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Anita Bernstein

*Brooklyn Law School*, [anita.bernstein@brooklaw.edu](mailto:anita.bernstein@brooklaw.edu)

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## QUESTION AUTONOMY, WITH AN ASTERISK

Anita Bernstein\*

Old-school baseball fans don't remember Roger Maris much for the sixty-one home runs he hit during the 1961 season, breaking a record held by Babe Ruth. We know that 61 got blown away years ago; most of us seldom look back. Nor do we care about the standout season Maris had the prior year when, newly arrived in the Bronx, he was named American League MVP and led the league in RBIs and extra-base hits. No, we remember Roger Maris for something bad—almost tragic—that he never even really had, the poor guy. His asterisk.

The asterisk story may be familiar. Babe Ruth had hit sixty home runs in 1927 when the baseball season had contained 154 games. In 1961, Maris was playing in a 162-game season. By July of that year it became evident that Maris, along perhaps with Mickey Mantle, just might smash what Ruth had built. Baseball commissioner Ford Frick perceived a threat to hallowed ground. "Any player who may hit more than 60 home runs during his club's first 154 games would be recognized as having established a new record," he declared at a press conference on July 17.<sup>1</sup> "However, if the player does not hit more than 60 until after his club has played 154 games, there would have to be some distinctive mark in the record books to show that Babe Ruth's record was set under a 154-game schedule."<sup>2</sup> As the assembled reporters absorbed Frick's announcement, New York Daily News columnist Dick Young called out from the floor, "Maybe you should use an asterisk on the new record. Everybody does that when there's a difference of opinion."<sup>3</sup>

Like Martha Fineman contemplating autonomy at this Symposium, journalist Allen Barra found a myth when he contemplated the Maris asterisk. Some contemporaries suspected that Frick and Young staged their colloquy. Frick's proclamation notwithstanding, there were no authoritative "record

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\* Sam Nunn Professor of Law, Emory University School of Law. Thanks to my generous colleagues Marc Miller and Tom Arthur, who shared their stimulating thoughts about baseball records and social foundations while this Essay was underway, and to John Witte for his leadership in arranging this Symposium.

<sup>1</sup> Allen Barra, *The Myth of Maris' Asterisk*, SALON.COM, Oct. 3, 2001, LEXIS, All News File.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

books" in baseball back in 1961; publishers, all unofficial, called the seasons' facts as they saw them. These publications never questioned the validity of what Maris achieved. "Today," concluded Barra in 2001, "there is no more question that Roger Maris held the record for home runs in one season from 1961 through 1998 (when Mark McGwire set the new record) than there is that Hank Aaron surpassed Ruth's career record for home runs."<sup>4</sup> And oh yes, but for the casual utterance of Dick Young, there never was an asterisk.

A myth, according to Professor Fineman, "may not present a strictly accurate historical account of the past, but it preserves the significance of the event."<sup>5</sup> Telling the Maris story using Fineman's words, one might say that a strictly accurate historical account would simply have crossed out "Ruth, 60, 1927" and substituted "Maris, 61, 1961." The mythical asterisk "preserves the significance of the [Maris] event"—a transgression, an overstepping of bounds.

Because it had no literal existence, the asterisk on Maris could never be wiped away.<sup>6</sup> It has proved more enduring than the 1961 personnel. Ford Frick, known for little beyond the Maris mess, called his autobiography *Games, Asterisks, and People*.<sup>7</sup> Unlike Henry Aaron, who also suffered for daring to outdo Babe Ruth,<sup>8</sup> Roger Maris was never able to transcend a bitter feeling of opprobrium. "They acted as though I was doing something wrong, poisoning the record books or something," Maris said at the 1980 All-Star Game.<sup>9</sup> He went to his grave five years later, still a victim of what Barra called the biggest myth in baseball (the runner-up myth being that Abner Doubleday invented the game).<sup>10</sup>

Barra wrote his article about the asterisk myth shortly after several sports writers had started muttering about giving away a few more baseball asterisks, after concluding that the 1998 home run records rested on a bed of cork and

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<sup>4</sup> *Id.*

<sup>5</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 13 (2004).

<sup>6</sup> Barra, *supra* note 1 ("The fact that it never really existed in the first place has made it impossible to kill the myth of the asterisk, which it appears will be with us at least for another generation . . .").

<sup>7</sup> FORD C. FRICK, *GAMES, ASTERISKS, AND PEOPLE: MEMOIRS OF A LUCKY FAN* (1973).

<sup>8</sup> Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287, 293 (1996) (citing HENRY AARON, *IF I HAD A HAMMER* 230–38 (1991)).

<sup>9</sup> Barra, *supra* note 1.

<sup>10</sup> *Id.* The *New York Times* recently published a front-page story about baseball's origin myths, noting that at the turn of the twentieth century, A.B. Spalding, the sporting goods entrepreneur, manipulated a commission report "to ensure the sport had, in his words at the time, 'an American dad.'" Bill Pennington, *Baseball's Origins: They Ain't Found Till They're Found*, N.Y. TIMES, Sept. 12, 2004, at 1. Not only did Abner Doubleday not invent the game; he might never have even set foot in Cooperstown. *Id.*

steroids.<sup>11</sup> Contemporary critics have proposed extending the asterisks to a few 1990s sluggers in particular: Sammy Sosa, Mark McGwire, and (especially) Barry Bonds.<sup>12</sup>

At this point, I can envision someone like Martha Fineman, who cares little for baseball but feels passionately about racial justice, wondering about baseball's more important asterisk—the boost that white players (and, more recently, immigrants of color) have received at the expense of African Americans. The game did not become integrated until about fifty years ago. How about an asterisk for Ty Cobb, Lou Gehrig, Walter Johnson, and others, including the Bambino himself, for excelling against competitors who would have played in the minor leagues where they belonged but for the boost of racism? Let us save a few asterisks for post-Jackie Robinson white ballplayers: In 1997, a New York Times editorial reported a study finding “that black players had to out-hit and out-pitch white players by substantial margins just to remain in the game.”<sup>13</sup> Moreover, white players “could have long, profitable careers as journeymen, then coaches. For African-Americans,

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<sup>11</sup> See, e.g., Tim Dahlberg, *An Asterisk for Big Mac?*, SEATTLE POST-INTELLIGENCER, July 1, 2004, at D6, LEXIS, All News File; Scott Puryear, *Herzog Says Drug Use in Baseball a Problem*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), May 1, 2004, at D1, LEXIS, All News File (proposing a “BS” in record books for achievements made before steroids, and “AS” thereafter). Even Henry Aaron, a man with a reputation for high moral rectitude, told a reporter in 2004 that had they been available, steroids would have tempted him in his playing days. Terence Moore, *Aaron Calls upon Players To Protect the Game*, ATLANTA J.-CONST., Apr. 1, 2004, at D1. Aaron played at 6 feet, 180 pounds: “Now such dimensions are closer to those of your average bat boy.” *Id.*

<sup>12</sup> One journalist complained that African-American Barry Bonds received an unjustly large helping of the steroid-asterisk criticism, in contrast to his European-American competitor Mark McGwire:

It's curious considering that Bonds has been clobbering home runs for years. That he's a 12-time all-star and a six-time National League MVP with a lifetime batting average of .298.

Then I think about Mark McGwire—Mr. Andro himself—and suddenly, I'm not curious anymore.

Where was everyone in 1998, when McGwire forgot to stuff the dietary supplement androstenedione in a drawer instead of leaving it out for a reporter to spot? Where was the uproar in the weeks that followed when he was exposed as a steroid user?

Who was talking about his legacy? What people would think of him in 25 years? His 70 home runs, which broke Roger Maris' record of 61 set in 1961? Who even thought about an asterisk being placed next to his name?

“I did! I did!” someone undoubtedly is yelling.

Well, then: Stand up and yell it again. Maybe then Bonds will get a fair shake.

Stephen A. Smith, *Turn the Pointing Finger from Bonds to McGwire*, PHILA. INQUIRER, Apr. 14, 2004, at F1. On racial patterns of asterisk distribution, see *infra* notes 13–15 and accompanying text.

<sup>13</sup> Brent Staples, ‘A White Man’s Place To Be’: *Race in Baseball Since Jackie Robinson*, N.Y. TIMES, Apr. 8, 1997, at A14.

it was play, then get lost.”<sup>14</sup> The study “also found that black players were steered out of so-called ‘thinking’ positions—pitching, catching, the infield—into ‘athletic’ positions in the outfield.”<sup>15</sup> For example, when I was reading newspapers online on the morning of this Symposium in March 2004, I learned how many African Americans would be American League starting pitchers in the new season: one.<sup>16</sup> How about giving asterisks for undeserving white men in the infield? Or should we save the stigmata for later, when they claim their racial set-asides—their jobs as coaches or in the front office—upon retirement?

The baseball penchant for resorting to quasi-scientific data to explain the rewards that it bestows—mere adulation in the past, and notorious salaries of late—exemplifies an American, or maybe Calvinist *manqué*, belief that prosperity derives from hard work and individual talent bestowed before a person is born. Nobody ever asked legendary misanthrope Ty Cobb to smile and tip his cap to the unnamed players who toiled in the Negro Leagues where they could not compete for official statistical glory and who, but for racism, would have made his job harder. Along with some other groups of successful Americans, the thriving ballplayer is seen as autonomous. Favored yet self-reliant, author of his own greatness, a contrast to the weaker beings who cannot live without care, he gave birth to his own luminescent self.

In her contribution to this Foundations of Law Symposium, *The Social Foundations of Law*, and its predecessor, *The Autonomy Myth*, Martha Fineman makes reference to this American myth about autonomy. Fineman links autonomy to notions of “economic self-sufficiency and a sense of separation from others in society.”<sup>17</sup> Autonomy, she elaborates, “is synonymous with a concept of self-governance and is characterized by self-sufficiency and independence—individual qualities that are seen as prerequisites for individual freedom of will and action.”<sup>18</sup> The autonomy myth, Fineman argues, makes people suffer. Everybody gets hurt, of course, because no human being can measure up to an ideal of perfect autonomy. But

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Gordon Wittenmyer, *Decrease in African Americans in Baseball Has Officials Puzzled, Concerned*, ST. PAUL PIONEER PRESS, Mar. 24, 2004, LEXIS, All News File.

<sup>17</sup> FINEMAN, *supra* note 5, at xvi. Other feminist explorations of autonomy take less direct interest in economic self-sufficiency, focusing more on consciousness and the effects of social influences on identity. See DIANA T. MEYERS, SELF, SOCIETY, AND PERSONAL CHOICE (1989); Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999). In this Essay on Fineman’s work, most of the time I refer to “autonomy” as Fineman uses it.

<sup>18</sup> Martha Albertson Fineman, *The Social Foundations of Law*, 54 EMORY L.J. 201, 224 (2005).

the people hurt the most are those whose daily lives express a refutation of the ideal:

In current U.S. free market ideology, absent discrimination or some other distortions of the market, any regulatory action by the state designed to confer more than neutral process in order to help some individuals or groups is susceptible to being interpreted as an intrusion on the autonomy of others. This interpretation results regardless of how desperate and (therefore) unequal the circumstances of those the state is seeking to assist or how privileged and (therefore) unequal the position of those who seek to shield themselves with autonomy's mantle.<sup>19</sup>

By the stern reckoning of this myth, entire classes of people—among them children, the disabled, the ill, and the frail elderly—become social pathologies rather than full human beings. Mothers who forswear the labor market to care for their children appear to do nothing; if non-autonomous people are invisible, then these women look like parasites. Along the same lines, people who care for others' children or the elderly, whether as a source of livelihood or for non-cash recompense, are also doing something close to nothing—and so they need not receive a living wage, the chance to form a labor union, or a modicum of social status. Workers are free to quit: when they stay, we know they must be content (enough) with their job conditions, and so there is no need for employment reform. All who are economically deprived—and are also deprived of the nonpecuniary social gains that go with having money—must have chosen freely to land in their straits.

Quite a lot of pain here. According to Fineman, this pain is not inevitable, and people do not need to endure it with stoic resignation. Instead, Fineman argues that the autonomy myth is a social construct that entrenches privilege for a few at the expense of multitudes. If this critique is right, then progress-minded citizens ought to reject the premises of the autonomy myth, condemn its effects, and uproot the paths it has laid down for us to follow.

Endorsing most of this critique of the autonomy myth, I argue in this Essay that to focus on the myth's victims, as Fineman does (insightfully), while not looking at its beneficiaries, misses a valuable portion of the challenge.<sup>20</sup>

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<sup>19</sup> *Id.* at 223.

<sup>20</sup> One article that serves as precedent for this kind of "positive thinking" from an area of interest to Fineman—judicial and legislative approaches to problems of asset division after divorce—is June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990).

Fineman does not much question the beneficiaries' autonomy. She writes that "[w]hile some, having benefited by history and circumstances, may have the current means and methods that make it fair to expect them to achieve autonomy, others have been disadvantaged and are deserving of some compensatory or supplementary societal support."<sup>21</sup> I reach a similar conclusion but concede less, and wonder whether the "means and methods" folks have been kidding themselves. In calling them autonomous, Fineman too politely looks away from the featherbed on which they repose. Who ironed that shirt they are wearing? Have they scoured their own toilet bowl lately? They do pay cash, I admit, for most of the personal services they receive—but how did they get that cash, and where would they be without the telephony, roads, electrical grids, government subsidies, and other unearned endowments that support them?<sup>22</sup> To describe those who benefit from the autonomy myth, I use a figurative asterisk as shorthand for the unearned boons that almost all Americans possess (to grossly varying degrees, of course) in comparison to other human beings around the world. Seen this way, the autonomy myth not only increases pain, as Fineman has documented; at one level even worse—worse, because this harm is harder to see and hence harder to cure—it unjustly enriches.

Questioning autonomy with an asterisk might help the political case for redistribution of wealth and income. Might: a faint chance. Maybe it won't help. But the case is faring so poorly that it cannot be a chooser, dismissing out of hand an offer of prospective rhetorical advantage.<sup>23</sup> Without an asterisk, the Emma Lazarus people whose cause Martha Fineman has taken up—the tired, the poor, the huddled masses presumed yearning to breathe free, and the wretched refuse—look like beggars.<sup>24</sup> Signifying unjust enrichment, an asterisk reveals that those from whom the subjugated appear to seek a handout did not earn what they have. We are all welfare queens now.

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(describing a system of alimony that grounds a spouse's claim to financial support in restitution, or unjust enrichment to the richer spouse, rather than compensation to the poorer spouse for past labors).

<sup>21</sup> Fineman, *supra* note 18, at 227.

<sup>22</sup> See Anita Bernstein, *Engendered by Technologies*, 80 N.C. L. REV. 1, 75 (2001) (adverting to subsidies for high tech that the industry ignores or denies, and citing PAULINA BORSOOK, *CYBERSELFISH: A CRITICAL ROMP THROUGH THE TERRIBLY LIBERTARIAN CULTURE OF HIGH TECH* 20–21 (2000)).

<sup>23</sup> On the uphill nature of the battle, see John Powers, *Children of Paradise*, L.A. WKLY., July 11–17, 2003, at 16, 16 ("Marx famously declared that the ruling ideas of any age are those of its ruling class, and it comes as no surprise that conservative intellectuals are currently crafting the Winners' postmillennial ideology, from arguments for militarism to defenses of high-end consumerism.").

<sup>24</sup> See Emma Lazarus, *The New Colossus*, reprinted in *EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE* 48 (Morris U. Schappes ed., 1967).

## I. THE ASTERISK IN CONCEPT

Political liberalism holds that in all societies that reveal significant disparities of wealth, the material conditions that individuals enjoy can be attributed only weakly or partially to their efforts or deserts. One could site this liberal view in between two extremes on a continuum. Complete contempt for private property would stake out a hypothetical far left wing; at that endpoint, no individual would ever own or earn anything. On the other endpoint, the far right, an exaggerated version of "autonomy" reigns. Individuals acquire goods either through the market or through voluntary transfer—or else fail to do so—all by themselves. They owe nobody any thanks. At some level these people do not even have parents.<sup>25</sup> Because of the sacrosanct status of their property rights, the state must refrain from taxing them or redistributing their wealth.

No contemporary society with any commitment to the rule of law follows either extreme; policymakers in economically advanced nations land somewhere in a liberal middle.<sup>26</sup> To the extent that their choices reflect more than mere expediency or cynicism, these governments have decreed that certain instances of disparity must be left where they lie because particular individuals have, by conclusory hypothesis, earned their measures of success and failure, while other instances of disparity should be remedied by state-mandated redistribution. Under the contemporary rule of law everywhere, the right to keep one's property exists, but is partially defeasible.<sup>27</sup>

This liberal consensus deems it not wrong—not unlawful expropriation, not "theft"—for the state to take money from one citizen and give it to another. John Rawls and other theorists laid the philosophical foundations under this judgment. Rawls established that a less prosperous individual may have a justice-based claim for resources against a state.<sup>28</sup> In response to the

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<sup>25</sup> See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 9 (1989) (arguing that a typical theory of justice will use as its starting point "mature, independent human beings" without inquiring about their parents who reared them, or what they learned about justice in their early childhood from observing relations between their mothers and fathers).

<sup>26</sup> Fineman, *supra* note 18, at 213–22.

<sup>27</sup> Cf. *id.* at 208 (noting that the liberal position "still concedes the fundamental distinction between public and private"); see also Christopher Jencks, *Does Inequality Matter?*, *DAEDALUS*, Winter 2002, at 49, 65 ("All things considered, the case for limiting inequality seems to me strong but not overwhelming. That is one reason why most rich societies are deeply divided about the issue.").

<sup>28</sup> See, e.g., T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 8 (1992); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *THEORY OF JUSTICE*]; JOHN RAWLS, *POLITICAL LIBERALISM* 294–99



libertarian notion that state-mandated economic equality is contrary to freedom,<sup>29</sup> an opposite contention—that *inequality* is contrary to freedom—is also plausible: “[S]ome degree of equalization of resources, so that there is a floor below which no citizen shall fall, would seem to be a prerequisite for the achievement of autonomy.”<sup>30</sup> Moreover, prosperous individuals may be better off when all of their fellow citizens enjoy a decent minimum of safety and material well-being.<sup>31</sup> The liberal consensus also agrees that certain types of detriment that individuals suffer cannot be linked to their shortcomings—one clear example, discussed in this Symposium by William Carney, is the poverty of poor children<sup>32</sup>—and thus punishes people who have done no wrong. This detriment ought to be assuaged. The price might not be too high: Divergences in utility curves among individuals suggest that a dollar here, for the poor, can do more good than a dollar there, for the rich.

Other rationales for redistribution abound, all of them sharing a common perspective on the human being: Individuals can move from circumstance to circumstance independent, at some level, from their surrounding conditions. In response to the market, or the state, or pure happenstance, the rich can become poor and the poor can become rich. The famous veil of ignorance that Rawls proposed in *A Theory of Justice* invites readers to imagine themselves in unfamiliar straits. Rawls started with a premise that each person holds an

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(1993). For a synthesis of Rawls on this point, see Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 550–55 (1994). For elaboration, arguing that Rawls equivocated on exactly what the poor have coming to them in transfer payments and whether they owe the state work in return, see Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 36–40 (2003) (“Rawls cast aspersions on the suggestion that a basic income guarantee is required by, or even consistent with, principles of justice.”).

<sup>29</sup> E.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). For elaboration in this Symposium, see William J. Carney, *Martha Fineman: On Feminism, Politics, and Rhetoric*, 54 EMORY L.J. 261 (2005).

<sup>30</sup> Fineman, *supra* note 18, at 227.

<sup>31</sup> Some evidence suggests (but only weakly) that among nations, longer life expectancy, self-reports of happiness, and other indicators of well-being correlate with the prevailing degree of economic equality. For a careful review of this record, see Jencks, *supra* note 27. See also Stephen Bezruczka, *Culture and Medicine: Is Globalization Dangerous to Our Health?*, 172 W. J. MED. 332, 332 (2000) (“Many recent studies show that populations with a greater income hierarchy are less healthy, and specifically have shorter lives, than populations that are more equitable.”). Even if the rich minority can buy shelter from the harshness that characterizes life for the majority—such as fancy medical treatments and pleasurable recreation—the rich minority group might rationally prefer some equalization as a source of goods for itself. Equalization could lead to benefits such as, for example, new customers who can afford what the wealthy minority wants to sell, relative safety from violent crime, reduced vulnerability to infection and contagion from the majority, and a productive labor pool.

<sup>32</sup> Carney, *supra* note 29, at 267–68.

identity distinct from biographical particulars.<sup>33</sup> This vision of the individual encompasses autonomy and counter-autonomy. On one hand, each person is unique, irreducible, and transcendent; this center underlies her prerogatives or rights, and her chance to pursue self-sufficiency. On the other hand, each person holds a mix of material endowments that she did not acquire by desert and that can change in response to forces beyond her control.

A metaphorical asterisk makes reference to both of these elements, acknowledging both autonomy and counter-autonomy. Recall the Roger Maris myth. Baseball's home-runs-per-season record was broken in 1961—as nobody, not even Ford Frick or Dick Young, can deny. Resembling another athlete who won a new round of fame in political philosophy, the Wilt Chamberlain character in *Anarchy, State, and Utopia*,<sup>34</sup> Maris earned his money and acclaim through talent and labor. Number 61 is his. But so too, alas, is number 61\*. Number 61 says, in effect, “Maris did it and he earned it; he exceeded everyone who came before him, including Babe Ruth.” Number 61\* says, “He broke the record, but with the help of extra at-bats in a season that had eight extra games. He didn’t earn it all.”

To continue the illustration, here is a mawkish piece of electronic flotsam that landed in my inbox a year or so ago. Perhaps you received it too. I reprint it all, even the silly bits at the end:

If you have food in the refrigerator, clothes on your back, a roof overhead and a place to sleep . . . you are richer than 75% of this world.

If you have money in the bank, in your wallet, and spare change in a dish someplace . . . you are among the top 8% of the world's wealthy.

If you woke up this morning with more health than illness . . . you are more blessed than the million who will not survive this week.

If you have never experienced the danger of battle, the loneliness of imprisonment, the agony of torture, or the pangs of starvation . . . you are ahead of 500 million people in the world.

If you can attend a place of worship without fear of harassment, arrest, torture, or death . . . you are more blessed than three billion people in the world.

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<sup>33</sup> RAWLS, *THEORY OF JUSTICE*, *supra* note 28, at 11. Elsewhere I have expressed qualms about Rawls's position on individual identity behind the veil of ignorance and noted similar qualms about it in feminist thought. See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 468 (1997). Here, however, I will accept it uncritically.

<sup>34</sup> NOZICK, *supra* note 29, at 161–63.

If your parents are still alive and still married . . . you are very rare, even in the United States.

If you hold up your head with a smile on your face and are truly thankful . . . you are blessed because the majority can, but most do not.

If you can hold someone's hand, hug them or even touch them on the shoulder . . . you are blessed because you can offer healing touch.

If you can read this message, you just received a double blessing in that someone was thinking of you, you are wealthy enough to have an internet connection and power on, and furthermore, you are more blessed than over two billion people in the world that cannot read at all.

Have a good day, count your blessings, and pass this along to remind everyone else how blessed we all are.<sup>35</sup>

Taking offense, or hitting Delete, in response to this message would have been fair enough. No need to tell us recipients to appreciate the fact that we can touch someone's shoulder. Quantitative claims would have been more convincing if they had had citations attached. The assertion that married parents are better than unmarried parents is simplistic at best.<sup>36</sup> Quasi-religious references to "blessed" and "blessings," which imply that a deity has smiled on the reader while withholding good things from other people, lack foundation. Those who will survive this week are not in a position to thank anyone; they do not yet know their happy fate, even if they are among those with "more health than illness." The final exhortation to spam "everyone else" I know with a copy of the message, I didn't even consider heeding.

All that said, the anonymous author of this declaration and the chain of fellow emailers who presumably endorsed it when they sent it my way conveyed a point about distributive justice, not just impertinent advice to count blessings: Unless the favored can get away with claiming that their largesse comes from supernatural design and intervention—a bit of rhetoric that John "God Gave Me My Money" D. Rockefeller made infamous<sup>37</sup>—they cannot expect anyone to believe that they have earned or deserved what fills their coffers. The late humorist Quentin Crisp made the same point: "I don't expect

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<sup>35</sup> Email to Anita Bernstein, Emory University School of Law (Oct. 30, 2003) (on file with the author).

<sup>36</sup> I briefly review the evidence in Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 183–85 (2003).

<sup>37</sup> See Jackson Lears, *Capitalism, Corrected and Uncorrected: The Lobster and the Squid*, NEW REPUBLIC, Feb. 15, 1999, at 27, 28 (contending that there was no arrogance in Rockefeller's notorious "God gave me my money").

anything,” he used to declare. “People are always saying they’ve got rights. They don’t have rights. If we all got what we deserved we’d all starve.”<sup>38</sup> Let us now extend the point and think about the distribution of undeserved holdings.

As everyone reading this far knows, “we all” are not equally endowed. We received our asterisks in unequal measure, and this inequality is not randomly distributed. In the United States, our membership in various groups—not only the law-noted divisions of race, sex, class, ability versus disability, religion, and sexual orientation or perceived sexual identity, but also whether we find ourselves fat or thin, healthy or sick, tall or short, handsome or homely, urban or rural; which schools and other venues we can enter, and how polluted or unsafe these environments are; who our parents knew and what experiences we had as children; how much stamina and faith and humor starts our day—at least lines up with, if it does not determine, the quantity of privilege we enjoy. Some of our memberships are readily mutable, while others are almost impossible to escape. Like Maris’s eight extra ballgames in 1961, all are at least partially unrelated to our efforts or what we have coming to us in any secular or material sense.<sup>39</sup>

Once we are willing to put aside the supernatural—to doubt that God gave John D. Rockefeller his money—questions of distribution enter the political realm. References to “autonomy” open a conversation rather than end it.<sup>40</sup> Divergent opinions on how to carve a pie, it turns out, correspond with the aforementioned groups. In their varying endorsements of Martha Fineman’s “autonomy myth,” American recipients of undeserved largesse fall into what looks like a hierarchy. Evidence suggests that white American men unmarked by minority status—the beneficiaries at the apex of a pyramid, who were handed the most goodies—tend to savor the autonomy ideology that celebrates them as self-made and fully entitled to keep what they have. Lower down in

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<sup>38</sup> Leah Garchik, *Upon a Star: What Do Gays Want, Anyway?*, S.F. CHRON., Mar. 24, 1993, at B5 (quoting Quentin Crisp).

<sup>39</sup> This footnote could go on and on. For a one-stop citation, see Don Bauder, *Income Inequality Is Raging, but the Poor Aren't*, COPLEYS NEWS SERVICE, Dec. 1, 2002, LEXIS, All News File (referring to a study by a Federal Reserve Bank of Chicago economist showing that about 60% of the income gap in one generation passes to the next generation).

<sup>40</sup> Consistent with Fineman’s claim that autonomy is a myth, Professor Cass Sunstein has used the word “[not] prepolitical” to describe certain rights, notably property rights. See, e.g., Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 882 (1987) (arguing that the increased regulation of business championed by Roosevelt reflected the new understanding that laissez faire ideology was “state-created, hardly neutral, and without prepolitical status”).

the hierarchy, those who gain less from the concept of autonomy find the myth less enchanting.

A fat generalization, to be sure. I acknowledge the exceptions but note the pattern, which emerges in studies of how groups express their opinions about autonomy with reference to proposed government spending. Analysts parsing the 2000 presidential election returns and pre-vote polling, for instance, found that women favored Al Gore over George Bush in part because women "generally expect more from government"—government being the source of redistribution—and hoped to see more money spent on "domestic security" programs like education and health care.<sup>41</sup> A poll conducted in July 2004 found that 69% of African Americans said they wanted "a bigger government providing more services," a stance that only 40% of respondents (that is, all races together) favored, suggesting that a large majority of white Americans disagreed.<sup>42</sup> One study of several states found that female and minority legislators were more likely than male or white legislators to introduce bills pertaining to health, education, and child welfare, and that legislators' party affiliation did not affect these outcomes.<sup>43</sup> "The haves,"<sup>44</sup> it appears, possess not only wealth but also a strong belief that unredistributed distributions should remain where they are, and the political strength to entrench their vantage point.

Questioning this view of entrenched entitlement, I would nevertheless insist that autonomy is much more than a pernicious myth. Notions of autonomy stand against the tendency of governments to intrude and coerce. Fineman's copious references to international human rights acknowledge the point: Anyone who wishes to applaud, for example, the European Court of Human Rights' invalidation of Irish laws prohibiting same-sex sexual acts cannot move far from applauding something like autonomy.<sup>45</sup> True, one could

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<sup>41</sup> Chuck Raasch, *Democrats Rely on Support of Women*, INDIANAPOLIS STAR, Feb. 11, 2001, at B3.

<sup>42</sup> *BET/CBS News Poll of African Americans Finds Mistrust, Disenfranchisement Heading Into Elections*, PR NEWswire, July 21, 2004, LEXIS, All News File. To leave the United States for a moment, one might recall that when Thabo Mbeki, a politician averse to pandering, took office in South Africa following the first free elections that had enfranchised the black majority, his coalition increased government spending on health, education, welfare, and housing—a prudent but significant rise from 52.9% to 58.3% of the federal budget. *South Africa: Increased Funding Needed for Rural Poor—New Report*, AFR. NEWS, Feb. 4, 2004, LEXIS, All News File.

<sup>43</sup> *Female and Black Legislators More Likely Than Others to Prioritize Children's Health, University of Michigan Study Finds*, ASCRIBE NEWswire, July 14, 2004, LEXIS, All News File.

<sup>44</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

<sup>45</sup> Fineman, *supra* note 18, at 221.

strain to distinguish “autonomy” (the bad thing) from liberty or self-determination (hooray!) by attributing only financial separation from others to the former term and packing the latter with nonpecuniary ideals, but I think the effort would founder: What about civil-rights boycotts or refusals to visit as a tourist (or hold one’s lucrative convention in) a state with a hostile law on its books? What about the old trick of leaving a few generous bucks for the restaurant staff at truck stops and small towns along with a card that reads, “You’ve been tipped by a gay man, does that matter?”<sup>46</sup> That lower-income Americans give a large proportion of their income to charity shows not only their generosity in the face of adversity, and perhaps their religious devotion, but that poor as well as rich people enjoy the sensation of spending money as a way to express themselves. The “economic self-sufficiency and a sense of separation from others in society” to which Fineman has expressed aversion<sup>47</sup> can indeed be ideological obstacles to equality and decency, but they also help to protect individuals from group-based, government-sponsored tyranny. To question autonomy should not be to jettison it.

## II. THE ASTERISK IN PRACTICE

A hundred years ago Vladimir Lenin asked “the workers,” *What is to be Done?*<sup>48</sup> I quote the famous Bolshevik to honor Martha Fineman, who has never let her theories slumber on a bookshelf. She effects results, particularly in the field of family law.<sup>49</sup> Such achievements notwithstanding, the income inequality that Fineman deplores has been getting bigger, not smaller, in the years since her scholarly work first saw print. According to one leading measure, the Gini Index, the United States has the most extreme income inequality in the developed world.<sup>50</sup> Over the last twenty-five years the nation

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<sup>46</sup> Mike Dorning, *25 Years of Progress for Homosexual Rights: Bar Raid Started Movement*, CHI. TRIB., June 26, 1994, at 1.

<sup>47</sup> FINEMAN, *supra* note 5, at 4.

<sup>48</sup> Richard Pipes, *The Prince of Darkness*, L.A. TIMES, Nov. 19, 2000 (Book Review), at 6, 7.

<sup>49</sup> Fineman’s book *The Illusion of Equality* was at the center of divorce law reform, reconceiving postdissolution maintenance and child support. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991). Wisconsin law in particular bears her imprint. Judges regularly cite her writings in decisional law. For example, when Fineman testified as an expert at one of the biggest divorce trials of the 1990s (after an unsuccessful struggle by the other side to keep her off the stand), the judge recounted her testimony at length in his decision. See *Wendt v. Wendt*, 1998 Conn. Super. LEXIS 1023, at \*160 (Mar. 31, 1998).

<sup>50</sup> Nationmaster.com, Map & Graph: Economy: Distribution of Family Income—Gini Index, at [http://www.nationmaster.com/graph/T/eco\\_dis\\_of\\_fam\\_inc\\_gin\\_ind](http://www.nationmaster.com/graph/T/eco_dis_of_fam_inc_gin_ind) (last visited Mar. 8, 2005) (citing CIA World Fact Book, Dec. 2003).

saw its biggest rise in income inequality since the infamous Gilded Age, 1870–1910.<sup>51</sup> State officials have been calling their budgets squeezed for many years, and cutting welfare programs accordingly. In 1996, a popular Democratic president signed welfare reform legislation that rolled back, not expanded per Fineman's wishes, the New Deal era entitlement of income for families with dependent children.

In various nonpecuniary, unquantified ways, other developments of the last decade have heightened the harms of economic inequality. Expansions in television—including cable and new media like DVDs that make the screen more central to the American household—and the Internet now rub wealth gaps in the poor's face. The nation's legislatures have become more available to high bidders, shifting the focus of legislation to what benefits the rich. Media concentration of ownership has reduced the sunny side of autonomy—the pluralism and decentralization rightly applauded by libertarians like Friedrich Hayek<sup>52</sup>—and fostered homogeneity in its place.

In sum, the agenda that Fineman has highlighted in this Symposium—call it what you will: “progressive” policy, “redistribution of wealth,” “tax and tax, spend and spend” (my own favorite), “social justice,” “class warfare,” or “economic rights” à la T.H. Marshall—is in trouble. A crisis calls for new tactics. What is to be done? I urge readers to question autonomy.

It's a job for the asterisk. Whenever you, Gentle Reader, see wealth, power, and success accompanied by an absence of caregiving—when it appears that a favored individual lives far away from any hint of dependency—you might pause to look for his or her covert subsidies. Any achievement is admirable, one might agree, but the triumph would have been even more impressive absent the boosts that made it possible. Baseball players of the 1900s who surpassed sixty-one home runs per season were great—they thought hard, practiced hard, and battled tough pitching and fielding—but they also had unearned advantages that Maris lacked. Not just steroids, I mean: throw in videotape technology and computers to improve batting practice, the weightlifting machines, the ever-cited higher salaries, and the more sophisticated fan base (or was it a postmodern fan base, feeling no weight of history?) that could cheer their good work without fretting over some shadowy deceased record holder. Maris in turn was great, but he had his big unearned

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<sup>51</sup> Jencks, *supra* note 27, at 49.

<sup>52</sup> For general information on the views of Friedrich Hayek, see his biography at Friedrich August von Hayek, 1889–1992, at <http://cepa.newschool.edu/het/profiles/hayek.htm> (last visited Feb. 10, 2005).

advantage over the incumbent—that you-know-what boost, the eight games. As for Ruth himself, we probably would have heard of him even if racism never existed, but Babe Ruth would have reaped less reward if he had had to play against racially integrated opposing teams. Like the asterisks of baseball, subsidies underwrite individual achievement everywhere. Start with the current President of the United States: Texas populist Jim Hightower carried the baseball metaphor to its next application with an oft-repeated remark that George Herbert Walker Bush “was born on third base and thinks he hit a triple.”<sup>53</sup>

A related exercise for those who choose to question autonomy is to take another look at familiar epithets about its obverse, what Fineman calls “dependency.”<sup>54</sup> Dependent people “mooch,” profit from “the dole,” “ask for a handout,” exploit “welfare,” await “something for nothing,” and otherwise slouch through the vernacular of good things unearned. But so do all those asterisked persons celebrated for their autonomy. What is “school choice,” for example, if not “public money to private and parochial schools”?<sup>55</sup> Fineman’s “economic self-sufficiency” is a contradiction in terms, or a “myth,” because all things “economic” require markets, trades, prices, or tradeoffs—every one of them unattainable to an individual in isolation. But even if it were not a myth, the rich among us have not achieved it.

“Corporate welfare” offers a ready example of the asterisk at play.<sup>56</sup> Numerous writers have challenged the standard conceit of the business corporation as victorious on the laissez faire playing field.<sup>57</sup> One recent contribution called *Confessions of a Welfare Queen: How Rich Bastards Like Me Rip Off Taxpayers for Millions of Dollars*, published in the libertarian

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<sup>53</sup> *Corrections*, SLATE, July 30, 2004, at <http://slate.msn.com/id/2104547>. The remark has been misattributed to Ann Richards, whom George W. Bush defeated for the governorship of Texas in 1994. *Id.* Adam Gopnik updated the asterisk-like barb when bicycle taxis settled into New York in 2004, writing that “the thing about George W. Bush is not that he was born on third base and thinks he hit a triple. It is that he has been in a bicycle taxi all his life but has not yet bothered to notice that someone else is pedaling.” Adam Gopnik, *Social Mobility*, NEW YORKER, July 26, 2004, at 27, 28.

<sup>54</sup> FINEMAN, *supra* note 5 (subtitled her book “A Theory of Dependency”).

<sup>55</sup> Ellen Goodman, *The Return of Those Guys We Didn’t Like Last Time*, BALTIMORE SUN, May 23, 1995, at A13.

<sup>56</sup> Jacob Weisberg reports that Clinton cabinet member Robert Reich was the first person to speak of “corporate welfare,” in 1994. “The phrase was brilliant political jujitsu, turning the Republicans’ favorite issue against them.” Jacob Weisberg, *Corporate-Welfare NIMBYs*, SLATE, Feb. 16, 1997, at <http://slate.msn.com/id/2264>.

<sup>57</sup> For an example of this standard conceit—a no-kidding paean to the American corporation as source and beneficiary of freedom—see JOHN M. HOOD, *THE HEROIC ENTERPRISE: BUSINESS AND THE COMMON GOOD* (1996).



magazine *Reason*, begins with a boon that journalist John Stossel enjoyed.<sup>58</sup> Shopping for beachfront property in 1980, Stossel learned that the federal government would sell him a “dirt cheap” insurance policy, priced at a fraction of what any private insurer offered, guaranteeing to pay \$250,000 toward the rebuilding of his house in the event of a flood. “The National Flood Insurance Program is currently the biggest property insurance writer in the United States, putting taxpayers on the hook for more than \$640 billion in property,” much of it held in rich hands, Stossel adds.<sup>59</sup> Yes, Stossel bought the property along with the bargain policy; yes, a flood did destroy the house that Stossel built; yes, he collected from the National Flood Insurance Program.<sup>60</sup> Stossel then romps through farm subsidies that such stalwart farmers as Sam Donaldson, Ted Turner, David Rockefeller, and Scottie Pippen, along with many large corporations, have collected; ethanol subsidies for Archer Daniels Midland; and eminent domain schemes by which citizens pay to knock down houses at the command of big business.<sup>61</sup>

How about an asterisk to mark the \$15 billion airline industry bailout following September 11? At the end of 2001, freelance writer Mary Conroy posed a rude question:

Did anyone notice those planes weren’t very full? A total of 137 passengers flew in the planes that struck the World Trade Center Towers, when the planes had a combined capacity of 510. A total of 96 passengers flew in the other two planes, which had a combined capacity of 478.<sup>62</sup>

Of all the numerous individuals and sectors that suffered financially from the terrorist attacks, commercial airlines had no uniquely strong claim on taxpayer-funded welfare. They were not alone on the dole. Conroy reported an estimate from the Cato Institute that “corporate welfare (whoops, direct subsidies to business) from the federal government” would exceed \$87 billion by the end of the year.<sup>63</sup>

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<sup>58</sup> John Stossel, *Confessions of a Welfare Queen: How Rich Bastards Like Me Rip Off Taxpayers for Millions of Dollars*, REASON, Mar. 1, 2004, at 22.

<sup>59</sup> *Id.* at 24.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 25–28; see also *A Safety Net for Corporations*, ROANOKE TIMES & WORLD NEWS, Aug. 24, 1996, at A7 (referring to Colin Powell’s use of the term “the welfare kings on K Street,” which may have been too “inside-the-Beltway” to take off).

<sup>62</sup> Mary Conroy, *When Going Gets Tough, Bailouts Get Going*, CAPITAL TIMES, Dec. 5, 2001, at C10.

<sup>63</sup> *Id.*; see also Weisberg, *supra* note 56 (reporting an estimate of \$300 billion).

Perhaps it takes more bravery to note the asterisks that persons rather than unnamed corporations enjoy.<sup>64</sup> Editorialist Cynthia Tucker took on a smaller unit, one family in particular:

Newt Gingrich is on to something. The welfare state has produced lazy whiners with absolutely no sense of moral values. Headlines are dominated by sordid tales of their illicit sex and indulgences at the expense of taxpayers. If that were not proof enough of the failure of a system that rewards people for doing nothing, these coddled degenerates have the nerve to complain about their lot in life, as if the country owes them a living.

Those Windsors are a sorry bunch.<sup>65</sup>

Questioning autonomy with an asterisk can and should take place in the pages of a law review. One example to follow is Mary Davis's article about a decade of products liability decisions from the Supreme Court.<sup>66</sup> Davis had the straightforward thesis that this decisional law was too protective of corporate defendants, but she approached her argument at a slant: The article's title criticized "our culture of irresponsibility," a term more commonly favored by conservative scolds.<sup>67</sup> As Davis masterfully implied, immunities and other legal escapes that were pressed successfully on the Court, particularly in *Boyle v. United Technologies Corp.*,<sup>68</sup> leave products liability defendants in the same category as negligent or deadbeat parents, lazy workers, casually pregnant teenagers, dog-ate-my-homework students, and other irresponsible actors.

If the questioning of autonomy should succeed, then a less hypocritical and more humane public policy would become more attainable. Questioning autonomy blurs the phony lines between autonomy and dependence, economic self-sufficiency and economic dependency, and triumphant winners and sorry losers. Here are two hopeful predictions for the time after autonomy has been questioned: New ideas will emerge from the disempowered latter category,

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<sup>64</sup> See Weisberg, *supra* note 56 (using "NIMBY" to refer to a tendency to decry "corporate welfare" that others get, while favoring one's own).

<sup>65</sup> Cynthia Tucker, *The Land Where Welfare Queens Reign*, ATLANTA J.-CONST., Nov. 26, 1995, at D5.

<sup>66</sup> Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075 (1996). For more detail about my high regard for this article, see generally Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193 (2002).

<sup>67</sup> See WILLIAM J. BENNETT, THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS (1998) (decrying public acceptance of irresponsibility); Froma Harrop, *Rush Limbaugh vs. Doctor Laura*, J. COM., Aug. 2, 1996, at A7 (noting that Limbaugh and Laura Schlesinger "talk a great deal about personal responsibility").

<sup>68</sup> 487 U.S. 500 (1988).

and the advantaged former category will cooperate more with an agenda of redistribution.

On the first prediction, emphasizing the similarities between rich and poor—if undertaken seriously enough, as if we mean it—should give voice to disparaged people. Pelted by unremitting asterisks, the privileged would eventually stand exposed as beneficiaries of a baseless favoritism. Go ahead, shrug off what the well endowed say. Roll your eyes. They did not earn any deference. A nation that told the Hanover monarchy to get lost should be able to regain its egalitarian foundations. Backing away from undue deference could leave space for someone else to speak.

Regarding the second prediction, I believe that blurring the autonomy line would bring the United States closer to the progressive goal (or pipe dream, if you prefer) of installing European-style welfare spending throughout the nation. Under the title “Promote the General Welfare!,” journalist Jane Haddam has reminded readers that in some countries, benefits flow to citizens and residents without a criterion of penury, the mean “means testing” of United States policy. European children get their prescriptions without paying a drug store; adults raising children receive transfer payments to support their work; governments pick up expenses like mortgage payments for any victims of a catastrophe; and day care is covered by the state rather than parents.<sup>69</sup> Policies like these both reflect and foster a distinct refusal to be stingy in welfare spending:

The European welfare states are not attempts to put a safety net under the “most disadvantaged.” They are by and large societywide programs available to everyone without the humiliating requirement of means tests—without, in other words, demanding that the recipient be reduced to penury and despair before receiving a minimal amount of grudgingly rendered and highly stigmatized aid. While we were in England, at least one of the Tory Members of Parliament had been on the dole within the past five years. The British dole is not a program for “them.” It is a program for everybody, and that is why, in spite of the shift to the right brought about by the ascendancy of Margaret Thatcher, it has proved politically impossible to dislodge.<sup>70</sup>

Politically impossible in the United States, you say? Haddam points out the American precedents: public schools whose “authorities will not ask you to

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<sup>69</sup> Jane Haddam, *Promote the General Welfare!*, NATION, Jan. 29, 1996, at 18, 18–19.

<sup>70</sup> *Id.* at 19.

pay tuition based on your income or refuse your child admittance because you are rich enough to afford private education,” and dignified transfer payments to elderly recipients.<sup>71</sup> “The Social Security Administration does not ask its clients what other pensions they have or what other property they own in order to determine the size of Social Security checks on a sliding scale.”<sup>72</sup> No coincidence that the American public gives these two entitlements much more support and respect than it renders to “welfare” or “socialized medicine.”

Questioning autonomy may be a necessary next step to reach the general-welfare destination. To date, American progressives have been calling for more income equality instead of attacking the autonomy myth, perhaps out of a belief that autonomy and power will flow to the disadvantaged as soon as these people get their hands on some money. But if Fineman is correct (as I think she is) to identify an autonomy myth as a potent obstacle to this kind of progress, then progressives may have it backward and need to change direction. First, question autonomy. Then watch the money change hands.

Once you settle into a habit of questioning autonomy with an asterisk, you need not stop at domestic economic policy. Nonpecuniary asterisks will emerge too. Take the privileges of Caucasian or fair-skinned persons, for starters. In a widely noted working paper, asterisk-counter Peggy McIntosh reported “more than forty concrete examples of white privilege in everyday American life.”<sup>73</sup> McIntosh noted that for her as a white woman, the task of contemplating the unearned entitlement she enjoys—i.e., whiteness—has shed light on the unearned entitlement she does not enjoy: maleness.<sup>74</sup> Following the suggestion of a colleague, and from a starting point of being tagged with the less privileged of the two genders, McIntosh moved on to count the asterisks of being further identified as heterosexual, known to be living in one among many diverse types of households:

1. My children do not have to answer questions about why I live with my partner (my husband).
2. I have no difficulty finding neighborhoods where people approve of our household.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 101 (2d ed. 2003) (citing Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies (1988) (unpublished manuscript), available at <http://web.clas.ufl.edu/user/s/leslieh/syg2000/whiteprivilege.html> (last modified Feb. 23, 1998)).

<sup>74</sup> See, e.g., McIntosh, *supra* note 73.

3. Our children are given texts and classes that implicitly support our kind of family unit and do not turn them against my choice of domestic partnership.
4. I can travel alone or with my husband without expecting embarrassment or hostility in those who deal with us.
5. Most people I meet will see my marital arrangements as an asset to my life or as a favorable comment on my likability [sic], my competence, or my mental health.
6. I can talk about the social events of a weekend without fearing most listeners['] reactions.
7. I will feel welcomed and "normal" in the usual walks of public life, institutional and social.
8. In many contexts, I am seen as "all right" in daily work on women because I do not live chiefly with women.<sup>75</sup>

Here the beauty of Roger Maris, may he rest in peace, is that he shows that not only the hopelessly politically correct can play the asterisk game. It may be telling that in mainstream discourse, the Ford Frick maneuver of 1961 has not been extended much beyond sports and jocular populism like the kind Bush-tweaker Jim Hightower propounded.<sup>76</sup> "Taking asterisks seriously" does seem trapped, for now anyway, in the corridors of Women's Studies. But a joke, or a frivolous occupation like baseball, can make an impression on the vernacular.<sup>77</sup> So too might Roger Maris share credit for increasingly serious talk about enhancing equality of opportunity in professional athletics and high-stakes amateur competitions like the Olympics. We're smiling when we mention the asterisk—just as Dick Young was probably smiling back in 1961—but we mean it.

## CONCLUSION

Advocating the asterisk, I emphasize that it is a small thing put to work for a larger cause. It complements, in negative terms, a positive campaign. The affirmative goals that Fineman and others have so eloquently defended—freedom, fairness, education, and the common good—ought to remain at center stage. Toward this end, I recall the ringing exhortation that Katha Pollitt wrote

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<sup>75</sup> *Id.*

<sup>76</sup> See *supra* note 53 ("hit a triple").

<sup>77</sup> Take "20/20 hindsight" or "déjà vu all over again," for example. Both originated as facetious redundancies, but today I seldom hear "in hindsight" without the numbers, or "déjà vu" without the Yogi Berra appendage. Jokes leave their mark. Cf. Bernstein, *supra* note 22, at 84–85 (arguing that "[n]eologisms, tendentious puns, and reclamations of pejorative nouns" can advance social change).

for candidate John Kerry during the 2004 presidential campaign, urging him to remember that the stances to which our honoree has devoted her distinguished career are as noble as anything else in American politics. Perhaps Senator Kerry should have listened to her more closely:

We liberals and progressives and leftists have our own noble principles, our own beautiful abstract words. We should take our stand on them. Fairness is a liberal value. Equality is a liberal value. Education is a liberal value. Honesty in government, public service for modest remuneration, safeguarding public resources and the land—these are all values we share. Liberty is a liberal value, trusting people to make their own decisions, letting people speak their minds even if their views are unpopular. So is social solidarity, the belief that we should share the nation's enormous wealth so that everyone can live decently. The truth is, most of the good things about this country have been fought for by liberals (indeed, by leftists and, dare one say it, Communists)—women's rights, civil liberties, the end of legal segregation, freedom of religion, the social safety net, unions, workers' rights, consumer protection, international cooperation, resistance to corporate domination—and resisted by conservatives. If conservatives had carried the day, blacks would still be in the back of the bus, women would be barefoot and pregnant, medical care would be on a cash-only basis, there'd be mouse feet in your breakfast cereal and workers would still be sleeping next to their machines.<sup>78</sup>

Identifying, building, and strengthening “the social foundations of law” is a variegated endeavor, and we all have plenty to do. Like most construction projects, this one calls occasionally for some demolition. The points of an asterisk puncture, but only a little, I hope. Roger Maris felt needlessly crucified, or exsanguinated, by his. Along with proud advice like Katha Pollitt's and the big-picture law reform work of scholars like Martha Fineman, and toward the same end, I toss in my soupçon of doubt and discounting. A couple of asterisks help me keep my own bloat in perspective.

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<sup>78</sup> Katha Pollitt, *Let's Not Devalue Ourselves*, NATION, Aug. 16–23, 2003, at 9, 9.

