Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right

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Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right

In his 1994 State of the Union Address, President Clinton promised to end “welfare as we know it.” Many believe that

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1 William J. Clinton, The State of the Union Address, WASH. POST, Jan. 26, 1994, at A12. In fact, President Clinton said:

[The current welfare system] doesn't work; it defies our values as a nation.
If we value work, we can't justify a system that makes welfare more attractive than work . . . .

. . . The people who most want to change this system are the people who are dependent on it. They want to get off welfare; they want to go back to work . . . .

. . . . But to all those who depend on welfare, we should offer ultimately a simple compact. We will provide the support, the job training, the child care you need for up to two years, but after that anyone who can work, must . . . .

Id.

he fulfilled this promise during his 1996 reelection campaign by signing into law a substantially Republican welfare reform bill that radically transforms the way in which government will address the needs of poor women and children. It is clear that this transformation will come at the expense of poor women and poor children. This new law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), prohibits single women from collecting certain welfare benefits for more than sixty months, whether or not consecutive, with the expectation that after five years these women will have skills to enter the paid job market and earn wages sufficient to support their families. The statute fulfills President Clinton’s vision that

need-based program for poor, dependent children and their custodial parents or caretaker family members. This program provided these families with “subsistence” income maintenance. 42 U.S.C. §§ 601-617 (1994).

2 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) [hereinafter PRWORA]. This statute dismantles the previous federal public assistance program for poor families with children, the Aid to Families with Dependent Children (AFDC) program, and establishes the “Temporary Assistance to Needy Families” program (TANF) as the primary source of federal assistance for needy families.

3 A common estimate is that “more than a million children” will be impoverished under the new proposals. Dorothy Gilliam, Turning Their Backs on the Poor, WASH. POST, Aug. 3, 1996, at B1. The proposals include cuts to food stamp programs and aid to legal immigrants. See Barbara Vobejda, Clinton Signs Welfare Bill Amid Division, WASH. POST, Aug. 23, 1996, at A1. It has been estimated that as many as 2.6 million people, including 1.1 million additional children, will be pushed into poverty by the new law and that the “poverty of millions who are already poor will be deepened.” CHILDREN’S DEFENSE FUND, THE STATE OF AMERICA’S CHILDREN: YEARBOOK 1997 at 1 (1997); After 60 Years Most Control Is Passing to the States, CONG. Q., Weekly Report, Aug. 3, 1996, at 2190, 2196 [hereinafter After 60 Years].

A number of states have already sought and received waivers from federal statutory guidelines under the AFDC program, allowing those states to implement projects which penalize poor women who are unable or unwilling to enter the paid labor market. Such waivers are authorized under section 1315 of the Social Security Act, granting the Department of Health and Human Services the power to waive the federal standards if the proposed state program will assist in promoting the objectives of the statute. 42 U.S.C. § 1315 (1948). Susan Bennett and Kathleen Sullivan report that since 1992 at least 30 states have sought waivers for state “demonstration projects” and argue that the deviations from federal norms permitted under the waiver process often represent defaults against the core values of the AFDC statute. Susan Bennett & Kathleen A. Sullivan, Disentitling the Poor: Waivers and Welfare “Reform,” 26 MICH. J. L. REFORM 741, 742 (1993); see also Lucy A. Williams, The Ideology of Division: Behavior Modification Welfare Reform Proposals, 102 YALE L.J. 719 (1992) (discussing various demonstration projects).

4 Although the language speaks to “single parents,” the vast majority of “parents” affected will be women.

5 PRWORA, supra note 2, § 103(a)(1), 110 Stat. 2113 (purpose of statute is to end
welfare recipients should enter into an agreement with the state and pledge that they will participate in programs designed to help them move from welfare to "self-sufficiency" in exchange for job training and child care benefits. As the President stated in his 1994 State of the Union Address: “[T]o all those who depend on welfare, we should offer ultimately a simple compact. We will provide the support, the job training, the child care you need for up to two years, but after that anyone who can work, must . . . .” The material terms of Clinton’s new social contract are threefold: (1) they are unilateral; (2) they are race-selective; and (3) they have as their purpose sexual punishment.

In reality, only poor women are bound by the terms of this “new” social contract. Poor women will be denied benefits after two to five years even if the state does not appropriate sufficient funds necessary for job training, education, and child care. States are not required to increase funds to programs that distribute birth control devices or provide information regarding birth control or sex education, nor is there federal funding of abortion services. As Professor Gwendolyn Mink has noted:

“Ending welfare as we know it,” means forcing women to choose work outside the home or marriage after two years on dependency by promoting job preparation, work, and marriage. In fact, the Institute for Women’s Policy Research reports that about 50% of women on AFDC work outside of their homes either concurrently, while receiving benefits because the benefits are not sufficient, or during frequent stints in the work force interspersed by short periods on AFDC. Williams, supra note 3, at 746 n.177 (citing Roberta Spalter-Roth et al., Combining Work and Welfare: An Alternative Anti-Poverty Strategy (Report to the Ford Foundation for the Institute for Women’s Policy Research, 1993)).

7 Clinton, supra note 1, at A12.
8 PRWORA, supra note 2, § 103(a)(1), 110 Stat. 2113 (no legal entitlement to assistance); id., 110 Stat. 2137 (no assistance for more than five years).
9 Although the PRWORA does not contain a child exclusion provision, the Department of Health and Human Services has allowed states to deny benefits to children who are conceived and born while their mothers are receiving welfare benefits. See supra note 3. While the PRWORA does allow states to use federal block grant money for “prepregnancy” family services—that is, contraceptive services—it does not require that states do so, and it does not provide additional money to states that provide such services. PRWORA, supra note 2, § 103(a)(1), 110 Stat. 2134. Finally, because of severe limitations on federal funding for abortion services, poor women have been forced to continue unplanned pregnancies or to have abortions performed by unlicensed practitioners. See Harris v. McRae, 448 U.S. 297, 326-27 (1980) (Hyde Amendment, which restricts federal funding for most abortions for women, upheld as constitutional); see also Maher v. Roe, 432 U.S. 464, 474 (1977).
AFD. It means forcing poor mothers to sink or swim in an economy that could not provide jobs for the nine million socially insured workers who collected unemployment compensation between 1990 and 1993. It means forcing women into sometimes unwanted and dangerous relations with the fathers of their children through child support enforcement. It means forcing the poorest of single mothers—women of color—into low wage community jobs because high rates of unemployment among men of color erase the economic benefits promised by child support enforcement and marriage. It means forcing the poorest of single mothers to control their fertility; it means limiting their reproductive choices.\(^\text{10}\)

On its face, the PRWORA is racially neutral; in fact, though, Black\(^\text{11}\) women are particularly targeted by the new welfare statute. Underlying the welfare reform movement generally, and the statute in particular, is the image of the typical welfare recipient as a promiscuous African American teenage girl with little or no self-control or respect for the values of the white middle class.\(^\text{12}\)


\(^{11}\) In this Article, I use the terms “African American” and “Black” interchangeably. I find the linguistic shift a bit troubling. I came of age when the descendants of American slaves were called, and called themselves, Black. I remember when Black was beautiful. Also, I find the term “African American” a bit limiting. For example, the term “Black” encompasses folks like Black Puerto Ricans, Afro-Cuban Americans, and other Afro-Caribbean Americans. I believe that the term “African American” refers only to persons of African descent whose ancestors were taken to the North American continent. It does not include those Americans whose ancestors were taken to other places in the African diaspora. We Black folk might want to think about whether we want to define our community so narrowly. In any event, I’m not sure it’s worth the argument. As a community, Black people have a plethora of problems to address; we need not fight over this—at least not now. So I am adjusting to the new term and the new self-definition that goes with it. I have come to believe that the term “African American” better reflects my own cultural identity and the cultural identity of most of the descendants in the United States of those who survived the genocide of the Middle Passage.

I also capitalize the word “Black” when it refers to a person’s race in order to reflect the political meaning of Blackness—that is, the political and social significance of being black in this society. Cf. Victor F. Caldwell, \textit{Book Review}, 96 \textit{COLUM. L. REV.} 1363, 1369-70 (1996) (critical race theory view of race acknowledges past and continuing racial subordination and oppression; by contrast, a more formal view of race treats race as merely reflecting skin color or ancestral origins).

\(^{12}\) \textit{Rickie Solinger, Wake Up Little Susie: Single Pregnancy and Race Before \textit{Roe v. Wade}} (1992) (detailing the history of the stigmatization of young African American mothers); \textit{see also} Williams, \textit{supra} note 3, at 725 (assembling the rhetorics of welfare reform in the 1980s, targeting women who fail to conform to middle-class behavioral and value norms); \textit{Ken Auletta, The Underclass} 210-19 (1982) (the poor are unable to obtain employment because of their unwillingness to model their behavior according to acceptable cultural norms).
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Edelman, has asserted, "welfare" is a "fourth generation code word" for race."13 The image of welfare has been attached to Black women even though, as of 1991, African American families made up less than thirty-nine percent of the welfare population.14

Also underlying the attack on "welfare as we know it" is the rhetoric that poor women of color on welfare are undeserving of assistance because they have broken the social contract by engaging in (heterosexual) sexual intercourse outside of the bonds of marriage and because they have had, and are believed to continue to have, children outside of the institution of marriage.15 In this country, single and teenage motherhood are thought of in blackface.16 As the conservative welfare scholar Charles Murray stated, "[B]lack illegitimacy . . . has always been at the center of public concern about illegitimacy and at the center of debate about causes."17

In fact, in 1991 teenage mothers comprised only 5% of the total recipients of AFDC. More than 80% of these mothers were either 18 or 19 years old. U.S. Dep't of Health and Human Services, Characteristics of Financial Circumstances of AFDC Recipients: FY 1991 at 43 (1993).


15 Over 75% of families receiving AFDC benefits have only one or two children. Id. At least one study comparing the fertility rates of women receiving AFDC with the fertility rates of women who receive no AFDC benefits has concluded that women receiving AFDC benefits have a lower fertility rate than does the general population. Mark R. Rank, Fertility Among Women on Welfare: Incidence and Determinants, 54 Am. Soc. Rev. 296, 298-300 (1989).


Senator Daniel Patrick Moynihan widely publicized this attitude in his 1965 report, The Negro Family: The Case for National Action. This report assigned to African American women the blame for Black people's inability to overcome the effects of four hundred years of racial hatred and discrimination in this country. He stated that "the Negro community has been forced into a matriarchal structure which, because it is too out of line with the rest of the American society, seriously retards the
As a result of this view of welfare, the PRWORA mandates that women either get a job or get a man—specifically, one who is able to support financially the woman and her children. As Professor Martha Fineman has noted:

[The core and common problem facing [poor, single] mothers . . . is identified as the missing male. It follows, therefore, that the solution to the problem for both categories of single mothers lies in the legally-coerced (re)establishment of a paternal presence, physically outside of, but metaphysically completing, the family structure.]

For those women who are unwilling to remain celibate as the morality of the state directs, the federal government permits states to penalize sexually active poor women for having additional children while on welfare.

Indeed, it has become popular and acceptable to expect poor women of color and their children to shoulder the costs of balancing the national budget and the blame for what is viewed as America’s unraveling moral fabric. An evaluation of an earlier Senate version of the welfare reform bill, performed by the Department of Health and Human Services, found that the two-year time limit provision alone would result in denying assistance to 3.3 million children living in poverty. African American chil-

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20 Office of the Ass't Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Services, Comparison of House and Senate Welfare Reform Plans Passed by the House March 24, 1995 and Senate September 19, 1995—"Impact on Children" 1 (November 1995) (internal report; on file with author). The report states that, absent a recession, 3.3 million children would be affected if the time limit provision was fully implemented.
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dren certainly will be overrepresented in this group.\textsuperscript{21} By denying economic assistance to poor children whose mothers do not comply with the social contract's rules of sexual subordination to an individual man, particularly through marriage,\textsuperscript{22} or sexual subordination to the state, through state-enforced celibacy, the state, through the PRWORA, is attacking the sexual independence and reproductive choices of poor women and women of color in the name of welfare reform and in the name of a modern social contract.

In this Article I hope to demonstrate fully that the PRWORA is ultimately a politically undesirable and thinly veiled attack on the reproductive and sexual activities of poor women; to demonstrate the difficulties of social contract theory as a rationalization for this attack; and to argue that welfare reform proposals are based in the state's claim of right to command the use of women's bodies. In Part I, I examine the development of social contract theory and analyze social contract theory as a justification for material inequality. In Part II, I examine social contract theory as a justification for the subordination of women. With this theoretical background established, in Part III, I evaluate the current welfare reform proposals as social contract. This section examines the social contractarian language found in the current welfare reform debates and argues that this "new" social contract reinforces the male sex-right and the subordination of women. In doing so, the new social contract replaces the male sex-right of husbands to control the sexuality of their wives in exchange for

\textsuperscript{21} Cf. PRA, supra note 1, § 100(3)(A)-(B) (illegitimacy rate among African Americans is 68%, compared to 22% for white Americans); PRWORA, supra note 2, § 101(5), 110 Stat. 2110 (89% of children living in female-headed households receive AFDC).

\textsuperscript{22} The institution of marriage has long been founded on women's sexual and economic subordination. Regarding marriage and the sexual subordination of women, see generally Carol Smart, \textit{Disruptive Bodies and Unruly Sex: The Regulation of Reproduction and Sexuality in the Nineteenth Century, in Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality} 7, 20-22, 25 (Carol Smart ed. 1992) (marriage is a systemic mode of regulating women's sexuality); \textit{Carole Pateman, The Sexual Contract} 2-5, 50-55 (1988) (same).

subsistence with the sex-right of the state to control the sexuality of poor, single women in exchange for subsistence.

I

THE SOCIAL CONTRACT: JUSTIFICATIONS FOR MATERIAL INEQUALITY

In this part, I outline the basics of both classical and contemporary social contract theory, drawing on the works of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau as exemplars of classic social contract theory and on John Rawls’s work as an exemplar of contemporary social contract theory. Next I discuss the social contract as justification for material inequality and as justification for distributive justice.

A. Classical Social Contract Theory

In the beginning was the state of nature. Nature was a perilous place, a place from which civilized, rational, reasonable men sought to escape. These men found their escape in the creation of civil society. Classical social contractarians agree that the State, or civil society, is the result of an agreement or contract made among individuals (men) who sought protection from the perils of the state of nature (life before civil society). For some social contract theorists, the state of nature and the creation of the social contract are historical events. For others, these notions are political fictions used to explain either the legitimate existence of the State or the legitimate parameters of its


authority.\textsuperscript{25}

Notwithstanding disagreements over these theories, social contractarians agree that a just society is created when people relinquish their "natural" autonomy or liberty and consent to live under a rule of law. In such an exchange, one gives up the life of all against all in order to benefit from the security, order, and freedom that result from the rule of law.\textsuperscript{26} For the agreement to be valid, there must be freedom of choice. Men must be free to choose civil society over the state of nature. But as Ian MacNeil notes, the validity of contract "does not require that choice be real, only that we act as if it is."\textsuperscript{27}

\section*{1. \textit{Hobbes: The State of Nature Is War}}

For Thomas Hobbes, men are equal in the state of nature.

Nature hath made men so equall, in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can there-upon claim to himselfe any benefit, to which another may not pretend, as well as he.\textsuperscript{28}

Hobbes does not celebrate this equality; he fears it. According to Hobbes, the result of equality in the state of nature is war, because "[f]rom this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End . . . endeavour to destroy, or subdue one an other."\textsuperscript{29} Because of the violence of the state of nature, a man cannot use his mind or body in any way other than to "preserv[e] his life against his enemyes."\textsuperscript{30} The result of such war is not merely the death of men, but the death of humanity. Thus, in the state of nature, "there is no place for Industry . . . no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of
man, solitary, poore, nasty, brutish, and short."

Under these conditions there can be no concept of justice or injustice:

The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. . . . Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. . . . They are Qualities, that relate to men in Society, not in Solitude.

As one commentator on Hobbes opined, "[O]nly in civil society is there mutual recognition of the obligation of obedience and the certainty of enforcement by the sovereign."

The social contract offers Hobbes a way out of the ominous morass of the state of nature. Hobbes reasons that civil society can be created only by unequivocal obedience to a sovereign founded on a social contract, in which all individuals agree to transfer or relinquish their natural freedom to the sovereign in the interest of maintaining peace. Hobbes writes: "The only way to erect such a Common Power [civil society] . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will." Hobbes believes that only a sovereign with absolute power can bring man out of the state of nature. The only limit on the sovereign's power is that the sovereign may not prohibit individuals from defending their lives, even against the sovereign. Hobbes's social contract is a "mutuall transferring of Right" in which both the individual and the State acquire duties and obligations. This social contract provides a mechanism not only for the end of the chaos and violence of the state of nature.

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31 Id. at 186.
32 Id. at 188.
33 PAUL E. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 78 (1971).
34 HOBBES, supra note 24, at 227.
35 Id. at 228, 260. Although Hobbes speaks of monarchs and assemblies, he believes that absolute monarchy provides men with the best protection from anarchy, war—the state of nature. See, e.g., id. at 239-50.
36 Id. at 199 ("A Covenant not to defend my selfe from force, by force, is always voyd. For . . . no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment . . . . And this is granted to be true by all men, in that they lead Criminals to Execution, and Prison, with armed men, notwithstanding that such Criminals have consented to the Law, by which they are condemned."); see also id. at 268-69 ("If the Soveraign command a man (though justly condemned,) to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live; yet hath that man the Liberty to disobey.").
37 Id. at 192.
but also for the enforcement of private agreements.\(^{38}\)

One of the primary functions of the social contract is to "legitimate and support inequality in the possession of wealth."\(^{39}\) Hobbes assumed that inequality in the distribution of wealth will exist in civil society. In his discussion of a citizen's duty to pay taxes, Hobbes asserts that both the rich and the poor should pay the same amount of tax since both receive protection from the sovereign, regardless of their wealth.\(^{40}\) Hobbes also supports the inequality of wealth in his discussion of public charity, where he assumes that poverty is inevitable. Hobbes states: "[W]hereas many men, by accident uninevitable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for (as far-forth as the necessities of Nature require,) by the Lawes of the Commonwealth."\(^{41}\)

Similarly, Hobbes also supports differential treatment of the poor based on whether they merit assistance. Hobbes believes that public charity should not be available to those able to work: "[F]or such as have strong bodies . . . they are to be forced to work . . . ."\(^{42}\) This legitimation of differential state obligations to the "deserving" and "undeserving" poor continues in our current discussion of economic assistance programs.\(^{43}\)

2. \textit{Rousseau: Men Are Free and Equal in the State of Nature}

Like Hobbes, Rousseau is concerned with man's exit from the state of nature. In Rousseau's theory, the original state of nature is quite peaceful, and men are free and equal.\(^{44}\) Although the men in Rousseau's state of nature are solitary and not capable of

\(^{38}\) Rosenfeld, \textit{supra} note 24, at 858. Hobbes writes:

Therefore before the names of Just, and Unjust can have place, there must be some coercive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant . . . and such power there is none before the erection of a Common-wealth.


\(^{39}\) Rosenfeld, \textit{supra} note 24, at 872.

\(^{40}\) Hobbes, \textit{supra} note 24, at 386-87.

\(^{41}\) \textit{Id.} at 387.

\(^{42}\) \textit{Id.}


morality, they are guided not only by self-interest or self-love, as are the men in Hobbes state of nature, but also by the emotion of pity. Because of the peacefulness of Rousseau's original state of nature, "savage" man does not require the safety and stability of civil society; consequently, he has no reason to enter into a social contract. Rousseau writes: "[W]andering in the forests, without industry, without speech, without dwelling, without war, without relationships, with no need for his fellow men, and correspondingly with no desire to do them harm, . . . savage man . . . had only the sentiments and enlightenment appropriate to that state; he felt only his true needs . . . ."

Nevertheless, Rousseau envisions a process by which savage man's social development necessitates that he acquiesce in the creation of civil society. Rousseau continues:

Things in this state [of nature] could have remained equal, if talents had been equal . . . . [But] [t]he strongest did the most work; the most adroit turned theirs to better advantage: the most ingenious found ways to shorten their labor. . . . Thus it is that natural inequality [in ability] imperceptibly manifests itself together with inequality occasioned by the socialization process.

War results only when men are forced into social relationships, including the patriarchal family, and develop private property. The prosperous begin to notice that war is disadvantageous to both physical safety and wealth and that wealth based on force could in turn be appropriated by force.

Influenced by this concern, those with material resources seek to leave the state of nature and progress to a civil society which

45 Rousseau, Inequality, supra note 24, at 124 (solitary, idle), 125, 132; Rousseau, Social Contract, supra note 24, at 64 (no "moral quality," only "instinct," in state of nature).

46 Rousseau, Inequality, supra note 24, at 115, 133, 135. Rousseau writes: [T]here is another principle that Hobbes failed to notice, and which, having been given to man in order to mitigate, in certain circumstances, the ferocity of his egocentrism or the desire for self-preservation before this egocentrism of his came into being, tempers the ardor he has for his own well-being by an innate repugnance to seeing fellow man suffer. . . . I am referring to pity . . . .

Id. at 133.

47 Id. at 137.

48 Id. at 147.

49 Id. at 144 (social relationships and violence); id. at 144, 146 (private property and violence, development of cultivation and agriculture tied to the rise in private property); id. at 142-43 (creation of patriarchal family and distinctions among family create tension).
preserves the inequality found in this stage of the state of nature. It is at this stage, Rousseau believes, that the State first develops. Rousseau posits that at this stage the rich say: "'[L]et us unite . . . in order to protect the weak from oppression, restrain the ambitious, and assure everyone of possessing what belongs to him. Let us institute rules of justice and peace to which all will be obliged to conform, which will make special exceptions for no one' . . . "

But the poor have little reason to agree to a state which preserves their economic and social position. As Rousseau notes: "Since the poor had nothing to lose but their liberty, it would have been utter folly for them to have voluntarily surrendered the only good remaining to them, gaining nothing in return." But the poor do "agree" to the formation of the state for that very reason: because they have no "might" in the final stages of the state of nature, they "agree" to the creation of a state whose purpose is to perpetuate their inequality in order to protect their freedom from those who have more wealth and physical power than they do. Hence, because force is used to obtain the poor's acquiescence, force is the foundation of the first attempt at civil society: might makes right. However, Rousseau believes that for civil society to be just, it cannot be based on might: it must be founded on the mutual agreement of all men in the state of nature, an agreement based on the will of each man. "To yield to force is an act of necessity, not of will; it is at best an act of prudence."

So for Rousseau, the justification of the state at this point in his hypothetical history is the legitimation of the exploitation of the poor and the legitimation of the inequality of material goods and other forms of economic resources. Rousseau concludes that

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50 Id. at 149.
51 Id.; see also Rosenfeld, supra note 24, at 859.
52 Rousseau, Inequality, supra note 24, at 151.
53 Id.
54 ROUSSEAU, SOCIAL CONTRACT, supra note 24, at 52. In addition, because freedom is a natural right of man that is inalienable, slavery cannot exist in a just society. It is incompatible with man's natural liberty. Rousseau explains:

To renounce freedom is to renounce one's humanity, one's rights as a man and equally one's duties. There is no possible quid pro quo for one who renounces everything; indeed such renunciation is contrary to man's very nature; for if you take away all freedom of the will, you strip a man's actions of all moral significance.

Id. at 55.
the government, formed to protect the riches of the wealthy, is incompatible with the natural freedom of men; accordingly, he investigates how to retain the advantages of civil society while avoiding the evils of subjugation. Rousseau articulates the problem this way:

'How to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with others, obeys no one but himself, and remains as free as before.' This is the fundamental problem to which the social contract holds the solution.  

Rousseau views the social contract as a way of resolving the problems of political subjugation and inequality in civil society. Under Rousseau's construction of the social contract, men give up their natural rights for civil rights. The natural rights that men relinquish "are reducible to a single one, namely the total alienation by each associate of himself and all his rights to the whole community." The civil rights that men acquire by this process are the total restitution of what they have relinquished. Rousseau explains:

[S]ince each man gives himself to all, he gives himself to no one; and since there is no associate over whom he does not gain the same rights as others gain over him, each man recovers the equivalent of everything he loses, and in the bargain he acquires more power to preserve what he has.

Through the process of alienation and restitution, men gain the force of law to protect what they own. As Maurice Cranston notes:

[The bargain is a good one because what men surrender are rights of dubious value, unlimited by anything but an individual's own powers, rights which are precarious and without a moral basis; in return men acquire rights that are limited but legitimate and invincible. The rights they alienate are based on might; the rights they acquire are rights based on law."

The surrender or alienation of these rights must be voluntary. As noted above, "To yield to force is an act of necessity, not of

55 Id. at 60.
56 Id.
57 Id. at 61.
The surrender must also create mutuality between the citizen and the state. It is the mutuality of obligation and duty that binds the citizen to the "general will" as expressed by the State. Rousseau states that "[t]he commitments which bind us to the social body are obligatory only because they are mutual; and their nature is such that in fulfilling them a man cannot work for others without at the same time working for himself." Men surrender their natural freedoms to the general will, which requires the State to legislate equally for all citizens. As Rousseau explains: "[T]he social pact establishes equality among the citizens in that they all pledge themselves under the same conditions and must all enjoy the same rights. . . . [T]he sovereign recognizes only the whole body of the nation and makes no distinction between any of the members who compose it."

Thus, the legitimacy of Rousseau's social contract is based on the "reciprocal commitment between society and the individual," or, in other words, on mutual consent and reciprocity. The social contract gives protection to citizens in return for the fulfillment of obligations by citizens to the society. But like the first try at civil society (where might made right), Rousseau's civil society, achieved through voluntary consent, also functions to maintain and legitimize pre-existing economic inequalities, even though Rousseau states that "no citizen shall be rich enough to buy another and none so poor as to be forced to sell himself."

Because "each man recovers the equivalent of what he loses, and in the bargain he acquires more power to preserve what he has," the pre-existing inequality endures and is legitimized by free consent. The poor man gains only the State's protection of what he has, which is very little or no material wealth.

In his *Discourse on Political Economy*, Rousseau explains his view that it is not the responsibility of government to provide equality in the distribution of wealth:

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60 Id. at 69 (regarding definition of general will).
61 Id. at 75.
62 Id. at 76. Although Rousseau's State has "absolute power" over all its citizens, *id.* at 74, that power "cannot go beyond the limits of the general covenants," *id.* at 77.
63 Id. at 62.
64 Id. at 96; see also *Rousseau, Inequality*, supra note 24, at 146 ("[I]n order to render everyone what is his, it is necessary that everyone can have something.").
It is not enough to have citizens and to protect them; it is also necessary to give some thought to their subsistence. And seeing to the public needs is an obvious consequence of the general will, and the third essential duty of government. This duty is not, as should be apparent, to fill the granaries of private individuals and to exempt these people from working, but rather to maintain abundance so within their reach that to acquire it, labor is always necessary and never useless.66

Centuries later, John Rawls used this idea as his “Special Conception” of justice.67

3. *Locke: Consolidation of the Existing Social Order*

John Locke is also concerned with man’s ascent from the state of nature to civil society. For Locke, the problem with the state of nature is not the lack of rights and social order, for Locke believes that there are natural rights in the state of nature which protect men from subjugation. The character of the state of nature is not war, but quite the reverse. The state of nature in Locke’s theory is one over which “Peace, Good Will, Mutual Assistance, and Preservation” preside.68 Men in the state of nature have the absolute freedom to control their property and their persons as they see fit within the bounds of the law of nature.69 In contrast with Hobbes’s vision, in Locke’s view men in the state of nature do not interfere in the affairs of other men.70 Men also have equality in the state of nature with “no one having more [power and jurisdiction] than another.”71 Accordingly, the purpose of civil society is not the *creation* of a society which protects men’s physical and material wealth, as is the purpose in Hobbes’s and Rousseau’s visions. Instead, Locke identifies man’s principal problems in the state of nature as the lack of written law to assist in resolving disputes; the lack of impartial judges who can interpret the written law; and the lack of a reasonable, or cost-effective, means for the execution of legal

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69 *Id.* at 269; see also *id.* at 270-71.

70 See *id.* at 271.

71 *Id.* at 269.
judgments.\textsuperscript{72}

As a result, Locke uses the social contract, or "compact" as he calls it, as a means to consolidate pre-existing economic and social relations found in the state of nature. Because property and social relations exist in the state of nature, it is not, according to Locke, the appropriate function of civil society to create changes in these institutions.\textsuperscript{73} Locke writes:

The great end of Mens entring into Society, being the enjoyment of their Properties in Peace and Safety, and the great instrument and means of that being the Laws established in that Society; the \textit{first and fundamental positive Law} of all Commonwealths, is the establishing of the Legislative Power; as the \textit{first and fundamental natural Law}, which is to govern even the Legislature it self, is the \textit{preservation of the Society}, and (as far as will consist with the publick good) of every person in it.\textsuperscript{74}

Hence, the sole purpose of the State, in Locke's view, is the protection of existing "natural law."

Because men are naturally free, equal, and independent, they cannot be subject to civil society without each man's individual consent. Locke writes:

Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own Consent. The only way whereby any one devests himself of his Natural Liberty, and \textit{puts on the bonds of Civil Society} is by agreeing with other Men to joyn and unite into a Community \ldots in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.\textsuperscript{75}

After the creation of the civil society by the consent of all its members, the majority of the community can determine the limits of the State, so long as the parameters of the State do not conflict with the natural rights of men.\textsuperscript{76}

Locke's formulation of the social contract is one in which the state is obligated to protect the natural rights of its citizens but is not owed anything by the citizen. Unlike the frameworks used

\textsuperscript{72} \textit{Id.} at 350-51.
\textsuperscript{73} See Rosenfeld, \textit{supra} note 24, at 860 (function of Locke's social contract is to "consolidate a previous existing order, not to create a new one").
\textsuperscript{74} LOCKE, \textit{supra} note 23, at 355-56; see \textit{id.} at 360 (preservation of property is the end of government and that for which men enter into civil society).
\textsuperscript{75} \textit{Id.} at 330-31.
\textsuperscript{76} \textit{Id.} at 331.
by Hobbes and Rousseau, Locke's social contract is not founded on mutuality of obligations between the State and the citizen. In that way, Locke's social contract is not a contract at all. It is but a mere agreement.\(^77\) As Rosenfeld notes, the social "compact"\(^78\) establishes a trusteeship between the government and its citizens: the government, as the trustee, holds power and wealth for the benefit of the people.\(^79\) Hence, Locke rejects the view that the relationship between the government and the people entails a reciprocity of obligations. "Instead, duties are delegated to the government and the people retain the rights."\(^80\) As Locke writes:

\[ \text{The Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end. . . .} \]

Nevertheless, like the other classical social contract theorists, Locke supports inequality in the distribution of wealth. The equality that Locke recognizes is a political right. It is the equal right of all individuals to be free from unwarranted governmental domination. Locke does not recognize an equality of material wealth as an integral part of a just society. Locke believes that because capabilities and talents are not evenly distributed among individuals, wealth cannot be evenly distributed. Locke writes:

\[ \text{Though I have said . . . That all Men by Nature are equal, I cannot be supposed to understand all sorts of Equality: Age or Virtue may give Men a just Precedency: Excellency of Parts and Merit may place others above the Common Level: Birth may subject some, and Alliance or Benefis others . . . .} \]

Locke understood that this inequality of material wealth led to subordination of the poor and believed that the poor had agreed to this subjugation. Locke writes that "the Authority of the Rich Proprietor, and the Subjection of the Needy Beggar began not from the Possession of the Lord, but the Consent of the poor Man, who preferr'd being his Subject to starving."\(^83\) Reiterating

\(^{77, 78, 79, 80, 81, 82, 83}\)
his belief that subordination is consensual, Locke writes that "it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth."\(^{84}\)

**B. Contemporary Social Contract Theory: John Rawls's Liberal Theory of Justice**

John Rawls offers a contemporary liberal account of the social contract. In *A Theory of Justice*, Rawls attempts to develop three ideas in order to support his conception of the social contract. First, Rawls argues that principles of justice underlie the moral and political values of the current liberal state.\(^{85}\) Second, Rawls attempts to demonstrate that the moral and political values inherent in classic liberalism are the result of a selection process which all people can agree is fair; this is referred to as the "justice as fairness" principle.\(^{86}\) Last, Rawls seeks to establish that the principles of liberalism support a desirable and functional civil society.\(^{87}\) For Rawls, the subject of justice is not a set of questions about the arbitrary or even distribution of goods; rather, justice concerns "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."\(^{88}\) So for Rawls, the justice of a social institution depends "on how fundamental rights and duties are assigned and on the economic op-

\(^{84}\) *Id.* at 302.

\(^{85}\) RAWLS, *supra* note 67.

\(^{86}\) *Id.* at 3-11. It is no mistake that Rawls's work, published in 1971, came on the heels of a profound political and social struggle which questioned the very foundation and legitimacy of the liberal state. In the United States, the civil rights movement, the Black power movement, the antiwar movement, and the second wave of feminist activity together raised fundamental questions concerning the inequality of political and social rights. *See* Norman Daniels, *Introduction to Reading Rawls* at xiv-xv (Norman Daniels ed. 1975).

\(^{87}\) RAWLS, *supra* note 67, at 3-11.

\(^{88}\) *Id.*

\(^{89}\) *Id.* at 7. Rawls defines fundamental rights or liberties narrowly. Basic liberties include "political liberty," including the right to vote and freedom of speech; the "liberty of conscience and freedom of thought"; freedom of the person, which includes a right to hold personal property; and "freedom from arbitrary arrest and seizure." *Id.* at 61. In contrast with Locke's theory of liberty, in Rawls's framework real property is not part of man's basic liberty, even though it is a major social institution that Rawls believes should be protected. Rawls defines major social institutions as "the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions." *Id.* at 7.
portunities and social conditions in the various sectors of society." As Professor Thomas Scanlon notes: "Conceived of in this way, principles of justice are analogous to a specification of what constitutes a fair gamble. If a gamble is fair then its outcome, whatever it may be, is fair and cannot be complained of."

1. Justice as Fairness

Instead of using the state of nature as a starting point for the development of the social contract, Rawls uses what he calls the "original position." In Rawls's formulation of the social contract, a group of people, in some ways like us ordinary folk, select the principles of justice which are to apply to civil society. As Rawls writes, "They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association." But the people choosing the makeup of justice are not like us. They are "objective." Their objectivity is

90 Id. at 7.
92 RAWLS, supra note 67, at 12. Rawls states:

In justice as fairness, the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs. . . . It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Id. (emphasis added); see also Stephen M. Griffin, Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution, 62 N.Y.U. L. REV. 715, 730 n.94. (1987) (regarding the dissimilarities between the original position and the state of nature).
93 RAWLS, supra note 67, at 11.
94 Id. In his choice of rational actors as the decisionmakers, Rawls relies on the tenets of rational choice theory. As I have elsewhere explained, rational choice theory is not a moral theory; rather, it is a normative theory which tells us what we should do in order to achieve our goals as well as we possibly can. Rational choice theory does not tell us what our goals should be. Under this theory, the appropriateness of our behavior or our choices can be determined only if our choice is made without unjustified or unreasonable coercion. See April L. Cherry, A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?, 10 WIS. WOMEN'S L.J. 161, 175 n.64 (1995). For a discussion of Rawls and rational choice theory, see Susan Moller Okin, Reason and Feeling in Thinking About Justice, 99 ETHICS 229, 240 (1989) [hereinafter Okin, Reason and Feeling]; SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 89-109 (1989).
95 Many liberal scholars have professed their belief in the existence of objectivity and neutrality. For example, Professor Bruce Ackerman has stated:

In proposing Neutrality, . . . I am pointing to a place well within the cultural interior that can be reached by countless pathways of argument
Welfare Reform and the Male Sex-Right

gained by their place behind a "veil of ignorance" which precludes them from knowing their own natural characteristics and abilities: the people making the choices regarding justice do not know their race or gender, their physical or intellectual abilities, or their class status. All they are permitted to know is that they are heads of families and as such are interested in their families' share of primary social goods. Rawls believes that the fiction of the "original position" allows him to demonstrate the fairness of the values chosen though the "objectivity" of those choosing the principles of justice.

2. Distributive Justice

Through what Rawls believes is a fair and objective process, those in the original position choose two principles that, if followed, will result in the justice of social and political institutions: the General and Special Conceptions of justice as fairness. The former has priority over the latter. The General Conception of justice distributes all social goods, including liberty, so that any coming from very different directions. As time passes, some paths are abandoned while others are worn smooth; yet the exciting work on the frontier cannot blind us to the hold that the center has upon us.

BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 12 (1980). At the same time many feminist scholars have questioned whether objectivity and neutrality are possible, and if so, whether they are preferable. As Professor Catharine MacKinnon has argued: "Indeed, the best way to preserve a concretely unequal status quo may be by the rigorous application of a neutral standard." CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 127 (1979); see also Alison M. Jaggar, Sexual Difference and Sexual Equality, in LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS 18, 26 (Alison M. Jaggar ed. 1994) ("[F]eminists should be ready constantly to challenge norms that may be stated in gender-neutral language but that are established on the basis of male experience, and so likely to be biased in favor of men.").

96 RAWLS, supra note 67, at 12, 136-42.
97 Id. at 128. Family exists in the original position, and the choosers, who are in positions of power in the family, are most likely male.
98 Id. at 140-41.
99 Id. at 120. Ronald Dworkin notes that Rawls's original position is a biased one. The abstraction of the original position is compatible only with a "deep theory" or underlying theory of rights. Hence, rights are not necessarily an outcome of the contract; rather, rights are a presupposition. See Ronald Dworkin, The Original Position, 40 U. CHI. L. REV. 500 (1973), reprinted in READING RAWLS, supra note 86, at 16, 38-46 [hereinafter Dworkin, Original Position]. In addition, Dworkin has posited that the nonneutral values of equal respect and concern underlie the finest liberal contractarian theories of the State. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 203-04 (1985).
100 See supra note 89 (Rawls's definition of liberty).
inequalities benefit those who are the most vulnerable.\textsuperscript{101} As Rawls explains: "All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."\textsuperscript{102} Rawls does not support equality in the possession of wealth as necessary for a just society. Rawls is, in fact, rejecting an egalitarianism which justifies equal distribution in favor of a system of justice which allows substantial inequalities in the distribution of material wealth so long as there is no procedural inequality in the distribution of fundamental political rights.\textsuperscript{103} He states that "[w]hile the distribution of wealth and income need not be equal, it must be to everyone's advantage, and at the same time, positions of authority and offices of command must be accessible to all."\textsuperscript{104} In other words, "[i]njustice . . . is simply inequalities that are not to the benefit of all."\textsuperscript{105}

When the General Conception of justice has been met, the principles of the Special Conception of justice apply. The Special Conception of justice consists of two principles. The first principle, which has priority over the second principle, guarantees a system of equal basic liberties—equal citizenship and equal opportunity.\textsuperscript{106} The second principle, also known as the difference principle, works to allocate wealth, income, and authority. Rawls explains: "[T]he second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."\textsuperscript{107}

Professor Scanlon has been troubled by Rawls's formulation of justice, particularly the difference principle. Scanlon observes that the difference principle appears to limit the benefits received by those with more natural talent or other lucrative attributes, requiring that the most talented donate their talents to the most vulnerable.\textsuperscript{108} This formulation leads Thomas Nagel to surmise

\textsuperscript{101} \textit{Rawls}, supra note 67, at 250, 303.
\textsuperscript{102} \textit{Id.} at 62.
\textsuperscript{104} \textit{Rawls}, supra note 67, at 61.
\textsuperscript{105} \textit{Id.} at 62.
\textsuperscript{106} \textit{Id.} at 61.
\textsuperscript{107} \textit{Id.} at 14-15; see also \textit{Id.} at 60-61.
\textsuperscript{108} Scanlon, \textit{supra} note 91, at 1062-63.
that the justice or legitimacy of social and political institutions, in Rawls's theory, "is measured not by their tendency to maximize the sum or average of certain advantages, but by their tendency to counteract the natural inequalities deriving from birth, talent, and circumstances, pooling those resources in the service of the common good." But as Scanlon notes, according to the difference principle, "a system of social and economic inequalities is just only if there is no feasible alternative institution under which the expectations of the worst-off group would be greater." So in reality the difference principle merely says that

[e]liminating the advantages of those who have more than you would not enable us to improve the lot of any or all of the people in your position (or beneath it). Thus it is unavoidable that a certain number of people will have expectations no greater than yours, and no unfairness is involved in your being one of these people.

Hence, there is in Rawls's theory of justice a judgment that inequalities are in everyone's best interest, since no one would benefit from their removal.

II

THE SOCIAL CONTRACT AS A JUSTIFICATION FOR SUBORDINATION: FEMINIST CRITIQUES OF SOCIAL CONTRACT THEORY

Social contract theory bases its legitimacy on the consent of those governed. This is the shining principle upon which the social contract is founded—that the social contract is based on the voluntary exchange of mutually beneficial promises. This idea of mutuality is foundational in social contract theory. What this view of the social contract fails to recognize properly is that the social contract is also founded on subordination. Inequality based on wealth, as noted in the previous discussion, as well as subordination based on gender are both fundamental elements of

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109 Thomas Nagel, Rawls on Justice, in Reading Rawls, supra note 86, at 1, 3.
110 Scanlon, supra note 91, at 1056; see also Dworkin, Original Position, supra note 99, at 49 (those in the original position "do not take account of relative deprivation, because they justify any inequality when those worse off are better off than they would be, in absolute terms, without that inequality"). Rawls, supra note 67, at 61 (inequality of wealth is acceptable so long as inequality to everyone's advantage).
111 Scanlon, supra note 91, at 1062.
112 See, e.g., Rawls, supra note 67, at 103, 150-51, 179; see also Scanlon, supra note 91, at 1062 n.68.
classical and contemporary liberal social contract theory. As Carole Pateman notes:

In principle, the [mutually beneficial] exchange could take a variety of forms and any kind of property could be exchanged, but the contracts that have a prominent place in classic social contract theory are not only about material goods, but property in the peculiar sense of property in the person, and they involve an exchange of obedience for protection.\(^1\)

Again, these theories all embrace a view of the social contract that encompasses the subordination of women, including state support of men's right to the sexual access of women's bodies. Social contract theorists are divided, however, on whether women's subordination is "natural"—that is, whether it exists in the state of nature or is instead the result of the creation of the social contract.

A. Thomas Hobbes: Women Are Free in the State of Nature but Subjugated by Civil Society

In explaining the origin of women's subjugation, Hobbes does not believe that women are naturally subjected. Rather, Hobbes believes that women are free and enjoy equality with men in the state of nature.\(^1\)

As a result of women's equality in the state of nature, maternity, as in the right of a father to his offspring, is also absent. In the state of nature, mothers, not fathers, have power over children. Hobbes argues: "[I]n the condition of meer Nature, where there are no Matrimoniall lawes, it cannot be known who is the Father, unlesse it be declared by the Mother: and therefore the right of Dominion over the Child dependeth on her will, and is consequently hers."\(^1\) As Karen Green notes, in Hobbes’s state of nature "authority over children rests with mothers exclusively, for without the social structures that ensure paternity, paternity cannot be proved . . . ."\(^1\) Thus, part of women's power over children derives from men's inability to control women's sexuality and hence to assure themselves as to the parentage of children.

Hobbes also perceives women's control over children as based

\(^{113}\) Pateman, supra note 22, at 58.
\(^{114}\) Hobbes, supra note 24, at 254.
\(^{115}\) Id.
in women's physical care of children. Again Hobbes explains: "[S]eeing the Infant is first in the power of the Mother, so as she may either nourish, or expose it, if she nourish it, it oweth its life to the Mother; and is therefore obliged to obey her, rather than any other . . . ."\(^{117}\) It is not the work of pregnancy and childbirth that gives women authority over children, but rather the "preservation [of children] which entitles the mother to dominion over her child."\(^{118}\) Hence, Hobbes argues that the dominion of fathers over children and the subordination of women as mothers are not natural but are rather functions of civil society.

Not only is the institution of paternity nonexistent in the state of nature, but Hobbes concludes that in the state of nature the institution of marriage (which subjugates women in civil society) also does not exist.\(^{119}\) Therefore, marriage does not naturally entail the subjugation of women. As Pateman notes: "Marriage does not exist because marriage is a long-term arrangement, and long-term sexual relationships, like other such relationships, are very difficult to establish and maintain in Hobbes's natural condition."\(^{120}\) Thus, Hobbes believes that any authority or control that husbands have over their wives is not "natural" but rather is a result of the social contract. And because the dominion of husbands is created by the social contract, the dominion of husbands vis-à-vis wives is political in nature.\(^{121}\)

In order for women's subordination to be just under social contract theory, it must be consensual. As a result, Hobbes posits that women are subordinated in civil society because they have consented to it. Hobbes maintains that the family is like the state in that it is created and held together "by a compact that reflects in miniature the compact that founds civil society."\(^{122}\) Like men who consent to the creation of civil society for their own protection, members of a man's household or family consent to the man's unequivocal control for their protection. With regard to children, Hobbes states that a parent has control over a child not because "he begat him; but from the Childs Consent,

\(^{117}\) Hobbes, supra note 24, at 254.
\(^{118}\) Green, supra note 116, at 458.
\(^{119}\) Hobbes, supra note 24, at 254 (no matrimonial laws in the state of nature).
\(^{120}\) Carole Pateman, "God Hath Ordained to Man a Helper": Hobbes, Patriarchy and Conjugal Right, in Feminist Interpretations and Political Theory 53, 60 (Mary Lyndon Shanley and Carole Pateman eds. 1991).
\(^{121}\) Id. at 66-67; Green, supra note 116, at 460.
\(^{122}\) Green, supra note 116, at 460.
either expresse, or by other sufficient arguments declared."123

Women, who are free in the state of nature, consent to subordination to husbands in order to be protected from other men in the state of nature, which is perpetually in a condition of war. Married women then resemble others who are controlled as a result of conquest. Hobbes argues that dominion and control of the vanquished is in the victor. The vanquished agree to give the use of their bodies for the remainder of their lives to the conqueror.124 No amount of force negates this contract. As Hobbes states: "Covenants entered into by fear, in the condition of meer Nature, are obligatory."125 Thus the marriage contract, which includes the right of paternity and hence sexual access to women (the conjugal contract/right), is based on force.

Hence, Hobbes believes that women are not naturally subjected in the family and in civil society; it is through contract and through force that women are subjected. Hobbes states: "[T]here is not always that difference of strength or prudence between the man and the woman, as that the right [over children] can be determined without War. In Common-wealths, this controversie is decided by the Civill Law: and for the most part . . . the sentence is in favour of the Father . . . ."126 Thus, Hobbes explains the subordination of women in the state as the result of their subordination in the patriarchal family. Hobbes believes that civil society awards dominion to men because women are already subjugated within patriarchal families.127 Hence, under Hobbes's theory, women's subordination in civil society is based on their subordination in patriarchal families, a situation which includes women's surrender of their sexuality. Both sites of subordination are a result of the creation of the social contract, and integral to this subordination is the male conjugal or sex-right. As Pateman writes:

The civil law of matrimony, which upholds conjugal right, is created through the original pact. . . . Hobbes makes it quite clear that conjugal right is not natural. Conjugal right is created through the original contract and so is a political right. The right is deliberately created by the men who bring civil society into being.128

123 Hobbes, supra note 24, at 253.
124 Id. at 255.
125 Id. at 198.
126 Id. at 253.
127 Green, supra note 116, at 460.
128 Pateman, supra note 120, at 66-67; see also Green, supra note 116, at 458-60;
Thus, Hobbes's social contract is a contract that institutes political right in the form of masculine political power, "a power exercised in large part as conjugal right."129

B. Rousseau: Women Are Subjugated in Nature

Unlike Hobbes, Rousseau argues that women are naturally physically and morally weaker than men and hence are subjugated in nature. Their natural weaknesses make women ill suited for social and political life.130 As Pateman notes, Rousseau believes that in social life "[w]omen are 'naturally' made to be at the mercy of man's judgement and 'to endure even injustice at his hands.'"131

Rousseau argues that women's abilities and their social function are defined and limited by their reproductive capacity. As Susan Moller Okin notes, "[A woman's] actual and potential abilities [are] perceived as stunted, in accordance with what have been regarded as the requirements of this role."132 For example, in his *Discourse on Political Economy*, Rousseau relies on women's capacity to bear children to demonstrate that fathers, and not mothers, should have dominion and control over children. Rousseau asserts:

First, the authority of the father and mother ought not be equal; on the contrary, there must be a single government and when there are differences of opinion there must be one dominant voice which decides. Second, however slight we regard the handicaps that are peculiar to a wife, since they always occasion a period of inactivity for her, this is a sufficient reason for excluding her from this primacy.133

This view of women's functions as severely limited by nature is in direct contradiction to how Rousseau views the character and function of men. Men in the latter stages of Rousseau's state of nature are understood as having infinite potential for intellectual

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129 Pateman, *supra* note 120, at 67.
130 See, e.g., Rousseau, *Political Economy*, *supra* note 66, at 165 (women not part of political society because subjugated in nature).
133 Rousseau, *Political Economy*, *supra* note 66, at 164.
and creative activity.\textsuperscript{134}

Women's capacity to bear children also makes them physically and emotionally weak. As Lynda Lange notes, "The timidity and weakness of the woman, according to Rousseau, inspire her to be pleasing to a man out of the basic impulse of self-preservation, that is if she is pleasing he is less likely to be violent."\textsuperscript{135} But this timidity and weakness are also described by Rousseau as assets, because they help the woman to perform her "proper purpose”—reproduction of the patriarchal family\textsuperscript{136}—by encouraging the man to stay with her.\textsuperscript{137} In \textit{Emile}, Rousseau writes:

If woman is made to please and to be subjugated, she ought to make herself agreeable to man instead of arousing him. Her own violence is in her charms. . . . From this there arises attack and defense, the audacity of one sex and the timidity of the other, and finally the modesty and the shame with which nature armed the weak in order to enslave the strong.\textsuperscript{138}

So the conception of women as unfit for civil life "which appears as a result of the association of the sexes is not simply the result of practical cooperation for Rousseau, but a reflection of the essential difference between the sexes."\textsuperscript{139} Hence, it is no surprise that Rousseau advocates that women be educated to please men and to be mothers. Of utmost importance to Rousseau is that women be trained to be sexually restrained and chaste in order to assure men of the paternity of their wives' children.\textsuperscript{140} Unlike men, women have no natural self-restraint, so they must be taught chastity and their behavior must be monitored.\textsuperscript{141} Rousseau states:

Moreover, a husband should oversee his wife's conduct, for it is important to him to be assured that the children he is forced

\begin{itemize}
\item\textsuperscript{134} \textit{OKIN, supra} note 132, at 100.
\item\textsuperscript{135} Lynda Lange, \textit{Rousseau and Modern Feminism, in Feminist Interpretations and Political Theory, supra} note 120, 95, 98.
\item\textsuperscript{136} \textit{Cf. Rousseau, Political Economy, supra} note 66, at 164 ("The chief purpose of the entire household's labor is to maintain and increase the father's patrimony . . . .")
\item\textsuperscript{137} Lange, \textit{supra} note 135, at 98.
\item\textsuperscript{138} \textit{JEAN-JACQUES ROUSSEAU, EMILE; OR, ON EDUCATION 358} (Allan Bloom trans., Basic Books 1979) (1779) [hereinafter \textit{EMILE}].
\item\textsuperscript{139} Lange, \textit{supra} note 135, at 100.
\item\textsuperscript{140} \textit{ROUSSEAU, EMILE, supra} note 138, at 361.
\item\textsuperscript{141} \textit{Id. (propriety “prescribes especially to women the most scrupulous attention to their conduct”); id. at} 370 (women never cease to be subjected to men or the judgments of men and should not be allowed to put themselves above those judgments).
\end{itemize}
to recognize and nurture belong to no one but himself. The wife, who has nothing like this to fear, does not have the same right over the husband.\textsuperscript{142}

Thus, because of the nature of women's sexuality (the ability to have children), women must be sexually controlled by men to ensure the existence of the patriarchal family.

Finally, Rousseau argues that women are naturally subjugated because they lack autonomy and rationality; that this deficiency results from women's "natural" sexual difference from men; and that rationality is required to enter into the social contract.\textsuperscript{143} Hence, because women lack autonomy and the ability to reason, they cannot be participants in civil society.\textsuperscript{144} As Lange notes:

This abandonment of moral autonomy for women is particularly damning from Rousseau, who considers such autonomy essential not only for citizenship, but even for true humanity. That the male-headed family requires women to abandon moral autonomy functions without alteration is a severe criticism of that institution.\textsuperscript{145}

Because women are not party to Rousseau's social contract, there is no reason to justify further their civil subjugation. Women are not part of civil society because they lack both autonomy (because of men's natural authority over them) and rationality (one of the reasons men have natural authority over them).\textsuperscript{146} As Pateman so astutely recognizes, however, women are not left in the state of nature by any of the social contract theorists: although brought out of nature (by men's natural au-

\textsuperscript{142} Rousseau, Political Economy, supra note 66, at 164. Rousseau repeated this argument in Emile, where he writes: "[T]he unfaithful woman . . . dissolves the family and breaks all the bonds of nature. In giving the man children which are not his, she betrays both." Rousseau, Emile, supra note 138, at 361.

\textsuperscript{143} See Rousseau, Emile, supra note 138, at 358 (women lack autonomy: "woman is made to please and to be subjugated"); id. at 359 (woman are not rational: God "abandon[ed] woman to unlimited desires"); see also Pateman, supra note 22, at 1-18.

\textsuperscript{144} This misogynist tautology motivated Mary Wollstonecraft's challenge to Rousseau, argued at length and in detail in Mary Wollstonecraft, The Vindication of the Rights of Woman (Carol H. Poston, ed., Norton 2d ed. 1988) (1792). Wollstonecraft disputed Rousseau's claim that women lacked the capacity for full rationality; what women lacked, according to Wollstonecraft, was access to education and encouragement fully to develop both reason and virtue. Id. at 43, 191-92; see also Virginia Sapiro, A Vindication of Political Virtue: The Political Theory of Mary Wollstonecraft (1992).

\textsuperscript{145} Lange, supra note 135, at 101 (footnote omitted).

\textsuperscript{146} See Andrea Nye, Feminist Theory and the Philosophies of Man 8 (1988); Pateman, supra note 22, at 96-98.
thority over them), "[w]omen are incorporated into a sphere that both is and is not in civil society."\(^{147}\)

**C. Locke: Women's Subjugation Is Both Natural and Consensual**

Unlike the absolutists of the period, Locke views the conjugal society as consensual.\(^{148}\) As a result, he rejects the idea that the marriage is irrevocable or requires the unequivocal dominion of the husband. Instead, he believes that the marriage contract can be terminated so long as the goals of the contract—procreation and the raising and nurturing of children—are accomplished.\(^{149}\) For example, Locke states that "the ends of Matrimony requiring no such Power in the Husband, the Condition of Conjugal Society put it not in him, it being not at all necessary to that State."\(^{150}\)

But because Locke views the role of civil society as consolidating pre-existing economic and social relationships found in the state of nature, Locke reinforces the subjugation of women. Women's

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\(^{147}\) Pateman, *supra* note 22, at 11.

\(^{148}\) Locke states that "Conjugal Society is made by a voluntary Compact between Man and Woman." *Locke, supra* note 23, at 319.

In describing the nature of men, women, and political authority, Locke is arguing against the position of the absolutists of his period. Absolutists like Sir Robert Filmer maintained that paternal authority in husbands and fathers and in the monarchy were divinely derived. As Chris Nyland explains:

As the absolutists' reading of the relationship between Adam and Eve led them to believe God had decreed that husbands had the right to expect obedience from their wives, it followed that the father was the senior parent within the family. Thus children owed their primary allegiance to their fathers. Paternal authority was therefore natural and divine in origin in that subordination of wife to husband was decreed by God . . . .

Chris Nyland, *John Locke and the Social Position of Women*, 25 *Hist. Pol. Econ.* 39, 40 (1993). Obedience of wives meant that conjugal society was a lifelong commitment that could not be destroyed by divorce except in the most limited circumstances. As Molly Shanley has noted, "The notion of justifiable rebellion was as ludicrous as the notion that a wife might be released from the subjection to her husband either by their mutual agreement or because of his abuse." Mary Lyndon Shanley, *Marriage Contract and Social Contract in Seventeenth Century English Political Thought*, 32 *Western Pol. Q.* 79, 81 (1979). Hence, "[t]he marriage contract was useful to [absolutists] because it provided an example of a contract which established a relationship of irrevocable hierarchical authority between the parties." *Id.* at 80-81. The marriage contract was used not only as a means to reinforce women's subordination but also as a paradigm for political relationships. *Id.*

\(^{149}\) Locke, *supra* note 23, at 321; *see also* *id.* at 319 ("Conjugal Society is made by a voluntary Compact between Man and Woman: and tho' it consist chiefly in such a Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation . . . .").

\(^{150}\) *Id.* at 322.
subjugation may not be necessary for the existence of conjugal society, but it is nevertheless natural for women to be subordinate to men. Because women's subordination is natural, Locke ultimately believes that civil society must reinforce it. As Mary Shanley recognized, it "was part and parcel of Locke's liberal politics—the family was a private association which preceded civil society and into which the state should not intrude." Differing from the absolutists of his generation, Locke does not argue that women's subordination is divinely derived. Instead, Locke argues there exists a "foundation in nature" for women's subordinate position. Locke maintains that women's physical weakness makes them the "weaker sex" and leads to their natural subjection. For example, Locke, when arguing that husbands should prevail in disagreements between husbands and wives, writes: "[T]he last Determination . . . naturally falls to the Man's share, as the abler and the stronger." It is curious that Locke places so much emphasis on women's physical weakness as evidence of their natural subordination, since when speaking of men Locke advocates that no one has the right to force another person to do anything. In fact, he says that "[t]he natural liberty of man is to be free from any Superior Power on Earth." So why is the physical strength of men, used to destroy women's autonomy and subordinate women, honorable or just either in nature or civil society? Chris Nyland proposes that physical strength is important because Locke views it as a form of property to be taken into account in any contract, including the marriage contract. Nyland writes:

151 See supra note 23 and accompanying text.
152 Shanley, supra note 148, at 91.
153 Locke, supra note 23, at 320; see Nyland, supra note 148, at 40, 43; Nye, supra note 146, at 6; Melissa A. Butler, Early Liberal Roots of Feminism: John Locke and the Attack on Patriarchy, in Feminist Interpretations and Political Theory, supra note 120, at 74, 85 (women subjection natural but qualified).

In addition, Chris Nyland notes:

While he accepted that women could match men intellectually, Locke did not believe the innate capacities of the sexes were equal in all spheres. . . . He accepted as valid . . . the claim that women have less innate muscular capacity than men.

Nyland, supra note 148, at 46.

154 Locke, supra note 23, at 321.
155 Id. at 269.
156 Id. at 283. (With recent discoveries suggesting the existence of life on Mars, this may take on new meaning.)
To the extent their greater strength is of value, it should be taken into consideration in the determination of the provisions of the marriage contract. Greater strength is a property that belongs to the man and the benefits of which belong to him. If wives wish to share the material rewards this capacity enables them to generate, Locke considered it reasonable that men ask a price for this concession.\textsuperscript{157}

The price reasonably extracted is the obedience and subordination and the sexual access of women to men.\textsuperscript{158} Locke himself says that sexual access is critical to conjugal society. The marriage contract, he says, “consist[s] chiefly in such a Communion and Right in one anothers Bodies, as is necessary to its chief End, Procreation.”\textsuperscript{159} Women pay the price of sexual subordination because it is the cost they must pay for physical protection and economic security.

Other scholars have argued that what Locke is describing is not consent at all. As Pateman maintains, women’s “apparent ‘consent’ to the authority of their husbands is only a formal recognition of their ‘natural’ subordination.”\textsuperscript{160} Pateman poignantly frames the question left unasked under consent-based accounts of marriage, which likewise choose to elide the subordination content of the marriage contract itself: “Why should a free and equal female individual enter a contract that always places her in subjection and subordination to a male individual?”\textsuperscript{161} The only sturdy explanation for this “choice” is that women are not free and equal before the marriage contract; rather, women’s prescribed subordinate status is normalized within it. The marital rape exemption, Pateman further explains, represents a distilled example of the conflation of consent and submission comprising the marriage contract;\textsuperscript{162} an equation further embodied in the standards for consent in sexual assault prosecutions generally.\textsuperscript{163}

So Locke appears to talk about women’s subordination as natural and consensual simultaneously.\textsuperscript{164} Locke contends that women consent to subordination through the marriage contract. It

\begin{itemize}
  \item \textsuperscript{157} Nyland, \textit{supra} note 148, at 47.
  \item \textsuperscript{158} Locke, \textit{supra} note 23, at 322; \textit{id.} at 319 (purpose of conjugal society is procreation).
  \item \textsuperscript{159} Id. at 319.
  \item \textsuperscript{160} Pateman, \textit{supra} note 131, at 74.
  \item \textsuperscript{161} Id. at 74.
  \item \textsuperscript{162} Id. at 76-77; see also Pateman, \textit{supra} note 22, at 154-88.
  \item \textsuperscript{163} Pateman, \textit{supra} note 131, at 77-83.
  \item \textsuperscript{164} But see id. at 74 (quoted \textit{supra}, text accompanying note 160).
\end{itemize}
is of no consequence to Locke, just as it was of no consequence to Hobbes, that force or physical strength is the basis for women's consent. Violence does not invalidate women’s consent to subordination. Regarding Locke’s lack of concern that force may invalidate any contract, including the marriage contract, Nyland states:

That one or the other of the bargainers may have a desperate need for the commodity being offered by the other, the intensity of which is not reciprocated by this other, does not for Locke negate the voluntary nature of any contract that may be negotiated.

Ultimately, I believe that it is Locke’s commitment to the existence of a private sphere/gender hierarchy, which precedes the creation of civil society and into which he believes the state cannot properly enter and regulate, that allows him to overlook the inconsistencies of his theories as they relate to women. As a result, under Locke’s vision of the social contract women are required in the marriage contract to surrender dominion over their sexuality. Although Locke argues that conjugal society is unlike civil society, in that it is “perfectly distinct and separate . . . built upon so different Foundations, and given to so different Ends” than civil society, conjugal society parallels civil society in that it is a contract based on gender hierarchy, enforceable by the state. Accordingly, the design of the social contract (as articulating the proper concern for both the public and private sphere) requires women’s subjugation, including their sexual submission to men. As a result, women in Locke’s civil society are required to relinquish control of their sexuality to men.

D. Rawls: Women Are Not Represented in the Original Position

Unlike classic social contract theorists, Rawls presents an account of the social contract that is, on its face, gender neutral. Rawls tells us that those in the original position operate under a veil of ignorance: ignorance of any of the essential facts about their talents, their class status, or their gender. Rawls asserts that

165 See supra notes 124-25 and accompanying text.
166 Nyland, supra note 148, at 51.
167 LOCKE, supra note 23, at 314; see also id. at 319 (political and conjugal society have “different Ends, Tyes and Bounds”); id. at 323 (family resembles “a little Common-wealth, yet is very far from it, both in its Constitution, Power and End”).
168 See ELSHTAIN, supra note 128, at 123.
gender, like race, is morally arbitrary; thus, gender should be hidden from those choosing the values of civil society and constructing the social contract.\textsuperscript{169} The only knowledge that those in the original position have is "the general facts about human society," which includes an understanding of political and economic theory, knowledge of human psychology, and knowledge of different types of social organization.\textsuperscript{170}

Rawls uses this sexually undifferentiated position to persuade us that women, as well as men, are represented in the making of the social contract and that justice as fairness relates to both women and men.\textsuperscript{171} But the sexually undifferentiated nature of those in the original position ultimately reinforces women's subordination in Rawls's account of the social contract. Under Rawls's formulation, if women are subordinated, then they are subordinated simply because they consented to it, in the original position, through reasoned and impartial judgment.\textsuperscript{172} This supposition reinforces women's subordination in Rawls's version of justice. But in reality, the original position is gendered in at least two ways: first by designating those in the original position as heads of families; and second by exempting the patriarchal family from the application of justice.\textsuperscript{173}

Although Rawls maintains that those in the original position are ignorant of their gender, he states that those in the original position are heads of families, who are often conceptualized as men.\textsuperscript{174} He then goes one step further and refers to heads of families as fathers. For example, Rawls writes: "The persons in the original position, however, are prevented from knowing any more about their descendants than they do about [themselves]

\textsuperscript{169} John Rawls, \textit{Fairness to Goodness}, 84 Phil. Rev. 536, 537 (1975); see also Rawls, supra note 67, at 149.

\textsuperscript{170} Rawls, supra note 67, at 137.

\textsuperscript{171} See Pateman, supra note 22, at 43.

\textsuperscript{172} Id. at 42 ("Rawls' task is to find a picture of the original position that will confirm 'our' intuition about existing institutions, including patriarchal relations of subordination."). Cf. John Rawls, \textit{Justice as Fairness: Political not Metaphysical}, 14 Phil. & Pub. Affairs 223, 241 (1985) [hereinafter \textit{Justice as Fairness}]; Rawls, supra note 67, at 141-42 ("[T]he preferred conception of justice... represents a genuine reconciliation of interests."). In addition, under Rawls's framework, because women are assumed to be represented in the creation of civil society, they have an obligation or duty to abide by the institutions of civil society. Id. at 14, 116, 344. This supposition also reinforces women's subordination in Rawls's theory of justice.

\textsuperscript{173} Cf. Rawls, supra note 67, at 5-6 (conception of justice is public).

\textsuperscript{174} See id. at 128, 209.
Thus the father can say that he would be irresponsible if he were not to guarantee the rights of his descendants by adopting the principle of equal liberty." By treating gender as irrelevant and making decisionmakers male, Rawls fails to recognize the inherent injustice of gender subordination.

Rawls believes that the traditional patriarchal family is just; as a result, he does not address the subjugation of women within families. His failure to challenge the traditional patriarchal family, coupled with his failure to challenge the division of labor within families, leaves women outside of his theory of justice. As Taina Bien-Aime notes:

[Rawls] therefore stops short of entering the private sphere, which has been instrumental in maintaining the socio-political superstructure, supporting a patriarchal system of power, and subjugating over half of the population.

In fact, Rawls's analysis leaves women and families outside the administration of justice. Although Rawls contends that social and political institutions should be just, he unambiguously excludes private association, including the family, from the administration of justice. Even if families were subject to the principles of justice, the structure of Rawls's theory would keep the family from being a proper locus for the administration of principles of justice. Rawls's theory requires that justice be de-

175 Id. at 209 (emphasis added); see also id. at 128; Pateman, supra note 131, at 46.

Rawls's gendered language is not unimportant. It is not simply gender-neutral. As Taina Bien-Aime has noted: "Rawls' inadequate consideration of the subjugation of women and his assumption that the 'abstract' person is male creates a gap in his search for equal justice and equal respect. An assumption of gender neutrality neglects an historical analysis of men's subjugation of women in both the public and the private spheres and avoids an analysis of the socio-political separation of the two genders." Taina Bien-Aime, The Woman Behind the Blindfold: Toward a Feminist Reconstruction of Rawls' Theory of Justice, 18 Rev. L. & Soc. Change 1125, 1129 (1990-91) (footnote omitted).

176 See, e.g., Rawls, supra note 67, at 19.

177 Id. at 490 (traditional family institutions are just); id. at 462-72 (supporting traditional roles within families).

178 Pateman, supra note 131, at 28.

179 Bien-Aime, supra note 175, at 1128.

180 See Rawls, supra note 67, at 5-6. In some of his later works, Rawls explicitly excludes the patriarchal family from the purview of justice. See, e.g., John Rawls, The Priority of Right and Ideas of the Good, 17 Phil. & Pub. Affairs 251, 263 (1988) (political virtues found in the doctrine of justice as fairness must be distinguished from the virtues that characterize ways of life appropriate to roles in family life); Rawls, Justice as Fairness, supra note 172, at 241; see also Bien-Aime, supra note 175, at 1125.
veloped by people who are mutually disinterested. But by designating those in the original position as heads of families, those in the original position are not disinterested in the institution or the rules that govern it. As Susan Moller Okin notes:

A central tenet of [Rawls's] theory, after all, is that justice characterizes institutions whose members could hypothetically have agreed to their structure and rules from a position in which they did not know which place in the structure they were to occupy. But since those in the original position are all heads of families, they are not in a position to settle questions of justice within families.\(^8\)

Hence, in Rawls's framework it is not possible to conceive of justice in families because those in the original position cannot be impartial: they do not have the distance\(^1\) needed to formulate rules of justice that could apply to families. By conceiving of those in the original position as part of families (and in hierarchal positions of power as heads of those families), Rawls leaves the family and women in a private sphere of injustice.

III

WEFAR E REFORM AND THE MALE SEX-RIGHT: THE SOCIAL CONTRACT REVISITED

We have, in effect married the state. To comply with the conditions of our recipient status, we cannot make any personal decisions ourselves. We must consult the Welfare Department first, and the final decision is theirs. The state is a domineering, chauvinistic spouse.

—Reports from the Front: Welfare Mothers Up in Arms\(^183\)

The history of social welfare programs in this country demonstrates that those who receive certain subsistence benefits from the state have an obligation to conform their behavior to state sponsored norms. Those receiving welfare benefits must (a) conform their working lives to acceptable social norms—that is, a recipient must get a job even if it does not pay enough money and the person must settle for substandard child care;\(^184\) and (b)

\(^{181}\) Okin, Reason and Feeling, supra note 94, at 235.

\(^{182}\) Okin, supra note 132, at 29.

\(^{183}\) Diane Dujon et al., Reports from the Front: Welfare Mothers Up in Arms, in FOR CRYING OUT LOUD: WOMEN AND POVERTY IN THE UNITED STATES 212-19 (Rochelle Lefkowitz and Ann Withorn eds., 1986) (emphasis added).

\(^{184}\) Cf. Diana M. Pearce & Kelly Ellsworth, Welfare and Women's Poverty: Reform or Reinforcement?, 16 J. LEGIS. 141, 149 (1990) (women require child care program that recognizes need for universal high-quality child care).
conform their sexuality, or sexual behavior, to the dominant, state-sanctioned, social norms regarding the proper role and behavior of women. In the social contract called welfare, women are forced to surrender control of their sexuality in order to receive basic physical needs. These socio-legal controls on behavior are applicable only to those who are requesting subsistence from the state. For example, similar social controls are not foisted upon others who receive monetary benefits from the state, such as farmers, corporations, and the elderly who receive Social Security benefits. Those recipients of state aid are deemed socially worthy of their benefits and, as a result, not subject to behavioral controls.

The surrender of poor women's control of their sexuality in return for basic physical needs echoes the exchange required of women in conjugal society by the social contract. Under welfare programs in the United States, poor women have the option of surrendering their sexuality to the proper man—that is, husbands who can support them—or surrendering their sexuality to the administration of the state. In this way the state replaces the husband in conjugal society and in the subordination of women. Thus, like the social contracts considered by Hobbes, Rousseau, Locke, and Rawls, U.S. social welfare programs have facilitated the establishment of men's political and social right over women, including the establishment of men's sexual access to women's bodies, and facilitates the state acting in the traditional role of husband, when suitable men are not available.

A. Welfare Programs and the Control of Women's Sexuality

By the end of the nineteenth century and the beginning of the twentieth century, social reformers and other policymakers be-

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185 Cf. supra text accompanying notes 158-63 (Lockean social contract theory forces women to relinquish control of their sexuality in order to have their subsistence needs met).

186 Joel Handler has suggested that all welfare reform measures are a result of the following principles: (1) "social welfare programs reflect ... fundamental attitudes toward ... the category of poor to be served"; (2) "[t]he core issue is whether the applicable category is morally excused form work"; (3) "[a]ll social welfare programs are both inclusive and exclusive"; and (4) "[t]he current welfare reform reflects the deeply held, historical attitude that female-headed households in poverty are a deviant category of the poor." Joel F. Handler, The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 459-60 (1987-88); see also JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM (1995).
lieved that children needed the care of the mothers to ensure the proper development of their social, intellectual, and moral capabilities. By this period, social reformers no longer favored placing poor children in orphanages or other institutions when their parents could no longer care for them. Instead, reformers favored finding ways for poor children to be raised at home. As the 1909 White House Conference Report on Children concluded:

Home life is the highest and finest product of civilization. It is the great molding force of mind and character. Children should not be deprived of it except for urgent and compelling reasons. . . . [C]hildren of reasonably efficient and deserving mothers who are without the support of a normal breadwinner, should as a rule be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of children. In addition to the conviction that children should be raised at home, reformers believed that women's employment also negatively affected their children's social, intellectual, and moral development. The 1914 Report of the New York State's Commission on Relief for Widowed Mothers echoed this belief:

Many thousands of widowed mothers in the State of New York . . . are obliged to deprive [their] children of motherly attention and training in order to give themselves over to wage earning work . . . [and] are unable to provide their children with a proper measure of the necessities of life . . . . They cannot in such cases be successful mothers because they are too much distracted by wage-earning. . . . The children suffer in soul and body both. They get neither proper material care nor proper physical support.

As a result of these two convictions about the needs of children and the proper role of women vis-à-vis children, the early twentieth century saw the development of social welfare programs

which gave cash benefits to poor women who had children but who did not have a male wage earner at home.  

I. Mothers' Pensions

The first social programs designed to address the needs of some poor women and their children were the mothers' or widows' pension programs. Advocates wanted these programs "to signify the public value of the labor of mothering and to recognize public responsibility for needy mothers." Instead, these programs, designed and administered by local and state governments, provided limited support to a narrow category of needy women with children. By 1921, forty of the forty-eight states had adopted some form of mothers' pension law. By 1935, forty-eight states and the District of Columbia had enacted such legislation. These programs served only "deserving mothers" who kept "suitable homes." In the vast majority of states, only white widowed women were able to meet the "deserving" and "suitable home" criteria.

White widows, however, were not completely insulated from the stigma attached to single mothers. In order to maintain their eligibility, women who received pensions were subject to constant scrutiny to assure the state agency that they in fact were deserving of aid. The women receiving mothers' pensions had to meet certain behavioral requirements to continue their eligibility. The state, as a condition of aid, gave itself the power to control the daily family life of recipients, as well as their sexual behavior.

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191 Social programs designed to give cash aid to women with children were also the result of labor market concerns regarding the quality of the future labor force. For an excellent analysis of this issue, see id. at 190-95.

192 For a comprehensive history of the mother's pension movement, see WINIFRED BELL, AID TO DEPENDENT CHILDREN 3-19 (1963).

193 GORDON, supra note 189, at 38.

194 ABRAMOVITZ, supra note 187, at 194.


196 ABRAMOVITZ, supra note 187, at 200; GORDON, supra note 189, at 45.

197 ABRAMOVITZ, supra note 187, at 200-01. African American women were almost never aided by these programs. For example, 96% of families who were receiving mothers' pension in 1931 were reported as white, and only 3% were reported as African-American. Id. at 201. In fact, the southern states with the largest concentration of African Americans were the last to pass mothers' pension legislation. By 1933, neither Georgia, Alabama, nor South Carolina had instituted a mothers' pension program. Id. at 194; see also SKOCPOL, supra note 187, at 471-75; Leff, supra note 195, at 414.
ensuring that the women who received aid were in line with the accepted role of women in American patriarchal society. As Linda Gordon notes, "Widows were not exempt from moral suspicion and supervision, the responsibility to make sure that mothers' aid recipients were 'pure.'"\(^{198}\) For example, in New York City, the Board of Child Welfare

required that each pension recipient be visited quarterly by a Board representative . . . [T]he investigator's review of pension appropriateness often turned out to be a loosely constructed judgement that reflected class and race biases. Reasons for rejection included use of tobacco, lack of church attendance, dishonesty, drunkenness, housing a male lodger, extramarital relations, poor discipline, criminal behavior, child delinquency, and overt child neglect. Agencies even forced families to move from neighborhoods with questionable reputations.\(^{199}\)

Even when the states began to loosen the eligibility rules to include a greater number of women in these programs, administrators and case workers continued to allow only women who conformed their behavior to the patriarchal norm of an unmarried mother's behavior, such as celibacy, to receive aid.\(^{200}\) As a result, few never-married mothers received aid under the mothers' pension programs.\(^{201}\) By focusing on widows, reformers avoided the stigmas attached to other unmarried mothers: widows were women who had followed the rules for women's

\(^{198}\) Gordon, supra note 189, at 49; see also Skocpol, supra note 187, at 469 ("Women could be penalized . . . for inability to prove their marriages, for using a language other than English in the home, . . . [and] for living in improper houses or neighborhoods . . . .").

\(^{199}\) Abramovitz, supra note 187, at 202; see also Gordon, supra note 189, at 45-46. Perhaps the social control was so readily accepted by some in society because some thought of the pensions as paying women to render a service for the state. As Linda Gordon notes: "Such standards were sometimes defended by analogy to the requirements made of an employee: The mothers were hired by the state to care for children, and their continued employment was dependent on satisfactory performance." Id. at 52; see also Skocpol, supra note 187, at 465 ("[The mother's] pension removes the mother and her children from the disgrace of charity relief and places her in the class of public servants similar to army officers and school teachers") (quoting Illinois Congress of Mothers, quoted in "State News," Child-Welfare Magazine, Mar. 1916, at 256-77).

\(^{200}\) Abramovitz, supra note 187, at 201.

\(^{201}\) Id. Although only three states, Michigan, Nebraska, and Tennessee, officially aided unmarried women, and another eight states had mothers' pension statutes broad enough to cover unmarried women, a 1931 national survey found that only 55 families headed by unmarried women were receiving aid under a mothers' pension program. Id.
behavior by marrying and who were out the support of their hus-
bands through no fault of their own. But, as Linda Gordon
notes, this focus on the innocent widow "intensified the stigmat-
tization of other single mothers; the emphasis on the widow's in-
ocence insinuated the noninnocence of others."\textsuperscript{202}

Because of the ideology of motherhood which supported the
existence of mothers' pension programs—based on the need of
children to be raised by women who did not perform waged la-
bor—women who received mothers' pensions were prohibited
from performing full-time waged work, even though the combi-
nation of full-time work and the mothers' pension could assure
the women of the ability to support their families. Women re-
ceiving mothers' pensions could accept part-time work that al-
lowed them to stay at home with their children, but acceptable
part-time employment was often the worst-paid work.\textsuperscript{203}

Hence, by sanctioning the state's control of poor women's so-
cial and sexual behavior, and by "arguing that women belonged
in the home and providing them a means for remaining there,
Mothers' Pensions programs replaced male breadwinners and
sanctioned the economic dependence [and sexual subordination]
of women on men or the state."\textsuperscript{204}

2. The New Deal Program for Women

As a result of the Great Depression, the federal government
created a series of social welfare programs designed in large part
as a safety net for workers in times of crisis and in old age. These
social programs can be divided into "dignified" entitlements,
designed for and available to white male wage earners and their
wives, and "undignified" entitlements, originally available only
to deserving white women and their children.\textsuperscript{205} The dignified
entitlements consisted of unemployment insurance and old age
benefits available to certain retired elderly workers and their
wives.\textsuperscript{206} These dignified, deserving beneficiaries received a

\textsuperscript{202} Gordon, supra note 189, at 27; see also id. at 45.
\textsuperscript{203} Skocpol, supra note 187, at 469.
\textsuperscript{204} Abramovitz, supra note 187, at 203.
\textsuperscript{205} Dorothy Roberts, Welfare and the Problem of Black Citizenship, 105 Yale
L.J. 1563, 1568 (1996)(reviewing Gordon, supra note 189, and Jill Quadagno,
The Color of Welfare: How Racism Undermined the War on Poverty
(1994)).
age benefits); Social Security Act of 1935, ch. 531, tit. III, 49 Stat. 626 (1935) (unem-
ployment compensation).
fixed amount of money of which little if any discretion was given to those administering the program. The undignified aid consisted of federal aid programs whose purpose was to meet the subsistence needs of single mothers and their children.\textsuperscript{207} The level of benefits available was designed to "prevent its recipients from being too comfortable on their own," and as a result, the amount of the benefits paid to poor women were too small to meet the minimal needs of their families.\textsuperscript{208} The national program developed during the New Deal, Aid to Dependent Children (ADC)—renamed Aid to Families with Dependent Children in 1962 (AFDC)\textsuperscript{209}—perpetuated the ideology of the mothers' pension in that it was available only to "deserving" women and children\textsuperscript{210} and was based on the ideology that white women were not expected to work.\textsuperscript{211} As was the case with the mothers' pensions that preceded it, much discretion was given to

\begin{footnotes}
\item[208] GORDON, supra note 189, at 7. ADC may have been designed originally as a means of recognizing the value of mothering and the responsibility of the state to provide financial support for families with an absent wage laborer, but the level of benefits has always been too small to raise a family. See, e.g., HOUSE WAYS AND MEANS, 103d Cong., 2d Sess., OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK, 366-67 table 10-11 (Comm. Print 1994) (showing that AFDC benefits are only a fraction of the poverty line in all states).
\item[209] When Congress passed the welfare program in 1935, it was named Aid to Dependent Children (ADC). The program gave aid only to children; no money was given toward the support of the mother or other adult caretaker. In 1962 the name of the program was changed to Aid to Families with Dependent Children (AFDC). The revised welfare plan provides cash assistance for the child's mother or other adult caretaker. See Public Welfare Amendments of 1962, Pub. L. No. 87-543 § 104, 76 Stat. 172, 185-86 (codified as amended at 42 U.S.C. § 602).
\item[210] ABRAMOVITZ, supra note 187, at 315.
\item[211] QUADAGNO, supra note 205, at 119; GORDON, supra note 189, at 276 (noting that Black women were expected to work). Because the individual states had a large degree of control in determining eligibility, African American women were often deemed ineligible. As one Southern public assistance field supervisor stated:

The number of Negro cases is few due to the unanimous feeling on the part of the staff and board that there are more work opportunities for Negro women and to their intense desire not to interfere with local labor conditions. The attitude is that they have always gotten along, and that "all they'll do is have more children" is definite . . . There is hesitancy on the part of lay boards to advance too rapidly over the thinking of their own communities, which see no reason why the employable Negro mother should not continue her usually sketchy seasonal labor or indefinite domestic service rather than receive a public assistance grant. ABRAMOVITZ, supra note 187, at 318-19 (quoting Mary S. Larabee, Unmarried Parenthood Under the Social Security Act, in PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 447-49 (1939)).
\end{footnotes}
administrators and case workers to determine eligibility (status of deserving) and the amount of the benefit.\textsuperscript{212} Similarly, the ADC statute and resulting regulations required women receiving benefits to abide by state-sanctioned standards of social and sexual behavior. For example, women receiving ADC benefits were subjected to a "suitable home" test.\textsuperscript{213} And as Professor Linda Gordon notes, the most frequent measurement of this test was the recipient's sexual behavior: "The presence of a man in the house, or the birth of an illegitimate child, made the home unsuitable. These provisions also permitted racist policies: For example, black-white relationships were particularly likely to make a child's home declared unsuitable."\textsuperscript{214}

3. Race and the Reform of AFDC

At least two factors have led to the reforms of the ADC/AFDC program during the latter half of this century. First, by 1939, amendments to the Social Security Act removed a great many of the "deserving" white widows from the welfare program, transferring them to survivors' benefits attached to the old

\textsuperscript{212} Roberts, supra note 205, at 1570. "Worthy widows" were removed from undignified assistance and transferred to the survivors' insurance program of Social Security, a program that is attached to the deceased man's lifetime wages. Thus, worthy white widows received a higher benefit without the indignity attached to welfare. See Skocpol, supra note 187, at 536; Abramovitz, supra note 187, at 318; Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 201-02, 53 Stat. 1360, 1363-64 (1939).

\textsuperscript{213} Some states also used "employable mother" rules to make African American women ineligible for ADC. The "employable mother" rule removed able-bodied women with school-age children from eligibility on the belief that these women should work. Abramovitz, supra note 187, at 318. As historian Jacqueline Jones notes:

[S]everal southern states authorized caseworkers to deny benefits to any woman who had a man in her home or who herself appeared "employable." Theoretically, this rule rendered all but ill and handicapped black mothers ineligible for aid, especially during harvest season in rural areas. Indeed, the "employable mother" provision had originated in Louisiana in order to deny assistance to families headed by women employable in the fields.


\textsuperscript{214} Gordon, supra note 189, at 298; see also Abramovitz, supra note 187, at 318.

Additionally, "[t]he presence of a man could also make the family fail the means test. Through the administrative process recently called 'deeming,' caseworkers had the discretion to 'deem' the income of any adult household members as available for the support of dependent children." Gordon, supra note 189, at 298.
age insurance program. Additionally, in the years following the end of World War II, the number of households headed by widows fell, and AFDC began to accept "less worthy" women for benefits. From 1948 to 1953, the number of widowed women receiving welfare benefits decreased by twenty-five percent. At the same time the number of never-married women receiving benefits increased by approximately fifty-eight percent, and the number of deserted, divorced, and separated women receiving benefits increased by thirty-six percent. Therefore, by the 1960s the majority of women receiving AFDC benefits were either never married, divorced, or separated.

The second factor which led to the increase of punitive reforms is that by the mid-twentieth century, AFDC had become increasingly identified with Black women and children. The number of Black women and children receiving AFDC benefits increased in part because of pressure from an organized welfare rights movement consisting primarily of women of color. In the mid-1960s, the National Welfare Rights Organization (NWRO) organized sit-ins and confrontations at local welfare offices. These women demanded an end to many of the behavioral rules which were used to control the sexual behavior of women on welfare. One successful tactic of this organization was to flood local welfare offices with applications from thousands of new families, with the intent of overburdening local welfare offices so that they would relax their eligibility review procedures. The review system collapsed under the weight of the new applications, resulting

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216 Abramovitz, supra note 187, at 321.

217 Id.

218 See Quadagno, supra note 205, at 120.

in the approval of all applications.\textsuperscript{220} As a result, by the mid-1960s African American women and children constituted forty-eight percent of the AFDC caseload.\textsuperscript{221} As Professor Dorothy Roberts has stated, “As AFDC became increasingly associated with Black mothers already stereotyped as lazy, irresponsible, and overly fertile, it became increasingly burdened with behavior modification, work requirements, and reduced effective benefits levels.”\textsuperscript{222} As early as 1945 a member of a Louisiana grand jury charged with investigating the state’s welfare program asked a welfare official: “I should like to know why you have so many Negro women on your payrolls. . . Why can’t they go back to the country and work instead of staying in the city and living on public welfare?”\textsuperscript{223}

Punitive reforms of the welfare program occurred at both the federal and state levels. In 1950 Congress passed one important federal reform which reinforced the sexual subordination of women. The Notification of Law Enforcement Officers amendment to the Social Security Act required welfare offices to notify the police whenever they awarded aid to a child with an absent father.\textsuperscript{224} As a condition of eligibility, women requesting financial assistance had to cooperate with authorities in their search for absent fathers.\textsuperscript{225} This notification rule not only required that women disclose information about their sexual activity but also worked to coerce women into continuing some sort of relationship with men who may have been dangerous to them or their children.\textsuperscript{226} It also allowed absent fathers to locate women with

\textsuperscript{220} See Piven & Cloward, \textit{supra} note 219, at 274-75.
\textsuperscript{221} Abramovitz, \textit{supra} note 187, at 321. Large postwar period migrations of African Americans from the southern states to large northern industrial cities may also have led to increases in the number of Black women and children receiving welfare. Although Black women were routinely denied benefits by northern states during the 1940s and 1950s, by the use of “man in the house” and “substitute father” rules, the large African American migrations resulted, in the 1960s, in a large urban Black population poised to demand services from the state that the Democratic party could no longer ignore. Teresa L. Amott, \textit{Black Women and AFDC: Making Entitlement Out of Necessity}, in \textit{Women, the State, and Welfare} 280, 288 (Linda Gordon ed., 1990); see also Jacqueline Jones, \textit{The Dispossessed: America’s Underclasses from the Civil War to the Present} (1992).
\textsuperscript{222} Roberts, \textit{supra} note 205, at 1572; see also Mink, \textit{supra} note 18, at 891-92.
\textsuperscript{223} Bell, \textit{supra} note 192, at 63 (quoting a conversation between one juror from the Codd Parish (Shreveport) Grand Jury and the local welfare director).
\textsuperscript{224} Abramovitz, \textit{supra} note 187 at 322.
\textsuperscript{225} Id.
\textsuperscript{226} See Mink, \textit{supra} note 18, at 894. A 1992 study from the State of Washington found that 60% of women receiving AFDC benefits had been punched, kicked, or
whom they had previously had sexual intercourse and as a result allowed these men greater sexual access to the mothers of their children.

Punitive reforms directed at restricting women's control of their sexuality also developed at the state level. During the 1950s many states added "suitable home," "man in the house," and "substitute father" provisions which made many Black single mothers ineligible. In fact, "by 1960, twenty-three states, many but not all in the South, had some type of suitable home policy on the books." As the assistant director of Georgia's state welfare agency stated in 1960: "An ADC home can be held 'unsuitable' for children if the mother is promiscuous, carries on with a man, or has illegitimate children."

Substitute father provisions permitted the state to determine that any man in the mother's life was deemed a substitute father. Because the children would no longer be "deprived of parental support," the family would lose its eligibility for assistance, regardless of whether the relationship was short-term or whether the man had an income with which to support the woman and her children. In order to obtain evidence of a man in the wo-


Other punitive reforms took place in the states. Numerous states decreased their financial support of the program. Some states increased eligibility rules, including the more stringent enforcement of residency requirements, which often prevented African American migrants from the South from receiving benefits. See Abramovitz, supra note 187, at 323.

Id. at 323; cf. Bell, supra note 192, at 76 (policies fell most heavily on Black children). Many states also required that women receiving AFDC follow agency and caseworker guidelines regarding child care and housekeeping. Abramovitz, supra note 187, at 323.

Abramovitz, supra note 187, at 323 (citing Bell, supra note 192, at 29, 93-110).

Bell, supra note 192, at 95 (quoting Gordon Robert, 1000 Children Lose Aid, Atlanta J., Mar. 29, 1960).

See, e.g., Bell, supra note 192, at 76-79.
man's life, state agencies conducted surprise "midnight raids" in order to determine whether there was a man in the house; if a man was found in the house, he would automatically be deemed a "substitute father." 232 As Professor Bettylou Valentine has noted:

State and local administration of the AFDC program was designed to penalize the welfare mother and her children, not only by supplying low levels of aid, but by making eligibility a complicated and negative process, by applying rules of "fitness," by prosecuting recipients for adultery, fornication, and neglect when children were born out of wedlock, and by threatening to take children from their mothers. This process of intimidation began immediately after passage of the Social Security Act, but state rules proliferated as the AFDC rolls grew. 233

We have recently seen a reincarnation of the suitable home requirements in both the Republican and Democratic welfare reform measures. The 1995 Republican welfare reform bill, the PRA, provides money to states for the purpose of establishing orphanages for the children of poor women. 234 The 1994 Democratic bill, the WRA, provides the government with the right to remove a child from its parent and place the child in an orphanage or foster home if the parent refuses to find work or get training or if the family is no longer eligible for benefits. 235 In essence, both proposals allow the state to consider a home unsuitable if the child's parent is unable to care for her due to the parent's poverty.

The most recent version of social welfare policy in this country, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, will further reinvigorate this process. As Professor Margaret Baldwin astutely recognizes:

Enforcement of these new contracts will likely renew surveillance practices reminiscent of the era of "suitable home" investigations. A new enthusiasm for home visitations is apparent in the intensification of government interest in com-

232 Abramovitz, supra note 187, at 324.
States also sought to control the sexual and reproductive behavior of poor women on welfare by the use of family cap provisions. Family cap provisions fixed a maximum family benefit regardless of the number of children in the family.

Although the Supreme Court has invalidated man in the house and substitute father rules, the Court has upheld the constitutional validity of family cap legislation. These policies were attempts to control women's sexual behavior as a condition of eligibility and receipt of subsistence benefits. Consequently, the welfare policies of ADC/AFDC worked to replace men as the sovereigns of poor women's sexuality. In other words, the social contract, as evidenced by federal and state welfare policy, replicated the method and the goals of liberal social contract theory. Echoing social contract theory, a significant goal of the American social welfare policy is the reinforcement of women's sexual subordination to men. But American welfare policy added an additional mechanism to the social contract, the sexual subordination of women to the state when a man is not available.


237 See Dandridge v. Williams, 397 U.S. 471, 483 (1970) (holding that a state regulation setting a maximum grant regardless of family size was constitutional).

238 See King v. Smith, 392 U.S. 309, 320-23 (1968) (holding invalid as inconsistent with the Social Security Act Alabama's substitute father regulation denying benefits to children otherwise eligible because their mother cohabited with a man who was not legally responsible for their support). The "midnight raids" were prohibited by statute. See also Parrish v. Civil Svc. Comm'n, 425 P.2d 223 (Cal. 1967) (midnight raids unconstitutional under federal and state constitutions).

239 Dandridge, 397 U.S. at 471; Wyman v. James, 400 U.S. 309 (1971) (caseworker searches of clients' homes did not violate Fourth Amendment even though refusal resulted in the loss of benefits). In upholding the constitutional validity of mandatory home inspections and eligibility checks, Justice Blackmun, writing for the Court, asserted with regard to AFDC: "One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are being utilized and put to work. The public, when it is the provider, rightly expects the same." Id. at 319; see also Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1245 (1965) (one corollary of legal theory holds that all forms of welfare represent the expenditure of public funds, and as a result, the public may properly interest itself in these funds even after they have reached the hands of beneficiaries).

240 But see Piven & Cloward, supra note 219, at 127 (man in the house rules aimed at ensuring that men do not benefit from welfare payments).
As Johnnie Tillmon, the first chairwoman of the National Welfare Rights Organization, sagaciously recognized:

[Welfare is] a supersexist marriage. You trade in a man for the man. But you can't divorce him if he treats you bad. He can divorce you, of course, cut you off anytime he wants....

In ordinary marriage, sex is supposed to be for your husband. On A.F.D.C., you're not supposed to have any sex at all. You give up control of your own body. It's a condition of aid.\^{241}


Like the social contract described by Hobbes, Rousseau, Locke, and Rawls, the new social contract of the 1990s, in the form of welfare reform, targets the sexuality of women for control by an individual man, her husband, or the state. The welfare reforms initiated by the states, in the form of waiver programs, as well as the dissolution of the AFDC by the federal government have as their goal the correction of women deemed deviant by the state because of their poverty, the "illegitimacy" of their children, and their race.\^{242} For example, in the early 1990s the coercive use of the contraceptive Norplant to limit the fertility of poor African American women was touted as a legitimate reform of the AFDC program.\^{243} Because of the continued desire to control the sexuality and reproduction of poor single women, the new social contract primarily encompasses behavior modifications with severe punishments for noncompliance in order to correct poor women's sexual deviance.\^{244} As Professor Baldwin


\footnote{242 See generally Solinger, supra note 10.}

\footnote{243 Norplant "incentives" have been proposed or enacted into legislation in many states. The legislature of the State of Kansas has gone further, proposing a law offering a $500 "bonus" to women on welfare who agree use Norplant. \textit{See} Tamar Lewin, \textit{A Plan to Pay Welfare Mothers for Birth Control}, \textit{N.Y. Times}, Feb. 9, 1991, at 9; John Robert Hand, \textit{Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion}, 46 \textit{Vand. L. Rev.} 715, 718 (1993).}

\footnote{244 For a comprehensive discussion of behavior modification provisions of AFDC waiver programs, see generally Williams, \textit{supra} note 3 ("learnfare," "wedfare," and family cap provisions are aimed at curbing poor women's socially and sexually deviant behavior).}
explains, the welfare reform proposals and programs in the 1990s enlarge the "supervisory regime" of women "under the aegis of 'child caps,' duration limits, and mandatory parenting and job training programs, measures which are all strongly inflected with behavior modification techniques couched in terms of sexual 'responsibility' and family competency."245

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) ends the legal entitlement of poor families to cash and in-kind assistance. Instead, the PRWORA substitutes a state block grant program, the Temporary Assistance for Needy Families program, in which the federal government gives a grant to eligible states and allows each state to design a social welfare program within guidelines set by the federal government.246 Poor people who meet existing eligibility requirements are no longer automatically legally entitled to assistance. States are given wide discretion to tighten eligibility requirements, and once a state has used its grant, neither the state nor the federal government is legally required to provide the needy family with benefits.247

Although the PRWORA was supported by Congress and the President as a "pro-family" measure, the statute's support of families consists solely of its support of the institution of marriage. As Professor Martha Fineman has noted with regard to other welfare reform measures, both conservative and liberal commentators consider "marital status [to be] central to the self-help regimes proposed for the poor" and "consider marital status an appropriate objective to be fostered by public policy."248 In its prefatory findings Congress states that "[m]arriage is the foundation of a successful society" and "that marriage is an essential institution of a successful society which promotes the interests of children."249 In short, Congress assumes that two-parent families are the source of culture and social order, social stability, economic self-sufficiency, and core social values. Additionally, the

245 Baldwin, supra note 236, at 102. These measures have also been couched in terms of cost controls. But given the percentage of the federal budget actually allocated to income maintenance programs and the paltry amount of projected savings, it seems clear that the major goal of these measures is social control and not fiscal control.

246 PRWORA, supra note 2, §§ 101, 103(a)(1), 110 Stat. 2110, 2112.
247 See After 60 Years, supra note 3, at 2192.
248 Fineman, supra note 18, at 285.
statute seeks to support families by destroying families headed by single women; it does so by eliminating financial support for these women and by emphasizing the necessity of decreasing the number of children born to these women.

The cost to poor families of this "pro-family" measure is astronomical. At least one study has estimated that the new federal law will add approximately 2.6 million people, including 1.1 million children, to the ranks of those living in extreme poverty. The PRWORA is designed to force the poorest women in this country into the lowest paying and lowest status jobs. It blames them for the unavailability of employment even in the lowest paying sectors, and it punishes them for their poverty. Both the PRWORA and state waiver programs assume that "individual economic default, social incompetence, and sexual delinquency of poor mothers . . . [are] the ultimate explanations for female poverty, and for any resulting 'dependency' on the welfare system that may result." Ultimately, the PRWORA uses poor women's behavior as an explanation of their poverty so that we, as a society, will not have to reform an economic and social system that creates poverty.

Three of the statute's measures—rules regarding teenage mothers; rules compelling cooperation of women in support and

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250 See After 60 Years, supra note 3, at 2196.
251 As Joanna Weinberg has recognized, many of the jobs created for workfare programs recipients are "work in shelters, day care centers, medical facilities, and similar . . . services. . . . [T]hese jobs are traditionally at the low end of the pay scale and have limited advancement potential. . . . Most importantly, they are seen as 'women's work.'" Joanna K. Weinberg, The Dilemma of Welfare Reform: "Workfare" Programs and Poor Women, 26 NEW ENG. L. REV. 415, 446 (1991).
252 Politicians and scholars who subscribe to behaviorist theories of welfare dependency often argue that the cause of welfare dependency is nonwork. For example, Lawrence Mead has written that "[n]onwork . . . is the immediate reason for destitution and dependency among most of today's working-aged poor." LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 5 (1992). His theory, like other behaviorist analyses, discounts both the effects of structural impediments to work and the "work" involved in the nonwaged work of child-rearing by mothers.
253 Work requirements were first added to AFDC with the Family Support Act of 1988 (FSA). The FSA required all states to establish a Job Opportunities and Basic Skills Program (JOBS), which was required to include secondary education instruction, job skills training, and job development and placement programs. States were also required to provide child care if child care was necessary for a recipient's education, training, or employment. See Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.). These programs were generally underfunded.
254 Baldwin, supra note 236, at 102.
paternity enforcement; and rules requiring durational limitations—operate to sanction poor women’s sexual and reproductive behavior according to the rules of the social contract.

In the PRWORA, Congress expresses a desire to gain control of—or, at the very least, to influence—the sexual, reproductive, and social lives of poor teenage girls. The statute does express concern about the lives of teenage girls, and it does indicate awareness of sexual abuse by, and pregnancy caused by sexual intercourse with, adult men.\(^{255}\) Congress even notes the limited life opportunities offered to women who become pregnant as teenagers.\(^{256}\) Nevertheless, the statute seeks to solve these problems by mandating educational programs and living conditions and by imposing penalties for noncompliance. In order to maintain eligibility for aid under the Temporary Assistance for Needy Families program, teenage mothers must attend school or undertake equivalent training\(^{257}\) so that they can become productive workers; they must live in an adult supervised setting\(^{258}\) to control their sexual behavior; and they must comply with individual responsibility plans developed by state social workers\(^{259}\)—which may include, if the state so chooses, abstinence training.\(^{260}\) While the Act provides no money for college education, which may open higher paying jobs to poor women, the Act makes money available for education or motivational programs that teach “social, psychological, and health gains to be realized by abstaining from sexual activity.”\(^{261}\) The abstinence programs will be designed to teach recipients that “abstinence from sexual activity outside marriage [is] the expected standard for all school age children”; that abstinence is the only way to avoid out of wedlock pregnancy and sexually transmitted diseases; and that

\(^{255}\) PRWORA, supra note 2, § 101(7), 110 Stat. 2111 (the increase in the number of pregnancies among the youngest girls is due to the “predatory sexual practices by men who are significantly older”; at least one-half of children born to teenage mothers are fathered by adult men; and the majority of teenage girls who get pregnant by adult men have a history of sexual or physical abuse by older adult men). In fact, the rate of pregnancy for girls under 14 years old increased 26% during the late 1980s. Id. § 101(7)(A), 110 Stat. 2111.

\(^{256}\) Id. § 101(8), 110 Stat. 2111.

\(^{257}\) Id. § 103(a)(1), 110 Stat. 2135-36.

\(^{258}\) Id., 110 Stat. 2136.

\(^{259}\) Id., 110 Stat. 2140-41. These individual responsibility plans are mandated for any recipient who is at least 18 years old or who has not received a high school diploma. Id.

\(^{260}\) Id. § 912, 110 Stat. 2353-54.

\(^{261}\) Id.
the mutually faithful monogamous marriage is the expected standard of human activity.262 Teenage mothers who refuse to or are unable to comply with any of these provisions are subject to being expelled from the program.263 It is clear that PRWORA permits states to condition subsistence benefits to these women on their compliance with the state's control of their sexuality.

The PRWORA also seeks to control the sexuality of poor women by compelling recipients to participate in paternity determinations as well as child support enforcement efforts as a condition of receipt of aid. Women who refuse to cooperate with state authorities in this regard are disciplined by a reduction of at least twenty-five percent of their families' grant.264 States may further punish the recipient for noncompliance by eliminating her eligibility altogether.265 This measure creates for poor women many of the same problems created by the Notification of Law Enforcement Officers Act of 1950.266 Like the Notification Act, the paternity and child support compliance provisions reinforce patriarchal rights of men to women and children by requiring women to disclose to the state detailed information about their sexual activity. These provisions may even force a woman to continue a relationship with a man who may be dangerous to her or her children and in many cases with a man who has no interest in maintaining a relationship with her children.267 In addition, the PRWORA contains a provision which links noncustodial parents' access to their children with their financial support of their children.268 This measure reinforces patriarchal/paternal power over children, whether or not it is in the child's best interest.

Some of the best-publicized portions of the PRWORA, the time limits and work requirements, are also designed to punish poor women for their sexual and reproductive decisions, as well as to gain control over these decisions and to reinforce women's dependence on men. In fact, Congress articulated the purpose of the PRWORA as ending "dependence of needy parents [i.e., wo-

262 Id.
263 Id. § 103(a)(1), 110 Stat. 2141.
264 Id., 110 Stat. 2135.
265 Id.
266 See supra notes 224-26 and accompanying text.
267 See supra notes 224-26 and accompanying text; see also Raphael, Domestic Violence, supra note 226.
268 See PRWORA, supra note 2, § 391, 110 Stat. 2258-59.
men] on government benefits by promoting job preparation, work, and marriage." The statute encourages marriage by eliminating benefits and forcing women with young children into low-paying jobs that will not enable them to care for their children on their own.

The provisions of the PRWORA require that adults receiving benefits begin working when the state judges them ready to work or within two years of receiving aid, whichever comes first. The penalty for noncompliance with the work requirement includes a reduction in benefits or, at the state's option, termination of all assistance to the family. Predictably, this provision does not regard the work that women do in their homes—raising their children—as work which can fulfill the statute's work requirement. Finally, the PRWORA confines the receipt of benefits to five years of assistance, whether or not consecutive.

The statute does allow some exemptions from the work requirement for single parents of young children. For example, the statute permits, but does not require, states to exempt single parents with children under one year old, but the state may grant this exemption to a recipient only once. The statute also allows, but does not require, states to exempt single parents of children under six years old from full-time work: single parents with children under six years are required to work only twenty hours per week and may be exempted for the work requirement altogether if the parent can demonstrate that child care is unavailable.

\[\text{Id.}\] § 103(a)(1), 110 Stat. 2113.
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\], 110 Stat. 2137. The statute permits exemptions from this limitation if the recipient received benefits as a minor child; the time spent receiving relief as a minor child is not counted toward this limitation so long as the minor child was not the head of household. \[\text{Id.}\] The statute also contains a hardship exception, which relaxes these time limitations for victims of domestic violence. \[\text{Id.}\], 110 Stat. 2137-38. In addition, the state may exempt up to 20% of its caseload from the lifetime cap provision. \[\text{Id.}\], 110 Stat. 2138.

\[\text{Id.}\], 110 Stat. 2131.

\[\text{See id.}\], 110 Stat. 2132, 2133. Joanna Weinberg notes that exempting women with young children from work requirements ultimately puts these women at a greater disadvantage in the labor market and may ultimately put these women at risk for becoming long-term welfare recipients. Weinberg, supra note 251, at 447 (one study "suggests that delaying a woman's return (or entry) to the labor market until the youngest child turns six, places women at a disadvantage because of her age, lack of recent work experience, and the length of time on public assistance").
Finally, despite all of the rhetoric regarding "welfare queens," the PRWORA does not contain a child exclusion provision, which would deny benefits to children conceived and born to women while receiving welfare benefits. Child exclusion provisions have long been defended as essential to the deterrence of births by single women and as indispensable both to persuading poor women with children to work and to putting recipients

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275 Child exclusion provisions differ significantly from the family cap provisions, which the Supreme Court declared constitutional. See Dandridge v. Williams, 397 U.S. 471 (1970). As Martha Davis has astutely noted:

These programs operate differently in ways that are critical. . . . For example, under a family maximum, when the oldest child in a large family becomes too old to receive AFDC, the family continues to receive the same level of benefits because the younger child's grants have not been totally rescinded. Under child exclusion, however, when the oldest child becomes too old to receive AFDC, those benefits disappear; the excluded children never receive benefits because their eligibility has been completely eliminated.


276 This defense is based on the uninformed and often racist belief that women on welfare have additional children in order to collect increased benefits and that refusing women the small increase will discourage maternity and ultimately foster work among poor women with children. As has been recognized:

African American and Latino welfare recipients are often characterized as sexually irresponsible, inclined to bear children outside of marriage, and encouraged by AFDC benefits to bear numerous children. These stereotypical traits are linked to the offensive idea of a moral deficiency among African American and Latino welfare recipients which causes them to reject marriage, legitimate births and limited family size. It is this racial stereotype of a lack of "family values" that is rarely applied to poor whites and which is often blamed for the poverty of Latino and African American communities.


These charges are made in the face of a Health and Human Services commissioned study that found no correlation between the level of welfare benefits and pregnancy. This study also found that the average increase in AFDC benefits resulting from the birth of an additional child is less than a mere $64 a month. See Les Payne, At $64 That Baby's A Steal, NEWSDAY, Jan. 26, 1992, at 30; Davis, supra at 89 n.20 (in New Jersey the increase is $64 per month for the second child receiving benefits; in Arkansas, the increase is only $42 per month). Even so, many states are currently considering or implementing child exclusion programs through federal waivers. See Laura M. Friedman, Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children, 56 OHIO ST. L.J. 637, 638 nn.8-10, 639 n.11. (1995); Yvette Marie Barksdale, And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of
“on the same footing as working people who do not get a raise when they have an additional child.” This reasoning does not take into account the fact that working families do indeed get a raise when they have an additional child; the raise is in the form of a decreased tax burden. In addition, this reasoning does not consider the fact that the per capita income of families on welfare actually decreases with the birth of each additional child because the increases received by the family are microscopic. Nevertheless, many conservative and some liberal theorists, like Charles Murray and Stephen Sugarman, continue to argue that the promise of public assistance encourages poor women to bear children.

As Professor Lucy Williams notes, child exclusion provisions are “inherently flawed” because they are founded on the belief that women receiving welfare benefits operate under a value system that is drastically different from the value system used by those not receiving public assistance benefits. This is in fact untrue. Even though women receiving assistance often do not have access to family planning and abortion services, women receiving welfare benefits have an average of only 1.9 children. This number is almost identical to the average number of children in two-parent families, which is 1.88. Despite these facts, child exclusion programs remain popular at the state level as a

Welfare Beneficiaries, 14 Law and Inequality 1, 10-15 (1995); see also Davis, supra note 275, at 20.

277 Davis, supra note 275, at 20.

278 Theresa Funicello, Tyranny of Kindness: Dismantling the Welfare System to End Poverty in America 57 (1993).

279 See Murray, supra note 19, at 154-66 (arguing that the program induces births by women who otherwise would have had fewer children or had them under different circumstances); Stephen D. Sugarman, Financial Support of Children and the End of Welfare as We Know It, 81 Va. L. Rev. 2523, 2534 (1995).

280 Williams, supra note 3, at 736.

281 In Harris v. McRae, 448 U.S. 297, 326 (1980), the Supreme Court upheld the constitutionality of the Hyde Amendment, which disallows the federal government from funding the abortions of poor women through Medicaid. See also Maher v. Roe, 432 U.S. 464, 469 (1977). In both Harris and Maher, the Court held that the Constitution does not require the government to finance abortion at all. Harris, 448 U.S. at 326; Maher, 432 U.S. at 469.

282 Marian Wright Edelman, Families in Peril: An Agenda for Social Change 70-71 (1987) (average number of children in families receiving AFDC benefits is 1.9); see also Joel F. Handler, Two Years and You’re Out, 26 Conn. L. Rev. 857, 861 (1994) (“Most welfare recipients do not have a large number of children.”).

way for states to control the behavior of poor women by conditioning assistance on the reproductive decisions of welfare recipients.284

CONCLUSION

Under liberal social contract theory, women are required to relinquish control of their sexuality to husbands in return for subsistence and safety. Under the new social contract, the PRWORA, poor women without husbands are required to surrender control of their sexuality to the state in order to receive basic physical needs. This surrender of poor women's control of their sexuality in return for basic physical needs echoes the exchange required of women in conjugal society by the social contract. Under American welfare programs, poor women have the option of surrendering their sexuality to proper men—that is, husbands who can support them—or of surrendering their sexuality to the administration of the state. In this way the state replaces the husband in conjugal society and in the subordination of women.

The PRWORA ends the legal entitlement for cash and in-kind assistance to poor families. Even if poor women meet all of the behavioral and work requirements of the Act, they may nevertheless be denied assistance if the state has already committed the balance of the federal grant.285 In the end, the women contract with the state for subsistence. They may fulfill their portion of the contract with the state by not having sex, by finding jobs, by finding child care (whether or not they think it is safe or suitable), and by attending abstinence training classes, but still not receive any cash assistance from the state. The state is under no legal obligation to perform its part. Like the position of women in the traditional marriage contract with regard to their husbands, "the legal interests held by women vis à vis the state are contracts of adhesion, the terms of which poor women had no

284 As Martha Davis points out, under the child exclusion provision, the "benefits are no longer based on family size but on the timing of children's conception and birth." This provision is clearly aimed at controlling poor women's sexual and reproductive activity. Davis, supra note 275, at 20. Some have argued that child exclusion laws are an unconstitutional violation of the fundamental right of poor women to bear children without undue state interference. See Barksdale, supra note 276, at 16-20.

285 PRWORA, supra note 2, § 103(a)(1), 110 Stat. 2113.
part in negotiating and have little power to change." 286 The provisions of the PRWORA reflect a judgment that poor women are unable to make "responsible" decisions regarding their social, sexual, and reproductive lives. This irresponsibility makes them ill suited for personal sovereignty and motherhood. The PRWORA makes it clear that the new social contract asserts that poor women are undeserving of motherhood, of subsistence provided for by the state, and perhaps of citizenship. 287 These women are deemed better suited for low-paying, low-status work. Hence, women living under the new social contract of PRWORA find themselves in much the same position as their long dead sisters, living in an economy that devalues their child-rearing work and trading their independence and sexual sovereignty to "a man" or "the man" for subsistence for themselves and their children. Women living under the new social contract know, indeed, that everything old is new again.

286 Baldwin, supra note 236, at 120.
