April 2001

Foreword: The Structures of Care Work

Katharine B. Silbaugh

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview
Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol76/iss3/2
FOREWORD: THE STRUCTURES OF CARE WORK

KATHARINE B. SILBAUGH*

A fantastic amount of activity is brewing around the subject of care work—meeting the needs of children, the elderly, the sick, or the disabled.¹ The family, which has been the primary repository of care responsibilities, has gone through an irreversible transformation in terms of expectations, aspirations, conduct, stability, composition, and abilities. These changes raise questions about the efficacy of assigning care solely to the family, and they also bring to light several kinds of persistent justice problems raised by that allocation. As the roles and expectations of both men and women have evolved in the family, in the workforce, and in civic life, the institutional arrangements that have dominated care work for the past century have proved themselves to be in need of significant re-envisioning.

People are now asking questions about care work along a multitude of axes. Who cares for society’s dependents? where and how? who pays for that care? how and how much? who generates the standards for that care? and why? who benefits from that care? in what ways? and what are their responsibilities? How do society’s institutions, the market (and the private institutions that compete in it), governments, and the family respond to, accommodate, allocate, pay for, and benefit from the care of dependents? What does care mean—how is it defined, and what is its meaning in the life and for the identities of those who give it? What are the consequences of the human need for care in terms of the economic well-being, citizenship status, workforce equality, strength, power, and emotional welfare of caregivers? How should care be conceptualized—as work, as civic obligation, as recreation or consumption, as familial or social, liberating or constraining for individuals, or both, and in what ways? How should we address the justice and equity issues raised by care

* Professor of Law, Boston University School of Law.

1. This use of the term care work is meant to call up the material work itself, as distinct from the set of feminist claims often discussed under the heading of an “ethic of care,” per CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).
work, including its increasing transfer to the market, along race, gender, and class lines?

The questions are being asked and answered toward so many different ends that the work in the field defies easy organization. Scholars interested in women, in citizenship and civil society, in equality, in race, in childhood well-being, in poverty and economic stratification, in social welfare programs, in the labor force, in workers' rights, and in family form, are coming to see questions surrounding care work as significant to their academic investigations. Conflicts have begun to arise in the literature on the topic, both over the best means to common goals and over the goals themselves. This Symposium is the first collection of some of the primary legal voices on the subject of care work. It is timely, as the literature has developed rapidly in the past five years. I will here introduce the articles in this Symposium, but the reader will need to delve into the texts themselves to obtain a full understanding of the arguments.

The Symposium is made up of six principal articles by Martha Fineman, Joan Williams, Lucie White, Dorothy Roberts, Mary Romero, and Linda McLain, and seven equally interesting commentaries by Mary Becker, Katherine Franke, Michael Selmi, Kathy Abrams, Katharine Baker, Martha Ertman, and Mary Anne Case. Three of the principal articles, by Fineman, Williams, and McLain, are primarily devoted to broad theoretical argument mapping out our current care work delivery system, and making the case that the current system is unjust and demands a public response of some kind. The other three principal articles examine aspects of the care work system as practiced. Lucie White considers care work in a Head Start program, Dorothy Roberts considers care work in kinship networks under the supervision of the foster care system, and Mary Romero examines care work as experienced by workers who deliver care work for pay, and the children of those workers. In addition, most of the commentators have used this forum expansively to raise significant practical and theoretical issues presented by the burgeoning care work debate at large, as well as within this Symposium. A number of the commentaries could serve as stand-alone articles in their own right. We are fortunate to have so many substantial arguments together in one place.

The Symposium begins with articles by Martha Fineman and Joan Williams, both of whom have established themselves as the anchors of the legal academy's movement to theorize care work. In the past several years they each have engaged in sustained research
projects digging into some of the most fundamental problems presented by the structures of care work, and their articles here further develop themes raised in past work. They each creatively envision more just and workable arrangements, involving fundamental restructuring of social institutions. Broadly speaking, Fineman focuses on re-envisioning the relationship between the family and both the state and the market as repositories of responsibility for care work, while Williams focuses on achieving accommodations from employers that will assist workers in spending more time with their own dependents. In part this is a difference of political strategy—Fineman does not hold back, in the face of likely resistance, on a theoretical vision for social organization as it ought to be, while Williams wants to see changes that are possible within the political constraints we face now.

Using the concept of the social contract, Martha Fineman establishes that the allocation of the costs of the care of dependents to the private family under current social conditions is unjust given the benefits that go to society at large from that care. In a sense, it is not a deal that can be sustained long-term in the face of family changes and the changing status of women. She reminds us that society is full of dependents of all sorts, and that all people are at some time, and often many times, dependent, and those who care for them become themselves dependent on either state or family. She believes the costs of care work to caregivers ought to be distributed socially, through subsidies that compensate as well as accommodate, just as the costs of other public goods are subsidized. She continues from past work her explicit rejection of the notion of independence for individuals, arguing that subsidy is pervasive in the culture, and independence is neither desirable, nor attainable. Instead, Fineman argues that the concept of independence is used to distinguish and punish, where real distinction can be exposed as illusory. The rights-based leverage she might be giving up by admitting dependency, she reclaims by universalizing dependency, and thereby eroding the status within the social contract afforded to those who make a claim to being self-sufficient. While Fineman wants to see a change in the


3. This argument directly conflicts with a recent one made on behalf of independence, Vicki Schultz, Life's Work, 100 COLUM. L. REV. 1881 (2000).
structure of the workplace so that the market sphere can bear its share of the costs of care, her sustained focus is on the need for a significant change in the relationship between family and state.

Williams explores care work through a system she calls domesticity, which organizes gender relations as well as market and family relations around care work. Domesticity includes resistance to capitalism's emphasis on self-interest, competition, and the individual, the spiritualization of care and housework, the feminization of care work, the ideology of intensive mothering, and the uncompensated (noncommodified) nature of care work. Williams uses her own unique blend of postmodernism and practical political strategy to make a number of arguments about the process of change that is needed. First, Williams notes that aspects of domesticity are positive for many parents who value a "norm of parental care." At the same time, domesticity has significant costs for many, including racial minorities, white women, gender nonconformists, and the childless. The dual nature of domesticity has produced feminist advocates of both the elimination of domesticity through women's greater paid labor force participation, and advocates of the elimination of domesticity through materializing and compensating the work of domesticity. Williams emphasizes that each camp needs to stop attacking the other camp "on the grounds that they reinscribe domesticity while we destabilize it. We all reinscribe domesticity," because it is not sensible to talk about a position from far outside such a constitutive system. Thus an effective change strategy must acknowledge what Williams calls "domesticity in drag." That is, it must make gender trouble by reproducing numerous aspects of gendered identities within domesticity simultaneous with subversive confusion and localized disruptions of those identities. Williams draws on the postmodern ideas of Judith Butler in considering constraints on the transformation of gendered identities.

At the same time, Williams can be exceedingly politically pragmatic. This shows in her preference for workplace accommodation over state subsidy for care based on the current political resistance to state subsidy in general. It also shows in her desire as a social persuader to use the language of domesticity to draw people into political alliance. She wants to engage the public's sense that

4. Joan Williams, From Difference to Dominance to Domesticity: Care As Work, Gender As Tradition, 76 CHI.-KENT L. REV. 1441, 1471 (2001).
5. Id. at 1491 (citations omitted).
6. Id. at 1445.
children need time with parents to demand that employers provide that time without penalty, arguing that "we need to use domesticity because its patterning lends resonance, familiarity, and authority to our proposals." She thus relies on Judith Butler's insights to argue that feminists need to use domesticity's feminine gender performance so as not to appear "out to lunch."

Because they set out two of the more foundational arguments in the volume, I invited three commentators, Mary Becker, Katherine Franke, and Michael Selmi to offer thoughts on the two articles as a pair. Katherine Franke, using historical materials illuminating the transformation of African American status from slavery to citizenship, draws an analogy with a warning: that a transformation in responsibility for care from the private family to state or market is not one from clear bad to clear good. It is instead "to exchange one practice of rule—the private family—for another set of regulatory governance practices, those imbued in the state and the market." The warning does not propose an alternative to the state so much as remind that the state will define the meaning of dependency, and that it has not always done so with the good of the dependent at heart. Becker comments on Fineman and Williams with approval amidst particular questions for each that might strengthen their analyses. Becker's article in large part defends Fineman and Williams against a charge that their proposals assume maternalism for women, to women's detriment. She does this through an examination of just that argument made by Katherine Franke against excessive "repronormativity" in feminist scholarship, with a thorough point by point response that is usefully read in a pair with Franke's repronormativity article.

Finally, Michael Selmi questions whether women's inequality in the paid labor market is attributable to care responsibilities, rather than to some other form of discrimination. He questions any employer obligation to accommodate care responsibilities. He expresses a preference for solving care problems with greater equality of care responsibility between the sexes, as he is skeptical that meaningful part-time work could be accomplished in the real world

7. Id. at 1490.
8. Id.
11. In this Selmi echoes the argument made in Schultz, supra note 3, at 1945.
without a penalty for women. In a sense, his critique shows greater confidence in the ability to change gendered behavior of individuals in families than the norm of employer (and male) prerogatives in the paid labor force. Putting the debate in its extreme for the purpose of contrast, Selmi sees an intransigent workplace on discrimination issues and so looks to the family for evolution toward equality, while care work feminists see an intransigently gendered family and look to the workplace for evolution toward equality.12

The Symposium next turns to questions of care work as practiced. Lucie White writes an intriguing account of care as practiced in a Head Start program in Los Angeles in the early 1990s. White daringly sets out a moral content to the act of care, under the right circumstances, where parents meet one another in loosely organized public spaces such as Head Start centers to care for children. Head Start has a particular set of legal rules that require giving parents a number of opportunities to participate in the centers either as parent-volunteers or as paid teachers. She describes how one mother, through acts of care for a challenging student at the center, demonstrated to herself that she could bring forth “what it took—the creativity, the patience, and the sheer, groundless hope—to be an effective agent of change.”13 This was among a number of relationships White describes at Head Start that are characterized by “mutual presence.”14 White links this very personal, nondelegable experience of intensive “long-term mentoring relationships for individual women,” with questions about how a Head Start classroom becomes a “beloved community,” a moral project.15 She wonders how the voices of people involved in such street-level projects can inform social policy questions surrounding care work.

12. The debate raises the interesting question of why scholars choose to be more optimistic about change in one sphere than the other. Selmi and Schultz are primarily employment law scholars, and probably are more intimately familiar with the workings of the labor market than are many of the family law scholars in this Symposium. They both see the workplace itself as the significant generator of inequality. Family law scholars generally see intimate relations as the more significant source. When we study something in great detail, are its problems inclined to seem more troublesome and intractable? Do we underestimate the difficulties generated by relations outside the field that we study intensively, relative to the difficulties generated by relations within the field we study intensively? (The tendencies I am describing do not apply to all the scholars of the work-family conflict, a number of whom are well-schooled in both family behavior and labor market data.)


14. Id. at 1601.

15. Id. at 1602-03.
Kathy Abrams responds to White with a commentary that praises the new literature on care work for its significant improvements on the first wave of legal feminist argument on care, the one that essentialized care as a characteristic of women’s moral thought. In the new debate, care work is “recognized as a complex set of practices that are structured, supported, and incentivized by a range of institutional decisions and social norms, and that differentiate and position women in relation to each other.”16 In addition to describing care as a practice rather than a characteristic, the new writing on care is also more sensitive to effects of the marginalized position of caregivers, and remedial arguments now “acknowledge and respond to the possibility of care’s devaluation.”17 At the same time, Abrams argues that this second round of debate about care, like the first, is a challenge to translate into conventional claims for legal intervention, because today’s arguments require major restructuring of many fundamental social institutions. Here Abrams sees hope in White’s approach in this Symposium. White is explicit about the role of legal intervention, saying only that it might work, for some people, when it occurs amidst the right mix of street-level institutions and public culture, such as those at play in the Los Angeles Head Start program she studied. That is to say, White is arguing that legal regulation might make it more likely that certain practices will emerge, without making a claim that law will make such practices emerge all the time, in the same way for all people.

Next Dorothy Roberts considers the way care is practiced in kinship networks monitored or facilitated by the public child welfare system, and in so doing she illustrates some of the consequences of allocating responsibility for care work to the private family. She argues that the recently popular kinship foster care replaces a traditional, private African American family arrangement with a similar structure that is regulated by state child welfare agencies. Because foster care arrangements receive a higher subsidy than that available from welfare, many families opt to surrender their children to the foster care system, with its more stringent supervision, in exchange for the higher level of support. She describes the risk of the broader family network losing custody altogether once a voluntary placement occurs. She argues that “[t]he transformation of kinship

17. Id.
care from a private to a state-run arrangement suppresses the historical strengths of this family form," as caseworkers do not involve extended family networks in long-term planning for the child.\textsuperscript{18} The state provides financial incentives for poor families to seek state-supervised fostering relationships, but Roberts warns of the dangers of state appropriation of the care arrangements of low-income African American families. The child welfare system, she argues, is built on the idea that "children's basic needs for sustenance and development will and can be met solely by parents."\textsuperscript{19} It is based on a vision of privatized care of children, one that rejects any collective responsibility for them. The child welfare system intervenes on what it must therefore view as pathological need, and then spends $1 billion a year "on maintaining poor children as state wards outside their homes, but only a fraction of that on child welfare services to intact families."\textsuperscript{20} Roberts's article in some ways illustrates the concern of Katherine Franke—that in practice, state assistance with care responsibilities may be punitive and may subject care workers to a new set of rules issued by the state rather than the family.

Kathy Baker comments on Roberts's analysis of kinship care by praising in general many arrangements that challenge the assignment of responsibility for the care of dependents to nuclear families. For Baker, that means that kinship foster care is superior to the old Aid to Families with Dependent Children ("AFDC"), because AFDC reinforced the notion that care work was a nuclear family responsibility. Kinship foster care, by making payments for care outside of the nuclear family, participates in spreading that responsibility to creative caretaking networks. Baker wonders whether any state support for caregiving that involves cash subsidies only to parents or primary caretakers reinforces the primary caretaker norm—just the norm that Joan Williams seeks to use in favor of social support for care work. Baker would rather see support in the form of in-kind government services, such as access to medical insurance, housing assistance, mental health treatment, and parental drug treatment. She would like to see subsidies that actively encourage parents to share their childcare responsibilities with others in order to expand the horizons of both parent and child.

19. \textit{Id.} at 1639.
20. \textit{Id.} at 1640.
Mary Romero next enters with an article that invites us to examine care work from the perspective of the paid caregiver, and more significantly, that caregiver’s children. She asks us to see the rise of the “work and family conflict” as an expression of a number of social movements and dislocations, rather than simply a result of more women entering the labor force or the gendered division and devaluation of care work. These influences include corporate reorganization that eroded workers’ confidence, declining government benefits that meant more wages per family were required, and the other forces that have caused worker hours to expand. These broad trends are experienced by individuals as work-family conflict. The individualized approach to remedying the need for time to work does not eliminate the conflicts produced by these trends, it simply shifts them to more vulnerable and less protected groups. In particular, she is concerned about shifting the care crisis onto the shoulders of paid domestic workers, drawn from the ranks of the more socially disadvantaged groups in our culture, low-income, African American and immigrant women. The only way to avoid this shift is to look to solutions that fundamentally reorganize the economy. Romero undertakes this investigation by looking at the way children of paid domestic workers view the care their mothers give to the children of their employers. Through this lens, Romero is able to bring to light some of the particularly damaging effects of domesticity, including its norm of intensive mothering, where it is provided by a paid caregiver. Romero argues that when employers hire substitute mothers under inferior working conditions, they “are purchasing services crucial to both the reproduction of their families and to the social reproduction of privilege.”

Turning from the investigations of issues surrounding care work as practiced offered by White, Roberts, and Romero, Linda McLain closes the Symposium with a reflection on the concept of care as a public value. She writes from within the discourse on civic republicanism, arguing that government’s formative project—its responsibility to prepare persons for democratic and personal self-government to help them live good lives—should include a recognition that affirming care as a public value is a precondition to civic and democratic life. From that perspective she critiques the
definition of personal responsibility offered by the welfare reform discourse. She argues instead that

[w]hat is needed is a more sustained focus upon the role of care in fostering human and social capital and a rejection of the simple equation of personal responsibility and good citizenship with market participation, without attending to the other responsibilities adults must honor and the other roles they must fulfill.\(^{23}\)

She joins Susan Moller Okin and Eva Kittay in arguing that John Rawls's version of political liberalism does not "make explicit enough the fact of human dependency and the importance of caregiving and caring relationships to human development."\(^{24}\) By focusing on families as "seedbeds of civic virtue," as the civil society literature does, a different function of the family is glossed over—that of providing necessary care.\(^{25}\) Without fully offering an institutional design for recognizing care as a public value, McLain argues that we should do so "in a way that does not replicate the inequality and injustice of the gendered care economy that has characterized much of this nation's history, nor the devaluing of care in law and public policy."\(^{26}\) She reflects positively on Nancy Fraser's idea of a "universal caregiver"\(^ {27}\) model (as distinct from universal breadwinner model) that seeks a redesign of workplaces to allow workers to meet both wage-earning and caregiving responsibilities. Finally, although she believes it has not yet arrived at its full potential and may be troubling in its current expression, McLain sees hope for transformation in parenting roles in the recent "responsible fatherhood" movement.

Both Martha Ertman and Mary Anne Case comment on McLain. Ertman wonders if liberal theory can accommodate care as a public value, as liberalism embraces individualism and autonomy so thoroughly. She worries that resting care as a public value on the notion that care of children creates citizens may make the citizenship of the caregiver derivative, grounded in the citizens it creates rather than the citizenship of the caregiver in her own right. She is concerned that making care a public value may allow the majoritarian middle to define the family, as public decision making involves high levels of government oversight and intrusion. The state's preferred


\(^{24}\) Id. at 1685.

\(^{25}\) Id. at 1690.

\(^{26}\) Id. at 1698.

\(^{27}\) Id.
family, Ertman worries, is and will be the heterosexual, two-parent family. Ertman prefers private law as a mechanism for gaining support for caregivers. She prefers contract as a mechanism to achieve remuneration, because private law, conceived by individuals rather than the collective, is friendlier to a proliferation of family forms.

In her commentary, Mary Anne Case worries that employer support for caregiving through accommodation of childrearing in particular will disadvantage workers without children, and specifically women workers without children, who will be required to do the extra work which mothers who receive workplace accommodations are relieved of. Case wants to see the burden of the care of children shifted from women to men, whom she believes are now the primary beneficiaries of the range of dependent benefits, not from women to state and market, both of which can then shift the childcare burden to childless individuals. To the extent accommodations are made, Case wants them to extend beyond the narrow definition of care and support of children, to include both other dependents (such as parents and nonmarital partners), and activities other than care altogether. Case’s article challenges us to ask how care compares with other needs of workers for time, pay, and dignity.

This Symposium opens many avenues for further debate. The reader will have to enter the Symposium to see the range of themes suggested, but I will briefly raise a few of them here. First, there is an overwhelming concern from all of the authors about the gender inequities created by our current care work system. At the same time, in thinking through remedies, there is a serious risk that care work, which is poorly remunerated in nursing homes, daycare centers, and private homes, is being delegated to the most economically and politically vulnerable workers (overwhelmingly women) in the paid labor market. What was gender stratification in the family becomes class and race stratification where care work is shifted to the market. For some this is an argument for returning more care work to families on an unpaid basis, where for others it is an argument for raising the status and wages of paid caregivers. The risk, though, is that a policy or theoretical promise to prevent care work from remaining one of the lowest paid forms of work will not be implemented. The likelihood of failure in that promise is exacerbated because the shift to the market occurs incrementally, as private individuals solve the individual problems created for them by the choices the system offers. Institutional thinking on the problems created by the care work crisis
has to be influenced by the possibility that, despite theoretical and political commitments that are made to expanding the institutions that are responsible for care work, it will continue to be specialized as the lowest wage work in the economy. Moreover, if the wages of childcare workers are raised and the costs past along only to parents, rather than socially subsidized, low-income workers in need of childcare may be further priced out of the licensed childcare market.

Second, there are quite divergent views on the role of men in care work. At times the care work crisis is presented in battle-of-the-sexes terms, with the overtone that the crisis is a creation of individual men exploiting individual women over what ought to be their shared care work responsibilities. This expression of the problem can lead to more than one kind of solution. One perspective seeks the solution to the work-family conflict through greater paternal care work responsibility. For some, this would go far in solving the crisis altogether. This remedy is appealing to those whose primary interest is in achieving workplace equality for women, as complete job integration seems only achievable under conditions of complete role integration at home. Here the goal is that the combined profiles of men and women, as wage workers and unpaid care workers, should look the same. For others, the solution to the battle of the sexes should not lie in persuading men to do more. They believe that for a range of reasons, including an internalized greater sense of responsibility for care work and a lack of any historical precedent for equal sharing, women's weaker bargaining position over care work is far more intractable than equal parenting advocates suggest. For them, if men's lesser participation is the source of the problem, then the creation of support systems without men's participation is the only safe strategy. This position views the battle of the sexes as a major problem, but women's tools in that battle would better include an effective exit strategy through partnership with market and state over care work, than bargaining from a weak position in a bilateral monopoly with a coparent.

Still others suspect that the battle of the sexes, meaning unequal participation by men in care work, is not the main source of the care work crisis. For them, evenly splitting the work between men and women will not change the fact that too much of the work is allocated to the private family to begin with. If two parents are equally buried in care work beneficial to society as a whole, such that their time for leisure or citizenship is greatly impaired, equal sharing between parents does not solve the more serious injustice of allocating care to
the private family sphere to begin with. But for others whether the work is too much or too little does not raise a substantive theoretical problem so long as inequalities between men and women are not created. In other words, it may be that caring for dependents is onerously burdensome, but for some this is not a public issue unless it is an equality issue.

Third, thoughts about the institutional design of remedies for the care work crisis are nascent throughout the literature. Questions are still proposed at abstracted and theoretical levels, with few details filled in. The questions being asked now are framed in terms such as, should we have redistribution of responsibility: among families? between men and women? between those with dependent care responsibilities and their employers? between dependents and government? between caregivers and government? This is quite distinct from articles devoted entirely to questions such as, should we fund parental leave out of the unemployment insurance trust fund? This is where work needs to be done, and interestingly, this Symposium only advances that ball a little bit (Lucie White’s and Dorothy Roberts’s articles, for example, are more explicitly focused on institutional design in its practiced details than most of the others).

Yet the good news of the Symposium is the sense that the imperative for a remedy has been reached, such that the fight is now about what the foundational framework for that institutional design ought to be. In a very real way, these arguments over the broad outlines of design are philosophical debates over the deep structure of the problem, and none are yet road-ready. But it is critical to engage in these debates at this time, before we have committed to an institutional design expounded in most of its particulars. Whether or not we agree on the deep principles that would point us toward one or another outline of a design, it is extremely productive to put all the concerns and principled arguments over the meaning of any given strategy on the table now. Whatever costs we do end up incurring with any given strategy, we can at least go in with eyes wider open.

It has been a great pleasure to work on this project. I want to thank the wonderfully devoted (and flexible) student editors of this Symposium. They have made great personal sacrifices far beyond their obligation in order to ensure that the Symposium reached its highest quality potential. I also want to thank the authors, many of whom cooperated beyond the call of duty with scheduling changes
and substantive reorganizations, even as they themselves were subject to countless demands on their time and energy.\textsuperscript{28} My hope is that the Symposium will generate more discussion on this issue among its participants and within the legal and policy communities.

\textsuperscript{28} I regret that Peggie Smith and Adrienne Davis, who were to participate in this Symposium, were in the end unable to due to snags in our deadline/production processes or other unforeseen obstacles.