

SUBSIDY FOR CARETAKING IN FAMILIES: LESSONS FROM FOSTER CARE

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I. INTRODUCTION

In her article for this symposium, Professor Fineman challenges us to reconceptualize support for the caretaking that occurs in the family.¹ She argues that intrafamilial dependency is not a private problem, as much of liberal theory assumes,² but instead imposes a public obligation. She proposes the development of “a theory of

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

2. For critiques of liberal theory, see generally SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) (critiquing the unchallenged nature of the family in law); MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS (1999); EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS OF WOMEN, EQUALITY, AND DEPENDENCY (1999); JOAN C. WILLIAMS, DEMONSTRATING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT. (1999).

collective responsibility for dependency,” which would allow caretakers autonomy and independence while providing them with adequate resources to exercise this independence and autonomy.³ To articulate this theory, she challenges us not just to question contemporary notions of dependency and fiscal subsidy, but also to promote a national dialogue concerning our vision of support for caretaking that would recognize its public nature.

In responding to Professor Fineman’s challenge, this Article explores one of the primary existing efforts to assume collective responsibility for dependency. As we considered concrete responses to Professor Fineman’s broad theoretical construct, it struck us that the major program that provides financial support for the caretakers of children in the United States, without examining the earning capacity of the caretaker, is the subsidized child welfare system.⁴ This program selects and subsidizes “worthy” families in which to place children from “unworthy” families. It is not a means-based program.⁵ The foster care system provides important information about the viability of subsidies for caretakers of children in the United States.

Professor Fineman urges us to consider the “actual (as contrasted with the assumed) family,”⁶ reminding us that contemporary families take many forms. Although she appears to focus on the diversity that stems from individual choices in forming families, a significant minority of families are created expressly by the state through the foster care system, often without individual choice.⁷ These families

3. Fineman, *supra* note 1, at 16.

4. The term “child welfare system” encompasses the state’s machinery for responding to allegations of child abuse and neglect, including neglect attributable to lack of money or housing, beginning with the initial report of suspected abuse and including any subsequent state contact with the family such as services, removal from the home to temporary placement in a foster family or institution, termination of parental rights, and placement of the child in an adoptive or other permanent home. The public welfare system provides money to poor children and, as discussed *infra*, it also subsidizes caretakers; this subsidy is available, however, only after examining the caretaker’s earning capacity.

In addition, a series of subsidies are imbedded in the tax system and other programs, but these remain more passive. To the extent that these subsidies benefit higher income families, they provide limited support for Professor Fineman’s reconceptualization of subsidies for caretaking. Professor Fineman’s dystopian fantasy makes clear the enormous impact that these deeply imbedded practices have on children. See Fineman, *supra* note 1, at 26-28.

5. Foster care providers are not subjected to any means-testing, although the children for whom they care must have been eligible for Aid to Families with Dependent Children as of June 1, 1995. 42 U.S.C. § 672(a)(4) (1998).

6. Fineman, *supra* note 1, at 14.

7. There are at least 500,000 children in foster care today. See EVAN B. DONALDSON, ADOPTION INST., MEDIA RESOURCE GUIDE: ADOPTION ISSUES 2 (1998) (noting that the 500,000 children in foster care in 1996 represented a 79% increase over 1986 figures).

Even if Professor Fineman’s proposal for subsidizing caretakers were to come into existence, foster families would still exist to provide care for children who are under state supervision.

form when the state removes children from their homes based on allegations of abuse or neglect, or when parents relinquish responsibility over their children to the state,⁸ and the state places the children in the foster care system. These are also “actual” families, and we believe they have much to tell us about possible relations between the family and the state.

In this paper, we explore the assumptions underlying contemporary foster care. We examine the significant legislation that establishes the federalized nature of the foster care system⁹ to determine the assumptions it reflects regarding the purposes of subsidizing caretaking and the relative merits of different categories of caretakers. Through these laws, we envision the issues that may inform a national debate on whether and how to provide additional public support for “private” caretaking. The foster care system shows that public support for subsidizing families is strongest when it is temporary and when it encourages families’ compliance with social norms. Moreover, support for the foster care system is conditioned on children living outside of their families of origin so that society has an assurance that it is not subsidizing adults who would otherwise be accountable for the care of their own children.

II. THE FOSTER CARE SYSTEM

In this section, we discuss the salient features of the foster care system that must be examined in order to formulate a theory of collective responsibility for dependency. Under contemporary law, the federally-funded foster care system provides funding for the caretaking of children whose parents are unable or unwilling to care for them. Children enter foster care when the state removes them based on abuse or neglect, or when parents voluntarily place their children in the foster care system.¹⁰ Foster care is supposed to be

8. Parents may relinquish a child either by an autonomous choice or by a coerced “voluntary” act, such as when a public agency threatens a parent with court action unless she signs a “voluntary” relinquishment. See generally William M. Schur & Joan Heifetz Hollinger, *Termination of the Parent-Child Relationship: Grounds for Termination*, in ADOPTION LAW AND PRACTICE § 4.04[1] (Joan Heifetz Hollinger ed., 1997) [hereinafter ADOPTION LAW AND PRACTICE] (discussing the termination of the parent-child relationship).

9. Federal support for foster care began pursuant to the 1935 Social Security Act, 42 U.S.C. § 301 *et seq.* (1994). See Mark Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, 8 FUTURE OF CHILDREN 88, 90 (1998). The conceptual basis for federal foster care dates at least to the 1909 White House Conference on Children. See Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. (forthcoming 1999). See *infra* note 72 for further discussion.

10. See James B. Boskey & Joan Heifetz Hollinger, *Types of Placement for Adoption: Foster Parent Placements*, in ADOPTION LAW AND PRACTICE, *supra* note 8, at § 3.02[2] (discussing parents’ relinquishment of responsibility over their children).