

1-1-1996

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## Recommended Citation

Eleanor Willemssen and Michael Willemssen, Symposium, *A Review of Martha Fineman's the Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies: She Threw Out the Baby with the Old Feminism*, 36 SANTA CLARA L. REV. 477 (1996).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol36/iss2/12>

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**A REVIEW OF MARTHA FINEMAN'S *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES: SHE THREW OUT THE BABY WITH THE OLD FEMINISM***

**A Review Essay by Eleanor Willemsen\*  
and Michael Willemsen†**

In her provocative keynote address, Martha Fineman presents us with a challenging proposal for thinking our way out of the "welfare dilemma." She addresses the social problems that stem from children growing up without resident fathers. These problems range from troubles in school, increased aggressive behavior, and precocious sexuality to inadequate nutrition and medical care. Fineman urges us to redefine the family as a "caregiving dyad," comprised of a dependent child (or other dependent person) and his or her principal nurturer, who is most often the mother. This enables us to focus on our collective responsibility to this revised family, free from the notion that its needs are the private responsibility of the absent father. She points out that caregiving and emotional nurturing are "gendered" activities that are usually assigned to females in our society, thus causing them to become undervalued. The caregivers of dependents often depend on resources outside of their own domain in order to provide the secure and nurturing setting that they and their children need. Fineman proposes that we should accept a collective responsibility for the derived dependency of this caregiving dyad instead of assigning it to a biological father who needs to be "brought back" into the family. We must provide support for the family as she has redefined it.

Fineman seems to base her suggestions on two interrelated concerns. First, when we assign responsibility for the

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nurture of the family to the father, we make the family's security a private matter which is based on the sexual bond between a man and woman. Our failure to see this child support as a public concern allows us to avoid subsidizing it. The result has been that many single female caregivers and their children are inadequately supported, by themselves or by society, and the problems of child poverty result. Children are at risk because their opportunities for nurture and care come from the sexual relationships that their principal nurturers may or may not have with the child's biological father. Threats to these sexual relationships are threats to child nurture. Finally, Fineman argues that, as a practical matter, forcing biological fathers to take financial responsibility has little potential to reverse child poverty. Because fathers of children raised by single mothers are not able to provide the needed resources to support them, child poverty will continue.

Much of Fineman's paper goes beyond the practicalities of how parents should nurture children, and instead focuses on the impact that current welfare policies and reform proposals have on women. While this too merits discussion, our concern is that the child's best interests will not be adequately addressed. We will carefully examine points of Fineman's argument before developing an analysis of this concern. We will look at her criticism of current feminist jurisprudence, explain her skepticism about the practical effects of making policy revolve around the father's role as a provider, and restate her proposal for the circumstances under which fathers should be assigned enforceable responsibilities for the nurture of their children.

Fineman notes much that is worthy of criticism in current feminist jurisprudence as it is applied to family law. Feminist scholars focus on equality between men and women, but the corresponding revisions in family law do not achieve this equality. The "no fault" family law revisions made in recent years achieve greater sameness of treatment of men and women. Men and women have equal access to contact with the child, equal standing to petition for custody, equal obligation to provide support, and equal responsibility for ensuring that the child has an opportunity to preserve a relationship with the other parent. The scrupulous attention to treating the mother and father the same may appear to be based on

the presumption that they are equally important in children's lives. However, it is instead based on a concern for equal rights among men and women.

Fineman addresses the results of an equality-based feminist approach to child nurture issues. First, this new "no fault" law retains traditional patriarchal notions of the family as a private and provider-based social sphere based on the sexual relationship between a man and woman who happen to be parents. Admittedly, under current law there is a more equal distribution of responsibility between the mother and father within the traditional family structure. Second, "no fault" law has done nothing to improve the welfare of children. In fact, their situation has become worse. Finally, child nurture continues to be regarded as a private matter, and therefore remains outside the realm of public responsibility.

Fineman's analysis of the points we have just identified is organized around her central thesis: "no fault" family law, based on the goal of treating men and women the same, damages women. This law retains the worst features of the patriarchal family. Namely, child nurture is a private matter and those who provide economic support have control. Additionally, this law assigns women new burdens of economic responsibility. Women retain the traditional gendered responsibility of child nurture because there is little recognition in the law for an equal duty of fathers to nurture their children. Women continue to nurture children, but must now do it without adequate provision for their derived economic dependency.

Fineman asserts that present laws consider both the mother's and the father's relationship with their children as equally worthy of protection by the state. Preservation of this equality is, however, more valuable than providing nurture for children. Mothering has lost its uniqueness and goodness in the eyes of society. This is apparent in the failure of current family law to give any special recognition to child nurture or to acknowledge those who provide such nurture. Instead, a mother who nurtures her child outside of a sexual relationship with the child's father is considered deviant. To correct such deviance, the woman must add a man, preferably the child's father, to the family. Such thinking sends the powerful message that a family must have a man at its

center. Children and their nurturers are not valuable except in the context of a family that includes a man.

Fineman ends her discussion by proposing change which is based on a newer feminist approach. This approach seeks equality of value between men and women instead of merely attempting to treat them alike. She proposes that society must share the responsibility for nurturing children. We will then assign the "gendered" responsibility for nurture to "mothers," most of whom are women. As a society, we will accept responsibility for the derived dependency of the mother-child dyad through minimum levels of subsidy for every caregiving dyad. Child nurture will no longer be based upon the sexual relationship that exists between the child's mother and father. Men who wish to be involved in child nurture and wish to provide for the nurturer-child dyad will negotiate their way into this arrangement by contract. There will be no marriage as a legal entity. Instead, marriage will become a private matter between a man and woman, and child nurture will become a public matter concerning us all.

We have two fundamental criticisms of Fineman's proposals for redefining the family and ending legal marriage. First of all, her radical redefinition of the family does not achieve an appropriate balance among the needs of the father, mother, child, and society. Second, Fineman's discussion of how her proposals would work simply ignores what we already know about the psychological and economic benefits children gain from having two parents instead of one.

First, consider the issue of balancing rights and needs. While Fineman may be correct in her assertion that "no fault" divorce has not improved the situation of children and is unfair to women, this does not mean that we should abandon fairness as a governing principle. As we see it, the unfairness of the treatment of women and the inadequacy of economic support and psychological nurture for children are the result of the lack of consideration given to children in the development of family law. We propose that when family arrangements are made under current "no fault" law, all parties must be required to take the best interests of the child into consideration. With this requirement, several results will follow. A workable provision for the nurture and economic support of the child will have to be made, thus assigning nurture a value. Children will have the right to be nurtured and to con-

tinue any nurturing relationships they have enjoyed and that the nurturer wants to continue providing. Often, but not necessarily, both parents will be included as members of nurturing relationships. Other adults, who are "psychological parents," may be included as well. The right of children to be nurtured will assign to society the duty of subsidizing the caregiving dyads when private arrangements fail to do so.

The addition of a "best interest" test to the resolution of disputes between divorcing or separating parents will not eliminate the parental rights of either mother or father. However, it should make parental rights subordinate to the child's right to be nurtured and to continue nurturing relationships. The child's right to receive top priority in the balancing of competing interests arises out of the child's dependency and lesser ability to provide for his or her own needs. But who is next in line after the child? The mother? The father? Society, with its duty to support the caregiving unit? Here, we would accept some elements of Fineman's proposal.

These priorities should not be the subject of fixed legal guidelines, but instead, should be made the subject of contractual arrangements. Where a child's mother and father have shared nurturing duties and have maintained nurturing intimate relationships with their child, equal claims to continuing these relationships can be acknowledged by the judicial process without resorting to the "no fault" solution of treating men and women the same. The child's best interest may be served if he or she remains primarily dependent on the mother whose derived dependency must then be acknowledged with an order for the father to sustain the "caregiving unit." The best interest test does not require either of the two extreme solutions discussed above. It does not involve the "neutered mother" and mindless solution of "no fault" law and does not require, as Fineman suggests, that a father be seen as irrelevant and society be seen as a supporter.

Having discussed our first concern that the child's rights must be given first priority when balancing the needs of mothers, fathers, and society, we turn now to our second concern regarding Fineman's analysis. Fineman simply ignores all evidence supporting the proposition that children who have relationships with their fathers have a better chance of being successful in the enterprise of growing up than those who lack these relationships. Children who have positive re-

relationships with their fathers are more likely to develop a sense of personal control over their lives, show less problem behavior, achieve success in school, express satisfaction with themselves and relate well to peers and other adults. These successful developmental outcomes are not limited to children who have relationships with their fathers. They are sometimes seen in the children of single mothers and lesbian couples. Regardless, the fact that a father's involvement is associated with greater psychological well-being and economic opportunity for their children requires a policy that encourages the involvement of men in the upbringing of their children.

In addition to the benefits children gain from involvement with their fathers on an individual basis, there is a psychological benefit for children who are a part of a family in which adults have a successful close relationship with one another. In such families, children develop greater faith in love and its possibility in their own lives. We also know that many father-child relationships are of poor quality and can, at times, be destructive. Additionally, many marriages are destructive in their effects on all parties concerned, including the children. This is precisely why the analysis of Fineman's question, "Who is a family?" or the related question "Who can continue being a family after divorce or separation?" must be approached from the perspective of the child's best interest.

Instead of assigning fixed rights and duties to the man, woman, and society in disputes about child nurture, let us begin with the child's need for nurture. We will most often discover that while both the father and mother have some relationship with the child, the mother is the chief provider of nurture and that she, as a result, is less able to provide autonomously for her and her child's support than she would be if she were not the principal nurturer. Family law needs to acknowledge the value to society of the mother's provision of child nurture, and society must be the safety net for her derived dependency. At the same time, we must acknowledge the value of the child's continuing relationship with his or her father and with other persons who may be significant sources of nurture. Economic arrangements for supporting dependents must reflect the value to society of child nurture wherever it occurs and in whatever amount.

We identify four criteria, at variance with Fineman's analysis, that we believe public policy should meet regarding the nurture of children. First, policy should not interfere with a child's opportunity to have permanent, intimate, and nurturing relationships with two or more parents (as in step-parents, significant partners of parents, etc.). While these relationships often do not develop, we should encourage any opportunity a child has to develop intimate relationships with both parents. If we relegate the father's participation to the private contractual sphere as Fineman proposes, the opportunity for many children to maintain relationships with their fathers would be curtailed.

The second criterion family policy should meet is to explicitly recognize the child's right to have family relationships and to be nurtured independently of the rights of other parties, the mother, father, and society. The third related criterion is that once the child's rights are identified, these rights must be balanced with the rights of the father, mother, and society.

The fourth criterion is that family law policy should explicitly recognize both the special "gendered" value of the nurturing role which is often, but not always, taken by the woman and the value of an ongoing, nurturing, and intimate relationship with a second parent. Policy must give men incentives to maintain relationships with and continue to support their children. Children and society are ill served when men are written off as unvalued participants in the family.

We agree with Fineman that the gendered experience of being the primary nurturer is not recognized and valued properly, as reflected by today's family law. As she eloquently argues, we need to back away from the equality-sameness quandary we have gotten ourselves into with regard to family law. We need to address the derived dependency issue and make a collective societal decision about what we are willing to do to support caregiving dyads. The current political climate will not support Fineman's proposal for a societal subsidy of single-mother caregiving units. Fathers should be included along with parent education about child care and job training as part of a complete package. An additional aspect of our proposal would be to enforce all contractual agreements between parents that assign child care duties to fathers. If we cannot enlist them, we must enlist

society. Some welfare subsidy is necessary and must be continued. In short, let children and their needs drive the development of family law.