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CONTRACT AND CARE

MARTHA ALBERTSON FINEMAN*

INTRODUCTION

It is not surprising in a society which offers, as icon, a construct of the autonomous individual and which trusts, as an ordering mechanism, the abstraction of an efficiency-seeking market, that sooner or later there would be a radical attack on any existing notion that there is some collective responsibility for children and other dependent persons.1 We have a historic and highly romanticized affair with the ideal of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good. After all, the very concept of the private defines the domain of the individual—an unregulated space where individual freedom reigns and in which each would-be-king can construct his castle. If a child is part of that private landscape, it is deemed a private matter, not the occasion for public subsidy or support. Children are like any other item of consumption, a matter of individual preference and individual responsibility.2

Somewhat surprising, however, is the fact that some of today's extreme rhetoric extolling private rather than public responsibility for dependency has come from self-identified feminist legal scholars and

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2. I have referred to this as the "Porsche preference," Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 AM. U. J. GENDER, SOC. POL'Y & L. 13, 21 n.15 (1999) (addressing the argument that the preference to have a child is no more deserving of subsidy than any other preference, including the preference to own a Porsche).
scholars otherwise aligning themselves with progressive positions. Some are led to a privatizing position through the logic of economic analysis with its emphasis on efficiency and utility. Of course, feminist theorists come in all ideological preferences, but most are at least skeptical about privatization as a route of first resort for serious social policy issues. In fact, one of the few common threads in feminist theory has been woven by expanding on the fundamental insight that "the personal is the political." Feminists have risen to breach the historic maintenance of a distinction between the "public" and the "private," writing volumes to show the interdependence and relationship between these "spheres," demonstrating, for example, the treacherousness of the protection of family privacy from a wife or child's perspective.

Of particular relevance to the debates about dependency are feminist attempts to show the ways in which the dichotomous concepts of public and private have significant political implications. These concepts represent more than mere labels. They interact as ideological channels for the allocation of societal resources, including the resources of power and authority. These concepts have

3. This opinion was expressed by several participants at the "Uncomfortable Conversation" panel discussions on "Children: Public Good and Personal Responsibility?" sponsored by the Feminism and Legal Theory Project and held on November 19 and 20, 1999, at Cornell Law School.


5. See, e.g., Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515, 535 (1982). "[The personal is political]... means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate—so that what it is to know the politics of woman's situation is to know women's personal lives." Id.

6. See Fineman, supra note 4, at 1217-19 (discussing the critique of privacy by feminists and child advocates including Elizabeth Schneider, Catharine MacKinnon, Anita Allen, and Barbara Bennett Woodhouse).

7. See id. at 1223 (arguing that autonomy, an updated version of privacy, if extended to caretaker-dependent units would be beneficial to the unit and society); Martha Albertson Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, 23 CONN. L. REV. 955, 972 (1991) (concluding that the privacy doctrine, as presently conceived, will not extend to protect the decision-making autonomy and dignity of poor and single mothers).
tremendous political and practical implications. Designation of some institutions in legal discourse as "public," while others are considered "private," has implications for the manner and method of state regulation and perceived legitimacy of collective subsidy. This dichotomous classification also shapes contrasting norms of interaction and expectation within and between the designated societal spheres.\(^8\)

The idea that the private is generally preferable as a means of responding to need and dependency is more and more firmly enmeshed with our sense of social justice—informing the unwritten "social contract" that guides and gauges the relationship among individuals, societal institutions, and the state. As it evolves, our understanding of the contours of an interwoven, collective set of responsibilities and entitlements—what may be referred to as our "social contract"—seems to be expanding along the private axis. Privatization is increasingly seen as the solution to complicated social problems reflecting persistent inequality and poverty.\(^9\) The rhetoric surrounding many current policy debates urges previously public concerns to be transferred to the magic realm of the private solution. From welfare reform to the construction of ideal educational or prison systems, the assertion is that the private market can better address historically public issues than can the public government.

My argument in this Article is a mirror image of such debates about the newly perceived advantages of the private sector assuming tasks historically located within the public sphere. In the pages that follow I argue for the assertion of collective or public responsibility for dependency—a status or condition that historically has been deemed appropriately assigned to the private sphere.

As things now stand, dependency is the responsibility of the family in the first instance. The family is considered to be the quintessentially private institution.\(^10\) Therefore, the public nature of

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8. This is manifest in the historic designation of the "separate spheres" in common law. The family and other institutions of care and altruism occupied the private (female) sphere, while the market and state were in the public (male) domain. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 132 (1872) (Bradley, J., concurring) (commenting "[t]hat God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws").


10. The family is the quintessentially "private" institution—the sphere that is theoretically
dependency is hidden, privatized within the family, rendering decisions about public responsibility unnecessary, except for those stigmatized families that "fail" in meeting their responsibilities.

One focus for the dissatisfaction with the privatization of dependency is the continuing unequal and gendered division of family labor, which burdens women more than men. Within the family, there is also delegation of responsibility for dependency—caretaking has traditionally been and largely remains gendered work, assigned to those in the family roles of wife, mother, grandmother, daughter, and daughter-in-law.

As developed in other essays, my assertion is that dependency warrants a more public, supportive, and collective response to the needs of caretakers. This assertion is grounded in an obvious social fact: caretaking work supplies an important and essential public good. Every society and every institution in society is dependent upon caretaking labor in order to perpetuate and reproduce itself.

My question has become: Why are not both the allocation of responsibility and the structural and economic supports for caretaking primary considerations in public policy discussions? In debates over social policy related to family, caretaking, and dependency, there is little attention to figuring out what is the optimal or appropriate distribution of responsibility for dependency across societal institutions. Nor is there consideration of how we might structure the corresponding relationships among government, market, and family in regard to dependency.

Of course, we do debate and theorize about structuring responsibilities in regard to some institutional arrangements. It is just the family that seems to be left out of the debates. For example, there is a great deal of attention paid to what might be the appropriate institutional interrelationship between state and market. Scholars and politicians set forth and defend competing positions on how to define the appropriate balance between freedom and responsibility, between subsidy and self-sufficiency, in regard to protected from intervention by the state. However, paradoxically, it is also a heavily regulated entity, with the state (through law) defining what is the core family connection and who may attain it under what circumstances. The state also defines the consequences of family relationship and controls the exit as well as the entrance into those relationships. See, e.g., 1 U.S.C. § 7 (Supp. V 2000) (originally enacted as Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996)) (defining "marriage" as a legal union between members of the opposite sex only); 28 U.S.C. § 1738C (Supp. IV 1999) (originally enacted as DOMA) (permitting states to refuse to recognize same-sex relationships that are treated as "marriages" in other states).
economic and regulatory matters involving state and market institutions.

My task is to lay the foundation for similar arguments about the family and its interrelationship with other societal institutions. How should the work associated with dependency be distributed? Should caretaking be publicly subsidized and supported or kept within the private family? How can we justly allocate costs of caretaking? Of course, my goal in developing arguments is ultimately to compel the state and the market to assume more (some) responsibility for dependency.

Conceding (in order to avoid disputing) that the historic designation of dependency as private was justified, in this Article I argue that the fact that society has changed in important ways makes the continuation of a private system for handling dependency untenable. Social practice and social institutions evolve and the theoretical implications of such changes must be addressed as primary societal institutions such as the family are transformed. Do such transformations necessitate a reconsideration of the societal tasks that they have been historically assigned? Do profound changes in the essential nature and structure of the family make continued delegation of primary, almost exclusive, responsibility for dependency unjust and unworkable?

Of course, not all change mandates societal response and adjustment. It is not only the extent of the societal change in the family that demands we now reconsider the configuration of coterminous societal institutions such as market and state. It is also the nature of the changes in the family. The family has become more egalitarian, permitting greater inclusion and participation by women in the public aspects of citizenship. These types of changes should be affirmatively supported and facilitated by adjustments to existing institutional arrangements.

In developing an argument about the need for adjustment in our basic social structures, I use the concept of contract. Specifically, I resort to the metaphor of "social contract" as a way to think about how institutions and relationships are thought to embody norms of justice asserted to be shared in and by members of a society. I do not intend to engage in the extensive, abstract (often turgid) debates about social contract theory undertaken by political theorists. My modest objective is to use the very modern concept of contract to question the justice of contemporary institutional relationships.
Contract is a useful tool with which to examine family relationships—relationships that have their roots in the more ancient realms of status and hierarchy. It is a useful rhetorical device because it reflects a process whereby individuals are given the means to voluntarily and willingly assume obligations and gain entitlements. Although contract as an ordering mechanism generally brings "stability" (and enforceability) to relationships, contract theory also takes into account the possibility of change. In using the concept of social contract, I am particularly interested in exploring the tensions in the relationship between the social contract and societal change.

Change can destabilize existing relationships. In this regard, the idea that contracts are made in the context of "background" conditions—conditions essential to the continued viability of ongoing contractual relationships—supports my argument that our social contract needs to be reworked. Once the background conditions have shifted precariously in ways that make existing relationships impossible or unjust, the terms of the initial covenant must be reassessed. Recognition that there are background conditions is a way to place social contractarian expectations in historical context. Arguments about changed societal context are a way to destabilize our satisfaction with existing relationships among state, market, and family in regard to responsibility for dependency.

I conclude this Article with a plea to feminists and other progressive persons who may place faith in the process of privatization (or in the concept of the private as synonymous with "just" and "fair"). I ask them to embrace the positive changes that are occurring in the "private" family and to join in a restructuring of the public, forsaking the societally isolated and normatively impoverished pursuit of the private. Considering the obligations the state and market have to those who care for others provides the basis for arguments that these public institutions must be responsive.

11. See generally Sir Henry Sumner Maine, Ancient Law 174 (6th prtg. 1920) ("[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.").
I. DEPENDENCY, COLLECTIVE RESPONSIBILITY, AND SOCIAL DEBT

In the current political climate, those who are concerned with the welfare of children and other vulnerable members of society need a theory of dependency. This theory would support arguments for collective responsibility—public and private subsidies for the caretaking/dependent relationship. It would also provide the basis for structural adjustments to market and other public institutions in order to accommodate caretaking so that caretakers do not have to compromise care in order to engage in wage work.

To this end, I have written extensively on the subjects of dependency and subsidy. I have posited that although these are highly stigmatized terms in today's political climate, both dependency and subsidy are universal in our society. All of us are or have been dependent and all are or have been recipients of significant social subsidy. I have identified as of particular societal concern two types of dependency, "inevitable" and "derivative." I have argued

12. This Part summarizes some of my earlier work on dependency and subsidy. See generally MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); Fineman, supra note 2.

13. In law and political discourse today the world is divided up and institutions (and their interactions) characterized along inappropriate fault lines. These lines are found in the unsupportable distinctions we make between categories such as the public and private, the individual and the collective, the independent and the dependent, the self-sufficient and the subsidized, as well as our fascination with market and contract as ordering mechanisms because they valorize the private, the individual, the independent, and the self-sufficient.

14. Articles such as Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency demonstrate my foundational idea that dependency is a universal and inevitable part of the human condition, therefore of collective or societal concern and, ultimately, collective responsibility. Fineman, supra note 2, at 25-26. Independence, understood as refusal to rely on others to supply the resources to meet our needs, is an illusion. Subsidy, which is the allocation of resources to some in society rather than to others, because of their status, contribution, need, or position, is universal. In this society no one is totally self-sufficient, either economically or socially. We all live subsidized lives, whether the benefits we receive are financial (such as in governmental transfer programs or favorable tax policy), or nonmonetary (such as those provided by the uncompensated labor of others in caring for us and our needs). The interesting question in our subsidy society therefore is why some subsidies are differentiated and stigmatized while others are hidden. Subsidies to market institutions and middle-class families are termed investments, incentives, or earned when government supplies them and called gifts, charity, or the product of familial love when they are contributions of caretaking labor. To a great extent stigma is attached only to those subsides that we as a society feel are required because of individual or family failure, or that provide for those who are thought not to engage in socially productive activity.

15. All of us were dependent as children and many of us will be dependent as we age, become ill, or suffer disabilities. In this sense, at least one form of dependency is "inevitable." Note that the examples I have chosen to illustrate this category of inevitable dependency are biological or physical in nature. Biological dependencies do not exhaust the potential range of situations of dependence, however, or the possible categories for cataloguing reliance on others. In addition to biological dependence, many of us are economically or emotionally dependent on
that society must respond to these forms of dependency in order to reproduce itself—to reproduce the workers, the citizens, the consumers, etcetera, who populate society and its institutions. Caretaking labor preserves and perpetuates society and, therefore, collective response and responsibility is warranted. Because of its public value, I have asserted that caretaking labor creates a societal or others. These other forms of dependence may even tend to accompany the physical type that I have labeled inevitable.

16. Derivative dependency arises on the part of the person who assumes responsibility for the care of the inevitable dependent person. I refer to this form of dependency as derivative to capture the very simple point that those who care for others are themselves dependent on resources in order to undertake that care. Derivative dependency has both economic and structural dimensions. The economic issues are related to the fact that within families, caretaking work is unpaid. The structural dimension is due to the fact that caretakers do their caretaking within societal contexts and rely on some institutional accommodation or noneconomic resources to assist in their labor. Far from structurally accommodating or facilitating caretaking, workplaces operate according to premises that mean that domestic dependency labor is incompatible with the norms and practices of paid labor. For those who have assumed the responsibilities of caretaking, current workplace expectations compete with the demands of dependency and, in this regard, caretaking interferes with or even precludes participation in the paid labor force. Derivative dependency, while it is inevitably associated with the tasks of caretaking, is not universal (and therefore not inevitably a part of each individual’s experience). Derivative dependency is socially produced and structured in the context of existing societal institutions. Many people in our society totally escape assuming caretaking of others, in fact are freed for other pursuits by the caretaking labor of others.

17. There are essential tasks to be performed in every society that are the legitimate concern of the state. One of these is certainly the response to dependency. See Fineman, supra note 2, at 26-27. The fact that biological dependency is inherent in the human condition means that it is of collective or societal concern. Individual dependency needs must be met if we as individuals are to survive, and our aggregate or collective dependency needs must be met if our society is to survive and perpetuate itself. It is this ultimate societal dependence on caretakers that mandates that dependency must be considered a responsibility of the collective society. The mandate that the state (collective society) respond to dependency, therefore, is not a matter of altruism or empathy (which are individual responses often resulting in charity), but is primary and essential because such a response is fundamentally society preserving. If infants or ill persons are not cared for, nurtured, nourished, and, perhaps, loved they will perish—we could say that they, therefore, owe an individual debt to their caretakers. But, it should also be apparent that without this type of caretaking in the aggregate there could be no society. Caretaking labor produces and reproduces society. It provides the citizens, the workers, the voters, the consumers, the students, and so on that populate our society and its institutions. This labor is an unrecognized subsidy, not only to the individuals who directly receive it, but more significantly, to the entire society. If this is true, the provision of care must be recognized as a central and fundamental social task, and we should examine how it is performed. Society-preserving tasks are commonly delegated to only some members of society, accomplished through the establishment and maintenance of societal institutions. The armed services, for example, attends to the collective need for national defense by structuring it as both the responsibility of only some members (volunteers or draftees) and of us all (taxpayers and voters). These institutions should operate consistently with our deeply held beliefs about how rights and obligations are accrued and imposed in a just society—they have both an individual and a collective dimension. Certain members of society may be recruited, volunteer, or even be drafted for service, but they have a right to be compensated for their service from collective resources, to be protected by rules and policies that facilitate as well as reward their performance, and to not be labeled “dependent” as a result. Caretakers should have the same rights in recognition of their society-preserving labor.
social debt—a debt that binds each and every member of society, not only individual family members or receivers of care. Further, this debt is owed generally, to caretakers as a group, and cannot be discharged by merely being supportive of one’s own caretaker (mother or wife, for example).\textsuperscript{18}

However, even though there may be some recognition that caretaking is of public benefit, no compensation and scant accommodation have been given to caretakers by societal institutions other than the family. Instead of being compensated or accommodated, caretaking labor is expected to be gratuitously and uncomplainingly supplied. Even when nonfamily members, such as nannies or nurses, supply caretaking labor, the family remains primarily responsible for the care. The wages are supplied from family funds (ensuring they remain low). In rare instances there is a more communal approach to caretaking and a nonfamily unit assumes some financial responsibility, such as company-sponsored childcare or home health aides provided by public funds. But such assistance is not compelled (in fact is contradicted) by our understanding of who is responsible for dependency. This sort of assistance also is viewed as merely supplementing the primary responsibility of the family.

There is also a problem from the perspective of the caretaker. Caretaking has costs and, as things are currently arranged, these costs are typically borne by the caretaker alone. If she is lucky, she is able to persuade her partner in the private family to share the costs with her, spreading them out a bit. But the costs remain confined to the family in a world in which market institutions assume workers are unencumbered by family and dependency and the government assumes that (functioning) families provide for basic needs.

The material consequences of caretaking are economic—resulting from a caretaker’s need to focus energy and time on dependency work rather than investing that energy and time in

\textsuperscript{18} It is of particular interest in understanding the philosophy of the social contract to understand how essential, state-preserving tasks are distributed among the complementary institutions which the state condones and constructs and through the state itself via the more public, explicit, and direct actions undertaken via politicians and other state personnel. In addition to caretaking, activities primary to the maintenance and preservation of society are those activities such as governance, trade, market production, propaganda, expansion, peace, and public safety. In this regard, the state must be understood as contingent at the same time as it is omnipotent—encompassing, containing, and mediating among social institutions at the same time as it is defined and redefined by these very same institutions as they produce ideas and generate claims and demands.
building market and other skills that would increase her value in the compensated sphere. Costs to the caretaker also can be psychological or spiritual in nature—resulting from the attenuated and compromised relationships a caretaker is forced to have with both market and family if she works in both, or from the need to choose, thus sacrificing one to gain the other. The caretaker is caught within social configurations and institutional arrangements that are unjust.

This injustice can only be addressed by policies that both subsidize and accommodate caretakers. First the economic consequences of dependency and caretaking must be addressed through governmental policies, using regulation and taxation to distribute of some of society’s accumulated wealth to caretakers and their dependents. Basic social goods such as child allowances, health insurance, and childcare or respite care would be considered a public responsibility, for example.

In addition, there are penalties that workers (at least those who are also caretakers) currently suffer while market institutions are relieved of responsibility for dependency (in fact, are even free to punish the dually responsible worker). These penalties must be removed and there must be a more equitable distribution of responsibility for dependency among the primary societal institutions of family, market, and state.

Adequately responding to dependency requires a restructuring of market institutions so that work for pay is compatible with caretaking responsibilities. This aspect of responding to dependency would lead us to reorient our workplaces

19. See Victor R. Fuchs, Women's Quest for Economic Equality 60-64 (1988) (discussing the hidden costs of children for women in the workplace); cf. Vicki Schultz, Life's Work, 100 COLUM. L. REV. 1881, 1894 (2000) (arguing that women do not choose lower-paying, lower-status jobs because of their heavier family obligations, but rather that the segregation of women into these jobs forces women into household labor).

20. Caretaking remains gendered in practice, but it is important to note that when men do care work they also suffer costs. It is the caretaking itself, not the gender of the caretaker, that is inherently disadvantageous in our system.

21. See, e.g., Fineman, supra note 2.


23. See, e.g., Fineman, supra note 2.
around a “dually responsible” worker—a worker who has caretaking obligations that warrant accommodation and integration with the workplace and its obligations.

II. THE METAPHORIC CONTRACT—ORDERING THE PUBLIC, DEFINING THE PRIVATE

In the sprawling, secular American context, appeals to social cohesion based on religious principles or on shared, limited geographic boundaries are of limited usefulness. Voluntary participation in societal institutions may generate identification with a group, but this too is limited. A national identity can be based on acceptance of a shared or common language, culture, or history, but in pluralistic and diverse societies citizens often are fragmented along exactly these lines. One way to conceive of national community is through the establishment and transmission of myths or fundamental principles addressing the way society is ordered. These principles can be viewed as cohesive, symbolizing a social compact or contract among otherwise strangers. The metaphoric or symbolic idea of a social contract connotes a sense of connectedness and unity among those in a society in the same way that contracts between individuals reflect binding relationships.

In fact, in the modern context, one of the primary devices for understanding individual and institutional relationships is the concept of contract. Contract is the term we apply to all sorts of relationships, be they formally established or implied. Contract displaces older, less democratic ways of perceiving relationships such as status and hierarchy. The underlying and essential elements in contract seem to be that the relationship was voluntarily assumed (consent) and that there was some mutually bargained-for benefit or trade involved (exchange) that provides the basis for establishing a contractual (reciprocal) legal relationship between individuals.24

Typically, contract is the way that private relationships in the so-called public sphere are ordered—relationships in the realm of the market and related arenas.25 The idea of contract, both as a means of

24. Law students are very attached to the idea of contract. Many would use it to resolve all sorts of difficult social policy and economic resource issues. The idea of consent is particularly potent . . . i.e., he or she asked for it. See generally RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 3 (1981) (defining contract, agreement, and bargain).

25. Relationships within the family are considered beyond contract, their legality and consequences governed by status or policy principles. In the private family, however, relationships are to a large degree the product of state imposed obligations, independent of
determining appropriate ways and conditions to bind individuals and as an ordering mechanism establishing predictable actions or interactions, is also useful for understanding societal or institutional arrangements.

A. The Social Contract

Just as reference to contract in the private (public) market context carries with it the understanding that the agreement it embodies is fair because it was bargained for and agreed to by the parties, a reference to the social contract is an implicit claim about formal agreements between family members and based more on an idea of status than contract.


27. Two positions often compared with each other as contrasting models of social organization are illustrated by the works of Robert Nozick and John Rawls. Nozick's position is that basic social relationships are found in the interaction among autonomous and independent individuals, ideally unencumbered and unburdened by legal regulation and state interventions. See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Nozick begins with the heuristic assumption that in the state of nature, an individual owns himself, his own labor, and any property it produces or procures. In this regard, the state would appropriately assume responsibility for the mechanisms whereby a free market (for individual transactions) might be facilitated and maintained; but beyond police protection and institutions such as courts for the maintenance of order, enforcement of contract, and transmission of property, the role of the state would be minimal. Individuals owe little to the collective and have no moral or legal responsibility. The market is the basic social institution, distributing goods and values in a manner that is both just and efficient. If individuals fail, it is their own responsibility and reflects lack of ambition, motivation, or talent. This position defines the basic parameters of the economic "conservative" argument today. Market relations are viewed as the most efficient way to create individual wealth and order society. Government intervention is condemned as fostering poverty and undermining family and other "private" institutional relations, ultimately leading to crime, social disintegration, and disorder. Correspondingly, the solution for existing social problems (caused by governmental intervention) is to return to the private sector—the market—allowing it to perform the corrective function of efficient distribution. An influential exposition of this perspective is found in GEORGE GILDER, WEALTH AND POVERTY 63 (1981).

Also illustrative are the debates concerning the revision of the welfare system. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110-12. Rawls, in contrast to Nozick, anticipates that the collective does have legitimate claims on the individual and that the state may appropriately work to perpetuate the "collective good," a societal resource to which individuals may be required to contribute through taxation and other tithes. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971). Distribution of property is potentially problematic and susceptible to challenges based on injustice. Rawls is the intellectual descendant of Locke. He bases his theory on the premises that (1) in the original "state of nature"—the base upon which to judge the justice of our current system—each person is in possession of his or her own labor; (2) there were resources which were held in common prior to their appropriation by individuals; and (3) justice demands that an individual is only able to appropriate a limited amount of property without violating principles of just entitlement. Waste and spoilage as well as greed are to be avoided. In the Lockean scheme, property is posited as historically common and distribution is a social or political act that can provoke questions of distributive justice. Rawls introduces into this formulation a construct that is useful in arguing that wealth redistribution should take place. In essence Rawls asserts that justice demands that the principles which govern society be those that citizens would invent from the perspective of the "original position." The citizens engaged in this experiment have all the information they need about society and its functioning, but are
the justice of the set of expectations, obligations, rights, and entitlements afforded an individual with regard to societal arrangements. Of course, in considering the social contract we encounter an arrangement that is not the product of individual bargaining or agreement. One is born into the social contract. Perhaps, for this reason alone, we must be more attentive to its fairness, the state assuming a more active role in monitoring the terms of the social as compared to private contracts in general.

The social contract serves as an explanation of society—legitimizing and justifying existing relationships. The concept of a social contract in this regard bolsters the status quo. It is a stabilizing device and can be wielded even to justify unequal financial and power distributions produced by market institutions. In fact, the idea of a social contract makes intelligible the fact that a modern, egalitarian-oriented, democratic state can accept, even condone, some degree and forms of inequality.  

prevented by a “veil of ignorance” from knowing what individual characteristics they will possess in the society. From this vantage (or disadvantage), the members of society can bargain and deliberate about what general rules should govern them all. Because they are ignorant of the class, social position, and individual characteristics they will attain in the “real” world, there is no incentive to bargain to attain special advantages for one group. Justice will be free to emerge when considerations are disassociated from the individual characteristics and identities of the arbiters of fairness. As part of the theoretical framework, Rawls presents two principles of justice: equal basic liberty and the difference principle. These principles mandate that when there are potential differences in social goods such as power, authority, wealth, or leisure, the distribution that is just is that which most benefits the most disadvantaged members of society. Differences in social goods are acceptable only if they are attached to positions open to all under the principle of equal liberty (or opportunity). Rawls has been criticized for this construct. The criticisms are not relevant to this discussion, which is developed merely to sketch out the different approaches to economic equality that have been influential during the latter part of the twentieth century. Criticism aside, it seems hard to refute the argument that one’s perception of justice might be altered if one were not sure what set of individual and group characteristics with attendant entitlements and social advantages he or she would have in a world where poverty, illness, prejudice, and catastrophe were facts of many peoples’ everyday life.

28. Feminist theorists, most notably Susan Moller Okin, have criticized mainstream philosophers such as Nozick and Rawls for their failure to specifically theorize the family in articulating ideas about justice. See SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 87, 93 (1989). Okin is mainly concerned with the omission of a sense of what would constitute justice within the gender system represented (or implemented) so well in the family. I agree with her criticism. The Rawlsian position is incomplete and unsatisfying because it proceeds from the wrong set of assumptions. Rawls’s position (and those that are conceptually compatible) proceed on the basis of arguments appealing to empathy—to the idea that inevitably there are going to be victims in any form of social organization. If someone is operating from a position of ignorance, they will not know in advance what social disadvantages they will possess and will, thus, be fair in devising (or consenting to) a system of distribution. Rawls addresses many of the characteristics that are typically designated as disadvantages, such as race, class, gender, etc. However, in failing to confront family position as conferring advantage or disadvantage, Rawls leaves an empirically significant source of actual social and economic injustice beyond his consideration. If family role were a central part of the analysis,
One of the primary ordering devices of the social contract is the distribution of social institutions into categories with policy implications. Concepts of "public" and "private," in particular, structure the relationship between the state and the market on one hand and the family on the other. Inherently neutral socially devised institutions, which could otherwise be considered public, if designated as decidedly private are thus shielded from public supervision and control. The preexisting societal arrangement—the social contract—evidences a historically agreed upon restraint on governmental regulatory zeal.

There remains substantial debate about the scope of the restraint on government implicated in the designation of an institution as public. One's position on the issue of governmental restraint can reflect an ideological predisposition in regard to a number of important policy and legal debates. For example, economic libertarians and other "free market" proponents assert social contractarian terms that would leave most things, aside from military matters, to the "private sector"—to individuals acting in markets or within families or, if absolutely necessary, to small units of government. Individuals thus freed from governmental restraints can work out mutually beneficial, particularized agreements among themselves within social institutions considered private, distinguished from the public sphere exemplified by the state or federal government.

In contrast, the terms of the social contract advocated by those with a more social welfare-oriented perspective are more active in defining a role for public supervision and regulation. Someone with a politically liberal perspective might suggest that families and markets can also fail individuals and that existing disparities in wealth and power may be unjust, warranting some corrective measures by the government. Some perceived injustices must be considered of a public nature, a concession that some situations are beyond individual power to alter. Gross inequality and inattention to the "victims" of the structural position of the family in society and the attendant appropriation of domestic labor by the state and the market would become apparent. This injustice should provide the occasion for a wholesale reconsideration of the system that hides such an abuse. Rawls is also criticized for failing to include dependencies, inevitable and derivative, in his theory. See EVA FEDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY 76 (1999). Kittay argues that a society based upon a theory of the political that excludes dependency concerns can be maintained only by the exploitation of the caretakers for the dependent individuals or by neglecting the needs of the dependents themselves. Id. at 76-78.

free market and family privacy are perceived of as public concerns, justifying governmental intervention and regulatory responses. This position, while more liberal in regard to supervision, still concedes the fundamental distinction between public and private.

The existing classification of society's three fundamental institutions (state, family, and market) into the categories of public and private contains some significant paradoxes. For example, while the state is designated the quintessentially public and the family as the quintessentially private institution (thus beyond contract), the market and its apparatus are distinctively chameleon-like. Markets are constructed as public (and therefore under a different, competitive set of norms) when contrasted with the family, but as private (and therefore not easily susceptible to public regulation) when paired with the state. The market reaps the best of both spheres.

Feminists have successfully deconstructed the public/private dichotomy in the context of the family. While the family may be viewed as private, it is highly regulated and controlled by the state. Law defines who may marry whom and what formalities must be observed. Only some relationships are "legitimate," or legal ones, which carry the weight of the state behind them. Law defines the consequences of marriage and parenthood during on-going relationships and imposes significant policy directives in the context of divorce. Law also defines what the responsibilities of the family are and what the role of the family within the larger society is.

The state consistently acts in ways that affect individuals. By shaping and regulating institutions such as the family, the state contributes to the way individuals construct their identities within society. The state establishes norms of citizenship and community.

30. The economic redistribution in our welfare policy, however limited, and in the legal rules readjusting traditional patriarchal power within families were products of a liberal political view. For a brief discussion of the historical development of a lack of faith and distrust in the market and the rise of "new" liberalism, see Liberalism in Liberalism As a Political Theory, Property and Market, Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/entries/liberalism (last visited Jan. 20, 2001) (on file with the Chicago-Kent Law Review).


33. See Martha Albertson Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 UTAH L. REV. 387, 400 (1993) (discussing the construction of family function in society and the distribution of roles within the family to meet those assigned functions).
Thus, the public nature of the state spills over to affect the very workings of private life. By scooping out what is public, it also defines what remains private.

Establishment of a dichotomous world of public and private continues to have profound implications for theory in the nonfamily context. The private family recedes, and the designated public remains the focus of concern and debate. As a result, not only are the family and dependency grossly undertheorized, the very concepts of the "individual" and the institutions of market and state which are the focus of theory are distorted and skewed because the family is invisible, cast as quintessentially private and conceptually separated from market and state. Family is wrongly assumed to be unchanging, an essentialized institution, natural in form and function—the repository for dependency. The sorting into public and private, once struck, is not reconsidered.

Yet, the family exists in a world of change. The family coexists within a changing society and is interdependent with both state and market. Changes, fluctuations, and transformations in either of these societal institutions will inevitably have ramifications for the family, affecting its functioning and its members' aspirations for themselves and for each other. Policy discussions and initiatives that fail to recognize and address this fact are doomed to be inadequate, perhaps even harmful. In addition to reflecting and responding to changes in other societal institutions, the family can generate changes and responses in other institutions. Altered patterns of family behavior can profoundly affect market and state, placing pressures and demands on these institutions.

In fact, the family is not a separate, private entity. Even in its invisibility, it is central. Some vision of the family underlies debates about public regulation and market autonomy. In our construction of social policy we assume a family with some form and function that complements the public institutions we explicitly address. The traditional function of the family is that it will be the primary repository for dependency, providing for the emotional, physical, and developmental needs of its members. Thus, we see the untheorized family offered as panacea, the all-purpose solution for social ills such as poverty and crime and individual malaise such as isolation and
unhappiness. Conceptually and ideologically, the assumed family relieves the state and the market from assuming responsibility for delivering the day-to-day necessities and addressing the dilemmas presented by dependency.

B. Contract and Consent

At this point I want to address the idea of "consent." The idea of consent is related to and used as justification for the assignment of responsibility in our society. Consent implies voluntariness as well as the option to not consent. We can view the social contract as a fictitious, symbolic idea embodying the notion of the legitimacy of social arrangements based on the norm of consent. The social contract is an ideological or rhetorical map defining the political landscape upon which to place existing and emerging social relationships.

Consent (or the notion of personal responsibility for one's actions) is the basis for withholding public (or other) aid from someone in a needy position. Consent in this context is tied to individual actions or behavior. The argument may be phrased as getting what one "asked for" or as the justice of having to "lie in the bed" that one has "made." The idea is that individual circumstances are the result of individual choices, freely made, and, therefore, that consequences, even if negative, are justified.

Within the rhetoric of public and private, contract and consent, existing institutional arrangements allow us to avoid general responsibility for the inequity and to justify the maintenance of status quo by reference to an abstract notion of individual "choice" or "personal responsibility" for the life circumstances in which one finds oneself. In this way, we can often ignore the implications of the fact that individual choice occurs within the constraints of social conditions (including the ideological) that funnel decisions into prescribed channels and often operate in a practical and symbolic manner to limit, or practically eliminate, options.

Using notions of individual choice or responsibility as justification for existing conditions also fails to recognize that quite often choice of one's status or position carries with it consequences not anticipated or imagined at the time of the initial decision. For

example, in assessing who should bear the burdens or costs associated with dependency and the caretaking of children, we may believe (cultural, familial, and societal imperatives aside) that a woman chose to become a mother, but does this choice mean she has also consented to the societal conditions attendant to that role and the many ways in which that status will negatively effect her economic prospects? Did she even realize what those costs might be? Is it even possible that society and culture might have lead her astray on the issue of costs, lied to her about the returns and rewards of caretaking?

Further, even if a woman did consent (in that she knew she was taking risks or forgoing opportunities), is the ultimate situation in which she finds herself one which society can tolerate for some of its members? In other words, are some conditions just too oppressive or unfair to be imposed by society even if an individual ostensibly agrees to or chooses them? Social conditions, particularly conditions of oppression, are of far more than individual concern. They are of public concern—of concern to the larger society in which norms of justice, equality, and inclusion have been fashioned by which to measure the individual circumstances of any member or members. In taking this measure, individual situations can inform a discussion about the underlying fairness of the existing social contract.35

Of course, the contractual requirement of consent is problematic in the context of establishing a social contract. The very idea of a social contract is that it preexists and transcends any individual citizen. Individual bargaining and specific consent are not provided for nor required. The whole idea behind the social contract is that it legitimates compelling the individual to concede certain existing interactions, expectations, and relationships with societal institutions. Consent in the social contract sense is predetermined—it is more like concession, based on some idea of a collective good or benefit signaling justice as well as reciprocity and abstract equality. Consent or concession is assumed by reference to the advantages and benefits conferred by this particular organization of society.

In our system, the government has limited authority to assess the underlying fairness of the actual distributions or the methods of allocation developed in market (or in the family). The government is not generally perceived of as constituted to pursue remedial or protective goals, such as pursuing equality or redistributing wealth in

35. For further discussion of unpacking choice, see Fineman, supra note 12, at 148-50, 165-66.
order to counter the excesses of market institutions. The state is constituted in order to be protective of private as well as social contractual arrangements.

However, sometimes an argument must be made that existing arrangements are unjust—so unjust that consent or ongoing concurrence should no longer be assumed. The historic social contract may be broken or its conditions may be impossible to perform or enforce in view of changed circumstances. If reconsideration is warranted given change, the state is the only institution that has any arguable mandate and capability to negotiate a reconsideration of the basic terms of our historic societal understanding.

III. THE SOCIAL CONTRACT—PUBLIC (MIS)USE OF THE PRIVATE FAMILY

In our current understanding, dependency is considered to be a private matter. It is the family, not the state or the market, that assumes responsibility for both inevitable and derivative dependency. The institution of the family frees the market to act without consideration or accommodation for dependency. The state is cast as a default institution providing minimal, grudging assistance should families fail. Each individual family is ideally responsible for its own members’ dependency, and resort to collective resources is considered failure and deserving of condemnation and stigma.\(^{36}\)

Institutional arrangements reflect the way in which responsibility for dependency has been allocated to the family and not the market (workplace) or (in any primary sense) to the government. These three institutions are the logical subjects of politics and objects of debates over public policy.\(^{37}\) Unlike more voluntary segments of society such as religion, philanthropy, and charity, these institutions and the rights and responsibilities of individuals participating within

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\(^{36}\) In fact, the failure to adequately provide for its members can move a family from the private to the public (therefore appropriately regulated and disciplined) category. See FINEMAN, supra note 12, at 177 (chapter entitled “The Limits of Privacy—The Public Family”).

\(^{37}\) Individuals coalesce within these institutions and also act in opposition to them. The institutions can be understood as reflecting (and constantly reformulating) group interests and political capital. One way to understand “the state” is to view “it” as the definable sphere of political and regulatory life in which institutions of “private” authority are defined and given reign to operate. The accepted scope of institutional interest or claims to authority is dependent upon the state, but it also represents the ideological definition of the state as an instrument of regulation and control. What is considered appropriately outside of institutional mandate is of “public” concern, susceptible to explicit control and regulation.
them are heavily defined and regulated by law, and are therefore appropriately understood in the rhetoric of social contract.\footnote{Voluntary structures, propelled by cultural, religious, or individual values may provide assistance. But voluntary and idiosyncratic responses are not extensive enough or sufficiently reliable to address the needs of dependency. The state must ensure adequate resources and accommodation. In addition, no one (and no institution) that benefits from dependency labor should be a "free rider" on the contributions of others. Thus neither President George H.W. Bush's "thousand points of light" nor Senator Hillary Clinton's "it takes a village" can be considered adequate responses to dependency. See, e.g., HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1996).}

Our attitude toward family as the appropriate repository for dependency follows scripts rooted in historic (and therefore contingent) ideologies, particularly those of patriarchy and capitalism.\footnote{Racism is also relevant, particularly when we consider caretaking in the paid labor force where women of color are substituted for the unpaid family laborer at low wages with few benefits. I omit it here because I am focused on the family and ideology associated with its historic role. This ideology is shared across racial and ethnic divisions in society.} These ideologies operate at an unconscious (therefore, unexamined) level and channel our beliefs and feelings about what is considered natural and what are appropriate social organizations. We deem it natural that the family is the repository for dependency and that collective responsibility is unwarranted and inappropriate. The family also has a "natural" form—it is heterosexual and marital in nature.\footnote{See Fineman, supra note 4, at 1217.}

A. The Marriage Contract

Within the institution of the family, marriage is central. Historically, marriage as a status dictated expectations for spouses as well as defining the marital couple's relationship to the rest of society and its institutions.\footnote{Paradoxically, this society has designated many of our most intimate and individual arrangements as inherently of public concern, susceptible to collectively generated norms rather than personal decision making. There is some indication that this mindset is changing in regard to some very limited areas. For example, contract, such as with prenuptial agreements, is now used to alter state-imposed notions about the consequences of marriage, but many matters in family and intimate life are not susceptible to legally enforceable agreements. Considering why those quintessentially private things such as domestic, sexual, and reproductive relationships are nonetheless deemed fundamentally of public concern and under governmental control should call into question the entire tendency to categorize the world into public and private compartments.}

Increasingly as the state has become less involved in monitoring entry and exit for the relationship, we discuss marriage as a consensual or contractual relationship forged between two individuals—husband and wife who are deemed marital partners and define their own terms through contract. But this does not mean that marriage does not continue to play a significant societal role.
Marriage on an ideological level remains significant because the marital family remains responsible for dependency.

This may have made some sense when marriage provided (and assumed) a certain population for the family—both a caretaker and a wage earner who are differentiated but complementary providers of emotional and material necessities for family members. Historically this role-differentiated and defined marriage allowed us to indulge in the myths of independence, autonomy, and self-sufficiency as aspirations for both individuals and for family units. Myths about independence and self-sufficiency were able to flourish and perpetuate themselves because dependency was hidden. Contradictory indications are viewed as failures due to the dependent nature of some individuals or to the deviance of the family to which they belong. Marriage and the marital family also had a societal role in the definition of aspirations and expectations for individuals outside of their family roles, as well as for other institutions. These myths are behind many current policy debates, creating the dominant perspective, which posits an autonomous and self-sufficient individual as the societal ideal.

Those occupying otherwise competing political and policy positions share belief in the attainability of the ideas of independence and self-sufficiency. In this regard, it is important to note, whatever differences exist between the libertarian and liberal positions, both perspectives incorporate the division between public and private, and both share the basic assumption that individual and family autonomy and independence are not only desirable but also achievable. In traditional social policy thinking, the allocation for responsibility for dependency has been satisfactorily made: the private family is responsible for dependency, the market for distribution of social goods, and the government for more or less facilitating and supervising it all within appropriate restraints.

42. It is this basic shared set of assumptions that my earlier work on the inevitability of dependency was meant to challenge. See Fineman, supra note 2, at 18.

43. Deviance in this regard can be because of the form of the family (such as a single mother household) or because the family is not economically self-sufficient and must rely on public subsidy to subsist.

44. See Governor Frank Keating of Oklahoma, Making Marriage Matter, Lecture before the Heritage Foundation (Sept. 27, 2000) (discussing efforts to strengthen marriage as a means to address out-of-wedlock births, violence, and drug abuse before members of the libertarian organization), at http://www.heritage.org/library/lecture/hl684.html (last visited Jan. 20, 2001) (on file with the Chicago-Kent Law Review); see generally An Introduction to Libertarianism, supra note 29; Liberalism in Liberalism As a Political Theory, Property and Market, supra note 30.
B. Contract in Context—Background Rules

The feminist message of the past several decades has been that most things are both public and private. Questioning of the public-private compartmentalization is to some extent also a questioning of the structure of the debates associated with the idea of a social contract. If all is both public and private simultaneously, then the labels will not resolve important questions concerning the current allocation of authority and responsibility among family, market, and state.

The deconstruction of the line between public and private has not only been undertaken by feminists. Others have made similar observations. The market may be posited as private in social contract debates, but how it functions and what it produces are as much of public concern as decisions about who may marry whom or what are the economic ramifications of parenthood.

Beyond the arguments based on public concern about private transactions, however, is another realization about the nature of the market within society. Most private contracting is an ultimately public activity so long as those who would contract must rely on law, courts, and police power as the default enforcement mechanisms. It seems sound public policy to allow some public monitoring to determine what should be enforceable private arrangements (whether inside or outside of the family) entitled to legal protection and recognition and which are not. In fact, this is why the law sometimes intervenes to regulate “private” contractual bargains and interposes duties on contracting parties such as that of good faith and fair dealing.

Contracts are not always enforced and sometimes they are altered by practices independent of the individual parties to the contract, such as custom. In addition, contract jurisprudence suggests there are always “background conditions” to contracting as a practice. Often these background conditions are the assumed

45. See, e.g., Fineman, supra note 2, at 14-15.
existence of other societal institutions such as courts and law, which are clearly in the public realm. Commentators have argued that the traditional market paradigm, which views law as a response to market failure, is wrong. Law is not properly viewed as a response to market failure, but as a precondition to the development of "the market." The existence of "background rules" (law) is necessary so that actors can bargain and contract. This approach is distinct from typical law and economics analysis in that law is posited as constitutive as well as reactive. From this perspective, law is viewed as having a significant and positive role in creating and sustaining the "market." As a social and legal institution, the market does not exist independent of law. Even more fundamentally, the market relies on law—law is necessary in order for markets to function. A system of background or default rules is required in order that competitive and voluntary transactions (contracting) can take place.

The notion of background conditions is simply the realization that all agreements are made in a historic context where certain preexisting structures and institutional arrangements are assumed. Background conditions are essential to the process of bargaining and contract. Established, predictable relationships and rules facilitate the formation of new alignments since contracting parties are aware of what will happen should the agreement not work out. In other words, the parameters of any covenant are influenced by the external arrangements as directly as they are set forth by specific terms. Primary background conditions for contracts generally include law and legal institutions that operate in predictable and consistent ways. For the social contract, by contrast, a necessary background is the marital family. This assertion is a way to bring the marital family to the fore in the social contract debate.

There are interesting and exciting questions presented by the application of this idea of background rules to intimacy and the family. If we perceive marriage as (at least partly) a contract, are there background rules that facilitate the agreement to marry? If we assume the idea of background rules is appropriately applied to the family, does

individual, or between individual and the state, to be operational there needs to be a context of "rights" upon which the agreements are based—a fallback position in other words. JEREMY WALDRON, When Justice Replaces Affection: The Need for Rights, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 370, 370-91 (1993). Waldron's "rights" represent the background conditions upon which individuals can reasonably rely in the event that goodwill and affection fail in interpersonal relations. Id.

49. See WALDRON, supra note 48, at 385-86.
50. Id. at 387.
the introduction of agreements between sexual affiliates reveal something about the strengths or weaknesses of our general thinking about contract and background conditions?

Some of the initial work in applying the concepts of background rules to the marriage context has already been done. Jeremy Waldron, defending Kant's conception of marriage as contractual, conceptualizes the idea of "rights" in ways that resonate with the theory of background rules. 51 Waldron states that the function of matrimonial law...is to provide a basis on which ties of love can be converted into legal responsibilities in the unhappy situation where affection can no longer be guaranteed. ... The structure of impersonal rules and rights not only provides a background guarantee; it also furnishes a basis on which people can initiate new relations with other people even from a position of alienation.... 52 Waldron asserts "the importance of a structure of rights that people can count on for organizing their lives, a structure which stands somewhat apart from communal or affective attachments and which can be relied on to survive as a basis for action no matter what happens to those attachments." 53

C. Background, Instability, and Change

If we take the idea of background conditions and apply it to the covenant we call the social contract, we encounter some interesting questions. Specifically, how should we think about existing long-term institutional expectations and aspirations for the individual, the market, and the state when they are built upon something as inherently unstable as today's marital family? What happens to these societal institutions when the background condition upon which they are premised is under contest—when arrangements are shifting and becoming uncertain and unpredictable? 54 Specifically in regard to the social contract: when does societal change signify the end of societal consensus and necessitate that existing institutional arrangements be renegotiated?

51. Id. at 370-91.
52. Id. at 376.
53. Id. at 379.
54. Other questions might include: What is the scope of the obligation of law and policy (and, hence the state) to accommodate significant societal change? Can societal change achieve such a transformation in context that injustice can be said to result without accommodation and incorporation of the new background conditions into a new version of the social contract?
If the existence of a certain type of family is a prerequisite for the coherent development of the existing concepts of the "public" market and state, what happens when we are forced to concede that there have been widespread and not easily reversible changes in the way we think about and practice family in the United States?55

Changes in the family are visible and undeniable. The law has responded to these changes on one level by altering the set of expectations, obligations, and entitlements governing the intra-family relationship between the spouses—family law. What we have not done, however, is to consider the required restructuring of extra-family relationships given the changes in the family—the alteration of the state, the market, and the individual that must correspond to and complement our “new” family. In this context, it is not the obligations and rights of “husbands” and “wives” that need restatement, but the relationship among the state, the market, the family, and individuals, now freed from the historic family expectations and roles. What social expectations apply to the relationships among the state, market, and man (outside his former category as “husband”) or woman (outside her former category as “wife”)? The changes in the family were provoked by (and further provoke) changes in other institutions.56 The ideology about state intervention and action must also shift in the context of change.

The questions raised in regard to the ideas of background conditions and change are significant in light of the fundamental alterations over the past several decades to the basic societal institutions of family and the workplace (a primary market institution).57 These institutions have been designated by our social contract ideology to be the primary deliverers of social goods in this country. Families “voluntarily” take care of us, provide for our needs throughout our lifetimes (and periods of dependency). Through “contract” and “bargaining,” the workplace, in addition to providing wages, supplies insurance against catastrophe through such things as health care coverage and pension plans.58 These institutions in their

55. Arising within this inquiry are questions concerning the bargaining opportunities that have been excluded from the generalized realm of “private” contract by being relegated to the special (and “publicly” regulated) category of marriage? Of course, a related question that arises from this articulation of this issue is whether such exclusion undermines the use of contract theory as the way to generate universal concepts to discuss abstract interactions of bargain and exchange in society.

56. See Schultz, supra note 19, at 1919 (noting that the changes in the workplace are creating a situation where all workers are experiencing the problems and dilemma that have traditionally faced women).

57. Id. at 1921-28 (documenting the threatening changes in the workplace).

58. But see id. at 1925 (noting the rise in contingent and temporary workers working without benefits).
historic roles as dispensers of social goods are the background conditions to the social contract representing American capitalist democracy. It is a system in which there are no citizenship “rights” or claims to social goods that can be enforced against government.\footnote{But see id. at 1928 (arguing for a right to work).} But, both family and workplace have changed so fundamentally over the past several decades that it is impossible to continue to view them as background to a privatized and individualized society. The historic premises of the social contract have changed, and it would be unjust to consider these institutions, as they now exist, as adequate to their historic assigned tasks. The argument that we must reconsider the terms of the social contract is stronger since the state has participated in and facilitated these changes, particularly those in the family.

Of course, not all changes are good and not all changes should be accepted and facilitated. The measure should be whether change represents progress for the society as measured by fundamental aspirations. Changes in the family (such as more women in the workplace and the demise of separate spheres ideology) push us more toward equality and inclusion. Women’s position is no longer inferior or formally burdened with disadvantages and this represents progress. On the other hand, many of the changes in the market have operated to restrict inclusion and to further inequality. These changes include falling family income and few or no opportunities for those with little education or training, which disproportionately affect women.\footnote{Martha Albertson Fineman, The Family in Civil Society, 75 CHI.-KENT L. REV. 531, 546-48 (2000).} These changes must be vigorously addressed by a responsive and active state.

IV. DISSOLVING BACKGROUNDS

A. The Tentative Family

The family is our quintessentially “private” institution, yet it has a decidedly public role in our ideology.\footnote{See Fineman, supra note 2, at 14-16.} We historically relied on the family to manage dependency. The family is the conceptual and ideological repository for dependency—the institution whereby dependency becomes labeled a private rather than a public concern. Yet, changes in our expectations and aspirations for families have been profound.
The transformations in the institution of the family are the result of two related "revolutions" in our way of thinking and both are reflected in law—the no-fault divorce revolution, which altered our view of marriage and the gender equality revolution, which altered the way women perceive their societal, nonfamilial roles.

Historically the family was a hierarchically organized system with well-defined gender roles. Marriage was perceived as a lifelong commitment, and the state heavily regulated exit from the institution. A husband's economic responsibility as head of the household gave him certain rights to discipline and control the subservient wife and children. A wife who conformed to the expectations of fidelity and obedience imposed by society had the right to insist even in the context of divorce that she be supported by her husband, provided with the necessaries of life. Women were excluded from many of the public aspects of life and their true calling considered the home and family.\(^{62}\)

No-fault divorce has certainly altered that historic situation, and rules limiting husbands' financial obligations have made reliance on marriage as a lifetime guarantor for economically dependent mothers and wives less realistic.\(^{63}\) In addition, we no longer think of marriage as hierarchical. Our new model for marriage is that of partnership, an

\(^{62}\) See generally Graham v. Graham, 33 F. Supp. 936, 938 (E.D. Mich. 1940) (holding that a contract between spouses to change the essential incidents of the marriage is void).

\(^{63}\) The state has redefined its traditional protective role vis-à-vis marriage and the spouses as individuals within marriage. No-fault divorce rules reflect the abandonment by the state of an expressed interest in maintaining the marital relationship unless one guilty spouse has transgressed and injured the other (innocent) one. See Fineman, supra note 33, at 396 (discussing the emergence of egalitarian models of family and no-fault divorce). Of course, the state's concern with dissolution of marriage continues to be manifested in regulations concerning the consequences of dissolution should it occur; but even here there have been changes reflecting the view that marriage is a voluntary association that can be terminated at will with few consequences transcending the marital tie. Manifesting both egalitarian and individualistic presumptions, for example, rules now decree that divorced women are expected to be capable of self-support and are not deserving of alimony or maintenance based on their status as an innocent ex-spouse. See, e.g., UNIF. MARRIAGE & DIVORCE ACT ("UMDA") § 308, 9A U.L.A. 446 (1998 & Supp. 2000) (Maintenance).

Do such profound changes in a significant social institution effect our expectations and understanding of the justice and fairness of existing terms in our "social contract" (the set of expectations and entitlements that define the relationship between state and individual)? Specifically, once the status and nature of marriage has been altered by the state through its laws and legal institutions—the relationship between the spouses adjusted and the state's interest in marriage redefined—is there not an obligation for society to also reconsider the continued appropriateness of the traditional societal role marriage has been assigned? If the terms of the marital contract are altered, should we not reflect on whether the functional role that the family plays within society must, of necessity, also be altered?

In other words, when the state actively participates in engineering background shifts, even merely acquiesces in such shifts, is there not a corresponding obligation to readjust perspective, perhaps rebuild or abandon some of the structures thus rendered askew? It seems to me that the possibility for change has important theoretical implications for public policy and law.
egalitarian concept that recognizes that both spouses make contributions, even if they differ in kind. Further, wives and mothers are now expected to be able to participate in the workforce, fathers and husbands to share responsibility for domestic tasks and caretaking.

The equality imagery in marriage reflects a more generalized societal transformation associated with women's roles. The equality revolution has occasioned wide participation by women in the workforce. Young women expect to have equal access to education and workplace opportunities, and law formally embodies these principles and aspirations. In fact, as the revisions in welfare and divorce policy during the past several decades indicate, society has moved far from the historic idea that women's place was in the home. Further, the changes in aspirations for individual women have quickly moved to an expectation on the part of the society that they will work, even if they are caretakers. Not satisfied with merely ensuring equal opportunity in all spheres of life, the current expectation is that mothers will participate in the workplace and must not rely on the state or an ex-spouse to fund stay-at-home caretaking. 

Even if women's aspirations for themselves (and society's demands of them) had not changed, other forces have pushed women into wage work. Prime among these forces is the reality of middle-class wage stagnation, coupled with inflation. Most middle-class families now require at least a wage and a half to maintain the same standard of living possible on a "family wage" of decades ago. Women, who used to be caretakers within the family, are now direct market participants. In addition, more and more families only have one parent present. Work and structure mean many families are potentially left without a full-time caretaker. What happens to dependency in those families?

The point is that, whether embraced as individual liberation, imposed by social policy, or mandated by economic necessity,


65. See U.S. DEP'T OF LABOR, FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY 28, available at http://www.ilr.cornell.edu/library/e-archive/gov_reports/futurework/ch3.pdf (noting that "other factors in the increased participation of women likely include the need for a second income to keep up with the rising cost of living") (on file with the Chicago-Kent Law Review); see also Schultz, supra note 19, at 1920-21 (listing the trends in labor that threaten negative consequences for social and individual life).

66. See FUCHS, supra note 19, at 73 (noting the increase in single mothers in the workplace).
women's changed relationship with the workforce and the alterations
to the institution of marriage should weaken our confidence in the
ability of the family as the primary societal institution designated to
manage its members' dependency over their lifetimes. Our altered
contemporary egalitarian family is a much more tentative institution
than that historically imagined. It is more structured by individual
whim than by state imposed consequences. Such a family cannot
comfortably be assumed to be the primary repository for dependency.
Nor can it be confined to the background of policy debates.

We must look at the reality of the contemporary family and
consider the implications of its transformation from the historic
model. We must explicitly reconsider our institutional arrange-
ments. 67 If it seems clear that the contemporary family cannot
conveniently be relied upon to fulfill historic expectations, then
responsibility for dependency must be reallocated.

This part of the discussion—the concept of background rules—is
relevant in the context of my realization that the family, particularly as
defined by and through the marital unit, serves an essential public
function in our society. This function has ideological and structural
dimensions that shape political and policy discourse and influence law. 68
The role assigned the family also has significant implications for those
operating within families. Family members are assigned roles with
economic and material consequences. 69 These consequences are often
not revealed until the family dissolves such as with the death or divorce
or in cases where the full complement of roles is not filled.
Consequences, both to the individual and to society, may also become
apparent when the family fails in its assigned societal role (or enough
families fail) and demands for collective response are made.

The concept of background conditions is particularly useful to
illustrate why we need to rethink old paradigms, set aside the
misleading discourses about personal versus public responsibility, and
cast a skeptical eye on current renditions of the metanarratives of
independence and self-sufficiency. Using the idea of background
conditions it is possible to argue that it is time to rewrite our social
contract, to reconsider the viability and equity of our existing social
configurations and assumptions.

67. See KITTAY, supra note 28; see also id. at 133-24.
68. See Fineman, supra note 33, at 400.
69. See id.; FUCHS, supra note 19, at 73.
Similar points about the need for rethinking the social contract given changes in the family can be made about transformations in the workplace. There are important differences, however, primarily in the nature or direction of change. Changes in the workplace have not mostly been in the direction of equality and participation. In addition, progressive change in the workplace is harder to envision or articulate since there is no idealized form of relationship to exemplify equality between worker and employer like the partnership notion of husband and wife. The absence of a competing ideal makes it more difficult to displace the historic model.

The worker-employer relationship is one of “real” as well as social contract, although, outside of collective bargaining agreements and some minimal governmental regulations, the historic workplace contract remains largely an unwritten one. Still, workplace terms are embodied in practices that have evolved over time. From a worker’s perspective, the employment-at-will doctrine never provided much security, yet assumptions about employer responsibility to employees (at least managerial and white collar employees) and the expectation that employment would secure some basic social goods did shift in the mid-twentieth century.

Things are shifting backwards and, while the ultimate direction of change is not as clear as in the case of families, some trends seem apparent. For example, any expectation that employment security for any segment of the workforce could be earned through long and loyal service is now illusory. Even this relatively minimal promise has been abandoned by many large corporations in favor of downsizing and profit-driven measures that seem to view labor as just another expense of production to be manipulated and contained. Various statistical summaries report that temporary employment status is rapidly becoming the norm for many new entries into the workplace as well as one of the few options for those terminated from

72. Id. at 523-24.
73. See id. at 541-47 (analyzing job tenure rates as an indicator of the precariousness of employment).
74. See Schultz, supra note 19, at 1924-25 (discussing the decline in job security and an increase in contingent work).
more traditional work situations. Temporary workers do not receive the benefits associated with more enduring ties to employers.

Even those with formally more traditional relationships find benefits dwindling. Increasing numbers of employers who previously did so, no longer feel it necessary to provide social goods such as health care, pension funds, and other dependency-related insurances for employees. Attempts to limit or cut back on existing benefits are now part of many negotiations. Furthermore, from a historic perspective, the real wages for workers have declined and the idea of a family wage has been replaced by the reality of a dual earner couple. Employers and capitalists articulate their social responsibility in terms that leave workers behind. Allegiance is to stockholders, not employees.

Perhaps the ease with which the terms and nature of the unwritten understanding of employers’ responsibilities to workers have been altered is related to the attacks on unions that have occurred during the last few decades. In the past when collective bargaining was in ascendancy, unions functioned to secure some social rights for some workers, moderating the harshness of unfettered capitalism through collective bargaining and contract. These rights served as models for other workers and employers, even if the specific contract terms were not directly applicable.

Unions have always been under attack by business and corporate interests, but attacks have increased in intensity and found more receptive political ears in recent years. Membership declined during the Reagan years after the air controllers’ strike and the passage of legislation designed to weaken unions in the name of individual worker’s rights. In recent years, unions have struggled to reshape themselves, not only by reaching out to new groups of potential members, but also by using political means. Concern has broadened beyond specific member contractual entitlement in some areas to the provision of political support for initiatives that benefit society (or

75. Id.
76. Id. at 1924.
78. For example, labor has engaged in issue advertising as a way to interest new members. This has brought them under increased scrutiny by those opposing the use of soft money. See generally Steven Greenhouse, Bush Is Moving to Reduce Labor’s Political Coffers, N.Y TIMES, Feb. 16, 2001, at A14.
workers) in general—a more universalized and class-based approach to the provision of fundamental social goods.79

Also worthy of mention in the context of change is the way that wealth distribution has become more skewed as a result of other changes in both structure and attitude of capitalists.80 At the same time that wageworkers and others who have previously considered themselves comfortably and securely middle class find their fortunes declining, huge fortunes are made by corporate officers and entrepreneurs.81 The differentiation between worker and manager is greater in the United States than in any other industrialized democracy.82

Outside of the terms of labor contracts they forge with unions, businesses and corporations do not consider themselves appropriately held responsible for meeting workers’ needs or desires. They resist the imposition of socially responsible mandates such as the Family and Medical Leave Act, which places no requirement of funding upon employers, merely mandating that they allow their workers to self-fund this particular social good, a leave for social caretaking of children, parents, or other dependent relatives.83 With even a minimalist work contract torn asunder by the asserted demands of a global marketplace, the myth that the market can and will provide protection cannot be maintained.84

79. The response to revitalized union activity by many Republican politicians has been to seek to enact legislation to burden such action. For example, President Bush intends to issue an executive order requiring federal contractors “to post a notice telling workers they have a right not to pay that part of union fees used for political activities.” Id.

80. See Schultz, supra note 19, at 1926 (discussing the incidence and ramifications of increasing wage inequality).

81. Id.

82. AFL-CIO, CEO Pay and Global Unfairness, at http://www.aflcio.org/paywatch/ceo-pay.htm (last visited Mar. 30, 2001) (noting that in 1999, American CEOs made 475 times the average blue collar worker, while German CEOs made 13 times the typical manufacturing employee and Japanese CEOs made 11 times the average worker) (on file with the Chicago-Kent Law Review).


84. Although voluntary charity and philanthropy are not the objects of the social contract configuration with which I am dealing, it is important to point out that they prove to be no substitutes for governmental mandates when it comes to business responsibility. Inventors and investors have accumulated huge fortunes, but such financial success has not made their holders socially uncomfortable. Giving is relatively miserly and much more narrowly directed than at the turn of the last century, an earlier era of capital consolidation and transformation. Today, philanthropy seems more industry related or self-enhancing than the generalized public institution building that occurred at the turn of the twentieth century. Andrew Carnegie may
C. The Tenable State

Of necessity, the state is implicated in any discussion of the social contract. As one of the primary social institutions, the state is affected by transformations in other institutions. In addition, the state may have a responsive or regulating role to play in regard to change. State transformation is a much more public and scrutinized process than family or market evolutions. In fact, state policy discussions (which are the way the definition of the state is altered) often implicate family and/or market developments as the basis for state action or inaction. In this way, the state is a more explicitly reactive institution. Unfortunately, noninterventionists and conservatives often view the appropriate role of the state as cheerleader for the market. The state should facilitate, not regulate economic arenas.

All of this occurs in the context of arguments by government policymakers and business leaders for increasing the spheres of influence and power of the market. The new vision is of a minimalist government, accomplished through the privatization of functions previously performed by government and the devolution of necessary government tasks to the smallest units of government. This restructuring is urged in spite of the fact that it has always been a struggle to hold the market or capitalists responsible for provision of social goods, such as health insurance, daycare, or a minimum family wage, in this country.

Complementing the way we now view the state (perhaps laying an essential foundation for a minimalist state) has been an ascendancy of economic principles as the preferred method of assessing social policy. For several decades the prevailing philosophy has been a supply-side orientation that posits the well-being of the capitalist class will provide for the rest of society ultimately. Termed “trickle down” economics, this theory has proven in this time of unprecedented expansion of national wealth to be an illusion.

have built libraries, but Bill Gates donates to them computer equipment that will illustrate to users the wonders of Microsoft while a scolding Ted Turner contributes funds to show the United States how to pay off its debt to the United Nations. See Ron Kampeas, Billionaires Calling Shots on Charitable Donations, DESERET NEWS (Salt Lake City), Feb. 7, 2001, at C02.

85. See generally An Introduction to Libertarianism, supra note 29.

Further, policies and practices developed fairly recently, such as the Federal Reserve System's highly publicized focus on inflationary indicators based on workers' improved status, seem to ensure that not too much trickles down.\(^7\)

A focus on market well-being has supplanted more inclusive and nuanced public assessments about national direction. The transformation in the focus of the public sphere is best captured by the way in which the well-being of the nation is currently measured. The Dow Jones Industrial Average is reported daily (even hourly on public radio) as though this reflected our country's health and wealth, an economic indicator substituting for other forms of evaluation of national standing such as the equitableness of the distribution of the wealth the society is producing or the well-being of the most vulnerable of our citizens. We seem blinded in a revere of self-satisfaction even as the position of our children and the historically disadvantaged subgroups in society deteriorates both from where they were a few decades ago and relative to the positions of these groups in other industrialized democracies.

It is as though the function and role of the state has been merged with those of the market. There is some effort to defend public programs such as education, but the basic tenets of a privatized and individualized philosophy seem to be driving policy on all political sides. Missing from public discourse is strong support for the role of the state in mediating market excesses and insuring a more equitable allocation of the wealth the society is producing. Perhaps this component is missing because the nature of public debate is so contrived and constricted, confined to politicians and those with access to them instead of engaging a wider and more diverse group of citizens.

V. REVITALIZING THE PUBLIC—FORGING A NEW SOCIAL CONTRACT

Reintegration of family, market, and state should begin with a few basic premises. First, dependency is of general concern and generalized responsibility. Second, caretaking requires resources, and engaging in caretaking has costs to individuals even in a society that

shares some of the burdens of caretaking. Therefore, subsidies must be of two kinds—some specific to support the caretaking task while others take the form of lifelong provisions of fundamental social goods necessary for individual survival and flourishing. These social goods are economic or financial in nature and include housing, health care, a basic income, and other necessities that complement and strengthen the civil and political rights we have as citizens of a democracy. The government has a crucial and nondelegatable responsibility to secure that these goods are delivered independent of the market value of any individual labor. This responsibility marks a right of citizenship no less important and worthy of governmental protection than civil and political rights and can be realized in a variety of ways.

In regard to the subsidies that are specifically directed at caretaking, the state must function in two basic redistributive channels—some income redistribution will be necessary to provide for services such as childcare and some restructuring of the workplace will be required so that the market can ante-up its fair share of the costs of responding to dependency. The task is that of structuring accommodation. The state must see that market institutions respond to dependency burdens born by workers dually responsible for economic and caretaking sufficiency. Workplaces must be restructured so that the burdens for dependency can also be redistributed in a more just manner as between family and market—so that caretakers have a meaningful “right to work” as well as a responsibility, a right enforceable through a demand for resources and accommodation.

This restructuring is not “special” treatment, but a version of the basic right to accommodation due to all members of society as they engage in society-enhancing or -preserving tasks. It is consistent with our deeply held beliefs about individual responsibility and independence. Individual independence requires that those who perform vital societal functions have the wherewithal to do the tasks they assume and those resources must be supplied outside of potentially exploitative, and therefore corrupting, institutions. We

owe caretakers the resources that ensure the opportunity for independence and self-sufficiency and allow the exercise of discretion and selection from among options. Independence in this regard is the ability to make decisions and act with integrity, to fashion one's life and fulfill one's obligations within societal structures that are responsive to needs and provide compensation and accommodation for dependency. The obligations of society can be delegated as the responsibility of select members only when we, as a society, are willing to recognize and repay the debt that we thus incur—implementing a just social compact.

While some conservative commentators might respond to pleas for the (relatively) modest economic adjustments by reference to individualistic notions such as bearing the consequences of one's choice and the sanctity of personal responsibility, I suspect that the problem for more progressive readers will be with the restructuring component of my reorientation. In contemplating a restructured workplace, for example, those without responsibility for dependency will fear that they will bear the costs of accommodation and change. In other words, one aspect of resistance is the fear of the exploitation now suffered by caretakers being displaced onto them.

In response to this resistance I point out that if we take the position of the caretaker in our society as the starting point, it becomes obvious that exploitation is the norm. In our current societal configuration, the labor of caretakers is appropriated for the good of the larger society without compensation or accommodation from that society's institutions outside of the family. It is essential to keep our sights on this larger picture, to see the implications of societal arrangements. It is necessary to constantly force our eyes beyond the details of our individual workplaces and our current personal circumstances.

Within the workplace, we are isolated from others, encouraged to view the provision of goods to one group to be simultaneously and inevitably at the cost of another group of workers. There are costs associated with caretaking. But the question to be asked is in what way is it just or fair that corporations and businesses are free to merely shift burdens and costs from one group of workers to another. How can they escape responsibility and avoid bearing some of the

89. See, e.g., Burkett, supra note 1, at 37-45.
90. Arlie Russell Hochschild, The Time Bind: When Work Becomes Home and Home Becomes Work 118-21 (1997) (noting that fathers who take parental leave may be viewed as doing so at the expense of other workers).
costs by accommodation and by accepting some reduction in profits or diminished returns on capital?

Further, we must also realize that even if we are unencumbered today, we do not know what the future holds. We may become caretakers ourselves. In this regard, even if we view having children as a choice, all of us had parents (no choice about that), and many of these parents may become dependent on us as they age. We ourselves might become the disabled or dependent rather than the caretaker in the future.

CONCLUSION

In conclusion, and directed toward those progressive proponents of privatization, I want to insist that while the exploitation claim of the caretaker who provides the uncompensated labor that reproduces society may be the most compelling, its character is not unique from the claims that can be made by noncaretakers in our increasingly workaholic society. An argument can be made that caretaking labor should not be viewed as socially productive only when directed at improving the situation of others—human beings must also provide for our own nonmaterial needs. Beyond our responsibilities as caretakers, citizens, and workers, we have responsibilities to ourselves—to regenerate our energies and resources, to participate in the artistic, nonmaterial, spiritual, or other inner-directed aspects of life upon which we are all dependent for our individual well-being. Society and its institutions must facilitate this type of caretaking also, structuring work so that the rest of life is not forfeited. The scripts of our lives must revolve around more than just work with more emotional and spirit regenerative aspects left lying on the cutting room floor.

It is also possible to expand ideas about the social contract and the existence of social debt well beyond caretaking labor (for others or for self). We could consider the situation of the laborer in general. The social contract metaphor can be a way to bring nonmarket values, such as norms of distributive justice and worker security found in other industrialized democracies, to bear on our


92. Schultz also argues for a living wage, the right to work, empowering work conditions, and reduced hours for all workers. Schultz, supra note 19, at 1942-57.
society as we confront the implications of change. Particularly in the market context, we need to be reminded that corporations as abstract legal entities and those who run, direct, and profit from them cannot function without the labor of others. Secretaries and truck drivers are as essential to commerce as are highly paid CEOs and stockholders.

The arguments made about exploitation in regard to caretaking are applicable to the situation of those who are providing for the needs, growth, and maintenance of society and its institutions but whose labor is undervalued within our version of the ideology of free market capitalism. The arguments that began with recognition of caretaking evolve into a claim for universal provision of basic social goods based simply on recognition of un- or undercompensated contributions to society and its institutions and the fact that contributions should be valued in a public, positive, and egalitarian fashion. After all, we are all in this together, and this realization should guide the direction in which we take our discourse about dependency and societal responsibility.