

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).

temporary¹¹ out-of-home care which generally occurs within a familial setting. The federal government provides funding for foster care providers regardless of the providers' income from other sources.¹² Both the financial subsidy and the relationship officially terminate when the child turns eighteen.¹³ If a family or individual adopts the child, then the subsidy normally ends as well.¹⁴ The express message is that once a child becomes part of a "legal" family, caretaking responsibilities become privatized. The transition between publicly and privately subsidized caretaking that occurs when a child leaves or enters the foster care system creates a tension that is part of Professor Fineman's argument. This section provides a review of the history of foster care in the United States and of the increasing federalization of the foster care system.

Foster care has a long history. Traditionally, older children in Western culture entered out-of-home placement through indenture to learn a craft, work as a servant, or learn appropriate demeanor.¹⁵

11. See *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 823 (1977) (acknowledging foster care as "[a] child welfare service which provides substitute family care for a planned period[.]" (citations omitted)); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 961 (D.D.C. 1991) (noting the temporary nature of a child's removal from the family home).

12. This paper concerns federal funding for licensed foster care providers. See 42 U.S.C. § 671(a)(10) (Supp. 1998) (requiring states to establish requirements for foster care home eligibility). A series of informal arrangements also exist that function without the state legally removing children from their families of origin. See, e.g., Note, *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047 (1999). The Department of Health and Human Services estimated that, in 1990, slightly more than two percent of all children lived in a relative's household without a parent, but "only a small fraction" of the children lived in a formal foster family. *Adoption Promotion Act of 1997: Hearings on H.R. 867 Before the Subcomm. on Human Resources of the Comm. on Ways and Means*, 105th Cong. 41 (1997) [hereinafter *Hearings*] (testimony of Olivia Golden, Admin. for Children & Families, United States Dep't of Health & Human Servs.). In these informal arrangements, the relatives may receive special Temporary Assistance for Needy Families [TANF] grants for the children. Moreover, states place some foster children outside of licensed families in licensed child care institutions. See Mangold, *supra* note 9.

13. See *Challenges Confronting Children Aging Out of Foster Care: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Robin Nixon, Dir. for Youth Servs., Child Welfare League of Am.), available at <http://www.house.gov/ways_means/humres/106cong/3-9-99/3-9nixo.htm>. A few states—Maryland, Massachusetts, Michigan, and New York—have begun to establish programs that will enable foster care children over the age of 18 to receive services and financial support until age 21 for educational and transitional purposes. See *id.*

14. Pursuant to 42 U.S.C. § 672(a) (1994), a child's eligibility for foster care maintenance payments continues for as long as the state has responsibility for her care. Once a family or individual adopts her, of course, the state is no longer responsible for her care.

The situation is different for "special needs" children, whose adoptive parents are entitled to some additional subsidy. See 42 U.S.C. § 673 (1994).

15. See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* 112 (1977) (relating that especially in lower and middle class families, children were viewed as an economic burden and were consequently sent to live with other families in the hope that the new family would provide a better life for them); EDMUND S. MORGAN, *THE PURITAN FAMILY, RELIGION AND DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND* 77 (1966)

In colonial Massachusetts, laws expressly empowered the Selectmen to place poor children with families other than their own.¹⁶ After indenture ceased to be a normal part of growing up for children of all social classes, placement in the presumptively worthy families of non-relatives remained a dominant option for the care of impoverished children.¹⁷ For about one hundred years, beginning in the mid-nineteenth century, philanthropic organizations or state and local governments arranged such out-of-home placements.¹⁸

The Social Security Act of 1935, which provided for Aid to Dependant Children in their own homes, did not provide direct subsidies for the care of children not living with family members or close relatives.¹⁹ Beginning in 1961, the federal government authorized the use of federal funds to subsidize foster families under the "Flemming Ruling."²⁰ The Flemming Ruling permitted states to use federal funds to pay foster care providers for the care of children

(stating that often children were sent to live with their school teachers or families to learn better manners); Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1118 (1997) ("Most colonial parents apprenticed their children soon after infancy ended . . . to learn a trade and to be educated at least minimally in the home of a master.").

16. See CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY: VOL. 1, 39 (Robert H. Bremner et al. eds., 1970) (citing Mass. Records, II (1853), 8-9 (reprinting a law dated 1642)); see also *id.* at 40 (citing LAWS AND LIBERTIES OF MASSACHUSETTS, REPRINTED FROM THE COPY OF THE 1648 EDITION (Max Farrand ed., 1929)).

17. See discussion in Catherine J. Ross, *Families Without Paradigms*, 60 OHIO ST. L.J. (forthcoming 1999); JOSEPH F. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT 148 (1977) (stating also that poor parents sent their children to work in the homes of wealthy families in order to support themselves as well as their natural family).

18. See ADOPTION LAW AND PRACTICE, *supra* note 8, at 1-20 - 1-29 (discussing the evolution of adoption procedures from the mid-nineteenth century to the early twentieth century); Catherine J. Ross, *Society's Children: the Care of Indigent Youngsters in New York City, 1875-1903* (1977) (unpublished Ph.D. dissertation, Yale University) (on file with authors). This tradition should be distinguished from the use of apprenticeship laws to extract unpaid labor from African-American children in the post-Civil War South. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 147-49 (1997) (discussing how certain state laws in the South gave local courts the authority to essentially re-enslave black children under the guise of apprenticeship laws, usually returning the children to their former masters).

19. H.R. 7260, § 406, 74th Cong. (1935) (enacted). See *infra* notes 20-21 and accompanying text; Naomi Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. (forthcoming 1999).

20. The Flemming Ruling was issued by the Secretary of Health, Education and Welfare, and adopted by the Congress in 1961. See *King v. Smith*, 392 U.S. 309, 322-23 (1968) (explaining the origins of the Flemming Ruling). The rule barred states from finding mothers ineligible for aid based on their marital status at the time of the child's birth, and provided that if the home was "suitable," it should receive Aid to Families with Dependent Children [AFDC] payments. If a home was "unsuitable," then the state would remove the child and place her in foster care, where she would remain eligible for Aid to Dependent Children. *Id.* (quoting Secretary Fleming's statement that "[a]ssistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere").

who would otherwise have been eligible for public welfare had they remained in their parents' homes.²¹ Over the past twenty years, Congress has enacted two major pieces of legislation that have firmly established federal oversight of the foster care system.

A. *Adoption Assistance and Child Welfare Act*

Federal financial and regulatory involvement in state-run foster care systems expanded in 1980 with the passage of the Adoption Assistance and Child Welfare Act (AACWA).²² The AACWA attempted to federalize state foster care programs to some extent by establishing comprehensive standards for foster care systems.²³ It also regularized federal reimbursements for state-approved foster care.²⁴

For purposes of comparison to Professor Fineman's proposal in this symposium, perhaps the most interesting aspect of the AACWA is the debate over the definition of the purpose of "Foster Care Maintenance Payments."²⁵ In 1980, the AACWA added the definition of such payments that remains in effect today.²⁶ The Act defined foster care maintenance payments to foster parents as "payments to cover the cost of (and cost of providing) food, clothing, shelter, daily supervision, school supplies, [and] a child's personal incidentals"²⁷ Controversy arose over language drafted by the Senate, which included payments to cover the cost of "daily supervision."²⁸ Although the House of Representatives ultimately agreed to the Senate language, it did so with reservations, underscoring that "payments for the costs of providing care to foster children are not intended to include reimbursements in the nature of a salary for the exercise by the foster family parent of ordinary parental duties."²⁹

21. See *id.* at 326 n.23.

22. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified at 42 U.S.C. §§ 620-628, 670-679 (1988)).

23. See Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 14 (1995) (stating that the federal government expressed its commitment to alleviating problems with state foster care programs by providing federal financial assistance). See 42 U.S.C. § 670 (Supp. IV 1992).

24. See H.R. REP. NO. 96-336, at 12 (1979). The act eliminates the old federal reimbursements that ranged from one-third to two-thirds of the cost of foster care, and substituting a flat reimbursement rate of 75%.

25. 42 U.S.C. § 675(4)(A) (1998).

26. See *id.* (recognizing that this act is current through Pub. L. No. 106-20, approved Apr. 9, 1999).

27. *Id.*

28. See H.R. CONF. REP. NO. 96-900, at 48-50 (1980). The act amends and strengthens the Social Security Act programs for state child welfare and social programs.

29. *Id.* at 49-50.

This debate over reimbursement for time spent on “daily supervision,” the most arduous and the most rewarding part of parenting, suggests that members of the House of Representatives shared the popular assumption that parenting—even foster parenting—should be primarily an act of altruism. The Senate, however, may have implicitly shared some of Professor Fineman’s recognition that “caretaking” requires financial resources, whether regarded as pay for services rendered or as subsidy to make the family system succeed.³⁰

B. Adoption and Safe Families Act

In 1997, Congress again enacted major legislation, the Adoption and Safe Families Act³¹ (ASFA), which confirmed federal government control over foster care.³² The primary purpose of ASFA was to increase the number of children adopted from the foster care system; indeed, legislators named the bill the “Adoption Promotion Act” when it passed the House of Representatives.³³ ASFA emphasizes the temporary nature of foster care. Nonetheless, it also recognizes that foster parents have some knowledge and understanding of the children for whom they care and, thus, although not entitled to any additional substantive rights, are at least entitled to additional procedural rights than they received under previous legislation.³⁴ The legislation provides that the state must give foster parents notice of, and an opportunity to be heard at, any reviews and permanency hearings.³⁵ Prior to ASFA, states often denied foster parents access to such proceedings.³⁶

During the hearings, foster parents testified about their lack of access to court processes concerning their children.³⁷ The Children’s Defense Fund testified in support of providing notice and an opportunity for foster care parents to participate at hearings that

30. See *id.* (noting that the Senate bill would convert the child welfare program to an “advance funding basis”).

31. 42 U.S.C. § 671 (1989).

32. Pub. L. No. 105-89, 111 Stat. 2115 (1997). See also *HHS Proposes Regulation: Adoption and Safe Families Act* (visited July 22, 1999) <<http://www.casanet.org/news/legislative/hhs-9-98.htm>> (explaining that the proposed regulation focuses on the results these programs achieve, rather than procedural reviews as in the past).

33. See H.R. REP. NO. 105-77 (1997).

34. 42 U.S.C. § 675(5)(F).

35. See H.R. REP. NO. 105-77 (1997).

36. See *id.*

37. See Bill Grimm, *Adoption and Safe Families Act Brings Big Changes in Child Welfare*, 18 YOUTH L. NEWS 1, 5 (1997) (discussing how ASFA represents a comprehensive overhaul of the federal welfare system).

review the status of their children, explaining the importance of "the involvement of *caretakers* at the review hearings."³⁸ In addition, the United States Department of Health and Human Services affirmed that foster care parents, "[a]s the primary caregivers of children in out-of-home care . . . have valuable firsthand knowledge that can help inform decisions. . . ."³⁹ Congressional legislation recognizes foster parents as key participants in the system, albeit with extremely limited claims.

III. PROFESSOR FINEMAN'S PROPOSAL AND THE FOSTER CARE SYSTEM

The foster care system is particularly well-suited to our examination of Professor Fineman's proposal because it differs in critical respects from other forms of public subsidy, such as Social Security and Temporary Assistance to Needy Families (TANF),⁴⁰ which replaced Aid to Families with Dependent Children (AFDC).⁴¹ First, although the foster care system remains similar to TANF in that it provides subsidy to the caretaking unit, it does so with relatively little interference into the caretaker's life; once a foster family is licensed, the activities of its individual members are not monitored, and "intervention" occurs only with respect to the child. Second, although it shares characteristics of other transfer programs such as Social Security or worker's compensation, it differs because the whole program is expressly earmarked for the expenses associated with caretaking of children.

A. *The Welfare Contrast*

Congress designed TANF to provide temporary support for children of poor families.⁴² Like the earliest public welfare programs,

38. *Hearings*, *supra* note 12, at 90 (testimony of Marylee Allen, Children's Defense Fund) (emphasis added). *See also Hearings*, *supra* note 12, at 16 (testimony of Senator Mike DeWine) ("[I]t is right that these foster parents be heard. To exclude the foster parents from the court proceedings may mean silencing the child's most forceful and most informed advocates.").

39. *Hearings*, *supra* note 12, at 41 (testimony of Olivia Golden) (acknowledging the inherent tensions in the foster care arrangement, and expressing concern that such involvement might give foster parents rights that were inconsistent with their status as "temporary" caretakers).

40. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) (establishing TANF as the replacement for AFDC and explaining that a state can opt in to the Act only if it had previously operated under AFDC).

41. *See id.* (establishing new state reporting and data requirements for the TANF program); *see also* Administration for Children and Families, *Factsheet-Welfare-Temporary Assistance for Needy Families (TANF)* (visited Jun. 30, 1999) <<http://www.acf.dhhs.gov/programs/opa/facts/tanf.htm>> (reporting the signing of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 by President Clinton on Aug. 22, 1996).

42. *See* LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994); Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized*

TANF screens "worthy" families for support.⁴³ Historically, the initial and ongoing screening processes for government subsidy recipients have involved a high level of scrutiny for recipients. This began with attempts to provide support for the children of "morally worthy" widows, which first received national attention at a 1909 White House Conference on Children.⁴⁴ Illinois enacted a Mother's Aid Law in 1911, which limited eligibility to widowed mothers who were American citizens.⁴⁵ Thirty-nine states had enacted similar legislation by 1919.⁴⁶ Not only did large percentages of potentially eligible mothers not receive aid, but also the amount received was generally insufficient to allow the women to stay at home as full-time mothers.⁴⁷ Due to the morality standards written into such laws, large categories of women did not receive aid.⁴⁸ Only three of the laws allowed unmarried mothers to receive pensions,⁴⁹ and, in a 1931 study, the U.S. Children's Bureau found that ninety-six percent of the recipients were white, and only three percent were black.⁵⁰ After the enactment of Aid to Dependent Children in 1935, morality requirements continued to exclude blacks;⁵¹ "man-in-the-house" rules⁵²

Contexts, 95 MICH. L. REV. 965, 965-66 (1997) (arguing that people must challenge the gender and racial perceptions in welfare reform cases by exposing the stereotypes that inform welfare regulations).

43. See *id.* (discussing additional requirements).

44. See Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mother's Aid*, in WOMEN, THE STATE, AND WELFARE 123, 138 (Linda Gordon ed., 1990) (discussing the development of federal and state support to the children of worthy widows).

45. See *id.* (explaining that initially Social Security contained no provision for the coverage of wives or widows); see also THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 424-79 (1992) (discussing the history and adoption of mothers' pension laws). The 1911 Missouri law on mothers' pensions allowed pensions to widows who were "in the judgement of the Juvenile Court . . . a proper person, morally, physically, and mentally, for the bringing up of her children." *Id.* See generally MIMI ABRAMOVITZ, REGULATING THE LIVES OF POOR WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 318-23 (1988) (discussing the history of mothers' pension laws).

46. See Nelson, *supra* note 44, at 139 (explaining the increase in state adoption); SKOCPOL, *supra* note 42, at 446-47 (citing a chart with date of state enactments).

47. See SKOCPOL, *supra* note 45, at 471 (explaining that this was the case despite the fact that the pension was designed to honor those that provided service to the state).

48. See SKOCPOL, *supra* note 45, at 471 (stating that the role of women was mothering, not civil service).

49. See SKOCPOL, *supra* note 45, at 467 (noting that initially social insurance excluded mothers altogether).

50. See Nelson, *supra* note 44, at 139 (noting that southern states were the least likely to have military service pensions and usually paid less money for them).

51. See generally GORDON, *supra* note 42 ("The superior programs are disproportionately white and male and they were designed to be so, because that was the dominant image of citizenship in 1935."); Dorothy Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996) (reviewing GORDON, *supra* note 42).

52. See *King v. Smith*, 392 U.S. 309, 334 (1968) (striking down man-in-the-house rules).

simultaneously discouraged the formation of two-parent families while policing the behavior of single women.⁵³

As an example of the ongoing scrutiny of welfare recipients, consider the 1969 case of *Wyman v. James*.⁵⁴ At the time, New York state law required home visits to public welfare recipients once every three months;⁵⁵ the visits were intended to verify information concerning eligibility for welfare, provide professional counseling, and prevent welfare fraud.⁵⁶ Moreover, New York law specified that a child would only be eligible for aid "if his home situation is one in which his physical, mental and moral well-being will be safeguarded and his religious faith preserved and protected."⁵⁷ Barbara James, a public welfare recipient, refused to allow her caseworker to visit her home.⁵⁸ She told her caseworker that she would provide any information that was relevant to her continued receipt of welfare, but that the caseworker could not make a home visit.⁵⁹ The Supreme Court upheld the validity of the home visits.⁶⁰ In dissent, Justices Marshall and Brennan explained:

[I]t is argued that the home visit is justified to protect dependent children from 'abuse' and 'exploitation.' These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse?⁶¹

The history of aid to poor women is replete with attempts to control their lives by conditioning the receipt of public welfare on

53. See Cahn, *supra* note 42, at 972 (arguing that aid to poor women was an attempt to coerce women to conform to morality requirements).

54. 400 U.S. 309 (1971). This discussion is drawn from Naomi R. Cahn, *Models of Family Privacy*, 68 GEO. WASH. L. REV. (forthcoming 1999).

55. *Id.* at 312 n.4 (explaining that contacts shall include home visits, office interviews, correspondence, reports on resources, and other forms of documentation).

56. *Id.* (explaining the desire of public welfare officials to provide assistance only so long as it is necessary).

57. *Id.* This requirement was to assure that the welfare recipient conformed to the standards of the community. See N.Y. COMP. CODES R. & REGS. tit. 18, § 369.2(d)(1) (McKinney 1992) (requiring that the home "be judged by the same standards as are applied to self-maintaining families in the community").

58. *James*, 400 U.S. at 310. Upon James' refusal, the AFDC program threatened to terminate her assistance.

59. *Id.* at 313 (explaining that James telephoned the worker ahead of time and asked the worker not to come to her house).

60. See *id.* (remanding the case with direction to enter a judgement of dismissal).

61. *Id.* at 341-42. Katharine Baker notes that "[t]he justification for affording single mothers less protection—i.e., that their individual claims to privacy are diminished by their dependence on the state—cannot withstand scrutiny." Katharine Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1504 (1997) (book review).

their compliance with morality requirements.⁶² Under TANF, the most visible form of such control is the requirement that a custodial parent relinquish her⁶³ rights to receive child support from the non-custodial parent, assigning all such rights to the state.⁶⁴ Generally, at her initial interview with a caseworker, the potential recipient signs a simple form in which she agrees that the state is entitled to collect her child support.⁶⁵ To help the state collect the support, the custodial parent must also agree to cooperate with the local child support agency in establishing the identity of the father and in obtaining the child support payments.⁶⁶ Federal regulations require that states define "cooperation" to include actions ranging from providing information at an interview at the local child support office to testifying at child support hearings.⁶⁷

In contrast, states initially screen foster families for certification that they meet reasonable expectations for caretaking. Still, until 1997, the federal government did not even require that such screening include background checks for criminal convictions.⁶⁸ Furthermore, once they are licensed, foster parents are subject to little day-to-day intervention, except with respect to their direct interactions with the child.⁶⁹ Professor Fineman's proposal emphasizes that a foster mother can choose to work or not to work and will still receive her subsidy. In contrast, a TANF mother must work, and her application for assistance ultimately relinquishes her freedom of choice regarding her time, her family's zone of privacy, and her financial autonomy.⁷⁰

62. This was true, regardless of the type of "aid" these mothers received. See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 280-85 (1988) (discussing attempts to impose middle-class norms on poor women who were victims of domestic abuse).

63. Virtually all of the custodial parents on AFDC are women. See BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, *MOTHERS WHO RECEIVE AFDC PAYMENTS* (1998).

64. 42 U.S.C. § 602(a)(26)(A) (1997).

65. See Cahn, *supra* note 42, at 973 (noting that the custodial parent must also agree to cooperate).

66. 45 C.F.R. § 232.12(a) & (b) (1995) (securing the cooperation of custodial parents by requiring, *inter alia*, their appearance at state or local agency offices to provide information or documentary evidence about the applicant). See also 54 Fed. Reg. 6237 (1999).

67. 45 C.F.R. § 232.12(b) (1995); see also Cahn, *supra* note 42, at 973 (explaining that federal regulations provide various means for obtaining cooperation).

68. 42 U.S.C. § 671(a). See Grimm, *supra* note 37, at 5 (discussing new requirements under AFSA).

69. *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (discussing the parameters of foster parents' rights). Unlike those in other families, however, children can be removed from foster care with very little process. *Id.* ASFA, as discussed *supra* notes 34-36 and accompanying text, provides a few more protections for foster parents.

70. The recipient must identify the putative father and cooperate with child support

At the furthest extreme, let us imagine a neurosurgeon mother. If she marries a similarly situated man, they may decide that he should subsidize her role as caretaker for the family unit. Their decision remains "private," and their financial choices are not subject to any scrutiny.⁷¹ If, however, she is a single mother who relies on her own salary, but wishes to caretake as full-time work for a period of time, our current public welfare system deprives her of that choice by requiring her to earn what she is capable of earning. She cannot "choose" to perform full-time home-work for any period of time. If she is a foster mother, rather than a biological or adoptive mother, who chooses to stay home, she will receive some subsidy for her caretaking without any comparable work requirement. Moreover, the foster care subsidy will be greater than what she would receive under TANF.⁷²

The distinctions between TANF and the federal foster care system are demonstrated both financially and with respect to the relative autonomy of the foster care parent compared to the TANF parent.⁷³ The disparities in the treatment of TANF recipients and foster parents result from two underlying assumptions. First, the foster care system expressly recognizes the contribution of caretakers to raising children. Notwithstanding the original ambivalence toward such subsidy in the 1961 legislation, foster parents receive public money to raise children in their homes.

Second, the disparity reflects our incentives. We want to

establishment and enforcement efforts.

71. For discussion of the factors leading up to these "choices," see RHONA MAHONEY, *KIDDING OURSELVES: BABIES, BREADWINNING, AND BARGAINING POWER* 9-27 (1995) (discussing the sexual division of labor and factors involved in this, including disparate education and wages, domestic violence, the drastically lower standard of living for women upon divorce, "the beauty problem," and how these factors affect children); JOAN WILLIAMS, *UNBENDING GENDER* (1999); Naomi Cahn, *The Powers of Caretaking*, 45 VILL. L. REV. (forthcoming 1999). For discussion of the public subsidies for these private choices, see Fineman, *supra* note 1.

72. See Jill Duerr Berrick, *When Children Cannot Remain at Home: Foster Family Care and Kinship Care*, 8 FUTURE OF CHILDREN 72, 74-76 (1998). As Mark Courtney notes:

In 1993, the median monthly AFDC payment for one child (\$212) was more than \$100 per month less than the median foster home maintenance payment.... Furthermore, foster care rates are proportional to the number of children placed (two children generate twice the foster care rate of one child), while AFDC per capita payment rates decreased with increased family size. Thus, the more children in a family, the greater is the difference in cost between public assistance and foster care.

Courtney, *supra* note 9, at 93. For example, some states have chosen to provide no additional per capita payments under TANF when a recipient mother gives birth to another child.

73. As Professor Barbara Bennett Woodhouse points out, "[t]he tensions between our ideals of community and our legacy of rugged individualism and reliance on private responsibility, compounded by economic crisis, have been played out in cases and policies surrounding the state's responsibility to children in foster care." Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497, 506-07.

encourage foster care by morally worthy families, but to discourage biological or adoptive families from depending on public welfare. We condition support for the foster care system on the notion that children are living outside of their families of origin, thus providing an assurance that the public is not subsidizing adults who would otherwise be privately responsible for the care of their children. It is reciprocally conditioned on the notion that children receiving public support through the foster care system would otherwise live with bad parents. In short, we want to privatize caretaking, except where the private caretaker is deemed inadequate or unwilling to provide care and a public caretaker is therefore substituted.

The judgments become more complex when the foster caregiver is related to the child.⁷⁴ Some states relax licensing requirements for kinship foster care;⁷⁵ and, sometimes, when the kinship care provider is not licensed, she may still receive TANF payments for the children who live in her home.⁷⁶ An exception even exists to the temporary nature of TANF for kinship providers.⁷⁷ Under these limited circumstances, then, federal law provides grudging support even to relatives, but only so long as they are not the biological parents.⁷⁸ For Professor Fineman, the critical task is to convince Americans that all parents may well need and deserve long-term support for caretaking.

B. Foster Care Compared with Other Transfer Payments

Foster care shares a superficial similarity with other public

74. States frequently attempt to pay kinship providers less than non-relative foster parents. Indeed, although Congress enacted the federal foster care legislation in 1960, only in 1979 did the Supreme Court hold that the legislation required states to reimburse kinship providers at the same rate as non-kinship providers. See *Miller v. Youakim*, 440 U.S. 125, 146 (1979). On the other hand, if a state operates a separately-funded foster care system in addition to participating in the federal program, the state may constitutionally deny support to relative caregivers. *Lipscomb v. Simmons*, 962 F.2d 1374, 1378 (9th Cir. 1992) (*en banc*) (declaring that a state's chosen statutory scheme in the area of economics and social welfare does not rise to the level of heightened scrutiny, nor does it create a suspect class that violates 14th Amendment equal protection).

75. See Berrick, *supra* note 72, at 75–76 (comparing AFDC financial assistance allocated for non-kin and kin foster care children in four states).

76. See *The Policy of Penalty in Kinship Care*, *supra* note 12, at 1050 (discussing TANF benefits). Kinship care providers may fail to qualify for foster care licensing because of the time involved between applying for licensing and the actual issuance of the license. Interview with Mark Hardin, ABA (Apr. 28, 1999).

77. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3)(e)(i), 111 Stat. 2115, 2118 (1997) (asserting that kinship foster parents approved by the state may continue to receive subsidies until the child moves out of the foster care system).

78. States may thus circumvent *Miller v. Youakim* by not labeling a kinship placement as foster care, but referring to it instead as care by a relative entitled to receive the child's public welfare benefits (i.e., TANF). The latter group of relative providers thus receives a lower level of benefits, even when fulfilling obligations equivalent to those of foster parents.

subsidies, such as social security, workers' compensation, or unemployment insurance. Foster care, like these other programs, involves no scrutiny of the recipient beyond whether the recipient satisfies certain concrete conditions. In other words, the state does not inquire into recipients' private lives beyond the circumstances prompting the relief (*e.g.*, being fired); nor does the state place any requirements on recipients to comply with social norms.

Closer examination, however, reveals that foster care differs substantially from these other forms of public welfare. First, other programs do not provide explicit support for caretaking that occurs in the family. They are simply available under certain circumstances (such as age or accidents or termination of employment). Second, many programs other than foster care are true entitlements that do not differentiate among the eligible based on their assets. Alternatively, some programs provide public benefits only upon the occurrence of some crisis.⁷⁹ Such entitlements, unlike the foster care system, are viewed generally as insurance programs for which the recipient has "paid." Indeed, Professor Theda Skocpol traces the development of the distinction between those who receive "contributory insurance" and those who receive "noncontributory public assistance," including public welfare. Nonetheless, she explains, the distinction remains illusory. For example, many women who never worked outside of the home have received social security benefits based on their *husbands'* contributions.⁸⁰ Similarly, social security participants today, who believe that they are receiving only what is due to them based on their contributions as workers, actually receive between two and five times what they paid into the system.⁸¹

IV. LESSONS AND CHALLENGES FROM FOSTER CARE

What Professor Fineman proposes—public support for private caretaking—is truly radical. In the United States, public opinion remains highly ambivalent, at best, about whether to subsidize private caretaking.⁸² The foster care program, which provides limited

79. See Michele Landis, "Let Me Next Time Be 'Tried by Fire': Disaster Relief and the Origins of the American Welfare State 1789-1894, 92 NW. U. L. REV. 967, 971 (1998) (arguing that it was the ability of claimants to depict themselves as "the morally blameless victims of a sudden catastrophe—a disaster—that has largely determined the success or failure of a given claim").

80. See SKOCPOL, *supra* note 45.

81. Matthew Miller, *It's Christmas: Let's Means-Test!*, NEW REPUBLIC, Jan. 1996, at 28 (discussing social security and means-testing).

82. The national debate over the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (Supp. 1998), provides another illustration of the difficulties in supporting parents. See generally Michael Selmi, *Family Leave and the Gender Wage Gap*, 77 N.C. L. REV. (forthcoming 1999); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO

support for poor children in care outside of their family of origin, is clearly a flawed model: it is temporary and provides inadequate support. On the other hand, in its effort to subsidize caring for children, it provides some precedent for Professor Fineman's theory. At its heart, the foster care program contains a recognition that children need caretakers, and that those caretakers, under certain conditions, deserve support from the state. Moreover, the similarity of the foster care program to various entitlement programs—through its comparative lack of scrutiny of the caretaker recipients—offers some promise for subsidizing caretakers while protecting their rights of privacy.

The foster care program offers a much more constrained vision of support for dependency than does Professor Fineman's proposal in at least two ways. First, the foster care system is not designed to provide long-term support, and it only provides support for children who live outside of their families of origin. Professor Fineman, however, seeks support for precisely such long-term caretaking within the family of origin. Society does not approve of adults who perform caretaking in order to be paid, as shown by the negative publicity given to foster mothers whose foster care payments support them.⁸³ Of course, Professor Fineman would argue that her proposed caretaker support would not "pay" parents, but merely enable them to devote more time to the caretaking function.

As a general matter, however, public support for subsidizing families is strongest when programs encourage families to "behave according to generally-accepted norms, in particular the norm of working and making efforts toward self-sufficiency."⁸⁴ Foster care, arguably, fits in because the supposedly temporary nature of foster families leads to an illusion that they help children from the families

ST. L.J. 133, 148-50 (1998) (arguing that the FMLA protections are too narrow); Susan Deller Ross, *The Legal Aspects of Parental Leave: At the Crossroads*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 98, 103-6 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991) (discussing the strengths and weaknesses of the FMLA as states apply it).

In contrast, throughout the industrialized nations of Europe, social policy requires lengthy paid maternity leaves and ongoing services for children. See SHEILA B. KAMERMAN & ALFRED J. KAHN, FAMILY POLICY: GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES 17 (1978) (analyzing the "explicit and comprehensive family policy" in European countries); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 85 (1989) (addressing the various legal images of family relationships in Europe that are lacking in the United States).

83. There is an enormous amount of skepticism about the genuineness of foster parents in providing care for the "right" reasons. See, e.g., Heather MacDonald, *Foster Care's Underworld*, 9 CITY J. 42 (1999) (claiming that kinship foster care "allows families to accommodate, and even profit from, their dysfunctions").

84. Jonathan Zasloff, *Children, Families, and Bureaucrats: A Prehistory of Welfare Reform*, 14 J.L. & POL. 225, 261 (1998).

of origin move toward self-sufficiency—either through a return to their families, or through adoption—and out of the child welfare system. Likewise, TANF, which transformed the underlying assumptions of aid to poor families, attempts to enforce compliance with public norms when poor families deserve support. TANF, which temporarily supports the family unit, is premised on the notion that the grant provides a transition to independence and that the caretaker will assume complete financial responsibility within a short period of time.⁸⁵ TANF also closely scrutinizes the behavior of the recipient caretaker; if she has any substance abuse problems, for example, the state may terminate her grant.

Moreover, even under foster care, we, as a society, will only help poor children. Interesting and unchallenged assumptions lie behind the federalization of foster care. We assume that wealthier parents will support their children without federal help; and that their children do not need—and consequently are ineligible to receive—federal foster care or subsidies, regardless of the treatment they receive at the hands of their parents.⁸⁶ After all, an express reason for state subsidized foster care is to remove children who suffer abuse or neglect. We had initially assumed, therefore, before doing research for this article, that the child's entitlement to public funds would not depend on the parents' financial status. In reality, however, federally funded foster care is only available for children whose family of origin would be qualified pursuant to 1995 standards governing AFDC eligibility. This reality raises some troubling points that Professor Fineman will need to address in promoting the dialogue that she wishes to encourage. It stands as a stark reminder that even where the state intends the subsidy solely for the protection of the innocent child, and not for the caretaker whose vision of responsibility may differ from social norms, the United States has proved reluctant to provide any benefits for the children of parents who have the financial capacity to support them, even if they lack the emotional capacity.

Second, both the foster care system and TANF are premised on providing support for the *child*, in whatever familial unit she currently

85. See 42 U.S.C. § 602(1)(A)(ii) (1997) (imposing a maximum number of months that welfare recipients may collect TANF payments before seeking employment). See also Eugene J. Grigsby III, *Welfare Reform Means Business as Usual*, 64 J. AM. PLANNING ASS'N 19 (1998) (suggesting the desire to break the "cycle of dependency" as the impetus behind the TANF legislation).

86. State foster care programs may provide different arrangements. See *The Policy of Penalty in Kinship Care*, *supra* note 12, at 1050-52 (arguing that states use many mechanisms in supporting needy, abused, and neglected children, including state funded programs that deviate from federal AFDC-FC eligibility requirements).

lives. Professor Fineman seeks support for the caretaking unit, not just the child. The willingness to support the individual child reflects much broader social, legal, and philosophical notions about the role of the child as the future deserving citizen of the state.⁸⁷ In order to convince policymakers to accept her proposal, Professor Fineman will need to address explicitly the reasons that the unit, as opposed to the child, is sufficiently important to the social good to deserve the independence and subsidy that Professor Fineman envisions.⁸⁸

By providing her alternative vision of how to support caretakers, Professor Fineman dramatically illustrates the class- and gender-based nature of our current system of caretaking, under which women who do not depend on public support provide caretaking without intervention and explicit subsidy.⁸⁹ Her proposal requires us to ask why only affluent women should be allowed to entertain the option of spending the majority of their time with their children. It also leads us to question our priorities for children, such as why only certain children deserve the uninterrupted attention of a parent, and, whether such attention truly serves the child's best interests.

And, not for the first time, she causes us to challenge the rhetoric surrounding the centrality of families to our social organization. Although we are not sanguine about the possibility of the national dialogue on the family that Professor Fineman recommends, we agree that such a dialogue could lead to more constructive visions about various family-related issues.⁹⁰ Critical engagement with the dilemmas of developing a thoughtful policy that protects children and their caretakers can only move our culture closer to the goal of valuing families.

87. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (discussing the role of parents and the state in guarding the welfare of children); VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 208-28 (1985) (discussing the historically shifting approach of the United States toward children as economically productive members of the family unit); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 267-311 (1990) (discussing legal perceptions of children as rights-based and in a relational context).

88. We understand that the article in this symposium is excerpted from a much larger book, and we assume that the larger book will address such an important issue. See, e.g., Martha Fineman, *What Place for Family Privacy?*, 68 GEO. WASH. L. REV. (forthcoming 1999) (arguing that subsidy to the caretaking unit preserves its autonomy and privacy).

89. *Id.* See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997) (analyzing women's role as a caretaker of home and family).

90. We remain, however, wary of such a dialogue lest it be dominated by powerful and unrepresentative voices. For example, the contemporary debate on morality in family law is multi-faceted, but conservative theorists such as David Blankenhorn and current presidential hopeful Gary Bauer seem to be receiving disproportionate attention.

