

# BUILDING ON FOUNDATIONAL MYTHS: FEMINISM AND THE RECOVERY OF “HUMAN NATURE”: A RESPONSE TO MARTHA FINEMAN

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Poverty law in the United States is largely law about women and the children for whom they care.<sup>1</sup> That assertion is meant to be something of an overstatement, but just something of an overstatement. The empirical realities of poverty and the lives of poor people in the United States, particularly as those realities apply to those who need or receive public assistance, is disproportionately about women and the children of whom those women are caretakers.<sup>2</sup> It seems, therefore, especially appropriate that those who identify themselves as “feminists”—those who support and strive for the full social, political, moral, and economic dignity and equality of human beings regardless of sex or gender—should raise their voices

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1. See Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL’Y 5, 36-37 (1996) and accompanying notes (observing, *inter alia*, higher rates of child poverty in households headed by women). See generally MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1996) (surveying the history of the feminization of poverty, especially chapter 10 “Aid to Families with Dependent Children” describing the rise in poor households headed by women); see also LAWRENCE MISHEL, JARED BERNSTEIN, JOHN SCHMITT, *THE STATE OF WORKING AMERICA* 280-82 (table 6.4) (1998-1999) (noting highest rates—about 40%—of poverty for female headed households).

2. See *supra* note 3 and accompanying text.

in defense of poor people and those threatened by poverty.<sup>3</sup>

Martha Fineman is such a voice—a powerful, articulate, reasonable, and impassioned voice. Her article on the social responsibility for dependency, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*,<sup>4</sup> will, I have no doubt, make an important contribution to the literature on law and social policy directed toward supporting those who perform functions that are socially valuable but undervalued or ignored by the market.

Laudatory introductions in response pieces are, however, rather like the antecedent clause in sentences that run: I have the greatest respect for X, but . . . . Whatever the magnitude of the praise that precedes the disjunction, one knows the thrust of a verbal dagger is soon to follow.

That is not my intention here. Rather, I want to identify and discuss, partly as good-natured teasing, but mostly because I believe it implicates an extraordinarily important development in contemporary feminism, one aspect of Fineman's argument. From the start it should be clear that Fineman's argument, at least the first part of her argument, is above all else a normative or moral argument about why we, as a society, ought to support caregivers. That point should be obvious.<sup>5</sup>

What may go unnoticed by readers most versed in feminist literature, readers long conditioned to respond with reflexive hostility toward essentialism of any kind, particularly that which takes the form of arguments from "nature," is that the structure and method of Fineman's argument is perfectly consistent with a tradition of moral argument that dates back at least to the time of Aristotle. This tradition of moral argument relies upon an idea that, for lack of a better term, may be called "human nature." This type of argument, while respecting the complexity and diversity of human experience, also holds that there are certain universal realities characteristic of the human condition across space and time: needs and capacities

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3. The economic effects of the systemic subordination of women in our society are not confined to poor families. Affluent and well-educated women also face impediments to career advancement and economic success. See, e.g., Ann R. Tickameyer, *Public Policy and Private Lives: Social and Spatial Dimensions of Women's Poverty and Welfare Policy in the United States*, 84 KY. L.J. 721, 725 (1995-96) (noting that the women have an "economic disadvantage in the labor market"). Given the abolition of the federal entitlement to public assistance in 1996, and the special urgency of the needs of the poorest families, the emphasis here is on female headed households in poverty.

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

5. Though Fineman's analysis of the concepts of subsidy and dependency are especially insightful, my focus is on the first part of her argument for the collective responsibility to care for caregivers.

that all human beings, as human beings, share, and material conditions that make human flourishing more likely. Moreover, as I contend below, this type of moral argument takes the universal and inevitable aspects of our common humanity as the starting point for its political and ethical inquiry.

That one of the most prominent feminists in legal academy makes such an argument should not, in itself, be so surprising. But that such an argument should come from a writer who has so brilliantly uncovered and criticized the social construction of gender and family roles—quintessential examples of social realities long taken to be “natural”—is worthy of comment.<sup>6</sup>

In what follows, I will: (1) describe and commend an ancient tradition of western normative argument; (2) offer a schematic of Fineman’s central argument, as I understand it, on the social duty of care to caregivers, and explain why I believe Fineman’s argument in structure and method is similar to the traditional form of normative argument I have described and commended; and (3) offer concluding reflections on why I believe this similarity is part of a salutary and important development in feminism in the United States; a development that would be strengthened if scholars as prominent and prolific as Martha Fineman acknowledged explicitly that they have become part of that tradition of moral argument.

## I. A TRADITION OF MORAL ARGUMENT

In his hilarious and withering critique of law and economics, the late Arthur Leff observed of the intellectual context in which we now exist:

While all this [the movement from Formalism to Realism in law] was going on, most likely conditioning it in fact, the knowledge of good and evil, as an intellectual subject, was being systematically and effectively destroyed. The historical fen through which ethical wanderings led was abolished in the early years of this century (not for the first time, but very clearly this time); normative thought crawled out of the swamp and died in the desert. There arose a great number of schools of ethics—axiological, materialistic, evolutionary, intuitionist, situationalist, existentialist, and so on—but they all suffered from the same fate: either they were seen to be ultimately premised on an intuition (buttressed or not by nosecounts of

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6. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 44-47 (1995) (discussing the continuing debate over categorizing women, which revolves around universalized representations of women).