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FOUNDATIONAL MYTHS AND THE REALITY OF DEPENDENCY: THE ROLE OF MARRIAGE

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In her most recent body of work, of which this symposium essay is a part,¹ Professor Fineman has been exploring the nature and character of dependency and its relationship to the operation of institutions in our society, including the state, the market and the family.² In particular, she has been developing a theoretical framework both for challenging the existing distribution of responsibility for dependency among and within these institutions and for imagining a more just reallocation of that responsibility.³ This conceptual project has both contributed to and emerged from Professor Fineman's critiques of social policies and political developments concerning welfare "reform."⁴ In her analysis of how dependency is understood and addressed in contemporary efforts to increase the punitive, invasive and demeaning character of "welfare," Professor Fineman has not only articulated a feminist analysis of the underlying assumptions driving the recent changes in welfare policy and practice, but also linked those changes to fundamental societal understandings of gender that affect women situated in multiple ways throughout society.⁵

In her work on welfare reform, Professor Fineman has attempted

* Professor of Law, American University, Washington College of Law, Carrington Shields Scholar. I wish to thank my colleague, Nancy Polikoff, with whom I have shared for many years an ongoing dialogue about marriage, and from whom I have learned enormously. I also wish to thank Joan Williams and Adrienne Davis, the organizers of this symposium, for the opportunity to explore Professor Fineman's contributions to legal and social thought about the family.

1. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self Sufficiency*, 8 AM. U.J. GENDER, SOC. POL'Y & L. 13 (2000) [hereinafter Fineman, *Cracking the Foundational Myths*].

2. *Id.* at 19.

3. *Id.* at 16.

4. *Id.* at 24.

5. *See generally id.*

to reorient the discourse about poverty and welfare away from ideological rhetoric about family form to an examination of multiple aspects of dependency within different institutional structures.⁶ Professor Fineman has analyzed the different forms of dependency.⁷ She has identified how our current, limited conceptual frameworks for understanding dependency have both distorted our appreciation for the caretaking work that is required to sustain those who are dependent and has resulted in policies that punish harshly those who fail to engage in caretaking in particular, socially and legally privileged ways.⁸ Law and society have privatized dependency by consigning responsibility for dependency to the family.⁹ The glorification and rewarding of the nuclear family form as the site for caretaking have produced the appropriation of women's unpaid labor and continuing inequality within the family, in spite of a dominant rhetoric of egalitarian relationships within that realm.¹⁰ Professor Fineman, by revealing the multiple and often hidden forms of subsidies for dependency administered by the state, has shown how certain kinds of subsidies, such as welfare payments, are reviled while others, often disguised as "investment," are valued.¹¹ Furthermore, she has described how the market, by continuing to rely on caretaking performed within the family, has eschewed any responsibility for dependency.¹²

In the essay that is the subject of this symposium, Professor Fineman extends her critique to show how the "foundational myths" of "independence, autonomy and self-sufficiency" distort our understanding of both biological and socially constructed forms of

6. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19-20.

7. See Martha Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 92 (1998) [hereinafter Fineman, *Inevitability of Dependency*]; Martha Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287, 289, 292-94 (1996) [hereinafter *Nature of Dependency*]; Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2200 (1995) [hereinafter Fineman, *Masking Dependency*].

8. Fineman, *Inevitability of Dependency*, *supra* note 7, at 89-90; Fineman, *Nature of Dependency*, *supra* note 7, at 288-94; Fineman, *Masking Dependency*, *supra* note 7, at 2182, 2193-94, 2210. See also MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 101-06 (1995) [hereinafter FINEMAN, *THE NEUTERED MOTHER*].

9. Fineman, *Masking Dependency*, *supra* note 7, at 2187; Fineman, *The Inevitability of Dependency*, *supra* note 7, at 92.

10. See Fineman, *Masking Dependency*, *supra* note 7, at 2181, 2188, 2209; see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 25-26, 157-60.

11. Fineman, *Inevitability of Dependency*, *supra* note 7, at 89-90, 91; Fineman, *Nature of Dependency*, *supra* note 7, at 288-94; Fineman, *Masking Dependency*, *supra* note 7, at 2205-06.

12. Fineman, *Inevitability of Dependency*, *supra* note 7, at 91-92, 96; see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 106-18.

dependency.¹³ She advocates for recognition of the ways that the “foundational myths” are built on the invisibility and maldistribution of the work of caring for those who are dependent.¹⁴ In place of these myths, Professor Fineman seeks a national dialogue about the collective stake in care for those who are dependent, a dialogue that could generate social policies and legal regimes that would support multiple forms of caretaking and lead to meaningful redistribution of responsibility for dependency.¹⁵

At the root of Professor Fineman’s analysis of dependency is her critique of the traditional family.¹⁶ The ideal of the nuclear family both supports the myths that Professor Fineman seeks to dispel in this essay and misdirects social policy towards reasserting both the naturalness and legitimacy of this social form.¹⁷ Those who deviate from this family form in performing caretaking work are punished through law and social practice.¹⁸ Those who participate are caught within the gendered structure and operation of the institution.¹⁹ Although Professor Fineman’s focus in this essay and in her larger project is on dependency and caretaking within multiple institutions of society, she, perhaps more than any contemporary feminist theorist, has continued to insist that we cannot understand fundamental allocations of responsibility within society or the gendered nature of foundational concepts within our legal, political and social institutions without confronting women’s position within the traditional, patriarchal family.²⁰ Therefore, in this Comment, I will identify several aspects of Professor Fineman’s critique of the nuclear family that are most central to her theory of dependency and caretaking.

Professor Fineman begins her critique of the family with a

13. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 14.

14. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19.

15. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 26-27.

16. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 15.

17. Fineman, *Masking Dependency*, *supra* note 7, at 2195-97, 2207-08, 2210-11, 2213-14; Fineman, *Inevitability of Dependency*, *supra* note 7, at 93-94; *see also* FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 23-24, 146.

18. *See* Fineman, *Masking Dependency*, *supra* note 7, at 2192-97, 2210, 2213 (commenting on the treatment by society of caretakers that do not fit the traditional family form); *see also* FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 106-18.

19. *See* Fineman, *Masking Dependency*, *supra* note 7, at 2197, 2209 (explaining the repercussions of failure to conform to the traditional family form); *see also* FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 161-64.

20. Fineman, *Cracking the Foundational Myths*, *supra* note 1; *see also* FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 161-64.

recognition of the disjunction between the ideologically dominant definition of the family and the empirical and normative reality of the institution.²¹ The traditional nuclear family maintains ideological vitality as both the theoretically “ideal” family unit²² and the “official” family, recognized by the state through the law.²³ Seemingly paradoxically, this ideal and official family has enormous significance politically, socially, legally and psychologically despite overwhelming empirical evidence that this family form is in serious and continuing decline in terms of people’s actual experience of family life.²⁴ In addition, this ideal and official family remains powerful despite normative challenges, some implicit and others explicit, rooted in the diverse “ethnic, religious, and cultural traditions” within American society, traditions that support alternative forms of family.²⁵

According to Professor Fineman, the key characteristic of the ideal and official family is the construction of the unit around a marriage relationship.²⁶ Historically, the family was defined legally around the relationship of marriage,²⁷ and that core connection between husband and wife has continued to dominate the legal regime governing the family and the political discourse surrounding it. Heterosexual marriage remains the single acceptable form for the family.²⁸ The reasons for the continued ideological dominance of the nuclear family rest in the role that its structure and operation play in relation to both the state and the market.

The state, through the law, provides recognition to a marriage and allocates to it the responsibility for reproduction and nurturing. The state provides “privacy” for the decisions made and behavior engaged

21. Fineman, *Masking Dependency*, *supra* note 7, at 2186, 2188-89.

22. Fineman, *Masking Dependency*, *supra* note 7, at 2181, 2182.

23. Fineman, *Masking Dependency*, *supra* note 7, at 2187.

24. See Fineman, *Masking Dependency*, *supra* note 7, at 2188-89; Fineman, *Inevitability of Dependency*, *supra* note 7, at 93-94 (commenting on the decline of the traditional family unit); see also June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 279-81 (1996) (discussing the changing nature of the family unit in terms of deferred pregnancies, an increased divorce rate, and a change in the response to unplanned pregnancies); Heidi Hartmann, *Changes in Women’s Economic and Family Roles in Post-World War II United States*, in WOMEN, HOUSEHOLDS, AND THE ECONOMY 36-45 (Lourdes Beneria & Catharine R. Stimpson eds., 1987).

25. See Fineman, *Masking Dependency*, *supra* note 7, at 2189-90 (offering different views on the concept of “family”).

26. Fineman, *Masking Dependency*, *supra* note 7, at 2182; see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 23, 146, 159, 161.

27. See Fineman, *Masking Dependency*, *supra* note 7, at 2189.

28. See Fineman, *Masking Dependency*, *supra* note 7, at 2183, 2191-92, 2197-98 (describing single mothers and other non-nuclear family forms as deviant); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 145-48.

in within the unit; the heterosexual married couple divides the labor necessary for caretaking.²⁹ Within the family, despite egalitarian ideals concerning family functioning,³⁰ work continues to be divided largely according to gender. Women perform the bulk of the caretaking work,³¹ even when they work outside the home. Men provide the major economic support.³² Locating caretaking within a family built on the sexual connection between two heterosexual adults appears natural.³³ This privatized allocation of caring for dependents within the nuclear family, both in terms of nurturing and economic support, permits the state and the market to retain distance from caretaking. Free from direct institutional responsibility, they are able, through their policies and practices, to provide support for caretaking performed only within the nuclear family, while ignoring or punishing nurturing provided in other family formations.³⁴

The application of norms of equality to the family has not significantly changed the reality of gendered allocation of work within the institution.³⁵ Changing hierarchical relationships between husband and wife into relationships of equal status has not shifted responsibility for caretaking. Women continue to care for dependents, but also to work outside the home. Hopes that husbands would assume significant caretaking responsibilities have been largely unrealized.³⁶ Furthermore, efforts to analogize other relationships to marriage, in order to achieve for those units the privileges of marriage, serve primarily to reinforce, rather than

29. See Fineman, *Masking Dependency*, *supra* note 7, at 2187-88, 2205, 2212 (describing the unequal division of caretaking duties in the traditional family); see also Martha Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 966-68 (1991).

30. See Fineman, *Nature of Dependency*, *supra* note 7, at 297 (noting that women are becoming dissatisfied with “dependency and perceived resulting inferiority within the family”); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 157-61.

31. See Fineman, *Nature of Dependency*, *supra* note 7, at 298-99 (discussing women’s caretaking position inside and outside of the family); see also Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 19-20 (noting the economic and career costs of acting as a caretaker); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 165.

32. Fineman, *Masking Dependency*, *supra* note 7, at 2187-88.

33. Fineman, *Masking Dependency*, *supra* note 7, at 2188, 2205; Fineman, *The Inevitability of Dependency*, *supra* note 7, at 92; see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 145, 161.

34. See Fineman, *Masking Dependency*, *supra* note 7, at 2187, 2205-06 (listing various hidden subsidies to families, such as the failure to tax interspousal transfers).

35. See Fineman, *Masking Equality*, *supra* note 7, at 2198-2202 (stating that women continue to function as caretakers); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 157-61.

36. Fineman, *Masking Dependency*, *supra* note 7, at 2202.

challenge, the primacy of the marriage relationship.³⁷ Marriage, both in its historically hierarchical form and in its contemporary egalitarian mode, appears natural and desirable. A primary heterosexual bond between two adults approved by the state, but constituting a private realm, continues to be the site of caretaking responsibility. The basic structure of caretaking responsibility within the nuclear family remains undisturbed. For the family to fulfill the dual responsibilities of caretaking and market work virtually requires two caretakers, who usually divide roles, thus recreating the sexual division of labor under an egalitarian ideal of choice.³⁸ Women's caretaking work within a marriage is appropriated by the state and the market, and women remain primarily identified with nurturance.³⁹ The enormous changes that have occurred in the ways that caretaking is actually performed remain unrecognized in law and unappreciated by society. Therefore, both those who are dependent and those who care for dependents suffer.⁴⁰

It is difficult to overestimate the importance of Professor Fineman's focus upon the essential role of marriage and the nuclear family in distorting our approach to dependency.⁴¹ Without a critique of marriage as the basic unit for caretaking, the other institutions of our society, including both the state and the market, have a tendency to devise limited reforms that require only minimal responsibility for caretaking and actually shore up marriage. These touted "family friendly" policies often fail to challenge the primacy of marriage as the basic caretaking unit or make alternative models of caretaking ideologically or economically viable.

For example, the state, rather than expanding public subsidies for caretaking to all those who provide care to dependents, may continue to restrict subsidies to those who are married. Similarly, the state may foster the gendered division of labor within the family by increasing

37. See Fineman, *Masking Dependency*, *supra* note 7, at 2198 (stating that non-traditional relationships reinforce the attributes of normalcy, desirability, and privilege in traditional marriages); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 157; Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure" of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993).

38. See Fineman, *Masking Dependency*, *supra* note 7, at 2208-10 (noting that little has changed in the allocation of responsibility for domestic labor and caretaking between marital partners); see also FINEMAN, *THE NEUTERED MOTHER*, *supra* note 8, at 159, 162, 165.

39. See Fineman, *Masking Dependency*, *supra* note 7, at 2209-12 (discussing the inconsistency between the demands placed on caretakers and the resources provided to them).

40. See Fineman, *Masking Dependency*, *supra* note 7, at 2203 (offering welfare reforms relying on marriage and child support to solve societal problems instead of income guarantees, publicly-assisted day care, and universal health coverage).

41. Fineman, *Cracking the Foundational Myths*, *supra* note 1, at 15.

tax benefits for married taxpayers in units where one person is the primary wage earner. Market support for caretaking could likewise favor marriage. Currently, certain forms of workplace “accommodations” to caretaking responsibilities are not realistically accessible or helpful to all families, particularly single mothers. Instead, they primarily serve the interests of middle-class and wealthy nuclear families in which both parents are in the workforce. Permitting, even valuing, part-time work is of little use to a single mother whose full-time salary is barely enough to support her and her children. Furthermore, despite the rhetoric of gender-neutrality in the structuring of dependent care leave and part-time work, women primarily take on the responsibility of juggling the demands of work with those of caretaking. Regular, on-site childcare is useless to non-professional working women unless its cost is subsidized by the employer. Permitting mothers to take off from work for the care of sick family members forces non-professional workers, who often have limited “sick days,” to choose between caring for their own health needs and those of their dependents—a choice rarely confronted by professional workers.⁴² The “family friendly” workplace tends to be designed around the needs of married people in nuclear families. Married couples benefit and single mothers confront a workplace as hostile to their caretaking needs as ever. One wonders if these “accommodations” actually support a modern form of companionate marriage. Perhaps these “accommodations” function as a way of preserving privileged women’s gender role as caretakers. While permitting this group of women some limited access to the world of work, these policies ensure that poor and working class women assume the double duty of full-time work and caretaking if they are to avoid the pitfalls of direct government income subsidy.

Through her continuing focus upon the role of marriage in shaping society’s view of and response to dependency, Professor Fineman helps us make the national dialogue about dependency that she advocates facilitate new societal allocations of responsibility for dependency, instead of increasing support for caretaking within marriage.

42. Cf. Fineman, *Nature of Dependency*, *supra* note 7, at 309 (remarking that the picture of the American worker is one of a person who can perform his or her job without worrying about caretaking obligations).

