Multiple Voices as a Means to Legal Reform (A Response to Martha Fineman)

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It may be useful to identify the many matters about which, I believe, Martha Fineman and I agree in order to delineate more precisely our areas of disagreement.

Fineman, for example, does not appear to question my historical periodization. She seems to accept my findings that the 1920s and 1930s were decades of legal enforcement of conventional morality; that the 1940s, 1950s, and 1960s were a time in which the law grew more permissive toward male sexual freedom and excess; and that in the 1970s the trend toward ever-expanding freedom was, in general, stopped and sometimes even reversed, as feminists began to articulate the harms to which excesses of freedom led. It is significant that Fineman does not question this doctrinal description of the "evolving eras of judicial action and reaction."[1]

Instead, Fineman looks for disagreement by focusing on my "choices of both subject and language," on the "tendencies of selection, omission, and nuance" that shape my essay, and on "a consideration of the interstices of [my] language" (p. 346). She finds that my refusal explicitly to position myself within the range of normative scholarship addressing the subjects considered historically in my essay[2] results in a narrative that is ambiguous and confusing. As is suggested by her choice of subtitle—"The Plot Might Change but the Message Remains the Same"—Fineman assumes that my lack of overt support for feminist normative positions amounts to a reactionary rejection of them.

In fact, I have great sympathy for them. I totally agree with the fact observed by feminist scholars that the sexual freedom which judges legitimated in mid-twentieth-century New York frequently resulted in "The

1. Martha Albertson Fineman, *Gender and Sexual License: The Plot Might Change but the Message Remains the Same (A Response to William Nelson)*, 5 YALE J.L. & HUMAN. 343, 349 (1993). Subsequent citations will be made parenthetically in the text.

2. I have always assumed that historians should strive to avoid taking normative stands on the subjects they are investigating. While I recognize that such striving cannot result in writing that is perfectly neutral and objective, it can facilitate inquiry into the complexities and nuances of the past which more partisan history might easily overlook.

Victimization of Women."[3] Like Fineman, I do not believe that American society during the 1950s and 1960s was marching toward a utopia of "ever-expanding notions of sexual freedom and individual autonomy" until the "radical intervention" of feminists interrupted the march (p. 344). I do not view the shift from the repression of the 1920s to the sexual libertarianism of the 1960s as a sign of progress, nor am I shocked by the feminist reaction that occurred during the 1970s.

I also agree with a central methodological point that Fineman makes. Like all other intellectual constructions, my essay is a self-consciously structured exercise in interpretation. I make no claim for its perfect neutrality or total objectivity, but only for its creative originality and faithful adherence to the sources.[4] I have no doubt that Fineman would have constructed an essay completely different from the one I wrote. My essay, like any that she might have decided to write, was profoundly affected by the source materials I decided to examine and the questions I chose to ask.

I disagree with Fineman, however, when she takes me to task for failing to explore the problematic character of gender and sexuality as categories. While I have never doubted the value of scholarship that analyzes the social construction of gender and sexuality and thereby shows how "women and men experience sexuality as well as other social and cultural events differently" (p. 344 n.5), I did not choose to write on that topic. My essay is part of a larger project about the history of legal doctrine in twentieth-century New York, not about gender and sexuality. In my larger project, I hope to examine how particular legal developments fit within a broader doctrinal mosaic and ultimately to relate the entire mosaic, and not simply the particular narrow doctrines, to broader social and cultural developments. I believe that this is an important and legitimate approach to legal scholarship and one that can provide valuable insights into law and legal development.

Indeed, I believe that my essay offers an important insight diametrically opposed to the conclusion of Fineman's critique. In that conclusion, Fineman ranks as more important than any other issue the question of "[w]ho in this society gets to define" the bounds of the law (p. 349). In contrast, I believe that the principles and standards which underlie decisions are typically more important than who makes the decisions.

By her emphasis on who gets to decide, Fineman falls into the same trap that ensnared the radical feminists of the 1970s. Either women must make decisions or men must make them. Whoever makes decisions will

3. Indeed, I used this language for the title of the section beginning on p. 310 of my article. *See* William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 310 (1993).

4. I have elaborated my understanding of the nature of historical knowledge, with which I understand my statement in the text to be consistent, in William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1250-59 (1986).

exercise control over the lives of those for whom the decisions are made, and in the absence of principled standards limiting what decisions can be made, control will quickly turn into domination. In the world of the 1950s and 1960s, when men had control over most decisions and the ruling ideology favored freedom over limitation, men dominated and victimized women.[5] Similarly, in an imaginable world in which women make most decisions in pursuit of a goal of forcing "men . . . to renounce their phallocentric personalities . . . [and] to excise everything in them that they now value as distinctively 'male,' "[6] women will dominate and, if their power is not subject to principled limitations, victimize men.

There is, of course, little reason for serious concern that women as a group will dominate and victimize men as a group in the immediate days to come. But that is precisely the problem. If what is centrally at stake in regard to the issues discussed in my article is whether women or men should have ultimate decisionmaking power, there is every reason to expect that ancient patterns of male domination will continue. The scholarship of 1970s feminists, establishing (among other things) that women experience sexuality and other cultural and social events differently than do men, was enormously important in demonstrating that sexual freedom for men entails expense for women. This feminist scholarship made male freedom seem less free and hopefully also made it less likely to be abused. Because many men do not yet appreciate how their sexual expression can hurt women, the feminist perspective bears repetition.[7] But once everyone understands that freedom for anyone inevitably imposes costs on others, a focus on the question of who should be given the power of decision provides no basis for deciding anything, including the question of who should decide. And there is every reason to expect, if my tentative insights into the legal history of twentieth-century New York survive in the final publication of a book, that the lack of a basis for decision will result in indecisive efforts at reform and hence in the retention of power by those who now hold it.

I have already done enough work to anticipate one of the book's major themes: fundamental legal change occurred in New York between the late 1930s and the early 1960s when New Yorkers shared a cohesive ideology; but in the decades thereafter, when the state's pluralism produced a cacophony of voices and perspectives, government and law slowly withered as effective vehicles for social change. With the withering of

5. In the 1920s and 1930s, when accepted ideology counseled sexual restraint instead of freedom, men still made most decisions and thereby dominated women, but women were probably less often victimized.

6. ANDREA DWORKIN, OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS 13 (1976), *quoted in* Nelson, *supra* note 3, at 320.

7. For like reasons, an emerging realization that granting new rights to women often entails real expense for men will also be repeated with increasing frequency in the years to come. In a world of multiple voices and perspectives, men too will begin to speak of the costs they bear.

government and law, the wealthy and powerful gained enhanced practical freedom to pursue their self-interest—a pursuit that, as Fineman fully appreciates, has devastated those with neither wealth nor power.

I join with Fineman in deploring the devastation to which the law concerning sexual expression led in the 1950s and 1960s. Like her, I have no wish to revive that law. I even agree that her "aspirations toward . . . destabilization" (p. 344) can sometimes serve as a useful first step toward reform. But once destabilization begins to undercut the law's capacity to promote social change rather than its capacity to preserve social order, destabilization serves no further purpose for reformers. Those who want change must then focus their energies not on creating multiple perspectives and on internecine battles about whose perspective should govern, but on working collaboratively to create a widely shared ideology which, like that of the mid-twentieth century, holds genuine transformative potential.