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# ALTERNATIVE CARETAKING AND FAMILY AUTONOMY: SOME THOUGHTS IN RESPONSE TO DOROTHY ROBERTS

KATHARINE K. BAKER\*

## INTRODUCTION

Dorothy Roberts's analysis of the ways in which current kinship foster care arrangements highlight the need for more state support of caregiving and perversely sever familial bonds in the African American community raises important issues for those concerned about caregiving and the legal treatment of families.<sup>1</sup> In this short response, I will address two of those issues. First, I argue that it is important to understand how state support for caregiving can reify primary caretaker norms and undermine alternative care arrangements that have proven so valuable in communities of color. Second, I suggest that attempts to strengthen family ties must articulate a theory for family autonomy that dispenses with current doctrinal rules linking autonomy to financial independence and parental prerogative.

## I. ALTERNATIVE CARETAKING

Roberts describes how financial exigency often compels parents to relinquish their parental rights so that a kinship care provider can collect the greater monthly payments and allocation of services provided to foster parents.<sup>2</sup> She implies that if the state did a better job of supporting caretaking, such alternative care arrangements would not be necessary and parents would not have to relinquish control of their children simply because they do not have adequate resources.<sup>3</sup> This raises an important question, though. Is the problem that parents have to relinquish parental control to grandparents,

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1. See Dorothy Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619 (2001).

2. See *id.* at 1621, 1627, 1630.

3. See *id.* at 1621, 1640.

aunts, and sisters (i.e., kinship care providers) or is the problem that parents have to relinquish control to the state? As the system is structured now, parents in need of more assistance must do both, but it is important to figure out where the problem lies. However appealing it may be to say that no parent should ever have to relinquish parental control for purely financial reasons, the fact is that many if not most parents do precisely that. Whether they are relinquishing control to daycare providers or nannies or grandmothers, parents who enlist others in helping them raise their children allow others to assert significant influence over their children. Parents with money may do this because they actually prefer to share parental responsibilities in this way (because such sharing allows them to earn more money or spend more time doing something else), but parents without much money may have comparable needs and desires.

The Aid to Families with Dependent Children ("AFDC") program, which Roberts indicates served women of color better because it did not lead to such a reliance on kinship foster care,<sup>4</sup> was founded on the premise that mothers should not have to share parental responsibilities.<sup>5</sup> The purpose behind the original AFDC program was to allow women who were not supported by men to stay home to take care of their children because it was assumed that a mother-as-primary-caretaker norm, if not mother-as-only-caretaker norm, was preferable.<sup>6</sup> Sharing parental responsibilities was something one was forced by circumstance to do, not something one might do by choice. The government stepped in to alleviate whatever hardship caused these single mothers to have to share.

There are now solid reasons to question the ideology behind the original welfare grants, and they are reasons that have nothing to do with the political rhetoric that ended AFDC or engendered the current structure of Temporary Assistance to Needy Families

4. *See id.* at 1626-27.

5. "Home life is the highest and finest product of civilization. . . . Parents of good character suffering from temporary misfortune, and above all deserving mothers fairly well able to work but deprived of the support of the normal breadwinner, should be given such aid as may be necessary to enable them to maintain suitable homes for the rearing of their children." PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN, S. DOC. NO. 60-721, at 5-6 (1909).

6. "The purpose of legislation for aid to dependent children has been to . . . enable the mother to stay at home and devote herself to housekeeping and the care of her children . . . ." COMM. ON ECON. SEC., SOCIAL SECURITY IN AMERICA: THE FACTUAL BACKGROUND OF THE SOCIAL SECURITY ACT AS SUMMARIZED FROM STAFF REPORTS TO THE COMMITTEE ON ECONOMIC SECURITY 233 (1937).

("TANF").<sup>7</sup> The problem with "welfare as we knew it" was not so much that it allowed women to stay on welfare so that they would not have to work; it was that it reinforced the notion that childcare was an exclusively nuclear family responsibility. An indirect benefit of the move to TANF is that it at least gets more people thinking about ways to integrate caretaking with work and other activities. Kinship care was less necessary under the AFDC regime, but its absence may have reflected an inadequate vision of the realm of appropriate caretaking arrangements.

There are important advantages to kinship care arrangements. They provide both children and mothers with an expanded understanding of family and caregiving. There is ample evidence that children raised in more collective environments, whether it be an Israeli kibbutz,<sup>8</sup> an American daycare center,<sup>9</sup> or an extended family, do not suffer in their emotional, moral, or physical development. Roberts herself notes that kinship foster care arrangements help preserve family, community, and cultural ties. Various scholars from a variety of disciplines suggest that children who are isolated in the home tend to be overly invested in their caretakers and insufficiently invested in collectives.<sup>10</sup> Children may benefit from systems that encourage more collective responsibility for childcare. Such systems allow children to experience a variety of caregivers and thus different kinds of affection, role modeling, and learning. Girls raised in such environments can come to understand that having children need not necessarily confine them, even temporarily, to an isolated life of mothering.

Mothers can come to understand this too, of course, and thus open up for themselves worlds in which they are less likely to overinvest in their children at their own expense. Mothers who rely on others to help them caretake tend to fare better emotionally, as

7. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. III, 110 Stat. 2105, 2198-2260 (codified as amended in scattered sections of 42 U.S.C.).

8. See Ron Shouval et al., *Anomalous Reactions to Social Pressure of Israeli and Soviet Children Raised in Family Versus Collective Settings*, 32 J. PERSONALITY & SOC. PSYCHOL. 477 (1975); see also Urie Bronfenbrenner, *Two Worlds of Childhood: U.S. and U.S.S.R.* (1970) (describing the Soviet Union as utilizing a collective-centered system of childrearing).

9. See Caryl Rivers & Rosalind C. Barnett, *Are Dual-Income Families Walking Time Bombs?*, CHI. TRIB., July 9, 1996, at 1-11.

10. See Beatrice B. Whiting & John W.M. Whiting, *Children of Six Cultures* 106 (1975); Sarane Spence Boocock, *Children in Contemporary Society*, in *RETHINKING CHILDHOOD* 414 (Arlene Skolnick ed., 1976); Jerome Kagan, *The Child in the Family*, DAEDALUS, Spring 1977, at 33.

they get older.<sup>11</sup> Moreover, the more mothers consistently rely on various different networks for caretaking, the less deviant are all nontraditional caretaking arrangements. The more we denaturalize the isolated nuclear family, the more freedom we give women to leave abusive relationships, to parent without men if they choose, and to nurture their own development even as they nurture their children.

Roberts's criticism of the current kinship foster care arrangement does not explicitly or implicitly endorse the old AFDC system or a primary caretaker norm, but as she calls for more state support of caretaking in order to avoid the problems with the current kinship foster care situation, it is important to keep in mind what we may want and not want that support to look like. Certainly, there is nothing wrong with providing all children, regardless of whether they have foster status, with the same governmental services, like access to medical insurance, housing assistance, mental health treatment, and parental drug treatment. However, we may not want a cash assistance program that extends only to parents or primary caretakers. There may be advantages to systems that actively encourage parents to share their childcare responsibilities with others so that we can allow those parents to expand both their own and their children's horizons. Childcare subsidies that go directly to childcare providers, whether they are daycare centers or grandmothers and aunts, might serve us just as well as cash allowances that go only to parents.

## II. FAMILY AUTONOMY

The main focus of Roberts's concern with the current state of kinship foster care is not that it encourages kinship care over primary parental care, but that it does so at the expense of family autonomy.<sup>12</sup> By putting a child in a foster care placement—whether that placement be with a family member or someone else—parent, child, and extended family subject themselves to a kind of state scrutiny that is forbidden in nuclear families that have not availed themselves of state services. Roberts clearly condemns such interference and suggests that the financial exigency that makes kinship foster care

11. See ROSALIND C. BARNETT & CARYL RIVERS, *SHE WORKS, HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER OFF* 27-34 (1996).

12. See Roberts, *supra* note 1, at 1632-33.

necessary need not and should not deprive families of their ability to raise children as they choose.<sup>13</sup>

Roberts's analysis demands clarification of two separate but important points. First, to suggest that the state should provide aid for caretaking yet still defer to the autonomy of caretakers who receive it requires a square rejection of the explicit reasoning in cases like *Wyman v. James*<sup>14</sup> and the implicit reasoning in cases like *Wisconsin v. Yoder*.<sup>15</sup> Second, asking for state deference to kinship units—not just parents—requires an articulation of a right to autonomy that discards parental rights rhetoric and focuses instead on other benefits that such state deference produces.

In *Wyman*, the Supreme Court held that state social workers could visit the homes of AFDC recipients because of the “public[] interest . . . [in] . . . protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent*.”<sup>16</sup> Lost on the Court was the rather obvious point that all children are dependent. The important question is: Dependent on whom? The Court ruled that if a child's dependency needs are met in part by the state, then the constitutional protection to be free from governmental searches into the home evaporates because of the reasonableness of a search whose purpose is “the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility.”<sup>17</sup> Comparably, in *Wisconsin v. Yoder*, the Court ruled that Amish parents' decision to pull their children out of what had been mandatory school after eighth grade was justifiable in part because the Amish community “reject[ed] public welfare in any of its usual modern forms.”<sup>18</sup> Because Amish children's dependency needs are met without relying on state assistance, Amish families are entitled to more deference. There is strong reason to question just how seriously the Supreme Court takes this proposition. Through its *parens patriae* authority, the state has responsibility for all children, not just those receiving “public welfare.” Does an across-the-board \$1000-per-child tax deduction subject all people who take advantage of it to the kind of state regulation that Ms. Wyman was forced to accept? One tends to

13. See *id.* at 1632-33.

14. 400 U.S. 309 (1971).

15. 406 U.S. 205 (1972).

16. 400 U.S. at 318 (emphasis added).

17. *Id.* at 323.

18. 406 U.S. at 222.

think not. Nonetheless, in calling for state deference to familial decision making in kinship care arrangements and simultaneously calling for more state subsidy for meeting children's dependency needs, Roberts clearly calls for the rejection of the analysis that limits freedom from government interference to those parents who forego "public welfare."

What then is the justification for family autonomy? Why is it important that the government refrain from interfering in family life? Traditionally, the justification has been framed in terms of parental rights. In *Prince v. Massachusetts*, the Supreme Court wrote that parents have rights to "bring up [a] child in the way he should go."<sup>19</sup> In *Yoder*, the Court wrote that the "primary role of the parents in the upbringing of their children is . . . established beyond debate as an enduring American tradition."<sup>20</sup> In *Smith v. OFFER*, Justice Stewart wrote:

If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter."<sup>21</sup>

These cases all root the right to be free from governmental interference in the parents. To ask the state to defer to childrearing decisions made by kinship care providers and other nonparents requires an articulation of the virtues of such deference. Why should the state defer to nonparents who want to make childrearing decisions with which the state might disagree? Because both the children and ultimately the state itself benefit from such noninterference.

First, it may well be in children's interest to have the government refrain from trying to guide or rear children. In a pluralistic society, the government must be very careful and balanced in its transmission of values.<sup>22</sup> That balanced treatment is often not what children most need. As Stephen Gilles writes, "loving efforts to transmit . . . values help form . . . children's characters, enable them to learn what it is to

19. 321 U.S. 158, 164 (1944).

20. 406 U.S. at 232.

21. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring) (quoting *Prince*, 321 U.S. at 166).

22. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("[A]ffirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.").

have a coherent way of life, and develop their capacity to enter into caring, long-term relationships with others.”<sup>23</sup> Children benefit from the value-laden educational process that usually accompanies the familial socialization of children. A clear sense of what is right and good helps children understand who they are. The state is clearly limited in its ability to establish its own notion of what is right and what is good. Children need the bias that the state is forbidden to demonstrate.

Second, children benefit from a sense of family and community that gives them both a sense of being special and a sense of belonging. In possibly the most influential book in family law, *Beyond the Best Interests of the Child*, the authors write: “Only a child who has at least one person whom he can love, and who also feels loved, valued, and wanted by that person, will develop a healthy self-esteem.”<sup>24</sup> Children need to feel a part of something unique. Too much government interference with the child’s upbringing makes the child one of a million citizens, not part of a select group. For children, who are inherently vulnerable and dependent, the benefits of feeling like one who belongs to a particular group may far outweigh the benefits of state interference. Moreover, as Martha Minow writes, “belonging is essential to becoming.”<sup>25</sup> Children cannot grow into moral autonomy without a sense of connection to a family or a community.<sup>26</sup> As Peggy Cooper Davis points out: “For children, civil freedom brings nothing less than the right to grow to moral autonomy, because the child-citizen . . . flowers to moral independence only under authority that is flexible in ways that states . . . cannot manage, and temporary in ways that states . . . cannot tolerate.”<sup>27</sup>

Third, the government itself benefits from its own deference to family autonomy because allowing children to grow into moral autonomy leads to a diversity and pluralism that keep democracies strong.<sup>28</sup> Family autonomy fosters heterogeneity in a manner that

23. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 941 (1996).

24. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 20 (1973).

25. Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894.

26. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989) (“If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships . . .”).

27. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371-72 (1994).

28. See Gilles, *supra* note 23, at 960; see also Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH.

ultimately serves a polity committed to various forms of individual rights. It produces healthier citizens who are able to respect difference even as they honor their own ethical beliefs.

Rooting the need for familial autonomy in something other than parental rights does not necessarily dispense with the idea of parental rights. There may be a variety of reasons why the state should defer to parents more than other family members. Given their investment in their children, parents may deserve such deference more than others, and there may be advantages to a clear hierarchy of parental rights.<sup>29</sup> Thus, if there is an intrafamily conflict and no evidence of parental unfitness, perhaps parents should enjoy the presumption that they act in their children's best interests.<sup>30</sup> But absent such intrafamily conflict, there are sound reasons for the state to respect a right to family autonomy that gives other family members a right to that presumption. Such deference benefits the children and ultimately the state in ways that should make us question the current government practice of regulating kinship foster care.

### CONCLUSION

As always, Dorothy Roberts has thoughtfully and poignantly called our attention to the ways in which current law forces disadvantaged people, particularly women of color, to endure hardships that many others need not endure. In doing so, she demonstrates the benefits of kinship care arrangements and the limitations of the current regulation of kinship arrangements through the foster care system. Her analysis raises important questions about alternative childcare and state regulation. In particular, her evaluation of the benefits of kinship care encourages us to consider the extent to which we want governmental support for caretaking to reinforce the primary caretaker norm. It also encourages us to understand family autonomy, not just as a parental right, but as a necessary part of a healthy, just, and rich polity.

L. REV. 463, 480-82 (1983).

29. See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1541-43, 1548 (1998) (explaining why parents benefit from state deference to their parenting decisions and why dispersing childrearing rights too broadly can be harmful to children).

30. See *Troxel v. Granville*, 530 U.S. 57 (2000) (upholding the right of a mother to block grandparent visitation that she felt was harmful to the children).