be redefined and a non-patriarchal discourse must replace the discredited one.

latter role, in particular, that continues to bear gendered consequences and expectations.

In an earlier work, I argued for the concept of “gendered lives” in order to legitimate differences based on women’s perspective. In a world in which gender is more than semantics, feminist legal theory *cannot* be gender-neutral, nor can it have as its goal equality, in the traditional, formal, legal sense of that word.²⁷ Addressing the material consequences of women’s gendered life experiences cannot be accomplished by a system that refuses to recognize gender as a relevant perspective, thereby imposing “neutral” conclusions on women’s circumstances. Women’s existences are constituted by a variety of experiences—many of them gendered. The potential for reproductive events such as pregnancy, breast feeding, and abortion certainly have an impact on women’s constructions of their gendered lives.²⁸

This concept of gendered life is my attempt to create a vehicle for arguing that a concept of differences is necessary to remedy harms to women. There are totalizing social and legal constructions that do not conform to our experiences or our needs as mothers. The concept of a gendered experience is an attempt to simultaneously open a space for women’s perspective in law, as distinct from men’s, while providing the occasion for unity among women over some specifics of their lives. Attention to the force an imposed—and in that sense, “common”—socially constructed concept of neutered motherhood exercises upon aspects of all mothers’ lives presents an opportunity for participation by diverse women in resisting that imposition.

Women can coalesce across differences to work together on the project of defining for ourselves the implications and ramifications of this gendered aspect of our lives. Women have an interest in the institution of Mother—how it is understood and given social and legal significance. Therefore, women have a basis for cooperation and empathy across their differences. The experience of struggling with the unreality of the idea of a neutered Mother provides the potential for this cooperation and empathy.

The recognition that women now face an inappropriately neutered concept of Mother reaffirms that the struggle over content and meaning in law is inherently political and that perspectives count. Any focus on perspectives that asserts as a basic premise that there

27. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 535-41 (1982) (discussing feminism as “the theory of women’s point of view” and human sexuality as a gendered experience).

28. Martha A. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 *FLA. L. REV.* 25 (1991).

are significant differences between women and men which must be addressed in law is fraught with potential pitfalls. On the other hand, given that male defined and controlled notions of law systematically disadvantage women in a variety of contexts, it seems essential that legal feminists affirm the need for law to respond to what women experience in their gendered lives. Adopting Mother's perspective will, of necessity, call into question the very core of patriarchy and force us to consider how the institution of Motherhood should be defined.