

The [Sexual Contract]

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Wives, Slaves and Wage Slaves

The story of the sexual contract is fundamental to an understanding of modern patriarchy, but the world in which the classic contract theorists told their stories was foreign in many ways to the social world we inhabit today. When Rousseau died in 1778, economic production was not yet completely separated from the household, the capitalist market was still being formed as an independent sphere of activity and families included servants, apprentices and slaves, as well as the master, his wife and children. At first sight, the modern patriarchal family of the classic contract theorists may look indistinguishable from the pre-modern form, or from the family in Filmer's patriarchy, since the inhabitants are the same. The crucial change is the claim that the modern family has its origins in contract, not in the father's procreative power. The civil master of a family attains his right over his wife through contract, his right over his servant was contractual and, according to some classic contract theorists and defenders of American slavery, so was his right over his slave. The 'family', in the sense in which the term is used today, emerged only after a long process of historical development. The many figures that populated the family in the seventeenth and eighteenth centuries gradually disappeared until the couple of husband and wife took the centre of the stage, and the marriage contract became constitutive of domestic relations.

The old, domestic contracts between a master and his (civil) slave and a master and his servant were labour contracts. Slaves and servants labour at the behest of their masters. The marriage contract, too, is a kind of labour contract. To become a wife entails becoming a housewife; that is, a wife is someone who works for her husband in the marital home. But what kind of labourer is a

(house)wife? How does the conjugal labour contract resemble or differ from other domestic labour contracts, or from the present-day employment contract? What form of subordination is involved in being a (house)wife? What is the significance of the fact that only women become (house)wives? Over the past three centuries, feminists have compared wives to slaves, servants and, the predominant comparison today, workers. But none of the comparisons, taken singly, serves fully to capture patriarchal subjection.

Feminist discussions do not usually consider the similarities and differences between slaves, servants and workers and whether the subjection of wives might throw light onto other forms of subordination. Nor is the fact that civil slaves, servants, workers and housewives are all constituted through contract given much weight. In the absence of knowledge of the story of the sexual contract, the classification of contracts as, for example, conjugal, or between a master and servant, can appear arbitrary indeed. Consider the following definition from *A Treatise on the Law of the Domestic Relations* published in the United States in 1874: 'a master is one who has legal authority over another; and the person over whom such authority may be rightfully exercised is his servant.' A civil slave, a wife or a worker are all 'servants' according to this definition. The volume includes an extensive discussion of the 'disabilities' of wives under coverture which seems to leave no doubt that a wife was the 'servant' of her husband. Yet she is not classified as such. Husbands and wives are discussed separately from masters and servants. The author remarks innocently that 'the relation of master and servant presupposes two parties who stand on an unequal footing in their mutual dealings; yet not naturally so, as in other domestic relations, . . . This relation is, in theory, hostile to the genius of free institutions.'¹

'Free institutions' presuppose parties who stand to each other as equals. The domestic relations of master-slave and master-servant, relations between unequals, have given way to the relation between capitalist or employer and wage labourer or worker. Production moved from the family to capitalist enterprises, and male domestic labourers became workers. The wage labourer now stands as a civil equal with his employer in the public realm of the capitalist market. A (house)wife remains in the private domestic sphere, but the unequal relations of domestic life are 'naturally so' and thus do not detract from the universal equality of the public world. The

marriage contract is the only remaining example of a domestic labour contract, and so the conjugal relation can easily be seen as a remnant of the pre-modern domestic order – as a feudal relic, or an aspect of the old world of status that has not yet been transformed by contract. Feminists sometimes portray the contemporary wife as like a serf and argue that the family is a ‘quasi-feudal institution’.² On the other hand, socialists, rejecting the claim that the worker is a free labourer, have argued that ‘unfree labour is not a feudal relic, but part of the essential relations of capitalism.’ How, then, are capitalist relations to be characterized? One writer claims that, under capitalism, ‘status relations are the mode of achieving contractual relations.’³ If a wife resembles a serf, this is not because a feudal relation lingers on; nor does the employment contract rest on relations of status. Modern marriage and employment are contractual, but that does not mean that, substantively, all resemblance to older forms of (unfree) status have vanished. Contract is the specifically modern means of creating relationships of subordination, but, because civil subordination originates in contract, it is presented as freedom. Arguments about feudal relics and status overlook the comparisons and oppositions created by original contract. Contractual relations do not gain their meaning from the old world but in contrast to the relations of the private sphere.

Private domestic relations also originate in a contract – but the meaning of the marriage contract, a contract between a man and a woman, is very different from the meaning of contracts between men in the public sphere. The marriage contract reflects the patriarchal ordering of nature embodied in the original contract. A sexual division of labour is constituted through the marriage contract. In Hobbes’ state of nature, when a male individual conquers (contracts with) a female individual he becomes her sexual master and she becomes his servant. Rousseau’s conjectural history of the development of civil society tells how women must ‘tend the hut’, and in *La Nouvelle Héloïse* Julie superintends the daily domestic business at Clarens. The story has been told again more recently – this time as science – by the sociobiologists. E. O. Wilson’s story of the genesis of the contemporary sexual division of labour in the earliest stages of human history is held to reveal that the division is a necessary part of human existence. The story begins with the fact that, like other large primates, human beings reproduce themselves slowly:

Mothers carry fetuses for nine months and afterward are encumbered by infants and small children who require milk at frequent intervals through the day. It is to the advantage of each woman of the hunter-gatherer band to secure the allegiance of men who will contribute meat and hides while sharing the labor of child-rearing. It is to the reciprocal advantage of each man to obtain sexual rights to women and to monopolize their economic productivity.⁴

That is to say, science reveals that our social life is as if it were based on a sexual contract, which both establishes orderly access to women and a division of labour in which women are subordinate to men.

In Zilboorg’s interpretation of the primal scene, women become sexual and economic slaves in the family. The co-operative socialist William Thompson provided a similar conjectural history of the origin of marriage. He argued that, ‘in the beginning’, men’s greater strength, aided by cunning, enabled them to enslave women. Men would have turned women into mere labourers except that they depend on women to satisfy their sexual desires. If men had no sexual desire, or if the propagation of the species did not depend on men’s intervention in a form which also provided sexual gratification, there would have been no need for the institution in which ‘each man yokes a woman to his establishment, and calls it a *contract*.’ Women are ‘parcelled out amongst men, . . . one weak always coupled and subjected to one strong’.⁵ John Stuart Mill offered a similar argument later in the nineteenth century; ‘from the very earliest twilight of human society, every woman (owing to the value attached to her by men, combined with her inferiority in muscular strength) was found in a state of bondage to some man. . . . [Marriage] is the primitive state of slavery lasting on . . . [it] has not lost the taint of its brutal origin.’⁶

Until late into the nineteenth century the legal and civil position of a wife resembled that of a slave. Under the common law doctrine of coverture, a wife, like a slave, was civilly dead. A slave had no independent legal existence apart from his master, and husband and wife became ‘one person’, the person of the husband. Middle- and upper-class women of property were able to avoid the full stringency of the legal fiction of marital unity through the law of equity, using devices such as trusts and pre-nuptial contracts.⁷ But such exceptions (compare: not all slave-masters use their power to the full) do nothing to detract from the strength of the institution of

coverture as a reminder of the terms of the conjugal relation established by (the story of) the original contract. Sir Henry Maine remarks in *Ancient Law* that:

I do not know how the operation and nature of the ancient *Patria Potestas* can be brought so vividly before the mind as by reflecting on the prerogatives attached to the husband by the pure English Common Law, and by recalling the rigorous consistency with which the view of a complete legal subjection on the part of the wife is carried by it.⁸

The Married Women's Property Act in Britain (1882) – which had been preceded from the 1840s by such Acts in some American states – was one of the great landmarks in the struggle to end coverture and gain recognition for married women as civil individuals. But it was only one landmark, and some decisive reforms in the legal standing of wives are so recent that most of us still bear marks of subjection, notably that we are known by our husbands' names.

The comparison of women and wives with slaves was frequently made from the late seventeenth century onward. In the previous chapter I cited Mary Astell's statement that, unlike men, who were born free, women were born slaves, and in the eighteenth century many novelists made similar statements. For example, in Daniel Defoe's *Roxana* (published in 1724), the heroine proclaims that she thinks a woman 'was born free, and . . . might enjoy that Liberty to as much Purpose as the Men do'. She continues, 'the very Nature of the Marriage-Contract was, in short, nothing but giving up Liberty, Estate, Authority, and every-thing, to the Man, and the Woman was indeed a meer Woman ever after, that is to say, a Slave.'⁹ The comparison of wives and slaves reverberated through the women's movement in the nineteenth century. Women were very prominent in the abolitionist movement and they quickly made the connection between the condition of slaves and their own condition as wives. John Stuart Mill wrote in *The Subjection of Women* that 'there remain no legal slaves, except the mistress of every house.'¹⁰ A year later, in 1870, the American feminist Laura Curtis Bullard declared:

Slavery is not yet abolished in the United States. . . . It was a glorious day for this republic when she shook herself free from the disgrace of negro slavery, . . . It will be a still more glorious day in

her annals when the republic shall declare the injustice of a slavery of sex, and shall set free her millions of bond women!¹¹

To be a slave or a wife was, so to speak, to be in a perpetual nonage that wives have not yet entirely cast off. Adult male slaves were called 'boys' and adult married women were – and still are – called 'girls'. As befitted civilly dead beings, the slave was brought to life by being given a name by his master (servants were also given another name by their masters if their own was 'unsuitable'; 'Mary' was very popular). When a woman becomes a wife, her status was/is singled out by the title 'Mrs'. A wife was included under her husband's name and, still today, can be called 'Mrs John Smith'. Elizabeth Cady Stanton, the great American suffragist, refused to give up her name of Cady when she married Henry Stanton, and in 1847 she wrote that she seriously objected to 'being called Henry. Ask our colored brethren if there is nothing to a name. Why are the slaves nameless unless they take that of their master?'¹² Under coverture, a wife was required to live where her husband demanded, her earnings belonged to her husband and her children were the property of her husband, just as the children of the female slave belonged to her master. But perhaps the most graphic illustration of the continuity between slavery and marriage was that in England – as Thomas Hardy's *The Mayor of Casterbridge* reminds us – wives could be sold at public auctions.

Samuel Menefee lists 387 recorded cases of wife-selling, beginning with an isolated reference from 1073, and then occurring regularly from 1553 through to the twentieth century. He argues that the sale of slaves and the sale of wives existed independently; the abolition of the slave-trade had no effect on the trade in wives. Wives, however, were a good deal cheaper to buy than slaves – and even cheaper than corpses.¹³ The wife usually stood to be auctioned with a halter round her neck (the popular belief seems to have been that the sale was valid only if the halter were in place); sometimes the halter was fixed round a waist or an arm, and occasionally decorated with ribbon, 'perhaps to lessen the humiliation of the symbol'.¹⁴ Halters, as Menefee notes, were part of livestock sales, but one might speculate that the symbolism goes further. Livestock are driven by men with whips, so the halter may at one remove have symbolized the slave-master's whip. Menefee's conclusion about wife-selling is that

wife sales alleviated friction in social life, providing one solution to intersecting problems of marriage, divorce and support. Based on well-known market mechanisms, with numerous symbolic parallels, wife-selling represented a conservative and traditional social solution to the dilemmas faced by individuals, relieving stress on the social fabric with a minimal strain on the communal *status quo*.¹⁵

The sale of wives enabled a husband to avoid supporting his wife and children, and the purchaser 'could insure himself against an action for *crim. con.*', i.e., criminal conversation.¹⁶ If a wife committed adultery, her sale could enable her lover to avoid action under the law of criminal conversation. The law was based on the assumption that a wife was (like) property; a husband could sue another man for damages for restitution – for injury to his property – if his wife committed adultery. A successful case was brought in Dublin as recently as 1979.¹⁷ No doubt, wife-selling provided an informal solution to marital breakdown in the absence of divorce. But why did the solution take this form? Menefee says nothing about the significance of the institution of wife-selling for the structure of marital relations and the subjection of wives, let alone the implications for the operation of the law of male sex-right.

American slave-owners sold their slaves, not their wives. However, the figure of the slave-owner's wife was a peculiarly dramatic symbol of patriarchal right for other (white) wives of the period. As a husband, the slave-master had right of sexual access to his wife – but he also, as a master, had sexual access to his female slaves. Mary Chestnut, wife of a plantation owner, wrote in her diary in 1861, that 'Mrs. Stowe [author of *Uncle Tom's Cabin*] did not hit the sorest spot. She makes Legree a bachelor.'¹⁸ The slave-master/husband was 'sole father of a "family, black and white"', and protector of his family.¹⁹ The term 'family' is beautifully ambiguous here. In 1800, Thomas Jefferson compiled a 'Census of My Family' which included his slaves.²⁰ But Jefferson's 'family' (in one sense of the term) resulted from his marriage and from his long union with his slave Sally Hemings, who was his wife's half-sister. In his brilliant study, *Roll, Jordan, Roll*, Eugene Genovese notes that masters were particularly concerned about their male slaves beating their wives, even as those masters themselves might with impunity seize and beat the black wives; the slave-master 'thought nothing of stripping a woman naked and whipping her till she bled'.²¹

In Britain, in the same period, it was widely believed that a husband had the right physically to chastize his wife provided that he used a stick no bigger than a man's thumb. Nineteenth-century feminists, like feminists today, were greatly concerned about injuries to wives inflicted by their husbands. Frances Power Cobbe published an influential article in 1878, 'Wife Torture in England', and, in a speech in the House of Commons, supporting women's suffrage during the debates on the Second Reform Bill, John Stuart Mill said that 'I should like to have a Return laid before this House of the number of women who are annually beaten to death, kicked to death, or trampled to death by their male protectors.'²² A husband owned the property in his wife's person and a man was fully a proprietor and master only if he could do what he willed with his own.

His right to do as he willed was given *de jure* sanction by the legal category of 'conjugal rights'. Even today, the comparison between marriage and slavery remains relevant in one respect in those states of the United States and Australia, as well as in Britain, where the law still sanctions marital rape. Lord Hale's *The History of the Pleas of the Crown* laid down in the eighteenth century that 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'²³ Until 1884 in Britain, a wife could be jailed for refusing conjugal rights, and, until 1891, husbands were allowed forcibly to imprison their wives in the matrimonial home to obtain their rights. The marriage contract, on this matter, is a contract of specific performance. Rousseau's advice to Sophie when she became Emile's wife was that she could secure her woman's empire and 'reign by means of love' if she rationed Emile's access to her body and so made herself precious. She must be modest, not capricious, so that Emile could 'honor his wife's chastity without having to complain of her coldness'.²⁴ But it is hard to see the relevance of this advice; only Emile could decide whether access would be 'rationed'. The husband's conjugal right is the clearest example of the way in which the modern origin of political right as sex-right is translated through the marriage contract into the right of every member of the fraternity in daily life.

The denial of bodily integrity to wives was a major reason why William Thompson called marriage the 'white-slave code'. He

implicitly suggests that, without the sexual contract, men would not have entered the social contract and created the state; men's conjugal mastery looks as if it 'compensate[s] them for their own cowardly submission almost everywhere to the chains of political power'.²⁵ John Stuart Mill went so far as to argue that wives were worse off than female slaves:

No slave is a slave to the same lengths, and in so full a sense of the word, as a wife is . . . however brutal a tyrant she may unfortunately be chained to - though she may know that he hates her, . . . he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.²⁶

At about the same time, in the United States, Elizabeth Cady Stanton declared that 'society as organized today under the man power, is one grand rape of womanhood'.²⁷

In most legal jurisdictions, despite some recent reforms, husbands still own the sexual property in their wives' persons. The comparison of wives with slaves, unfortunately, is not yet completely redundant. Still, the comparison cannot now be pressed any further, although in the early stages of the current revival of the women's movement the argument was again made that a wife was a slave. One reason advanced to support this characterization was that a wife who works full time in the conjugal home is not entitled to pay. Wives are housewives and housewives, like slaves, receive only subsistence (protection) in return for their labours; Sheila Cronan asked, 'does this not constitute slavery?'²⁸ Her juxtaposition of a description of the Alabama slave-code of 1852 and a description of the duties of a wife in about 1972 does not, as she argued, show that a wife is a slave. Wives are not civilly dead as they once were, but are now, for most purposes, juridically free and equal; we have won citizenship. A juridically free and equal citizen cannot be an actual slave (which is not to say that conditions of wage labour may not, at times, look like that of slavery); at most, a citizen could contract to be a civil slave. Perhaps a wife is like a civil slave. The marriage contract can still, in principle, last for a lifetime, and the civil slave contract also runs for life.

The difficulty with this analogy is that the civil slave contract is an extended employment contract and a civil slave is a special kind of

wage labourer. A wife, as feminists have continually emphasized, is not paid a wage for her labour; she is not employed. Furthermore, employment is part of the public civil world, and a wife labours in the private home. Perhaps, then, despite the fact that a wife receives no pay, she is more like a servant, who also is a domestic labourer. A wife is now usually the only other adult member of the family, or if there are others they, too, rely on her labours.

In the past, a wife's position in the master's family was never exactly comparable to that of other subordinates. The wife of an American slave-master, for example, had her own jurisdiction over the slaves (but a married woman had no power of manumission), even though she was also subject to her husband. The most apt characterization of the position of the wife was that she was the first slave of the master; or, more generally, as many of the early feminists insisted, a wife was merely the first servant of the master of the family. Mary Astell's pointed comment was that a woman 'has no Reason to be fond of being a Wife, or to reckon it a Piece of Preferment when she is taken to be a Man's Upper-Servant'.²⁹ Lady Chudleigh summed up the matter neatly in 1703:

Wife and servant are the same,
But only differ in the name.³⁰

A few years later, Daniel Defoe stated that he did not 'take the State of Matrimony to be designed as that of Apprentices who are bound to the Family, and that the Wife is to be us'd only as the upper Servant in the House'.³¹ And in 1792, in *A Vindication of the Rights of Woman*, Mary Wollstonecraft criticized the patriarchal claim that woman was 'created merely to gratify the appetite of man, or to be the upper servant, who provides his meals and takes care of his linen'.³² At the end of the nineteenth century, Thorstein Veblen called a wife 'the chief menial of the household'.³³

There is, though, one fundamentally important difference between wives and other labourers. Only *women* become (house)wives and provide 'domestic service', even though all masters demand 'service' from their subordinates. As Genovese makes clear, many slave-owners wished not just to be masters but good masters, and the prevailing ideal of the good master was that he protected his slaves and fulfilled certain responsibilities towards them. The ideal for slaves was that they showed gratitude and rendered faithful service -

an impossible requirement, of course, to demand of a piece of property.³⁴ And 'faithful service' is precisely what all masters desire, including husbands. My late father-in-law's indenture paper as an apprentice printer, which he signed as a boy of fourteen in 1918, includes clauses binding him to 'truly and faithfully serve' his master, 'his secrets keep, and his lawful commands willingly obey'. The specific content of the 'faithful service' demanded by a husband, however, is determined not only by the marriage contract but by the 'foundation in nature' that gives rise to the sexual contract and the sexual division of labour. The provision of 'domestic service' is part of the patriarchal meaning of femininity, of what it is to be a woman.

In 1862, a commentator on the problem of 'surplus women' in Britain stated that female servants were not part of the problem:

They are in no sense redundant, . . . they discharge a most important and indispensable function in social life; they do not follow an obligatory independent, and therefore for their sex an unnatural, career - on the contrary, they are attached to others and are connected with other existences, which they embellish, facilitate, and serve. In a word, they fulfill both essentials of woman's being; *they are supported by, and they minister to, men.*³⁵

Leonore Davidoff has shown how familial ties often entailed domestic service for women; 'female kin could be and were used as domestic servants without pay.' Female family members and domestic service were identified so closely that, although residential servants might contract with a master for a year at a time, the wages paid were seen as an extension of bed and board, or protection, and 'legally the payment of wages had to be explicitly stated in the contract, otherwise it could be assumed that the service was being given voluntarily.' By the mid-nineteenth century, domestic service had become predominantly women's work. Significantly, a wife could not enter domestic service unless she had obtained her husband's permission. He had right over her services. If the employer failed to obtain the husband's permission, he 'could be sued for "loss of services", in exactly the same way as an employer could be sued for enticing away a servant. In lay terms, a woman could not serve two masters'.³⁶

Until very recently, the law of consortium confirmed that a wife stood to her husband as a servant to a master. If his wife was

negligently injured by a third party, a husband could sue for loss of consortium which 'in addition to housework and child care, . . . includes her love, affection, companionship, society, and sexual services'.³⁷ The loss through wrongful injury of the wife's ability to work in the home was seen in the same light as an injury to a servant which also, necessarily, injures a master. The law was not abolished in Britain or the state of New South Wales in Australia until the 1980s. In the United States only a small minority of states have abolished the law; most (rather oddly, although, as I shall show in the next chapter, in keeping with the standpoint of contract) have extended the right to sue to wives. In New South Wales in 1981, a successful case was brought under the law of consortium and a husband was awarded damages of \$40,000.³⁸

Only during the last fifty years in Britain has a wife become the sole servant in the family. The emergence of the little world of the married couple and their children, now taken for granted as constituting a proper 'family', was completed only relatively recently. The persistence of the older understanding of the 'family' is illustrated in the Report on the 1851 Census in Britain, in which the Registrar General stated that 'the English family, in its essential type, is composed of a husband, wife, children, and servants.' He adds that it is formed 'less perfectly but more commonly, of husband, wife, and children'.³⁹ In American cities in the middle of the last century, between 15 and 30 per cent of all households had resident domestic servants. The great majority of these servants were women (at that time, usually white women) and most women in paid employment were domestic servants.⁴⁰ In Australia in 1901, almost half the women in paid employment were in some kind of domestic service (not all in private homes), and throughout the nineteenth century the demand for servants was greater than the supply, which was perhaps not surprising when a woman well-trained as a servant was eminently suitable as a wife.⁴¹ Servants were also objects of desire for some upper-class men in the complex, intricately demarcated world of class and sex in nineteenth-century Britain. (Perhaps the most dramatic recorded example was the long liaison between the servant, Hannah Cullwick and the gentleman, Arthur Munby.)⁴² Until the 1930s, very many families in Britain, including those of modest means in the skilled working class, could keep servants or a maid of all work. Domestic service was a major area of employment. In 1881 one person in every twenty-two was a domestic servant, the

majority of residential servants were female, and one-third of all women aged between fifteen and twenty were in service.⁴³

A (house)wife now performs the tasks once distributed between servants of different rank or undertaken by the maid of all work. Her 'core' jobs are cleaning, shopping, cooking, washing-up, laundering and ironing.⁴⁴ She also looks after her children, frequently cares for aged parents or other relatives, and is sometimes incorporated to a greater or lesser degree as an unpaid assistant in her husband's work. This aspect of being a wife is visible in many small shops or in the activities of the wives of clergymen and politicians, but the same service is provided, less visibly, to husbands in all kinds of occupations. A wife, for example, contributes research assistance (to male academics), acts as hostess (to a business man's clients), answers the phone and keeps the books (for a small business man).⁴⁵ However, as Christine Delphy has argued, to list the tasks of a housewife tells us only so much. The list cannot explain why exactly the same services can be bought in the market, or why a particular task is performed without pay by a wife, yet she would get paid for providing the service if she worked, for example, in a restaurant or for a firm of contract cleaners.⁴⁶ The problem is not that wives perform valuable tasks for which they are not paid (which has led some feminists to argue for state payment or wages for housework). Rather, what being a woman (wife) *means* is to provide certain services for and at the command of a man (husband). In short, the marriage contract and a wife's subordination as a (kind of) labourer, cannot be understood in the absence of the sexual contract and the patriarchal construction of 'men' and 'women' and the 'private' and 'public' spheres.

One of the features of the unfree labour of the slave, or the labour of a residential servant, is that they must serve their masters at all times. A wife, too, is always available to provide for her husband. Thus, (house)wives work extremely long hours. Evidence from the United States and Soviet Union indicates that there was no significant decrease in the hours that housewives worked each week between the 1920s and 1960s, although a decline may have occurred in the United States between 1965 and 1975. But the decline was from a very high level; American time-budgets in the 1960s and 1970s show that housewives worked around 55 hours each week, and where there was a child under a year old the working week stretched to nearly 70 hours.⁴⁷ Wives in Britain in 1971 worked on average 77

hours a week.⁴⁸ Husbands contribute very little; one recent, very detailed empirical study of the division of conjugal labour in the United States concluded that 'very little could be found that affected how much husbands did.'⁴⁹ The presence of a husband may also increase the workload in the home; 'the husband may be a net drain on the family's resources of housework time - that is, husbands may require more housework than they contribute.' Heidi Hartmann estimates that a husband generates about eight hours extra housework each week.⁵⁰

A wife obtains her means of support ('protection') from her husband, and also the means to perform her tasks. She is dependent on the benevolence of her husband and can only endeavour to obtain a 'good master'. Davidoff's comment about the Victorian and Edwardian husband is not irrelevant today; if he gave his wife 'extra' money, or 'helped' in the house 'it was much in the same tradition as the "kindly" squire and his lady who gave charitable extras to their retainers and villagers.'⁵¹ The services a wife is expected to supply and the amount of support she obtains is entirely dependent on the will of her husband; 'it is impossible for married women to improve their own standard of living by improving their services. The only solution for them is to provide the same services for a richer man.'⁵² However, a wife cannot guarantee that her husband will be generous, whether he is a proletarian or capitalist. Yet economists, for example, have assumed that husbands are always benevolent. The law of coverture haunts neo-classical economic analyses of the family. Economists take for granted that there can be a single welfare function for the whole family; that is to say, the welfare function of the husband - the 'one person' who represents his wife (and children) - can stand for all the rest. Even socialist writers, such as George Orwell in his famous *The Road to Wigan Pier*, were oblivious to the greater poverty and deprivation among working-class wives than among their husbands.⁵³ Wives typically denied themselves the basic necessities so that their husband and children could be fed, and there is no reason to suppose at present, in a period of very high, long-term unemployment and of cuts in welfare benefits, that wives will act any differently. Even at the best of times, there can be conflict between the requirements of the husband's recreations and the (house)wife's demand for support from the breadwinner.

The housewife is frequently presented as being in a very different

position from a worker, a servant or a slave; a housewife is her own boss. Housewives see freedom from control as their great advantage; they stress that they can decide what to do and how and when to do it, and many housewives have strong, internalized standards of what constitutes a good job of work.⁵⁴ Wives, like the strikingly high proportion of male workers who tell investigators that they are satisfied with what, to an outsider, appear to be extremely unsatisfactory jobs, make the best of their lot; life can be insupportable otherwise. Certainly, during the daytime, during 'working hours', the housewife is alone at her place of work, unless her husband also works from his home, or the home is 'above the shop'. But the husband, the boss, is there at other times. Discussions of housework often overlook the expectations and requirements of the husband. The demands of *his* work largely determine how the housewife organizes her time. Meals are served, for instance, according to his hours of work, and he has views about how he wants his home and children to look – and he has means of enforcing his expectations by destruction of meals and physical violence in the last resort.

That wives should be housewives now appears so natural that, in the very popular British television series *Minder*, the wife of one of the two main characters is never seen on the screen and is referred to as 'er indoors'. Some effort is now required to appreciate the historical and cultural specificity of this arrangement. In Britain in the seventeenth century, wives were subordinate to their husbands but they were not economic dependents. Another breach in the law of coverture allowed married women to trade as *feme sole*, and women engaged in a wide variety of occupations. By the middle of the nineteenth century, to have a wife as a full-time housewife had become the goal for husbands of all respectable classes. But, as I have already noted, many or most wives, for a long time, were upper servants, not 'housewives' as the term is now understood. Moreover, only relatively few wives today are full-time housewives, but the continuing strength of the social ideal of the 'housewife' is a tribute to the power of the sexual contract.

Many working-class wives have always been in paid employment from economic necessity. In 1851, a quarter of the married women in Britain were in paid employment.⁵⁵ The social standing of these women under coverture was contradictory to say the least. The status of 'wife' affirmed that a woman lacked the capacities of an 'individual'; she became the property of her husband and stood to

him as a slave/servant to a master. A wife was civilly dead. At the same time, since many wives entered the employment contract, their standing as 'individuals', capable of entering contracts was also affirmed. Just as slave-masters could not but help recognize the humanity of their human property – what use was it to brandish a whip at a mere possession? – women's capacity as 'individuals' could never be denied completely. Entry into the employment contract seems to show beyond any doubt that women possess the requisite capacities to be individuals and parties to contracts. To make a contract in the public world of the capitalist market, to become a wage labourer, presupposes that an individual owns the property in his person; he can then contract out his labour power, part of that property, in the employment contract. Women, too, it seems, can become workers.

Many feminists have argued that a wife's subordination to her husband is like that of worker to capitalist. Not only do women become workers, but the marriage contract is like the employment contract and constitutes the (house)wife as a worker in the conjugal home. To see the marriage contract as if it were an employment contract is, however, to forget the sexual contract once again. A (house)wife is not like a worker, and women cannot become 'workers' in the same sense as men. The marriage contract is not like an employment contract; rather the employment contract presupposes the marriage contract. Or, to make this point another way, the construction of the 'worker' presupposes that he is a man who has a woman, a (house)wife, to take care of his daily needs. The private and public spheres of civil society are separate, reflecting the natural order of sexual difference, and inseparable, incapable of being understood in isolation from each other. The sturdy figure of the 'worker', the artisan, in clean overalls, with a bag of tools and lunch-box, is always accompanied by the ghostly figure of his wife.

One reason why the comparison between wives and workers has been so attractive to feminists is that, like socialists, they have focused on the coercive conditions of entry into contracts. Employers control the means of production and so are able to set the terms of the employment contract to their advantage; workers own only the property in their labour power, and have no genuine choice about whether or not to enter the employment contract. Using the techniques of contemporary analytical philosophy, G. A. Cohen recently argued that proletarians, though formally free not to remain workers

– they can, for example, become small shopkeepers, and a particular worker, or even most workers, are free to escape from the proletariat in this way – nevertheless are forced to sell their labour power; workers are ‘collectively unfree, an imprisoned class’.⁵⁶ Similarly, women collectively are coerced into marriage although any woman is free to remain single. William Thompson compared women’s freedom to decline to marry with that of the freedom of peasants to refuse to buy food from the East India monopoly which had already cornered all the supplies; ‘so by male-created laws, depriving women of knowledge and skill, excluding them from the benefit of all judgment and mind-creating offices and trusts, cutting them off almost entirely from the participation, by succession or otherwise, of property, and from its uses and exchanges – are women kindly told, “they are free to marry or not”’.⁵⁷ In 1909, Cicely Hamilton argued in *Marriage as a Trade* that marriage was virtually the only way in which women could earn their livelihood; marriage is ‘essentially . . . a commercial or trade undertaking’.⁵⁸ Women’s trade differed from the trades of men because women had no choice of employment; there was only one trade for them, which they were compelled to enter.

Today, when many workers, objectively, can obtain the resources to rise into the petite bourgeoisie, so many more women than in the last century, or in 1909, can obtain the educational qualifications and skills that enable them to find jobs and support themselves. Nevertheless, everyday observation reveals that few women are to be found in highly paid positions in the professions or business. The capitalist market is patriarchal, structured by the sexual division of labour. The sexual segregation of the labour force, and the preservation of workplaces as arenas for fraternal solidarity, have remained remarkably stable during the twentieth century.⁵⁹ Most women can find paid employment only in a narrow range of low-status, low-paid occupations, where they work alongside other women and are managed by men, and, despite equal-pay legislation, they earn less than men. Marriage thus remains economically advantageous for most women. Moreover, the social pressures for women to become wives are as compelling as the economic. Single women lack a defined and accepted social place; becoming a man’s wife is still the major means through which most women can find a recognized social identity. More fundamentally, if women exercised their freedom to remain single on a large scale, men

could not become husbands – and the sexual contract would be shaken.

Coercion to enter the marriage or employment contract casts doubt on the validity of the contract; but to concentrate on economic coercion does little to question the practice of contract. If entry into the marriage and employment contracts were voluntary, would feminists and socialists cease their criticism? One difficulty with the comparison of a wife with a worker is that too little attention is paid to the specific manner in which workers are subject to capitalists. The Marxist analysis of capitalist exploitation is applied to conjugal relations. At the meeting of the National Women’s Suffrage Association in 1878 in the United States, it was unanimously agreed that ‘man, standing to woman in the position of capitalist, has robbed her through the ages of the results of her toil’.⁶⁰ A more recent account states that, if we ‘focus on the parallel with the role of the bourgeoisie in relation to the proletariat’, it is clear that the husband ‘benefits directly from the exploitation and oppression of the wife within marriage’.⁶¹ The comparison between workers and wives has been central to the contemporary controversy over the relationship between capitalism and patriarchy. Heidi Hartmann, for example, claims that there is a ‘partnership’, in which ‘the material base upon which patriarchy rests lies most fundamentally in men’s control over women’s labor power’, just as the capitalist controls the worker’s labour power.⁶² And Christine Delphy argues that ‘marriage is the institution by which unpaid work is extorted from a particular category of the populations, women-wives.’ The marriage contract is a work contract, ‘the contract by which [the wife’s] labour power is appropriated by her husband’.⁶³

The *locus classicus* for the argument that wives are like workers is, of course, Engels’ conjectural history of *The Origin of the Family, Private Property and the State*. Engels argues that ‘the first class oppression’ was that of male oppression of the female sex, and he states that ‘within the family [the husband] is the bourgeois and the wife represents the proletariat’. However, he also claims that in the monogamous family the wife became ‘the head servant’, and that ‘the modern individual family is founded on the open or concealed domestic slavery of the wife.’ Engels’ famous statement about the oppression of wives thus uses all three feminist terms of comparison; the upper servant, the slave and the worker. Despite his references to the slave and the servant, Engels treats all subordination as class

subordination; all 'workers' lack freedom in the same way whether they are located in public workplaces or the private workplace of the home, whether they receive protection or the token of free exchange, the wage. Sex is irrelevant to subordination, and the position of wives is best understood as exactly like that of proletarians. Thus, Engels argued that the solution to the subordination of wives in the home was 'to bring the whole female sex back into public industry'.⁶⁴ If wives became public workers like their husbands, the married couple would stand together as equals against capitalism, and the husband would have lost the means through which he could control his wife's labour power in the home.

Engels' solution assumes that the original contract was purely a social contract and that the terms of the social contract are universal; conjugal relations in the family are like those in the market. That is to say, he assumes that men have no stake *as men* in their power over women; a husband's interest in his wife's subordination is exactly like that of any capitalist who has another man labour for him. Engels also assumes that sexual difference is irrelevant in the capitalist market. Once women enter into paid employment then, as workers, they become their husbands' equals. The category of 'worker' is universal and applicable to all who enter the capitalist market and sell their labour power.

Contemporary feminists soon ran into difficulties with these assumptions. When the current revival of the organized feminist movement focused attention on housework, many socialists and feminists assumed initially that what became called 'domestic labour' could be brought within the orthodox Marxist critique of capitalism.⁶⁵ This approach led to a series of dead-ends; little insight could be gained into the subordination of a wife by seeing her merely as another (unpaid) worker in the interest of capital. The theoretical impasse in the domestic labour debate provoked new interest in the concept of patriarchy. Once it was apparent that the subjection of wives could not be subsumed directly under class subordination, the way was opened for new theoretical categories to be used to understand conjugal power. However, as the 'dual systems' account of the relationship between capitalism and patriarchy illustrates, patriarchy is all too frequently merely joined to existing analyses of class. The model of bourgeois and proletarian is still seen as appropriate for marriage, even though the husband's appropriation of his wife's labour is also seen as patriarchal power. That the wife's subjection

derives from the fact that *she is a woman* has received acknowledgment, but the full political implications of patriarchal right remain obscured.

The dual systems argument assumes that patriarchy is a feudal relic, part of the old world of status, and that feminist criticism of this relic must be added to the existing socialist critique of capitalism. But 'class' and the 'worker' can wear the trousers (to borrow a formulation that philosophers are fond of using) in the 'partnership' between capitalism and patriarchy only because half the original contract is ignored. No hint is given that capitalism and class have been constructed as modern patriarchal categories. The *social* contract is about the origins of the civil sphere and capitalist relations. Without the *sexual* contract there is no indication that the 'worker' is a masculine figure or that the 'working class' is the class of men. The civil, public sphere does not come into being on its own, and the 'worker', his 'work' and his 'working' class cannot be understood independently of the private sphere and his conjugal right as a husband. The attributes and activities of the 'worker' are constructed together with, and as the other side of, those of his feminine counterpart, the 'housewife'. A (house)wife, a woman, naturally lacks the capacities required of a participant in civil life, and thus she cannot participate as a worker on the same basis as her husband. Women have now won civil and juridical standing almost equal to men's, but they are not incorporated into workplaces on the same basis as male workers. The story of the original contract shows how sexual difference gives rise to a patriarchal division of labour, not only in the conjugal home between the (house)wife and her husband, but in the workplaces of civil society.

A (house)wife is not a worker who happens to be located outside the workplace and who is subject to her husband; she is not a 'worker' at all. The work of a housewife – housework – is the work of a sexually subject being who lacks jurisdiction over the property in her person, which includes labour power. But sale of labour power, in contrast to sale of labour or the person, is what makes a man a free worker; the ability to contract out a piece of property in exchange for a wage is, it is held, what distinguishes the worker, the wage labourer, from unfree labourers and slaves. A (house)wife does not contract out her labour power to her husband. She is not paid a wage – there is no token of free exchange – because her husband has command over the use of her labour by virtue of the fact that he is a

man. The marriage contract is a labour contract in a very different sense from the employment contract. The marriage contract is about *women's* labour; the employment contract is about *men's* work.

The connection between the sexual division of labour and the subordination of wives was emphasized in various radical circles in the early nineteenth century, especially by the Owenite co-operative socialists, including William Thompson. They attacked 'single family arrangements' and, in their model communities established between the 1820s and 1840s, they attempted (not altogether successfully) to combat marital subjection through communal forms of housework.⁶⁶ If Marx and Engels had not dismissed their predecessors so summarily and scathingly as utopians, they would have found it far harder to forget the sexual contract, and to treat the private sphere as the politically irrelevant, natural basis from which the worker emerges to contract out his labour power and engage in political struggle in the workplace. Socialist criticism of the employment contract might then have continued to be informed by feminist criticisms of the marriage contract and an appreciation of the mutual dependence of conjugal right and civil equality.

Men resisted their transformation into workers. It was not until late in the nineteenth century that civil society developed into an 'employment society', in which 'work' was the key to citizenship and full (male) employment became the central political demand of the working-class movement.⁶⁷ But while men clung to their older ways of life, they also fought to keep the new status of worker as a masculine privilege. They did not join in their wives' resistance to being turned into housewives. Brecht once wrote of the worker that:

He wants no servants under him,
And no boss over his head.⁶⁸

If this were true of (some? many?) workers in their places of work, it was true of virtually none of them at home. Few husbands were willing to relinquish their patriarchal right to a servant.

The labour of a (house)wife is aptly termed domestic servitude, or, more politely, domestic service. Housework is not 'work'. Work takes place in the men's world of capitalism and workplaces. The meaning of 'work' depends on the (repressed) connection between the private and civil spheres. A 'worker' is a husband, a man who

supports/protects his wife, an economic dependent (subordinate). That is to say, a worker is a 'breadwinner'. The difference between 'work' and what a wife does is established in popular language and in official statistics; the labours of housewives are not included in official measurements of national productivity. The construction of the male worker as 'breadwinner' and his wife as his 'dependent' can be charted in the classifications of the Census in Britain and Australia. In the Census of 1851 in Britain, women employed in unpaid domestic work were 'placed . . . in one of the productive classes along with paid work of a similar kind'. This classification changed after 1871, and by 1911 unpaid housewives had been separated from the economically active population. In Australia, an initial conflict over the categories of classification was resolved in 1890 when the scheme devised in New South Wales was adopted. The Australians divided up the population more decisively than the British, and the 1891 Census was based on the two categories of 'breadwinner' and 'dependent'. Unless explicitly stated otherwise, women's occupation was classed as domestic, and domestic workers were put in the dependent category.⁶⁹

A worker supports/protects his (house)wife by earning a wage. Receipt of a wage in return for contracting out labour power distinguishes the (free) worker from the slave; the worker is a *wage labourer*. There is no free exchange between master and slave; the slave receives only the subsistence (protection) that enables him to continue to labour. The conventional view of the wage is that the crucial token of exchange has no taint of protection and servitude clinging to it. But the 'wage', like the 'worker', is a category that depends on the connection between the civil world of contract and the private realm of protection. A large element of protection remains embodied in the wage. The worker contracts out his labour power, so that he appears to receive a wage as an individual in exchange for the employer's use of his services. Only since equal-pay legislation has been introduced over the past decade or so, is the wage becoming an individual wage. When husbands became 'breadwinners' and their wives became economic 'dependents', the wage became a *family wage*. Wages are paid to the male worker as a husband/breadwinner to maintain himself *and* his dependents, not merely in exchange for the sale of his own labour power. A 'living wage' for a man is a wage that can support himself and his wife and family at a decent level.

The family wage was enshrined in law in Australia in 1907 in the famous Harvester Judgement in the Commonwealth Arbitration Court. Justice Higgins ruled in favour of a legally guaranteed minimum wage – and defined a living wage as sufficient to keep an unskilled worker, his wife and three children in reasonable comfort. Today, it is still 'standard trade union practice to draw up pay claims for low-paid workers which refer to the need to maintain the level of living of a standard married man with two children'.⁷⁰ The worker as protector of his dependents was also seen by political economists as the true creator of the next generation of wage labourers. The father and his family wage, not the mother, provided the necessary subsistence to maintain children. The political economists were thus able to see the mother's labours as 'the raw material on which economic forces acted, the elements of nature with which human [i.e., civil] societies were built'. The father/breadwinner gained 'the status of value-creator'.⁷¹ Or, to make the point a different way, men as wage labourers share in the masculine capacity to create and nurture new political life.

However, the family wage has always been as much an ideal as a reality. Many, perhaps most, working-class families have been unable to survive on the husband's wage alone, and, as feminists pointed out many years ago, not all male workers have families, while many women have had to support dependents, including aged parents. But precisely because the wage has been seen as a family wage, women's earnings have been regarded as a 'supplement' to a husband's wage. Women are assumed to be wives, and wives are assumed to be economically dependent on their husbands, obtaining their subsistence in return for domestic service. Therefore, wages have been sexually differentiated. Women workers are paid less than men – and so an economic incentive for women to become wives is maintained. The conviction that a 'wage' is what is due to a male breadwinner, was nicely illustrated as recently as 1985 in the United States, in the claim that 'women have generally been paid less [than men] because they would work for lower wages, since they had no urgent need for more money. Either they were married, or single and living at home, or doubling up with friends'.⁷²

Women workers have often been invisible in the chronicles of the working class. The figure of the miner, and the solidarity and fraternity that he embodies, has often represented 'the worker', yet in 1931 the British Census recorded twice as many domestic servants

as miners.⁷³ Nor have male workers been eager to have women work alongside them, especially if the women were married. Paid employment for wives threatens both the husbands' right of command over the use of their services and the fraternal order of the workplace itself. In 1843 in Britain, the Poor Law Commissioners noted that the husband 'suffered' if his wife was in paid employment; 'there is not the same order in the cottage, nor the same attention paid to his comforts'.⁷⁴ Whether or not the family wage enabled some sections of the working class to obtain better living standards than would otherwise have been the case (as trades unions claimed), the history of the labour movement leaves no doubt that the insistence on a family wage was an important strategy through which men were able to exclude women from many areas of paid work and bolster the husband's position as master in the home.

Sometimes wives have simply been excluded from employment; for example, women were compelled to resign from the Australian public service upon marriage from 1902 until 1966, and the ban was not lifted in the State of Victoria until as recently as 1973. More generally, women's employment has been restricted by 'protection' due to those who lack ownership of the property in their persons. One of the best known examples is the judgement in the case *Muller v. Oregon* in the United States in 1908, in a period of great conflict over freedom of contract. In 1905 (in *Lochner v. New York*), the Supreme Court ruled that a law limiting the work of male bakers to eight hours per day was unconstitutional. In *Muller v. Oregon* the Court ruled that it was permissible to restrict the working hours of women workers. The Court's reasoning harks back to the story of the sexual contract; the argument appeals to man's strength, woman's physical structure and child-bearing function and her dependance on man. The Court maintained that although 'limitations upon personal and contractual rights may be removed by legislation, there is that in [woman's] disposition and habits of life which will operate against a full assertion of [civil] rights'. Woman is 'properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained'.⁷⁵

For women, the terms of the sexual contract ensure that all men, and not just craftsmen, form an aristocracy of labour. Married women have entered the paid labour force on a large scale over the past thirty years, but husbands can still be found who believe that

their wives must obtain their permission to work; many husbands would prefer their wives to be full-time housewives and try 'to limit and diminish their wife's job'.⁷⁶ Some wives do both their unpaid and paid work at home, often because their husbands prefer them to do outwork. When both spouses leave the home 'to go to work', the action has a very different meaning for the husband than for his wife. Spending eight hours each day in the workplace and bringing home a wage packet is central to masculine identity, to what it means to be a man; in particular, hard, dirty manual labour has been seen as *man's* work. Certain kinds of detailed, clean work have been designated 'women's work', but it does not follow that such work is seen by either men or women as enhancing femininity. Popular receptiveness to the contemporary anti-feminist movement indicates that many people still see paid employment as detracting from womanhood.

Many married women work part time, often because no other jobs are available (in the United States in 1980 almost a quarter of all jobs in the private sector were part-time),⁷⁷ but also because they can then devote the major part of their energies to domestic service, and so avoid conflict with their husbands. A wife who is in paid employment never ceases to be a housewife; instead she becomes a *working wife*, and increases the length of her working day. Evidence from the United States shows that married women workers spend less time on housework than full-time housewives, but their working week is longer, averaging 76 hours. Their husbands, in contrast, do not increase their contribution to domestic tasks, and are able to use the time when they are not at work for leisure activities. Wives continue their domestic service on their 'days off'.⁷⁸ In one British study, 'all the men (except one) drew a strong distinction between part-time and full-time work, a distinction not shared by their wives. What was crucial for the men was that *they* should remain the primary breadwinner.'⁷⁹

The worker is conventionally discussed, by defenders of socialism and capitalism alike, as if the fact of his masculinity and that he is a husband is quite irrelevant to his working-class consciousness. 'Fraternity' is assumed to mean community, not the brotherhood of men. Recent feminist research, especially in Britain, has begun to reveal how the terms of the original fraternal contract are upheld in the everyday life of the workplace and the working-class movement. In *Brothers*, a fascinating study of British printers, Cynthia Cockburn

has shown in detail how the workplace and trades unions are organized as fraternal territory, where 'it was unthinkable' that a girl could be part of an apprenticeship system so clearly 'designed to produce a free *man*', where 'skilled' work is the work done by men, and where manhood is tested and confirmed every day.⁸⁰ One of the most graphic illustrations of the practical strength of the sexual contract in daily life is that both men and women see women workers as less than full members of the workplace.

Women factory workers, doing jobs comparable to those of unskilled male workers, 'still feel they are housewives, even when they are at work'.⁸¹ Other women, doing traditional 'women's work', and working exclusively with other women, also 'saw their job as secondary to their main work *inside* the home'. The women recognized that to enter paid employment was to cross a boundary; they saw their female workplace 'as part of another world - the male one - and therefore essentially dominated by men. Their excursions into it were merely as migrant labour - almost as trespassers'.⁸² Even more strikingly, married women workers who took over their shoe factory and ran it as a democratic co-operative from 1972-6, saw each other 'fundamentally, . . . as wives and mothers'. Despite their identification with the co-operative, their difficult economic and political fight to keep it going and the increased knowledge and confidence that came from running a democratic workplace, they were not 'workers'. The women's perception of themselves is not, as many popular accounts suggest, a consequence of 'socialization'; rather, their consciousness accurately reflects their structural position as women and wives. Their wages were economically necessary, but their husbands still saw wives' incomes as supplementary; the women spent their earnings on 'extras' for their home and their children, so that 'their basic position as economic dependants' remained unchanged. The women also continued to perform domestic service as housewives. Although their responsibilities as workers had increased dramatically, the only change at home was that two husbands began to help with the washing-up. One husband succinctly expressed the law of male sex-right when he commented, 'I don't keep a dog and bark myself.'⁸³

The law of male sex-right operates in the workplace in its other sense, too. Cockburn found that, as in other male clubs, the 'social currency of the composing room is women and women-objectifying talk, . . . the wall is graced with four-colour litho "tits and bums"'.

Even the computer is used to produce life-size print-outs of naked women'.⁸⁴ What is now labelled 'sexual harassment' helps maintain men's patriarchal right in the public world. Women workers are frequently subject to persistent, unwelcome sexual advances, or their promotion or continuing employment is made conditional upon sexual access. Much more is at issue than 'discrimination' in employment. Sexual domination is part of the structure of subordination in the workplace. In another factory, 'sexual banter and pranks became something more than a laugh - it became the language of discipline.'⁸⁵

Such language is very different from the language of contract or exploitation usually used to discuss capitalist employment. The familiar language is used for relations between men; another language, the language of patriarchal discipline, is required for relations between men and women. Even as workers, women are subordinated to men in a different way than men are subordinated to other men. Women have not been incorporated into the patriarchal structure of capitalist employment as 'workers'; they have been incorporated as *women*; and how can it be otherwise when women are not, and cannot be, men? The sexual contract is an integral part of civil society and the employment contract; sexual domination structures the workplace as well as the conjugal home. To be sure, men are also subordinates as workers - but to see the worker as no more than a wage slave fails to capture a vital dimension of his position in civil society; he is that curiosity, an *unfree master*.

When contemporary feminists compare wives with workers they assume that the worker is, at the same time, both a subordinate and a master. The worker who is subordinate to the employer is also a master at home. Many feminists also argue explicitly that, as a husband, the worker emulates the capitalist and appropriates the labour power of his wife. The argument forgets that the marriage contract is not an employment contract in which labour power or services are contracted out for use by another. 'Labour power' is an inappropriate category to use in arguments about conjugal relations, but that is not the only problem when the comparison of workers and wives is put in these terms.

To understand contract, including the employment contract, the category of labour power (services) is vital - but also, as Marx was well aware, extremely misleading. The claim that *labour power* is

contracted out, not labour, bodies or persons, enables proponents of contract to argue that the employment contract, like other contracts about property in the person, constitutes a free relation. When feminists argue that a husband appropriates the labour power of his wife in exactly the same way that a capitalist appropriates the labour power of a worker, they are implicitly joining hands with contract. To compare a wife to a worker because the latter is a subordinate, requires that the idea of labour power is rejected; that is to say, critical attention must be directed to the employment contract along with the marriage contract. To criticize the employment contract is not, as Philmore asserts, to fall into a *reductio ad absurdum* but to add another political fiction, the fiction of labour power, to the political fiction of the original contract.

If a husband did indeed contract for use of his wife's labour power, she would, according to contract doctrine, be a free worker. By accepting the category of labour power at face value, feminists leave themselves unable to criticize other contracts about property in the person, such as the prostitution contract and the contract with the so-called surrogate mother, which are contracts that, necessarily, involve women, and which are defended precisely on the grounds that services (labour power), and nothing more, is contracted out in free, fair exchange. The prostitution and surrogacy contracts (which I shall discuss in detail in chapter 7) are contracts made in the public world of the capitalist market - although they do not spring readily to mind in this context - and their defenders assimilate the two contracts to the paradigm of the free employment contract. For feminists to enter onto the terrain of contract through uncritical use of 'labour power', is to offer contract theorists the opportunity to appear as opponents of patriarchy. Contractarians can argue that a husband is a master only in an uncivil form of marriage. Marriage should become genuinely contractual, like the employment contract, the exemplar of contract. If marriage is a genuinely dissoluble contract, entered by two civil individuals who can, free from constraints, bargain with each other about the disposition of the property in their persons, conjugal relations will finally lose the taint of their coercive, patriarchal past. I shall look at the feminist version of this argument in the next chapter.

The patriarchal construction of 'civil society' is so powerful that most discussion of marriage and employment assume that the employment contract will illuminate the subordination of wives.

That is to say, the public sphere is always assumed to throw light onto the private sphere, rather than vice versa. On the contrary, an understanding of modern patriarchy requires that the employment contract is illuminated by the structure of domestic relations.

A good deal can be learnt about the employment contract by considering its relationship to the domestic labour contracts entered into by a master with his slave, servant and wife. In the 1980s, marriage has still not lost all trace of its 'brutal origins' – and nor has the employment contract. The figures of the worker and the housewife are relatively late arrivals in the story of civil society. The old law of Master and Servant in England, the origins of which went back beyond the Statute of Artificers in the days of Good Queen Bess, was not repealed in its entirety until 1875, when the Employer and Workman Act recognized the formally equal standing of the two parties to the contract. The (domestic) labour contract then became a (civil) employment contract. Before the transformation was completed, legal authorities had great difficulties in deciding exactly how a servant differed from a slave. Britain was not a slave society, but there were considerable numbers of slaves in British families in the seventeenth and eighteenth centuries. In 1772, Lord Mansfield stated that slaves were sold in Britain 'with as little reserve as they would have been in any of our West India possessions'.⁸⁶ At the time, according to the not necessarily reliable figure cited in standard texts, there were some 15,000 blacks in Britain, the majority of whom might have been slaves.

Slaves were first imported in substantial numbers into Britain towards the end of the sixteenth century and, until well into the next century, they were commonly termed servants. In 1677 the Solicitor General ruled that 'negroes ought to be esteemed goods and commodities within the Acts of Trade and Navigation', and their status as property was confirmed in judgements in common law.⁸⁷ British lawyers gave many contradictory opinions and judgements about the status of slaves ranging from the view (1706) that 'by the common law no man can have property in another . . . there is no such thing as a slave by the laws of England'; to the opinion (1729) that 'a slave coming from the West Indies to Great Britain or Ireland, with or without his master, doth not become free, and that his master's property in him is not thereby determined or varied.'⁸⁸ Popular belief held that slavery was outlawed in the Somerset case in 1772 – feminists in the nineteenth century, for example, cited the

case when attacking coverture – but only the forced export of slaves from Britain was prohibited; ownership of the persons of blacks as property was not disturbed. Lord Mansfield, judge in the Somerset case, was clearly not alone when he declared that he hoped the question of human property would never 'be finally discussed. For I wou'd have all Masters think they were Free and all negroes think they were not because then they wo'd both behave better'.⁸⁹

Sir William Blackstone's famous exposition of common law provides a remarkable example of trimming on the question of free and coerced labour (probably to bring his views into line with those of his mentor and patron Lord Mansfield).⁹⁰ In the first edition of the *Commentaries*, in book I, chapter 1, Blackstone wrote that the 'spirit of liberty is so deeply implanted in our constitution, . . . that a slave or negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman'. In the second edition, Blackstone added the clause, 'though the master's right to his service may probably still continue'. By the fourth edition (from which I have been citing Blackstone) his text reads that the slave falls under the protection of the law, 'and so far becomes a freeman; though the master's right to his service may *possibly* still continue'. Certainly, his original statement sat very oddly with another argument in the first edition, in book I, chapter 14 (unaltered in subsequent editions), that:

A slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term.⁹¹

Or, Blackstone might also have added, the slave's status was little different from the subjection for life and the perpetual service required of a wife. Domestic contracts are hard to differentiate from one another.

A worker and the employment contract were separated from a servant and a domestic labour contract only in the late nineteenth century, and contractarians now argue that a (civil) slave contract is

merely an extended employment contract. How then does the free worker differ from servants and slaves? One participant in the controversy over paternalism has stated that 'many perfectly reasonable employment contracts involve an agreement by the employee virtually to abandon his liberty to do as he pleases for a daily period, and even to do (within obvious limits) whatever his boss tells him.'⁹² Such statements beg the question why, if the employment contract creates a free worker, he must 'abandon his liberty', or, perhaps more accurately, the need to ask this question never arises when, for three centuries, contract doctrine has proclaimed that subjection to a master – a boss, a husband – is freedom. Moreover, the problem of freedom is misrepresented here. The question central to contract theory does not involve the general liberty to do as you please, but the freedom to subordinate yourself in any manner that you please. If all involved 'did as they pleased', economic production – and social life – would be very difficult if not impossible. The issue is not abstract, unconstrained liberty, but the social relations of work, production, marriage and sexual life. Are relations between women and men to be politically free, and is there to be collective participation in the task of deciding what is to be produced and how it is to be produced; or is political right to be exercised by men, husbands, bosses, civil masters?

Free labour, or employment, is said to be separated from unfree labour because, first, the worker stands on an equal footing with the employer as a juridically free and equal citizen; second, because the employment contract (unless it is a contract of civil slavery) is temporally limited; third, because unfree labourers receive protection, but the worker receives a wage, the token of a free exchange; and fourth, because a worker does not contract out himself or even his labour, but his labour power or services, part of the property in his person. The worker and the unfree labourer appear to be at opposite poles. The criteria held irrevocably to separate the free wage labourer from an unfree labourer, as I pointed out in chapter 3, are eminently permeable. To be sure, a juridically free and equal citizen cannot be property, but defenders of slavery in the Old South who claimed that the institution originated in a contract, also argued that slaves were not the property of their owners. Consideration of the arguments of the classic contract theorists about the distinction between free and coerced labour also raise grave doubts whether the second criterion is very robust.

The contractarians have performed a service by defending the 'civilized' slave contract, so revealing the extreme fragility of the criterion of temporal limitation of the employment contract as a distinguishing mark of a free worker. Consider Hegel's statement:

I can give [someone else] the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being. By alienating the whole of my time, as crystalized in my work, and everything I produced, I would be making into another's property the substance of my being, . . . my personality.⁹³

Socialists typically respond to such statements by arguing, correctly, that it is virtually impossible to distinguish the piecemeal contracting out of labour power from the alienation of the whole lifetime of a man's labour. But the response does nothing to counter the contractarian argument that to deny the individual the right to alienate the property in his person for as long as he sees fit is an arbitrary restriction. The contractarian argument is unassailable all the time it is accepted that abilities can 'acquire' an external relation to an individual, and can be treated as if they were property. To treat abilities in this manner is also implicitly to accept that the 'exchange' between employer and worker is like any other exchange of material property. Labour power is exchanged for a wage, and receipt of a wage is the third criterion that is held to distinguish a free worker from an unfree labourer.

A worker receives a wage – but the wage is not easily distinguished from protection. I have already shown how the fact that the worker is also a husband/breadwinner means that protection is part of the wage. But protection is also involved in the wage in another sense. Workers are usually bound to employers by more than the cash nexus. Trades unions have won many more benefits for workers than improved wages, and in giant bureaucratic enterprises, run on a day-to-day basis by an hierarchy of managers who enforce impersonal rules, protection is provided in the form of a wide array of extra-wage benefits and perquisites. For example, an American mining company operating in Queensland, Australia, provides housing for employees, carefully graded according to status, and, in the best tradition of the village squire, gives workers' wives two turkeys for Christmas.⁹⁴ Contemporary capitalist managers enforce

workers' obedience by regular evaluations of personal character and work-habits and, at higher levels, loyalty and commitment. That is, they demand 'faithful service', which is valued as highly as productivity.⁹⁵

The reason why the wage embodies protection is that the employment contract (like the marriage contract) is not an exchange; both contracts create social relations that endure over time – social relations of subordination. Marx commented that the capitalist 'obtains the productive force which maintains and multiplies capital', and he obtains this force through a process which is '*qualitatively different from exchange, and only by misuse could it have been called any sort of exchange at all*'.⁹⁶ Ironically, the contractarian ideal cannot encompass capitalist employment. Employment is not a continual series of discrete contracts between employer and worker, but (as Coase made clear) one contract in which a worker binds himself to enter an enterprise and follow the directions of the employer for the duration of the contract. As Huw Benyon has bluntly stated, 'workers are paid to obey.'⁹⁷ The employment contract is open-ended, not a contract of specific performance, and the employer alone gains the ultimate right to decide what the content of the contract will be.

Alan Fox has argued that the Act of 1875 left the employment contract 'virtually unrecognizable as contract'; that is, contract in which the two parties freely bargain. If worker and employer negotiated the terms, duration and conditions of the employment contract until a mutually beneficial result were reached, all aspects of employment would have to be open to negotiation. No employer could accept such an arrangement. Fox argues that 'the damaging implication of pure contract doctrine for the employer would have been that it could not allow him to be the sole judge of whether his rules were arbitrary or exceeded the scope of his authority.'⁹⁸ If unrestricted bargaining took place, the employer's possession of the political right that makes him an 'employer' would have disappeared; hence, instead of 'pure contract' there is the employment contract, which is enforced by the employer. His task is much easier if the wage includes protection that binds the subordinate more closely to the contract. Extra-monetary benefits, or, in the case of the marriage contract, 'generous' housekeeping money or 'help' around the house, are obvious examples. There are, of course, other means to enforce both contracts; husbands use physical violence, there are an im-

pressive array of coercive measures, sanctioned by the state, available to employers and the wider structure of patriarchal capitalism makes disobedience costly for both wives and workers.

Feminist and socialist critics of the marriage contract and employment contract severely weaken their criticism when they rely on the categories 'exchange' and 'labour power'. When argument is couched solely in terms of labour power, critics tend to concentrate on the absence of a fair exchange between capitalist and worker; that is, they concentrate on exploitation (both in the strict Marxist sense of extraction of surplus value and the more popular sense of unjust and unfair treatment). Subordination can then be seen as arising from exploitation (or as part of exploitation) rather than as the relation that makes exploitation possible. Marx provides an illustration of this point. In his polemic against Lassalle in the *Critique of the Gotha Programme*, Marx argues that Lassalle takes wages at face value as payment for the worker's labour, instead of seeing that wages are payment for labour power. Marx stresses that the worker can only gain his livelihood if he works for nothing for a certain time for the capitalist (i.e., the latter expropriates surplus value). Capitalism depends on the extension of this free labour by such means as lengthening the working day; '*consequently*', Marx states, 'the system of wage labour is a system of slavery.'⁹⁹ But wage slavery is not a consequence of exploitation – exploitation is a consequence of the fact that the sale of labour power entails the worker's subordination. The employment contract creates the capitalist as master; he has the political right to determine how the labour of the worker will be used, and – consequently – can engage in exploitation.

If the free worker is to stand at one pole and the slave in his absolute servitude is to stand at the other – or, conversely, if the employment contract is to be extended into the civil slave contract – it is necessary to make a sharp distinction between the sale of the slave himself (he is a commodity or piece of property) and the sale of the worker's labour power (a commodity external to himself, the owner). The 'individual' owns his labour power and stands to his property, to his body and capacities, in exactly the same external relation in which, as a property owner, he stands to his material property. The individual can contract out any of his pieces of property, including those from which he is constituted, without detriment to his self. However, although labour power is property, a

commodity, it is not quite the same as other material property. One difficulty is that,

with most commodities the contract of sale, and acquisition of the use-value, are concluded more or less at the same time. In the case of wage-labour there is a problem for the capitalist in that after hiring the worker he must find ways of enforcing performance of work with desired quality and in maximum quantity.¹⁰⁰

Socialists have not been alone in noticing that labour power is an extremely odd commodity. T. H. Green, for example, a liberal writing in 1881, argued that 'labour . . . is a commodity which attaches in a peculiar manner to the person of man. . . . [Labour] differed from all other commodities inasmuch as it was inseparable from the person of the labourer.' Green insisted that it followed from this peculiarity of labour that freedom of contract, the right of the individual to do what he wills with his own, is never unlimited. He argued that a slave contract cannot be a valid contract, albeit entered into voluntarily, since it prevents any further exercise of a man's freedom and free use of his capacities. Restrictions can legitimately be placed on the sale of this commodity so that all men can remain in a position 'to become a free contributor to social good' and enjoy their freedom on the same footing as others.¹⁰¹ Green does not spell out exactly why it is that the curious attachment of labour power to the person means that freedom of contract must be curtailed. Unless the case is made in full, contractarians can always respond that the restriction is arbitrary paternalism. The question that is bypassed in all the argument about the duration of the employment contract, fair wages and exploitation is *how* this peculiar property can be separated from the worker and his labour. All the parties to the argument, in other words, tacitly accept that individuals own property in their persons.

The answer to the question of how property in the person can be contracted out is that no such procedure is possible. Labour power, capacities or services, cannot be separated from the person of the worker like pieces of property. The worker's capacities are developed over time and they form an integral part of his self and self-identity; capacities are internally not externally related to the person. Moreover, capacities or labour power cannot be used without the worker using his will, his understanding and experience, to

put them into effect. The use of labour power requires the presence of its 'owner', and it remains as mere potential until he acts in the manner necessary to put it into use, or agrees or is compelled so to act; that is, the worker must labour. To contract for the use of labour power is a waste of resources unless it can be used in the way in which the new owner requires. The fiction 'labour power' cannot be used; what is required is that the worker labours as demanded. The employment contract must, therefore, create a relationship of command and obedience between employer and worker.

Capitalist employment, and the argument that the worker is the exemplar of a free labourer, who, paradoxically, can exemplify his freedom by entering into a civil slave contract, depends on the claim that the worker is not a commodity; labour power is the commodity that can be subject to contract. The idea of the individual as owner is thus central to an understanding of the employment contract. That the idea of ownership of property in the person is a *political fiction* is equally central to understanding the employment contract. The political fiction is all too often overlooked today by both socialists and feminists. The worker and his labour, not his labour power, are the subject of contract. The employment contract, necessarily, gives the employer political right to compel the worker to use his capacities in a given manner, or the right to the worker's obedience:

Here is a real peculiarity of labor-power. The enjoyment of the use-value of any other commodity is non-problematic: . . . not so with labor-power. Its 'use value' is not delivered, it is not offered, it is not consumed. It must be extracted. This process of extraction engages the energies of armies of supervisors, time-motion men, guards, spies, and bosses of all descriptions.¹⁰²

In short, the contract in which the worker allegedly sells his labour power is a contract in which, since he cannot be separated from his capacities, he sells command over the use of his body and himself. To obtain the right to the use of another is to be a (civil) master. To sell command over the use of oneself for a specified period is not the same as selling oneself for life as another's property – but it is to be an unfree labourer. The characteristics of this condition are captured in the term *wage slave*.

The term wage slave ceased to be fashionable among socialists a long time ago. In its own way, 'wage slave' is as indispensable as

'patriarchy'. Both terms concentrate the mind on subordination, and, at a time when contract doctrine is so popular, such reminders are necessary if feminist criticism of the marriage contract and socialist criticism of the employment contract are not to tip over into collusion with contractarianism. The attractions of contract for socialists who cling to the political fiction of labour power are not hard to discern. The fiction suggests that capitalism can be replaced by contract-socialism (as it might be called). There is no need, it may seem, for employers to have command over the use of workers' labour or to have an employment contract. What is required is that the conception of the individual owner be universalized. All individuals, as it were, become subcontractors or petty entrepreneurs, and 'employees' and 'wage labourers' disappear. Owners of labour power contract directly with each other about the terms and conditions of work, and so make mutually advantageous use of the property in their persons. Contract-socialism cannot, however, eliminate the need for a boss, as contractarian attempts to amend Coase's argument in the direction of 'pure contract' inadvertently reveal.

A firm, according to Alchian and Demsetz, is a 'privately owned market', and the employer is a 'central common party to a set of bilateral contracts [which] facilitates efficient organization of the joint inputs in team production'. The story they tell is less a political fiction than a political fairy tale. The 'central common party' is claimed to have no more and no less rights than other members of the team; any member is able to terminate his contract if he so desires. However, to avoid the problem of 'shirking' (or free riding) a 'monitor' is required. The monitor, in turn, will be constrained from shirking if he has a right to 'any residual product above prescribed amounts'. To perform his task, the monitor must be able to discipline members of the team and must have the right to revise the terms of individual contracts, and to 'terminate or alter every other input's contract'. He alone has the right to 'expand or reduce membership, alter the mix of membership, or sell the right to be the residual claimant-monitor of the team', but his own association with the team remains unaltered. Alchian and Demsetz suggest that, in the absence of 'several input owners', the classic firm becomes a 'socialist firm'.¹⁰³ In the contract-socialist firm, all the contracting parties are owners of the property in their persons. But 'individuals' are self-interested and thus shirking is an endemic problem. The

only way that bilateral contracts can be enforced is for the contracting parties to turn themselves into bosses (monitors) and wage slaves. To begin with contract in the capitalist market is to end with the firm. Contracts about property in the person inevitably create subordination.

The wage slave is subject to the discipline of the employer - but the workplace is also structured by patriarchal discipline. Women workers are not wage slaves in the same sense as male workers, and nor is the subordination of the wage slave the same as that of a wife. Both employer and husband have right of command over the use of the bodies of workers and wives, but although each husband has his own specific demands, the content of the labour of a housewife is determined by the fact that she is a woman. The content of the labour of the worker is determined by the capitalist, but since capitalism is patriarchal, the labour of women workers is different from that of male workers. Because the subjection of wives derives from their womanhood and because the sexual division of labour extends into the workplace, it is tempting for feminists to conclude that the idea of the individual as owner is anti-patriarchal. If women could be acknowledged as sexually neuter 'individuals', owners of the property in their persons, the emancipatory promise of contract would seem to be realized. Or so many critics of the marriage contract now argue.

Feminism and the Marriage Contract

From at least 1825, when William Thompson published his attack on the 'white slave code' of marriage, feminists have persistently criticized marriage on the grounds that it is not a proper contract. In 1860, for example, Elizabeth Cady Stanton stated, in a speech to the American Anti-Slavery Society, that 'there is one kind of marriage that has not been tried, and that is a contract made by equal parties to lead an equal life, with equal restraints and privileges on either side.'¹ Marriage is called a contract but, feminists have argued, an institution in which one party, the husband, has exercised the power of a slave-owner over his wife and in the 1980s still retains some remnants of that power, is far removed from a contractual relationship. Some recent discussions of marriage assume that conjugal relations are purely contractual - 'husbands and wives contractually acquire for their exclusive use their partner's sexual properties'² - and feminists sometimes take criticism of the marriage contract to contractarian conclusions. One feminist legal scholar, for example, has argued that marriage should be modelled on economic contracts and that there should be a move from 'public marital policy to private contract law'.³ However, not all feminist critics of the marriage contract conclude that marriage should become a purely contractual relationship.

Marriage, according to the entry under 'contract' in the *Oxford English Dictionary*, has been seen as a contractual relationship since at least the fourteenth century, and Blackstone states that 'our law considers marriage in no other light than as a civil contract'.⁴ The attraction of contractual marriage for feminists is not hard to see. Feminist criticism takes a 'contract' to be an agreement between two equal parties who negotiate until they arrive at terms that are to

their mutual advantage. If marriage were a proper contract, women would have to be brought into civil life on exactly the same footing as their husbands. Many feminists, especially in the United States, now advocate what are called 'intimate contracts' or 'marriage contracting' instead of the marriage contract.⁵ Negotiation of a clear-cut agreement, that may even include advance provision for dissolution, has obvious advantages over the marriage contract. Critics of marriage contracting have pointed out that, since few women can earn as much as men, only a few middle-class and professional women are likely to be in a position to negotiate an intimate contract. But the problems with a purely contractual view of marriage run much deeper.

Feminist writers have stressed the deficiencies of a contract in which the parties cannot set the terms themselves. They have also pointed to the respects in which the marriage contract differs from economic contracts, but, by and large, their criticisms offer little insight into *why* this contract is so curious. Nor have they explained why legal authorities, despite Blackstone's firm statement, have also expressed similar doubts about the contractual character of marriage. For example, in Schouler's *A Treatise on the Law of the Domestic Relations* we find, 'we are then to consider marriage, not as a contract in the ordinary acceptance of the term; but as a contract *sui generis*, if indeed it be a contract at all; as an agreement to enter into a solemn relation which imposes its own terms.'⁶ A few years later, in 1888, a judge in the United States stated:

when the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, . . . It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law.⁷

More recently, in a reference to marriage towards the end of *The Rise and Fall of Freedom of Contract*, Atiyah remarks that 'we are not here dealing with matters conventionally classified as contract.'⁸ But legal writers are very reticent about why the marriage contract is unlike other contracts.

Blackstone explained the singular situation of married women as follows; under coverture, for a man to contract with his wife, 'would

be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage'.⁹ Blackstone, like the classic contract theorists, assumes that women both are, and are not, able to enter contracts. If a man and a woman agreed to draw up the terms of their contract when they married, the contract would be void. A married woman lacks a civil existence so she could not have made a contract with her husband. No wonder there are still problems about the contractual character of marriage! To concentrate on the defects of the marriage contract as contract deflects attention from the problems surrounding women's participation in this agreement. In particular, enthusiastic embrace of contractarianism by some contemporary critics presupposes that contract is unproblematic for feminists. The solution to the problem of the marriage contract is presented as completion of the reforms that have eroded coverture; wives can take their place as 'individuals', and contract appears once again as the enemy of the old world of status or patriarchy. All the anomalies and contradictions surrounding women and contract, brought to light in the story of the sexual contract, remain repressed.

William Thompson's *Appeal of One Half the Human Race, Women, Against the Pretensions of the Other Half, Men, to Retain them in Political, and Thence in Civil and Domestic, Slavery*, laid the foundation for subsequent feminist criticism of marriage as a contractual relation. The vehemence of his polemic has rarely been equalled, but Thompson places little weight on a proper contract as a solution to the problems of conjugal relations. In this respect, his argument differs not only from much contemporary feminist argument but also from John Stuart Mill's much better known *The Subjection of Women*. According to Thompson, political rights for women and an end to the economic system of individual competition (capitalism) are the crucially important changes that are needed. Only political rights can bring an end to 'the secrecy of domestic wrongs',¹⁰ and free relations between the sexes will be possible only within a social order based on 'labour by mutual co-operation', or co-operative socialism.

Thompson built model dwellings for his workers on his Cork estate and established mechanics institutes – he argued that women should be admitted to the institutes, to libraries and other educational establishments. He worked out a detailed scheme for co-operative communal socialism but he died before his plan could be fulfilled. The co-operative or utopian socialists included communal house-

work in their blueprints for their new communities and, in the *Appeal*, Thompson emphasizes that provision for children, for instance, would be a communal responsibility. When women contributed to all the work of the community along with men, and could make equal call on communal resources in their own right, the basis of sexual domination would be undermined. When man had 'no more wealth than woman, and no more influence over the general property, and his superior strength [is] brought down to its just level of utility, he can procure no sexual gratification but from the voluntary affection of woman'.¹¹ Once women had secured their civil and political rights and were economically independent in the new world of voluntary co-operation, they would have no reason to be subject to men in return for their subsistence and men would have no means to become women's sexual masters.

The *Appeal* was occasioned by the argument of John Stuart's father, James Mill, that women did not need the vote because their interests were subsumed in the interests of their fathers or their husbands. Unlike his fellow utilitarians then and now, and the economists who incorporate members of the family into one welfare function, Thompson extended his individualism to women. He argued that the interests of each individual member of a family must be counted separately and equally. Individual interests of wives and daughters could not be subsumed under those of the master of the family, nor could his benevolence be assumed to be sufficient to ensure that their interests were protected. Thompson says that close examination must be made of the 'so mysteriously operating connexion in marriage', and of the 'moral miracle, of the philosophy of utility of the nineteenth century – of reducing two identities into one'.¹² The marriage contract was the means through which the 'moral miracle' was wrought, but it was anything but a contract. Thompson cries that it is an 'audacious falsehood' to refer to marriage as a contract.

A contract! where are any of the attributes of contracts, of equal and just contracts, to be found in this transaction? A contract implies the voluntary assent of both the contracting parties. Can even both the parties, man and woman, by agreement alter the terms, as to *indissolubility* and *inequality*, of this pretended contract? No. Can any individual man divest himself, were he even so inclined, of his power of despotic control? He cannot. Have women been consulted as to the terms of this pretended contract?¹³

Women were forced to enter into this supposed contract. Social custom and law deprived women of the opportunity to earn their own living, so that marriage was their only hope of a decent life. The marriage 'contract' was just like the contract that the slave-owners in the West Indies imposed on their slaves; marriage was nothing more than the law of the strongest, enforced by men in contempt of the interests of weaker women.

Thompson makes the very important point that no husband can divest himself of the power he obtains through marriage. I have found in discussing this subject that confusion easily arises because we all know of marriages where the husband does not use, and would not dream of using, his remaining powers, and it thus seems that feminist criticism is (today, at least) very wide of the mark. But this is to confuse particular examples of married couples with the *institution* of marriage. Thompson carefully draws a distinction between the actions of any one husband and the power embodied in the structure of the relation between 'husband' and 'wife'. To become a 'husband' is to attain patriarchal right with respect to a 'wife'. His right is much diminished today from the extensive power he enjoyed in 1825, but even if a man does not avail himself of the law of male sex-right, his position as a husband reflects the institutionalization of that law within marriage. The power is still there even if, in any individual case, it is not used. Christine Delphy makes the same point: 'the particular individual man [may] not play a personal role in this general oppression, which occurs before his appearance on the scene: but, reciprocally, no personal initiative on his part can undo or mitigate what exists before and outside his entrance'.¹⁴ Thompson adds the further important observation that, even if a husband renounces his power, his wife's freedom is always contingent on his willingness to continue the renunciation.

Some husbands may, as Thompson puts it, allow their wives equal pleasure to their own. However, the wife's enjoyment depends entirely on the benevolence of her husband and what he does, or does not, *permit* her to do. The husband can make the marital home into a prison and cut off 'his household slave from all sympathy but with himself, his children, and cats or other household animals'. A wife can be excluded from all intellectual and social intercourse and pleasures, and can be prevented from forming her own friendships: 'is there a wife who dares to form her own acquaintances amongst women or men, without the permission, direct or indirect, of the

husband . . . or to retain them when formed?'¹⁵ If a husband chooses to forego all his legal powers, his wife still has 'but the pleasures of the slave, however varied', because her actions are always contingent upon the permission of her husband.¹⁶ Thompson claims that in these matters wives are worse off than the female slaves of the West Indies, and husbands have wider jurisdiction than slave-masters.

In one respect the marriage contract differs from slavery or from the extended employment contract of civil slavery. Slavery originated in and was maintained through physical coercion. In the civil slave contract, like the employment contract, service (labour power) is exchanged for subsistence or wages. Civil slavery cannot be maintained through time unless the worker (slave) is obedient to the commands of the employer; obedience is constitutive of contract. As Thompson emphasizes, in the marriage contract a wife explicitly agrees to obey her husband. The marriage contract is distinguished by reserving for wives 'this gratuitous degradation of swearing to be slaves'. Thompson wonders why it is that men do not find the 'simple pleasure of commanding to be sufficient, without the gratification of the additional power of taunting the victim with her pretended *voluntary* surrender of the control over her own actions?'.¹⁷ The vow of obedience is now no longer always included in the marriage ceremony but nor has it entirely disappeared, and I shall come back to this feature of the marriage contract.

Just as wives' social pleasures depend on the benevolence of their husbands, so, Thompson argues, do their sexual pleasures. In his brief conjectural history of the origins of marriage, Thompson speculates that men's sexual desires led them to set up 'isolated breeding establishments, called married life', instead of using women merely as labourers.¹⁸ With the establishment of marriage and the pretence of a contract, men's domination is hidden by the claim that marriage allows equal, consensual sexual enjoyment to both spouses. Husbands, it is held, depend upon the voluntary compliance of their wives for their pleasure. Thompson declares this to be an 'insulting falsehood'; a husband is physically strong enough, and is allowed by public opinion and the law, to compel his wife to submit to him, whether she is willing or not. She, however, has no right to enjoyment at all; she can beg, like a child or a slave, but even that is difficult for women who are not supposed to have sexual desires. Thompson concludes that 'sexual desires increase

tenfold the facility of exercising, and of continuing for life, the despotism of men in marriage.'¹⁹ Thompson's argument implies that, to bring the audacious falsehood of the marriage contract to an end, not only sweeping political and economic changes are required, but also a radical change in what it means to be a masculine or feminine sexual being; the original contract must be declared null and void.

Four decades later, John Stuart Mill drew much less far-reaching conclusions from his attack on the marriage contract as a contract. In some ways this is rather surprising, since there are some striking parallels between Mill's arguments in *The Subjection of Women* and Thompson's *Appeal*. But there are also some important differences. The suggestion has recently been made that Mill had 'unconsciously' taken over Thompson's argument 'almost word for word'.²⁰ Be that as it may, it is curious that Mill does not mention Thompson, whom he met in 1825, the year that the *Appeal* was published. Mill was sympathetic to co-operative socialism, and in the 1820s and 1830s he went to meetings at the South Place Chapel in London, a radical gathering-place, where Anna Wheeler sometimes lectured. Anna Wheeler's contribution to the *Appeal*, which has come down to us with William Thompson's name on the cover, is, perhaps, more clear cut than Harriet Taylor's role in *The Subjection of Women*, published in the name of John Stuart Mill.

Women had a very large hand in both the *Appeal* and *The Subjection of Women*. The controversy about the contribution of Harriet Taylor to Mill's works has continued for many years, and offers a fascinating glimpse into the patriarchal bastion of political philosophy, often fiercely defended by women; Diana Trilling, for instance, announced that Harriet Taylor had 'no touch of true femininity', no intellectual substance, and was 'a monument of nasty self-regard, as lacking in charm as in grandeur' - clearly quite unfitted to associate with a male theorist admitted to the pantheon of Great Western Philosophers. Gertrude Himmelfarb has blamed Taylor's undue influence for Mill's lapses from the path of moderation, most notably in his feminism. Philosophers must clearly choose their wives with care or women's natural political subversion will undermine the work of the mind.²¹ As a friend of a writer ignored by political theorists and dismissed by Marxists as utopian, Anna Wheeler has suffered only from neglect. In the 'Introductory Letter to Mrs. Wheeler', with which Thompson opens the *Appeal*, he states

that he had hoped that she would continue the work begun by Mary Wollstonecraft, 'but leisure and resolution to undertake the drudgery of the task were wanting.' Only a few pages were written by Anna Wheeler herself; 'the remainder are our joint property, I being your interpreter and the scribe of your sentiments.'²²

John Stuart Mill was one of the rare men who not only supported the feminist movement but attempted to put his sympathies into practice. His criticism of the marriage contract was summed up in a statement that he drew up two months before he and Harriet Taylor were married in 1851. Mill completely rejected the legal powers that he would acquire as a husband - though his rejection had no legal standing - undertaking 'a solemn promise never in any case or under any circumstances to use them'. He states that he and Harriet Taylor entirely disapproved of existing marriage law, because it 'confers upon one of the parties to the contract, legal power and control over the person, property and freedom of action of the other party, independent of her own wishes and will'. Mill concluded his declaration by stating that Harriet Taylor 'retains in all respects whatever the same absolute freedom of action and freedom of disposal of herself and of all that does or may at any time belong to her, as if no such marriage had taken place; and I absolutely disclaim and repudiate all pretension to have acquired any such rights whatever by virtue of such marriage'.²³

Mill agrees with Thompson on several issues. He argues, for example, that women have no alternative, they are compelled to marry. 'Wife' is the only position that their upbringing, lack of education and training, and social and legal pressures realistically leave open to them. Mill also distinguishes between the behaviour of individual husbands and the structure of the institution of marriage. He argues that defenders of existing marriage law rely on the example of husbands who refrain from using their legal powers, yet marriage is designed for every man, not merely a benevolent few, and it allows men who physically ill-treat their wives to do so with virtual impunity. Again, like Thompson, Mill argues that to become a wife is tantamount to becoming a slave, and in some ways is worse; a wife is the 'actual bond-servant of her husband: no less so, as far as legal obligation goes, than slaves commonly so called'.²⁴ Mill is much more reticent than Thompson about a wife's sexual subjection, although, as I have already noted, he drew attention to the right of a husband to compel his wife to grant his 'conjugal rights'.

Where Mill parts company with Thompson is that he denies that there is any connection between conjugal domination and a wife's position as housewife and economic dependant. Mill calls for reform of marriage law to bring the marriage contract in line with other contracts. Echoing Pufendorf, he notes that 'the most frequent case of voluntary association, next to marriage, is partnership in business', but marriage compares very unfavourably with business. No one thinks that one partner in a business must be the absolute ruler; who would enter a business partnership if that were the case? Yet, if power were placed in the hands of one man, the arrangement would be less dangerous than in marriage, since the subordinate partner can always terminate the contract; such a course is not open to a wife (and Mill, who was very cautious in public on the highly charged question of divorce, adds that even if a wife could withdraw from a marriage she should do so only as a last resort). In business, theory and experience both confirm that the appropriate arrangement is for the conditions of partnership to be negotiated in the articles of agreement. Similarly, Mill argues, in marriage, the 'natural arrangement' is a division of powers between husband and wife, 'each being absolute in the executive branch of their own department, and any change of system and principle requiring the consent of both'.

How is the division to be made? Mill suggests, on the one hand, that an arrangement will be made according to the capacities of the partners; they could 'pre-appoint it by the marriage contract, as pecuniary arrangements are now often pre-appointed'. On the other hand, as feminist critics have recently pointed out, Mill is ultimately inconsistent in his argument. He falls back on the appeals to custom and nature that he had rejected at an earlier stage of his argument in *The Subjection of Women*. Mill, like the classic social contract theorists, assumes that sexual difference necessarily leads to a sexual division of labour, a division that upholds men's patriarchal right. He remarks that, because a husband is usually older than his wife, he will have more authority in decision-making, 'at least until they both attain a time of life at which the difference in their years is of no importance'. However, he does not say why the husband would be willing to relinquish his power, or how the appropriate time of life is to be recognized. Again, Mill notes that the spouse (and he disingenuously writes, 'whichever it is') who provides greater support will have a greater voice, but his own argument ensures that the wife's voice will remain subordinate.²⁵

Mill states that when the family is reliant on earnings for support, 'the common arrangement, by which the man earns the income and the wife superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons.' Mill assumes that when women have equal opportunity in education and thus 'the power of earning', and marriage has been reformed so that husbands are no longer legally sanctioned slave-masters, a woman, by virtue of becoming a wife, will still choose to remain in the home, protected by her husband. He explicitly equates a woman's choosing to marry with a man's choice of a career. When a woman marries and has a household and family to attend to, she will renounce all other occupations 'which are not consistent with the requirements of this'.²⁶ Even if marriage became a freely negotiable contract, Mill expected that women would accept that they should render domestic service.

Harriet Taylor was much closer to William Thompson on this issue. In 1851 in *The Enfranchisement of Women*, she responded to the objection that opening all occupations to both sexes on merit would lead to too many competitors and the lowering of wages and salaries. Taylor argued that, at worst, such an enlargement of opportunity for women would mean that a married couple could not then earn more than the man could now earn on his own. The great change would be that the wife 'would be raised from the position of a servant to that of a partner'. As long as economic life was governed by competition the exclusion of half the competitors could not be justified. She added that she did not believe that 'the division of mankind into capitalists and hired labourers, and the regulation of the reward of labourers mainly by demand and supply, will be for ever, or even much longer, the rule of the world'.²⁷

Most of the reforms to marriage law demanded by feminists in the nineteenth century have now been enacted. Nevertheless, contemporary feminists still emphasize that the marriage contract diverges in significant respects from other contracts. Some of their arguments resemble those of Thompson and Mill, others highlight yet further peculiarities of marriage as a contract.²⁸ For example, contemporary feminists point out that the marriage contract, unlike other valid contracts, requires that one party gives up the right to self-protection and bodily integrity. They have also pointed out that the marriage contract does not exist as a written document that is read and then

signed by the contracting parties. Generally, a contract is valid only if the parties have read and understood its terms before they commit themselves. If very large amounts of property are involved in a marriage today, a contract will sometimes be drawn up that resembles much older documents, common when marriage was a matter for fathers of families and not the free choice of two individuals. The fact that most marriages lack any document of this kind, illustrates one of the most striking features of the marriage contract. There is no paper headed 'The Marriage Contract' to be signed. Instead, the unwritten contract of marriage, to which a man and a woman are bound when they become husband and wife, is codified in the law governing marriage and family life.²⁹

There is another reason, too, why there is no written document. A man and a woman do not become husband and wife by putting their signatures on a contract. Marriage is constituted through two different acts. First, a prescribed ceremony is performed during the course of which the couple undertake a speech act. The man and woman each say the words 'I do'. These words are a 'performative utterance'; that is to say, by virtue of saying the words, the standing of the man and woman is transformed. In the act of saying 'I do', a man becomes a husband and a woman becomes a wife. Bachelors and spinsters are turned into married couples by uttering certain words – but the marriage can still be invalidated unless another act is performed. Second, the marriage must also be 'consummated' through sexual intercourse. Kant was emphatic about this:

The Contract of Marriage is completed only by conjugal cohabitation. A Contract of two Persons of different sex, with the secret understanding either to abstain from conjugal cohabitation or with the consciousness on either side of incapacity for it, is a *simulated Contract*; it does not constitute a marriage.³⁰

The story of the sexual contract explains why a signature, or even a speech act, is insufficient for a valid marriage. The act that is required, the act that seals the contract, is (significantly) called *the sex act*. Not until a husband has exercised his conjugal right is the marriage contract complete.

Contemporary feminists have also emphasized the fact that a married couple cannot determine the terms of the marriage contract to suit their own circumstances. There is not even a choice available between several different contracts, there is only *the* marriage

contract. Married women first obtained some power to contract for themselves after Married Women's Property Acts were passed in the nineteenth century – in Britain a wife's personal liability for contracts was acknowledged by Parliament only in 1935 – but, as Lenore Weitzman has noted, despite major reforms since then, two legal restrictions have been maintained on contract between husband and wife. 'First, no contract could alter the essential elements of the marital relationship, and second, no contract could be made in contemplation of divorce.' A married couple cannot contract to change the 'essentials' of marriage, which are seen as 'the husband's duty to support his wife, and the wife's duty to serve her husband'.³¹ The relation of protection and obedience cannot legally be altered, so that, for example, a married couple cannot contract for the wife to be paid by her husband for her work as a housewife. Couples do have some scope for making their own arrangements, but it is important to note that William Thompson's point about the permission of the husband remains relevant; individual variations are made within 'a relationship of *personal* dependency. The couple work out together what the husband wants [the wife] to do . . . within certain general parameters'.³² The general parameters are set by the law governing marriage, and feminist legal scholars often follow other legal authorities in arguing that, therefore, marriage is less a contract than a matter of *status*.

But 'status' in which sense? Some discussions suggest that the old world of status has lingered on into the modern world. Thus, in *The Subjection of Women*, John Stuart Mill argues that 'the law of servitude in marriage is a monstrous contradiction to all the principles of the modern world', and that women's subordination is 'a single relic of an old world of thought and practice exploded in everything else'. The 'peculiar character of the modern world . . . [is] that human beings are no longer born to their place in life, . . . but are free to employ their faculties, and such favourable chances as offer, to achieve the lot which may appear to them most desirable'.³³ At present this principle applies only to men; to be born a woman still entails that a place in life is already waiting. Marriage, Mill argues, must thus be brought into the modern world; the relics of status must be eliminated and marriage must be moved from status to contract. In the old world of status, men and women had no choice about the social positions they occupied as husbands and wives. Mary Shanley has remarked of marriage in the seventeenth

century, that 'the "contractual" element in marriage [was] simply the *consent* of each party to marry the other, . . . To contract a marriage was to consent to a status which in its essence was hierarchical and unalterable'.³⁴ Feminist critics of the marriage contract often make a similar point about contemporary marriage; for example, the marriage contract 'is not, in fact, a contract between the spouses, but rather they agree together to accept a certain (externally defined) status'.³⁵

Emphasis on 'status' as an externally defined position overlaps with 'status', as used by legal writers, to refer to regulation of, and restriction on, freedom of contract by the state. Status, they argue, is then incorporated into contract. Feminist legal scholars, too, present marriage as either an exception to the movement from status to contract or as part of a reversal back to status. For example, Weitzman argues that marriage is not yet a contract, in which the parties freely negotiate the terms, but has moved 'from a status to a status-contract'. Men and women can choose whether or not to marry, just as they choose whether or not to enter other contracts, but, once they decide to marry, 'the contract analogy fails, because the terms and conditions of the relationship are dictated by the state. The result is that marital partners have lost the traditional privileges of status and, at the same time, have been deprived of the freedom that contract provides'.³⁶ Marjorie Shultz recognizes that there has been a shift from Maine's use of 'status' to 'legal conditions imposed on the individual by public law, not usually as a result of birth characteristics, but through choice or consent'. Nevertheless, she still refers to a movement from contract back to status. In marrying, 'spouses can contract into a status "package" with little control over its substantive terms.' She argues that the movement from contract should be reversed; marriage should be purely a matter of contract, since contract 'offers a rich and developed tradition whose principal strength is precisely the accommodation of diverse relationships'.³⁷ Exactly; the contract tradition can even accommodate the relation between master and slave.

To argue for the assimilation of marriage to the model of economic contract in the heyday of freedom of contract (if such a period ever existed) is to assume that the public and private worlds can be assimilated and to ignore the construction of the opposition between the world of contract and its 'natural foundation' within civil society. Contract appears as the solution to the problem of patri-

archal right (status) because contract is seen as a universal category that can include women. Contract in the public world is an exchange between equals (between 'individuals') so it appears that, if contract is extended into the private sphere, inequalities of status between men and women in marriage must disappear. The husband exercises political right over his wife, and only men can be 'husbands'. Status in yet another sense must also be replaced by contract.

Contemporary feminist critics have pointed out that, unlike other contracts, the marriage contract cannot be entered into by any two (or more) sane adults, but is restricted to two parties, one of whom must be a man and the other a woman (and who must not be related in certain prescribed ways). Not only does a 'husband' obtain a certain power over his wife whether or not he wishes to have it, but the marriage contract is sexually ascriptive. A man is always a 'husband' and a woman is always a 'wife'. But what follows from this criticism? The argument that marriage should become a properly contractual relation implies that sexual difference is also an aspect of 'status'. Legal writers argue that there has been a movement back from contract to status because substantive social characteristics of parties to contracts are treated as relevant matters in decisions whether certain contracts should be permitted or regulated. Freedom of contract (proper contract) demands that no account is taken of substantive attributes – such as sex. If marriage is to be truly contractual, sexual difference must become irrelevant to the marriage contract; 'husband' and 'wife' must no longer be sexually determined. Indeed, from the standpoint of contract, 'men' and 'women' would disappear.

The completion of the movement from status to contract entails that status as sexual difference should disappear along with 'status' in its other senses. There can be no predetermined limits on contract, so none can be imposed by specifying the sex of the parties. In contract, the fact of being a man or a woman is irrelevant. In a proper marriage contract two 'individuals' would agree on whatever terms were advantageous to them both. The parties to such a contract would not be a 'man' and a 'woman' but two owners of property in their persons who have come to an agreement about their property to their mutual advantage. Until recently, there was no suggestion that status in the sense of sexual difference would also give way to contract. To sweep away the last remnants of status in marriage can have consequences not foreseen by Thompson or Mill who did not

object to the fact that *women* became wives; they strongly objected to what being a *wife* entailed. Earlier feminist attacks on the indissoluble marriage contract and its non-negotiable terms were directed at the husband's conjugal right, not at the sexually ascriptive construction of 'wife' and 'husband'. The contemporary attack on sexual difference, apparently much more radical than older arguments, suffers from an insuperable problem; the 'individual' is a patriarchal category. Contract may be the enemy of status, but it is also the mainstay of patriarchy. Marriage as a purely contractual relation remains caught in the contradiction that the subjection of wives is both rejected and presupposed, a point illustrated in the argument over the marriage contract between Kant and Hegel.

The contractual conception of marriage presupposes the idea of the individual as owner. The marriage contract establishes legitimate access to sexual property in the person. Kant was the contract theorist who came closest to presenting a view of marriage as nothing other than a contract of sexual use. Marriage, for Kant, is 'the Union of two Persons of different sex for life-long reciprocal possession of their sexual faculties'.³⁸ Locke remarked that marital society established through the marriage contract, 'consist[s] chiefly' in the spouses' 'Communion and Right in one another's Bodies'.³⁹ But, as the story of the original sexual contract reveals, the right is not to one another's bodies; the right is that of masculine sex-right. Kant endorsed the sexual contract, but, paradoxically, he also rejected the idea of the individual as owner of the self (property in the person) and he had to go to some rather startling lengths to maintain a self-consciously contractual view of marriage.

Kant's view of marriage offers a particularly clear example of the simultaneous denial and affirmation that women are 'individuals', or in Kant's terminology, 'persons'. On the one hand, his philosophy rests on the assumption that, by virtue of being human, everyone has reason, and so possesses the capacity to act according to universal moral laws and to participate in civil life. On the other hand, human capacity is sexually differentiated. Women lack political or civil reason. Kant's rather banal observations on the characters of the sexes owe everything to Rousseau. He tells us that women are creatures of feeling, not reason, so that it is useless to attempt to enlarge women's morality to encompass universal rules. Women only act if the action is pleasing to them. They are incapable

of understanding principles so, for women, the good must be made pleasing. Women know 'nothing of *ought*, nothing of *must*, nothing of *due*'.⁴⁰ The tenaciousness with which male philosophers cling to the sexual contract is illustrated by the recent comment that, 'whatever Kant's conclusion about woman's role, his analysis of her condition is still worthy of his great name.'⁴¹

Men are governed by reason and are their own masters. Self-mastery is demonstrated in the way a man gains his livelihood, by 'not allowing others to make use of him; for he must in the true sense of the word *serve* no-one but the commonwealth'. If social circumstances require a man to be another's servant or enter into the employment contract and labour at the behest of another, he lacks the criterion for possession of a 'civil personality' and so is excluded from citizenship. Kant attempts to distinguish men who serve others, such as a barber or labourer, from a wig maker or tradesman who is an independent master. A tradesman, for instance, 'exchanges his property with someone else', while the labourer 'allows someone else to make use of him'. Kant, rather despairingly, adds that it is hard to define the criteria for self-mastery.⁴² Or, at least, it is hard in the case of *men*, because all men have the potential for self-mastery; mere accidents of fortune and circumstance make some men servants, used by another, and disqualify them as civil personalities or individuals. The case of women appears to pose no difficulties.

Kant states that 'women in general . . . have no civil personality, and their existence is, so to speak, purely inherent.'⁴³ They must, therefore, be kept well away from the state, and must also be subject to their husbands – their masters – in marriage. Kant claims that birth cannot create legal inequality because birth is not an act on the part of one who is born. He argues that the equality of legal subjects cannot be forfeited through contract; 'no legal transaction on his part or on that of anyone else can make him cease to be his own master.'⁴⁴ Kant fails to mention that the marriage contract is an exception to this argument. Even if women were men's civil equals, they would forfeit their standing upon entering into the marriage contract. But all women lack a civil personality and so the marriage contract merely confirms the natural sexual inequality of birth. At the same time, Kant's contractual view of marriage presupposes that his own explicit statement about women's 'inherent' lack of civil standing is invalid. If civil equality between the sexes does not exist, if women are not property owners and their own masters, Kant

cannot sustain his curious category of 'personal right' and his account of the marriage contract.

Personal right, Kant writes, 'is the Right to the *possession* of an external object as a Thing and the *use* of it as a Person'.⁴⁵ The marriage contract takes a different form from other contracts. In the marriage contract an individual acquires a right to a person – or, more exactly, as Kant states, 'the Man acquires a Wife'⁴⁶ – who thus becomes a *res*, a thing, a commodity or piece of property. But because both parties become things, and each is the possession of the other, they both, according to Kant, thereby regain their standing as 'rational personalities'. They make use of each other not as property but as persons. Kant's discussion of the idea of personal right and his argument about how and why a married couple must be things and persons is tortuous – and contradictory.

He states that there is always a danger that sexuality will bring humans down to the level of the beasts. The question, according to Kant, is 'how far [a man] can properly make use of [this desire from nature] without injury to his manhood. . . . Can [the sexes] sell themselves or let themselves out on hire, or by some other contract allow use to be made of their sexual faculties?'⁴⁷ Kant answers that such use is not permissible. The reason he gives is that property in the person cannot be separated from the individual owner. To acquire 'part of the human organism' – to take possession only of the sexual property of another individual – is to acquire the individual as property, a *res*, since the human organism is a unity.⁴⁸ Indeed, Kant argues that it is impossible to use only *part* of a person 'without having at the same time a right of disposal over the whole person, for each part of a person is integrally bound up with the whole'. Kant concludes that 'the sole condition on which we are free to make use of our sexual desire depends upon the right to dispose over the person as a whole – over the welfare and happiness and generally over all the circumstances of that person.'⁴⁹

Kant's rejection of the idea of property in parts of the person is very odd. If marriage is, as he defines it, nothing more than a contract of mutual sexual use – mutual use of sexual property (faculties) in the person – then there is not the slightest need for him to argue in terms of use of persons, and least of all to argue that persons are used as things. To have right over a person as a thing, as a piece of property, is to have the power of a slave-master – but Kant's husband does not have such a power. Kant argues that, if

both parties to the contract acquire the same right, they each give themselves up and win themselves back. They are simultaneously owner and owned. They become persons again, unified into one will. The reason for all these very unconvincing theoretical manoeuvres becomes clear once the story of the sexual contract has been told.

Kant does his best to have his philosophical cake and eat it. If he is to maintain his claim that all human beings have the rational capacity to act according to universal moral principles, then the two parties to the marriage contract must be of equal standing. Moreover, if their standing is to be maintained, they must engage in an equal exchange of property; or an equal exchange of themselves as property. Therefore, Kant implies, women, like men, are individuals or persons. If this is the case, there is no need for Kant to insist that the married couple are property for each other. If the person is a unity, if sexual faculties are inseparable from the self, then why do not the husband and wife remain as persons for each other? The reason is not hard to discern. Kant excludes women from the category of persons or individuals. Women can only be property. Personal right exists only in the private sphere of marriage and domestic relations. In the public realm, individuals interact as civil equals, and even a man whose circumstances place him in the position of a servant does not also become property. The social contract, which creates civil freedom and equality, depends on the sexual contract, which creates patriarchal (personal) right; civil equality depends on personal right. What it is to be master of oneself in civil life becomes clear in contrast to men's mastery of women in marriage. Kant's pervasive influence on contemporary political theory is not surprising in view of his adept sleight of hand through which the sexual contract is concealed by marriage as a contract of mutual sexual use.

A moral miracle (as William Thompson would call it) turns women's natural subjection into marital equality. Nature has given us sexual desire so that we will procreate, but this is not the only end for which to marry; 'enjoyment in the reciprocal use of the sexual endowments is an end of marriage', and it is legitimate to marry with this end in view.⁵⁰ But if men and women wish to use their sexual property they *must* marry. 'Matrimony is the only condition in which use can be made of one's sexuality. If one devotes one's person to another, one devotes not only sex but the whole person: the two cannot be separated.'⁵¹ Kant not only declares that mutual

sexual use outside of marriage dehumanizes a man and a woman (they remain as mere property for each other), but that the use is 'in principle, although not always in effect, on the level of cannibalism'. To consume a body with teeth and mouth instead of a sexual organ merely provides a different form of enjoyment. Only the marriage contract can turn use of sexual property, in which 'one is really made a *res fungibilis* to the other', into the use of a person.⁵² But it is the *husband* who has use of a person, not the wife. Kant's marriage contract establishes the husband's patriarchal right; *he* possesses his wife's body, which is to say her person, as a thing, but she has no corresponding right. 'Personal right' is the right of a husband as a civil master.

And there is no doubt that he is a master. The unity of wills is represented by the will of the husband. Kant claims that a 'relation of equality as regards the mutual possession of their Persons, as well as of their Goods exists between husband and wife'. He rejects the suspicion – a suspicion voiced very loudly from a variety of quarters by the 1790s, when the *Philosophy of Law* appeared – that there is something contradictory about postulating both equality and legal recognition of the husband as master. He states that the husband's power over his wife

cannot be regarded as contrary to the natural Equality of a human pair, if such legal Supremacy is based only upon the natural superiority of the faculties of the Husband compared with the Wife, in the effectuation of the common interest of the household; and if the Right to command is based merely upon this fact.⁵³

Although Kant states that, if either spouse ran away, 'the other is entitled, at any time, and incontestably, to bring such a one back to the former relation, as if that Person were a Thing', it is clear that the right is only likely to be exercised by the master of the family. The master, Kant says, also has the same right to bring back servants who abscond, 'even before the reasons that may have led them to run away, . . . have been judicially investigated'.⁵⁴ In amplifying his notion of personal right, Kant uses the revealing example of the difference between pointing to someone and saying 'this is my father', which means only that I have a father and here he is, and pointing to someone and saying 'this is my wife.' To point to a wife is to refer to 'a special juridical relation of a possessor to an

object viewed as thing, although in this case it is a person'.⁵⁵ Kant notes that personal right is distinct from possessing a man who has lost his civil personality as a slave – but to possess a wife is to possess someone who, naturally, has no civil personality, although she is not called a slave.

Hegel attacked Kant's marriage contract, declaring that it was 'shameful' to see marriage 'degraded to the level of a contract for reciprocal use'.⁵⁶ Hegel also rejected the doctrine of the social contract. He denied that the state should be understood as if it was, or could be, generated from an original contract. Commentators on Hegel's theory invariably conclude that Hegel opposes contract theory. In the absence of the whole story of the original contract such a conclusion appears entirely reasonable, and it can be forgotten that, despite his criticism of Kant's marriage contract, Hegel argues that marriage originates in a contract. The extensive area of common ground that he shares with contract doctrine, notably the patriarchal construction of civil society, masculinity and femininity, can then also be overlooked.

Hegel rejects the keystone of contract theory, the idea of the individual as owner. He also rejects the contractarian ideal of social life as nothing but contract, all the way down. On these issues, he is the most profound critic of contract. However, Hegel's arguments are fatally compromised by his acceptance of the sexual contract. In order to incorporate women into civil society while excluding them, Hegel re-enacts the contradictions of Kant's theory. Hegel attacks Kant's claim, that individuals become property in marriage, but his own marriage contract, like Kant's, assumes that women are not, and cannot be, and yet are, individuals. Hegel dismisses the marriage contract of mutual use or exchange of property, but still advocates a contract that constitutes a wife as subject to her husband.

Hegel regards it as shameful to substitute the one-sided, contractual individual as owner, or person-thing, for the complexity of human personality and ethical life. The individual as owner and contract-maker is what Hegel calls an 'immediate self-subsistent person', and although this is one element, or 'moment', in the individual personality and in social life, it is not and cannot be the whole.⁵⁷ To see marriage as a contract entered into by owners of the sexual property in their persons, or to see spouses as property, is completely to misunderstand marriage and its place in modern civil life. Purely as contract, marriage is open to the contingency, the

whim and caprice, of sexual inclination. The marriage ceremony becomes merely the means to avoid unauthorized use of bodies (or sexual cannibalism). On the contrary, for Hegel, marriage is a distinct form of ethical life – part of the universal family/civil society/state – constituted by a principle of association far removed from contract.

The marriage contract, according to Hegel, could not be more different from other contracts; the marriage contract 'is precisely a contract to transcend the standpoint of contract'.⁵⁸ From the standpoint of contract, two individuals who contract together recognize each other as property owners and mutually will that they should use each other's property. The owner is related externally to his property and so, as it were, stands outside the contract and is unchanged by it. Similarly, the self of Kant's person-thing is unaffected by this curious status. The unity of will of the two parties is sheer coincidence. In contrast, Hegel's marriage contract changes the consciousness and standing of the man and woman who marry and a public, duly authorized ceremony is thus essential to marriage. A husband and wife cease to be 'self-subsistent' individuals. They become members of a little association which is so closely unified that they are 'one person'. Hegel writes that, in marrying, the spouses 'consent to make themselves one person, to renounce their natural and individual personality to this unity of one with the other. From this point of view, their union is a self-restriction, but in fact it is their liberation, because in it they attain their substantive self-consciousness'.⁵⁹ The husband and wife are bound together through a rational, ethical bond which unites them internally in their association and not externally as property owners. The end of marriage is not mutual sexual use; sexual passion is merely one 'moment' of marriage, a moment that disappears as it is satisfied. The marriage contract creates a substantive relation constituted by 'love, trust, and common sharing of their entire existence as individuals'.⁶⁰

A husband and wife are bound together neither by contract, nor sexual inclination, nor even by love, as 'love' is usually understood. They are incorporated by 'ethico-legal love' which transcends the fickleness of ordinary, romantic love.⁶¹ Hegel states that love is 'the most tremendous contradiction'.⁶² The contradiction comes about because the lovers' first impulse is to obliterate their individuality in total unification with the loved one. However, in opposition to this desire, they also discover that their sense of themselves as auton-

omous beings is strengthened through the relationship with the beloved. The gulf between obliteration and enhancement of self can be overcome by the mutual recognition of the two lovers, through which each gains a deeper sense of unity with the other and sense of autonomy of the self. Love (in Hegel's sense) both unifies and differentiates. Thus marriage offers a glimpse of the differentiation and particularity of civil (economic) society and the unity and universality necessary to membership in the state.

Hegel's criticism of the marriage contract goes far beyond the reduction of conjugal relations to a contract of mutual use. If marriage were merely contractual, civil society would be undermined; the necessary, private foundation for public life would be lacking. Or, to make this point in a manner that may seem incongruous in the context of Hegel's theory, the social contract (civil life) depends on the sexual contract (which is displaced onto the marriage contract). The idea of the 'individual' is fundamental to contract, but if ownership is exhaustive of the human personality, then, ironically, the necessary social condition for contract is eliminated. Any example of contract presupposes that contracts must be kept; that is to say, trust and mutual fidelity are presupposed. Individuals understand what 'to contract' means, only because any single contract is part of the wider practice of contracting, and the practice is constituted by the understanding that contracts are binding. The conception of the individual as owner of the property in his person, especially in its most extreme, contractarian form, inevitably generates a problem of keeping faith and 'performing second'. Attempts are made to solve the problem in classic contract theory by stratagems such as Leviathan's sword, Kant's postulate of a necessary idea of an original contract which embodies a law that contracts must be sealed, or by building the requisite non-contractual background into the state of nature. Hegel's discussion shows why the idea of the individual as owner undercuts all these stratagems.

The 'individual' at once denies yet presupposes the intersubjective understanding of what it means to enter into a contract. Contract cannot provide a universal basis for social life. Contract must form part of wider non-contractual social institutions. Contracts can be entered into precisely because consciousness is developed and informed within arenas that are non-contractual. If individuals were merely owners they could enter into no contracts at all; strictly, 'contract' would be meaningless to them. Hegel, like Durkheim

sometime later, argued that 'a contract supposes something other than itself.'⁶³ Contract has an appropriate place in social life in the economic sphere – the sphere that Hegel calls 'civil society' – but if contract is extended beyond its own realm, social order is threatened. Contract on its own is an incoherent basis for social life. Hegel, echoing Kant, argues that marriage is an ethical duty; 'marriage, . . . is one of the absolute principles on which the ethical life of a community depends.'⁶⁴ Ethical life depends upon marriage because marriage is the origin of the family. In the family, children learn, and adults are continually reminded of, what it means to be a member of a small association based on love and trust; in the private dimension of ethical life they gain experience of a non-contractual association and so are prepared – or, rather, men are prepared – for participation in the universal public sphere of civil society and the state.

In the *Philosophy of Right*, Hegel criticizes Rousseau's social contract theory as well as Kant's marriage contract, but he follows Rousseau closely in his patriarchal understanding of masculinity and femininity, and, therefore, of the public and private. Hegel claims that 'difference in the physical characteristics of the two sexes has a rational basis and consequently acquires an intellectual and ethical significance.'⁶⁵ Sexual difference also has patriarchal political significance (rational expression) in Hegel's theory. Woman, Hegel tells us, 'has her substantive destiny in the family, and to be imbued with family piety is her ethical frame of mind'. Hegel goes on to note that, in *Antigone*, family piety, the law of woman, is opposed to public law and, he comments, 'this is the supreme opposition in ethics' – and, we can also add, in politics. Women cannot enter into civil public life because they are naturally lacking in the capacity to submit to 'the demands of universality'. Women, Hegel says, 'are educated – who knows how? – as it were by breathing in ideas, by living rather than by acquiring knowledge'. A man, on the other hand, has 'actual substantive life in the state'. A man acquires the status of manhood only through struggle with himself and struggle in the civil world, through learning and 'much technical exertion'.⁶⁶

Women are what they are by nature; men must create themselves and public life, and they are endowed with the masculine capacity to do so. Women must remain in the natural private sphere of the family. The family is represented in public by the husband, the 'one

person' created by the marriage contract. Sexual difference also entails a patriarchal division of labour. The husband has the 'prerogative to go out and work for [the family's] living, to attend to its needs, and to control and administer its capital'.⁶⁷ Like Rousseau, Hegel sees women as naturally politically subversive. Women brought about the downfall of the ancient world; in the *Phenomenology* he writes that the ancient community created

what it suppresses and what is at the same time essential to it an internal enemy – womankind in general. Womankind – the everlasting irony [in the life] of the community – changes by intrigue the universal end of government into a private end, transforms its universal activity into a work of some particular individual, and perverts the universal property of the state into a possession and ornament for the Family.⁶⁸

In the modern world, if 'women hold the helm of government, the state is at once in jeopardy'.⁶⁹

But it is not only if women seize the reins of government that the state is in peril. Women play a substantive part in Hegel's argument. For Hegel, like the classic social contract theorists, marriage and the family provide the natural foundation for civil life, but Hegel goes much further. He also implies that, through their love, husbands and wives play out (in a manner suited to the 'immediate' ethical sphere) the dialectic of mutual acknowledgment that characterizes relations among men as makers of contracts in civil society and as citizens in the state. In contract, men recognize each other as property owners, enjoying an equal standing; as citizens – participants in the social contract – they also recognize their mutual civil equality. Hegel's account of love within marriage suggests that the same process takes place between husband and wife, through the dialectic of autonomy and unity. But one party to the marriage contract is a woman; conjugal relations cannot take the same form as civil relations between men. Sexual difference is political difference, the difference between mastery and subjection; so how can there be mutual acknowledgment by husband and wife as, at one and the same time, particular and universal beings? And if such recognition is impossible, how can marriage and the family constitute a 'moment' of Hegel's social whole of family/civil society/state?

Some feminist interpretations of Hegel, particularly those drawing on Simone de Beauvoir, have turned to his famous passages in the *Phenomenology*, on the opposition between master and slave, as the model for the relation between husband and wife. The comparison of Hegel's dialectic of mastery and slavery with conjugal relations involves one of the same difficulties as the comparison of husband and wife with employer and worker. The master and slave, like the capitalist and proletarian, are both men. Use of the passages on the master and slave also poses another difficulty. The struggle between these two antagonists is part of Hegel's story of the development of self-consciousness. Indeed, the master and slave appear at the genesis of self-consciousness. Hegel argues that consciousness of self presupposes consciousness of another self; to be self-conscious is to have one's consciousness reflected back from another, who, in turn, has his own consciousness confirmed by you. The mutual acknowledgment and confirmation of self, however, is possible only if the two selves have an equal status. The master cannot see his independence reflected back in the self of the slave; all he finds is servility. Self-consciousness must receive acknowledgment from another self of the same kind, and so the master-slave relation must be transcended. The master and slave can, as it were, move through the 'moments' of Hegel's great story and eventually meet as equals in the civil society of the *Philosophy of Right*. The men's story can be completed once the original pact is sealed and civil society brought into being. In the fraternity of civil society each man can obtain self-confirmation and acknowledgment of his equality in the brotherhood. But this is not quite the end of the story.

The original contract is not merely a social contract; it is a sexual contract which constitutes men's patriarchal right over women. Women are outside the fight to the death between master and slave at the dawn of self-consciousness, but they are part of modern civil society. Hegel's story of the development of universal freedom requires that men recognize each other as equals; the day of the master and slave is past. But men's self-consciousness is not purely the consciousness of free civil equals (the story of the social contract) – it is also the consciousness of patriarchal masters (the story of the sexual contract). The ostensible universalism of Hegel's public world (just like that of the classic contract theorists) gains its meaning when men look from the public world to the private domestic sphere and the subjection of wives. The family (private) and civil

society/state (public) are separate and inseparable; civil society is a patriarchal order. As a husband, a man cannot receive acknowledgment as an equal from his wife. But a husband is not engaged in relations with other men, his equals: he is married to a woman, his natural subordinate. Wives do not stand to husbands precisely as slaves do to masters 'in the beginning'. Slaves are not naturally slaves, but a wife cannot be an 'individual' or a citizen, able to participate in the public world. If the family is, simultaneously, to be part of the state and separate from it, constituted through a unique contract, and if patriarchal right is not to be undermined, women's acknowledgment of men cannot be the same as men's acknowledgment of their fellow men. Men cease to be masters and slaves, but Hegel's social order demands a sexually differentiated consciousness (his discussion of ethico-legal love notwithstanding). The recognition that a husband obtains from a wife is precisely what is required in modern patriarchy; recognition as a patriarchal master, which only a woman can provide.

Hegel rejects the social contract, but, in accepting the sexual contract, he embraces the anomalies and contradictions surrounding women, contract and the private and public generated by classic contract theory. Ironically, Hegel's critique of marriage as a contract of sexual use involves the same set of problems as the marriage contract in the hands of the classic contract theorists or Lévi-Strauss. Hegel's argument raises the same question that I have posed of these theorists. Women are held to be natural subordinates lacking the capacities required to enter into contracts; why, then, are women always capable of entering into the marriage contract?

Hegel's argument raises the question in an especially acute form. Why should a theorist who declares that it is shameful to see marriage as merely contractual still insist that marriage originates in a contract? Other forms of non-contractual free agreement exist, to which Hegel could turn; or, more logically, given the patriarchal construction of masculinity and femininity that Hegel shares with the classic contract theorists, the marriage ceremony could provide more than adequate confirmation of the natural subordination of women when they become wives. Of course, Hegel insists that his marriage contract is a unique contract that transcends the standpoint of contract. Hegel has to make this move in order to posit the requisite form of consciousness within the private sphere. From the standpoint of contract, spouses are related only by the mutual

advantage of property owners. As owners, their selves are always external to the conjugal relation and so no dialectic of consciousness can take place. Even the bond of mutual use is illusory because it cannot exist over time without the trust and faith which the standpoint of contract eliminates. Hegel's special marriage contract transcends the contractarian standpoint – but it cannot transcend the sexual contract.

The reason why women must enter into the marriage contract is that, although they have no part in the social contract, women must be incorporated into civil society. The major institutional bonds of civil society – citizenship, employment and marriage – are constituted through contract. If the free relations characteristic of civil society are to extend to all social spheres, marriage, too, must originate in a contract. Hegel rejects contract theory, but he retains contract as one essential element of civil freedom. Social life as a whole cannot be constituted through contract, but contract is appropriate in civil society (the economy). Men interact in civil society through the 'particularity' that characterizes makers of contracts, and they can do so because they also interact in the non-contractual state and family. Women, as parties to one of the central contracts in civil society, must share in the attribute of 'particularity'; or, that is to say, they share in the attributes of 'individuals'. Women are incorporated into civil society through the marriage contract, and are incorporated on the same basis as men; parties to contracts enjoy equal standing. Only if women, too, enter into a contract, can Hegel argue that the dialectic of love is a 'moment' in the wider dialectic of family/civil society/state, or the contract theorists write of the mutual exchange of property in the person in marriage. Only if women enter into a contract, can Kant argue that spouses are both property and persons for each other.

Modern civil society is an order of universal freedom and so stands opposed to the old world of status. All inhabitants of civil society enjoy the same standing – and, when marriage is created through a contract, we can be confident that this is the case. The marriage contract, however, also involves a variant of the contradiction of slavery. The social contract story requires that some clear indication is present that women are part of civil society and capable of entering into contracts (slaves must be seen as part of humanity). Women must enter into the marriage contract. But the sexual contract requires that women are incorporated into civil society on a different

basis from men. Men create patriarchal civil society and the new social order is structured into two spheres. The private sphere is separated from civil public life; the private sphere both is and is not part of civil society – and women both are and are not part of the civil order. Women are not incorporated as 'individuals' but as women, which, in the story of the original contract, means as natural subordinates (slaves are property). The original contract can be upheld, and men can receive acknowledgment of their patriarchal right, only if women's subjection is secured in civil society.

Hegel's marriage contract that transcends contract replicates the sexual contract just as completely as the marriage contract in classic contract theory. This unique contract is the genesis of a private sphere that throws into relief the masculinity – the fraternity – the freedom and equality of the public world; the family provides the example of (women's) natural subjection on which the meaning of civil society/state as a sphere of freedom depends. Hegel is quite right; the marriage contract is very different from contract in the civil realm. The difference, however, is not quite as Hegel argues. The marriage contract cannot be like, say, the employment contract because *women* are party to the marriage contract. Women have to be incorporated into civil society through a contract because only contract always creates free relations and presupposes the equal standing of the parties, yet, at the same time, because women are involved, the contract must confirm patriarchal right.

The difference between the marriage contract and other contracts has always been indicated plainly enough. Contemporary feminists have paid relatively little attention to the vow of obedience (perhaps because it is not always now included in the speech acts of the marriage ceremony), and when half the story of the original contract is repressed, even an explicit commitment to obey can be overlooked by other critics of contract theory. The employment contract gives an employer right of command over the worker and his labour. Workers must obey directives of employers, but in contracts about property in men's persons, silence is maintained on the matter of obedience. Only the marriage contract – the contract into which women must enter, women who lack the standing of owners – includes the explicit commitment to obey. If the promise of universal freedom heralded by the story of an original contract is not to appear fraudulent from the start, women must take part in contract in the new civil order. If men's civil status as equals and patriarchal

masters is to be maintained, the contract into which women enter must be separated from other contracts. A woman agrees to obey her husband when she becomes a wife; what better way of giving public affirmation that men are sexual masters, exercising the law of male sex-right, in their private lives?

Criticism of contract theory rarely takes the sexual contract into account. There is, therefore, a strong temptation for feminists to throw out Hegel's profound insights about the deficiencies of contract along with his patriarchal marriage contract. The conclusion is then all too easy to draw that properly contractual marriage has not yet been tried. Hegel's critique of contract highlights some acute difficulties that arise when feminists embrace contract theory, especially in the extreme form of contractarianism. For example, the classic contract theorists do not tell the story of the primal scene; their stories begin after physical genesis and human development. 'Individuals' appear as fully grown men, equipped with the attributes required to make contracts. At the same time, most of the pictures of the state of nature contain the non-contractual conditions necessary for infants to thrive and grow; love, trust and family life are assumed to be found naturally. Only for Hobbes, as for contemporary contractarians, are all social relationships generated through contract, even that between parent and infant. But would an 'individual' ever enter into a contract to be a parent? A contract for mutual sexual use can accommodate physical genesis without difficulty. The problem arises with the long-term commitment as a parent required for human development. Would the marriage contract for mutual sexual use be extended to include provision to rear an infant?

In chapter 3, I noted that Hobbes' self-interested female individual in the state of nature would have little or no incentive to make a contract to 'breed up' an infant. Of course, without Hobbes' war of all against all the disincentive would be less, since an infant would not endanger personal safety. Nevertheless, from the standpoint of contract, can an infant be seen as anything more than an encumbrance? The question is more pressing when contract demands that, just as soon as the infant is sufficiently grown to make contracts for itself, the parent-child relationship should be placed on an explicitly contractual basis. How can any parents be sure that their trouble will not be wasted and their child will not make a more advantageous contract elsewhere? Again, would anyone want to contract

with a child; or would the only contracts open to a small, relatively resourceless contractor be slave contracts? I am concerned with adult heterosexual relations not parent-child relations, so I shall merely raise and not pursue such questions.

There is a closely related point, however, which is directly relevant to my theme. One of Hegel's objections to marriage as a contract is that it leaves the relationship at the mercy of the whims and capricious wills of the contractors. Similarly, Durkheim emphasizes that the bond created by contract is both external and of short duration; it leads to 'transient relations and passing associations'.⁷⁰ A contract of mutual advantage and reciprocal use will last only as long as it appears advantageous to either party. A new contract with a different partner will always appear as a possible and enticing alternative. That is to say, exit from the marriage contract becomes as important as entry. Contemporary advocates of marriage contracting stress that one advantage is that the contract can be for a limited term, and run for, say, five years in the first instance. Nor is it accidental that current controversy over slave contracts and paternalism emphasizes the crucial importance of dissoluble contracts. The way in which popular advice-books on marriage and sexual matters present divorce illustrates the influence of a contractual view of marriage; divorce is seen as something that can be 'pre-considered in terms of personal upward mobility, with stress . . . on what lies ahead that may be incorporated into a new and better image'.⁷¹ When the contract is made only for mutual use and advantage, its real point becomes 'to anticipate and provide for divorce'.⁷²

To anticipate the termination of the marriage contract in the very act of contracting has become possible only quite recently. In England, for example, there was no divorce before 1700 (a divorce *a mensa et thoro* could be obtained from an ecclesiastical court but it did not permit remarriage) and until 1857 divorce could only be granted through a private Act of Parliament.⁷³ Not until 1969, when the ground for divorce became the irretrievable breakdown of the marriage, were divorces obtained relatively easily by both wives and husbands and by members of all social classes. Only recently, too, have divorce and divorced persons ceased to be a scandal. Many nineteenth-century feminists who favoured divorce, in particular as the best means for a wife to escape from a brutal husband, steered clear of the subject for fear of compromising their other goals; other feminists were opposed to divorce, fearing that the

consequence would be to enable husbands to abandon their wives and children more readily. Divorce is usually seen as the opposite of marriage, but Christine Delphy argues that divorce today is, rather, the transformation of marriage. She argues that, since divorced wives almost always continue to look after the children of the marriage, 'marriage and divorce can be considered as two ways of obtaining a similar result: the collective attribution to women of the care of children and the collective exemption of men from the same responsibility.'⁷⁴ However, it is far from clear, from the standpoint of contract, whether such a responsibility would continue to arise.

The logic of contract, and of marriage as nothing more than a contract of mutual sexual use, is that 'marriage' and 'divorce' should be eliminated. The most advantageous arrangement for the individual is an endless series of very short-term contracts to use another's body as and when required. Other services presently provided within marriage would also be contracted for in the market. A universal market in bodies and services would replace marriage. The logic of contract is that marriage would be supplanted by contracts for access to sexual property. Marriage would give way to *universal prostitution*. Moreover, 'individuals', and not 'men' and 'women', would enter these contracts. Contract would then have won the final victory over status (sexual difference). When negotiations about use of sexual property in the person can have no pre-determined outcome, and individuals can contract as they see fit to use the property of another, sexual difference would be meaningless.

The Beatles used to sing that 'All You Need is Love.' The objection that contract will never be victorious because love will stand in the way has been anticipated already; love has been reduced to another external relation, or aspect of property in persons, and defined, for example, as a 'particular non-marketable household commodity'.⁷⁵ To draw attention to such arguments is not to imply that contract is invincible, but to illustrate the incongruous character of an alliance between feminism and contract. The victory of contract has a considerable appeal for feminists, given the long sway of coverture and the various social and legal means still used to deny women ownership of property in their persons. The conclusion is easy to draw that the denial of civil equality to women means that the feminist aspiration must be to win acknowledgment for women as 'individuals'. Such an aspiration can never be fulfilled. The 'individual' is a patriarchal category. The individual is masculine

and his sexuality is understood accordingly (if, indeed, 'sexuality' is a term that can be used of a self that is externally related to the body and sexual property). The patriarchal construction of sexuality, what it means to be a sexual being, is to possess and to have access to sexual property. How access is gained and how the property is used is made clear in the story of the demand of the brothers for equal access to women's bodies. In modern patriarchy, masculinity provides the paradigm for sexuality; and masculinity means sexual mastery. The 'individual' is a man who makes use of a woman's body (sexual property); the converse is much harder to imagine.

The patriarchal construction of sexuality is illustrated in the 'sexual revolution' of the past two decades or so. Initially, emphasis was placed on breaking down the barriers surrounding 'the sex act'. Most of the former social constraints surrounding women's sexual activity outside of marriage have been swept away. Only the individual, according to contract argument, can decide whether and how sexual property should be contracted out. No prior limits can be placed on contract. The argument runs parallel to feminist criticism that parties to the marriage contract are prohibited from deciding from themselves what the content of their contract should be. Marjorie Shultz, for example, raises the following problem; suppose that 'John and Mary decided that she would agree in principle to sex on demand, should such an agreement prevent her from later filing a rape claim against John?' Shultz states that there is a strong argument that private contract should not override the criminal law, but, she writes, 'the idea of enforceable private agreements concerning violent sexual conduct is less offensive than a state declaration that violent sexual conduct is automatically acceptable in marriage.'⁷⁶ Such a response begs the question about limitations to and alternatives to contract.

More recently, contract argument has been used to bring other forms of hetero- and homosexual activity within the ambit of the 'sexual revolution'. Hardly coincidentally, when the slave contract is defended by the argument that only the individual can decide in what way to contract out his property, contract doctrine has also been used recently to defend sado-masochism, or what might be called a fantasy slave contract. Some feminists defend sado-masochism on the ground that 'it is a consensual activity. . . . The key word to understanding S/M is *fantasy*. The roles, dialogue, fetish costumes, and sexual activity are part of a drama or ritual . . .

relationships are usually egalitarian.⁷⁷ Feminists who object to sado-masochism have been dismissed as moralistic and as failing to appreciate the element of parody in fetish costumes. Be that as it may, sado-masochism is less a rebellious or revolutionary fantasy than a dramatic exhibition of the logic of contract and of the full implications of the sexuality of the patriarchal masculine 'individual'.

'Individuals' are interchangeable – the difference between men and women disappears – or limitations would still remain on the jurisdiction that individuals exercise over the property in their persons and on the kinds of contracts that they enter. Thus, participants can take any role in sado-masochism depending on their inclination at a particular time.⁷⁸ The triumph of contract and the 'individual' over sexual difference was foreshadowed by the Marquis de Sade in the latter part of the eighteenth century. He wrote, 'charming sex, you will be free . . . you are as free as we [men] are and the career of the battles of Venus as open to you as to us' – and de Sade's women fight the battles alongside and in the same way as his men. One of his characters, Noircœur, enlists another, Juliette, in acting out a fantasy game; Juliette,

dressed as a woman, must marry a woman dressed as a man at the same ceremony where I, dressed as a woman, become the wife of a man. Next, dressed as a man, you will marry another woman wearing female attire at the same time that I go to the altar to be united in holy wedlock with a catamite disguised as a girl.⁷⁹

The endless permutations of de Sade's characters provide a ghastly parody, and a vivid portrayal, of the consequences of the absolute conquest of status as sexual difference by the individuals of the contractual imagination. From the standpoint of contract, there is nothing surprising in the representation of sexual freedom through the figures of master and slave, through the 'personae of guard and prisoner, cop and suspect, Nazi and Jew, White and Black, straight man and queer, parent and child, priest and penitent, teacher and student, whore and client, etc.'⁸⁰ Civil mastery requires agreement from the subordinate and numerous stories are spun in which slaves and women in chains contract and consent to their subjection. In the famous pornographic story, *The Story of O*, in which O, a woman, is imprisoned and used sexually by her captors, she is always asked before each assault and violation whether or not she consents.⁸¹

Men exercise their masculine capacity for political creativity by generating political relationships of subordination through contract. How apt it is, in a period when contract and the patriarchal construction of the individual have such widespread appeal, that the end of the movement from status to contract should be proclaimed in feminist defences of fantasy slave contracts.

Contemporary feminists (especially in the United States) often conclude that the only alternative to the patriarchal construction of sexuality is to eliminate sexual difference, to render masculinity and femininity politically irrelevant. At first sight, the complete elimination of status and its replacement by contract appears to signal the final defeat of patriarchy and the law of male sex-right. The realization of the promise of contract as freedom appears to be in sight, and the patriarchal construction of men and women, masculinity and femininity, appears to be breaking down. Feminists have campaigned for, and won, legal reforms that are couched in what are now usually called 'gender neutral' terms. Such reforms can mean that women's civil rights are safeguarded, but this approach to reform can also lead to curious results when, for example, attempts are made to incorporate pregnancy into legislation that applies indifferently to men or women. Odd things happen to women when the assumption is made that the only alternative to the patriarchal construction of sexual difference is the ostensibly sex-neutral 'individual'.

The final victory of contract over status is not the end of patriarchy, but the consolidation of the modern form. The story of the sexual contract tells how contract is the medium through which patriarchal right is created and upheld. For marriage to become merely a contract of sexual use – or, more accurately, for sexual relations to take the form of universal prostitution – would mark the political defeat of women *as women*. When contract and the individual hold full sway under the flag of civil freedom, women are left with no alternative but to (try to) become replicas of men. In the victory of contract, the patriarchal construction of sexual difference as mastery and subjection remains intact but repressed. Only if the construction is intact can the 'individual' have meaning and offer the promise of freedom to both women and men so that they know to what they must aspire. Only if the construction is repressed can women have such an aspiration. Heterosexual relations do not inevitably take the form of mastery and subjection, but free relations

are impossible within the patriarchal opposition between contract and status, masculinity and femininity. The feminist dream is continuously subverted by entanglement with contract.

7

What's Wrong with Prostitution?

In modern patriarchy a variety of means are available through which men can uphold the terms of the sexual contract. The marriage contract is still fundamental to patriarchal right, but marriage is now only one of the socially acceptable ways for men to have access to women's bodies. Casual sexual liaisons and 'living together' no longer carry the social sanctions of twenty or thirty years ago, and, in addition to private arrangements, there is a huge, multimillion dollar trade in women's bodies. Prostitution is an integral part of patriarchal capitalism. Wives are no longer put up for public auction (although in Australia, the United States and Britain they can be bought by mail-order from the Philippines), but men can buy sexual access to women's bodies in the capitalist market. Patriarchal right is explicitly embodied in 'freedom of contract'.

Prostitutes are readily available at all levels of the market for any man who can afford one and they are frequently provided as part of business, political and diplomatic transactions. Yet the public character of prostitution is less obvious than it might be. Like other forms of capitalist enterprise, prostitution is seen as private enterprise, and the contract between client and prostitute is seen as a private arrangement between a buyer and a seller. Moreover, prostitution is shrouded in secrecy despite the scale of the industry. In Birmingham, a British city of about one million people, some 800 women work either as street prostitutes, or from their homes or hotels, from 'saunas', 'massage parlours', or 'escort agencies'. Nearly 14,000 men each week buy their services, i.e., about 17 men for each prostitute.¹ A similar level of demand has been recorded in the United States, and the total number of customers each week across the country has been conservatively estimated at 1,500,000

- 79 Rousseau, *Emile*, p. 409.
- 80 I. Kant, *Anthropology from a Pragmatic Point of View*, tr. M. J. Gregor (The Hague, Martin Nijhoff, 1974), p. 171.
- 81 Pitkin, *Fortune is a Woman*, p. 236.
- 82 P. Rieff, *Freud: The Mind of the Moralist* (London, Methuen, 1965), ch. VII.
- 83 Brown, *Love's Body*, p. 4. I am grateful to Peter Breiner for drawing my attention to Brown's interpretation in *Love's Body*. A similar point is made, though its implications for patriarchy are not pursued, by M. Hulliung, 'Patriarchalism and its Early Enemies', *Political Theory*, 2 (1974), pp. 410-19. Hulliung (p. 416) notes that there is no reason why the parricide 'cannot just as well be turned into a morality play on behalf of . . . democratic ideals', and that 'the assassins are "brothers" toward each other, and brothers are equal.'
- 84 S. Freud, *Moses and Monotheism*, tr. K. Jones (New York, Vintage Books, n.d.), p. 104.
- 85 Ibid., pp. 107-9.
- 86 S. Freud, *Totem and Taboo*, tr. A. A. Brill (New York, Vintage Books, n.d.), p. 184.
- 87 Freud, *Moses and Monotheism*, p. 103.
- 88 Locke, *Two Treatises*, II, §90.
- 89 Freud, *Totem and Taboo*, p. 183.
- 90 Freud, *Civilization and Its Discontents*, p. 53.
- 91 Ibid.; *Moses and Monotheism*, p. 153.
- 92 Freud, *Totem and Taboo*, p. 206.
- 93 S. Freud, 'From the History of an Infantile Neurosis', in *Case Histories II*, (Harmondsworth, Penguin Books, 1979), Pelican Freud Library, vol. 9, p. 277, note 2. I was alerted to the importance of the primal scene by M. Ramas, 'Freud's Dora, Dora's Hysteria; the Negation of a Woman's Rebellion', *Feminist Studies*, 6, 3 (1980), especially pp. 482-5.
- 94 Freud's analysis of the case of the Wolf Man offers three alternatives: the child actually saw his parents' act of sexual intercourse; he displaced his observation of animals' copulation onto his parents; the scene is a phylogenetic inheritance. Freud's use of phylogenetic argument is discussed by R. Coward, *Patriarchal Precedents* (London, Routledge and Kegan Paul, 1983), ch. 7.
- 95 See my 'Women and Consent', *Political Theory*, 8, 2 (1980), pp. 149-68; also, for example, S. Estrich, *Real Rape* (Cambridge, MA, Harvard University Press, 1987).
- 96 Report in *The New York Times* (5 September 1986).
- 97 G. Zilboorg, 'Masculine and Feminine: Some Biological and Cultural Aspects', *Psychiatry*, 7 (1944), p. 282.

- 98 Ibid., pp. 266, 268.
- 99 Zilboorg takes the term 'gynaecocentric period' and the basis for his conjectural history from the sociologist, Lester Ward.
- 100 Zilboorg, 'Masculine and Feminine', pp. 282-3. Zilboorg (pp. 288-90) argues that 'the primordial male' was hostile to children; 'man does not want the woman to be a mother, but a convenient sexual servant or instrument.' Yet man was also envious of woman's capacity to give birth to children who then loved her 'without stint', and who never loved him. Zilboorg explains the *couvade* as an outcome of this hostile masculine identification with the woman and as the origin of psychological fatherhood - but the story could also be used to explain why men have appropriated women's unique capacity and turned it into the ability to give political birth.
- 101 Ibid., pp. 285, 287.
- 102 Freud, *Moses and Monotheism*, p. 153.
- 103 Freud, *Totem and Taboo*, p. 186.
- 104 C. Lévi-Strauss, *The Elementary Structures of Kinship*, rev. edn, ed. R. Needham (Boston, Beacon Press, 1969), p. 42.
- 105 Ibid., pp. 29, 481.
- 106 Ibid., p. 62.
- 107 Ibid., p. 115.
- 108 McWilliams, *Idea of Fraternity in America*, p. 16.

5 Wives, Slaves and Wage Slaves

- 1 J. Schouler, *A Treatise on the Law of the Domestic Relations*, 2nd edn (Boston, Little, Brown and Co., 1874), pt VI, ch. 1, p. 599.
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- 3 P. Corrigan, 'Feudal Relics or Capitalist Monuments: Notes on the Sociology of Unfree Labour', *Sociology*, 11, 3, (1977), pp. 438, 449. See also R. K. Aufhauser, 'Slavery and Scientific Management', *Journal of Economic History*, 33, 4 (1973), pp. 811-24.
- 4 Cited in R. Scruton, *Sexual Desire: A Moral Philosophy of the Erotic* (New York, The Free Press, 1986), p. 186.
- 5 W. Thompson, *Appeal of One Half the Human Race, Women, Against the Pretensions of the Other Half, Men, to Retain Them in Political, and Thence in Civil And Domestic, Slavery* (New York, Source Book Press, 1970), pp. 54-5.
- 6 J. S. Mill, 'The Subjection of Women', in *Essays on Sex Equality*, ed. A. S. Rossi (Chicago, University of Chicago Press, 1970), p. 130.
- 7 See N. Basch, 'Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America', *Feminist Studies*, 5, 2 (1979), pp. 346-66.

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- 9 D. Defoe, *Roxana* (Harmondsworth, Penguin Books, 1982), p. 187.
- 10 Mill, 'Subjection of Women', p. 217.
- 11 L. C. Bullard, 'The Slave-Women of America', in W. L. O'Neill, *The Woman Movement: Feminism in the United States and England* (London, George Allen and Unwin, 1969), pp. 119, 121.
- 12 Cited in E. Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton* (New York and Oxford, Oxford University Press, 1984), p. xx.
- 13 S. P. Menefee, *Wives for Sale: An Ethnographic Study of British Popular Divorce* (Oxford, Basil Blackwell, 1981), p. 160, table 3; and p. 167, table 5; cases of wife-selling are listed in the Appendix.
- 14 Ibid., p. 88.
- 15 Ibid., pp. 209-10.
- 16 Ibid., p. 66.
- 17 Report in *New Statesman* (2 May 1980).
- 18 Cited by E. D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York, Vintage Books, 1976), p. 427. See also A. Rich, 'Disloyal to Civilization', in *On Lies, Secrets, and Silence* (London, Virago Press, 1980).
- 19 Genovese, *Roll, Jordan, Roll*, p. 483.
- 20 See F. M. Brodie, *Thomas Jefferson: An Intimate History* (New York, W. W. Norton and Co., 1974), p. 358. I have followed Brodie's (controversial) argument about Jefferson's 'black family'.
- 21 Genovese, *Roll, Jordan, Roll*, p. 483.
- 22 Reprinted in S. G. Bell and K. Offen (eds.), *Women, the Family and Freedom: The Debate in Documents*, (Stanford, Stanford University Press, 1983), vol. I, p. 487; see also Mill, 'Subjection of Women', p. 163. Cobbe's article appeared in *The Contemporary Review* in 1878.
- 23 Sir M. Hale, *The History of the Pleas of the Crown* (London, Sollom Emlyn, 1778), vol. I, ch. LVIII, p. 628.
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- 25 Thompson, *Appeal*, p. 65.
- 26 Mill, 'Subjection of Women', pp. 159-60.
- 27 Cited in Griffith, *In Her Own Right*, p. 140.
- 28 S. Cronan, 'Marriage', in *Radical Feminism*, eds. A. Koedt, E. Levine, A. Rapone (New York, Quadrangle, 1973), p. 217.
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- 30 Lady Chudleigh, 'To the Ladies', in *The Whole Duty of a Woman: Female Writers in Seventeenth-Century England*, ed. A. Goreau (New York, The Dial Press, 1985), p. 273.

- 31 D. Defoe, *Conjugal Lewdness; or, Matrimonial Whoredom. A Treatise concerning the Use and Abuse of the Marriage Bed* (Gainesville, Florida, Scholars' Facsimilies and Reprints, 1967 [originally published 1727]), p. 26.
- 32 M. Wollstonecraft, *A Vindication of the Rights of Woman*, ed. C. Poston (New York, W. W. Norton and Co., 1975 [1792]), p. 40.
- 33 T. Veblen, *The Theory of the Leisure Class* (New York, The Modern Library, 1934), p. 182.
- 34 Genovese, *Roll, Jordan, Roll*, esp. pp. 70-86; 123-49.
- 35 Cited in P. Hollis, *Women in Public 1850-1900: Documents of the Victorian Women's Movement* (London, George Allen and Unwin, 1979), p. 12.
- 36 L. Davidoff, 'Mastered for Life: Servant and Wife in Victorian and Edwardian England', *Journal of Social History*, 7 (1974), pp. 410-11; 420.
- 37 L. J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* (New York, The Free Press, 1981), p. 60.
- 38 Report in *Sydney Morning Herald* (15 March 1982).
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- 40 See F. E. Dudden, *Serving Women: Household Service in Nineteenth Century America* (Middleton, CT, Wesleyan University Press, 1983), intro.
- 41 See B. Kingston, *My Wife, My Daughter, and Poor Mary Ann: Women and Work in Australia* (Melbourne, Nelson, 1975), ch. 3.
- 42 For Cullwick's account see L. Stanley (ed.), *The Diaries of Hannah Cullwick: Victorian Maid-servant* (London, Virago Press, 1984). Also, L. Davidoff, 'Class and Gender in Victorian England: The Diaries of Arthur J. Munby and Hannah Cullwick', *Feminist Studies*, 5, 1 (1979), pp. 86-141. Hannah Cullwick offered a remarkable contrast to the (cross-class) ideal of womanhood centered on the wife as a dependent in the home. A physically very strong, vigorous working-class woman, she would threaten 'over-familiar males with her fists' (and other working women were observed intimidating passing men). She wrote in her diary in May 1871 of Arthur Munby, that 'I can heave my Master easy & carry him as if he was a child nearly, & he's 11 stone 7 lbs' (Stanley, *The Diaries*, pp. 2, 167).
- 43 Davidoff, 'Mastered for Life', pp. 409-10.
- 44 A. Oakley, *The Sociology of Housework* (London, Martin Robertson, 1974), p. 49.
- 45 J. Finch, *Married to the Job: Wives' Incorporation in Men's Work* (London, George Allen and Unwin, 1983). Finch (pp. 132-3) provides eight rules for women to follow who wish to marry but to avoid incorporation in their husbands' work.
- 46 C. Delphy, *Close to Home: A Materialist Analysis of Women's Oppression*, tr. D. Leonard (Amherst, University of Massachusetts Press, 1984), pp. 87-9.

- 47 H. Hartmann, 'The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework', *Signs*, 6, 3 (1981), pp. 388-9; see also A. Oakley, *Housewife* (Harmondsworth, Penguin Books, 1976), p. 7, table A.
- 48 Oakley, *Housewife*, p. 6; *Sociology of Housework*, pp. 92-3.
- 49 S. F. Berk, *The Gender Factory: The Apportionment of Work in American Households* (New York, Plenum Press, 1985), p. 161.
- 50 Hartmann, 'Family as Locus', pp. 378-9; 382-3.
- 51 Davidoff, 'Mastered for Life', p. 419.
- 52 Delphy, *Close to Home*, p. 70.
- 53 For a feminist critique of Orwell, see D. Patai, *The Orwell Mystique: A Study in Male Ideology* (Amherst, University of Massachusetts Press, 1984), esp. ch. 3. Beatrix Campbell has retrodden the road to Wigan Pier; see *Wigan Pier Revisited: Poverty and Politics in the 80s* (London, Virago Press, 1984).
- 54 This aspect of housework was the most highly valued by Oakley's respondents; over half the sample referred to being 'your own boss'; Oakley, *Sociology of Housework*, pp. 42, 182; and *Housewife*, ch. 6.
- 55 Figure from H. Land, 'The Family Wage', *Feminist Review*, 6 (1980), p. 61.
- 56 G. A. Cohen, 'The Structure of Proletarian Unfreedom', *Philosophy and Public Affairs*, 12, 1 (1983), p. 12.
- 57 Thompson, *Appeal*, p. 57.
- 58 C. Hamilton, *Marriage as a Trade* (London, The Women's Press, 1981), p. 27.
- 59 In Britain, for example, in 1901, 88 per cent of women worked in occupations dominated by women; in 1971, 84 per cent did so. In the United States today 80 per cent of women's jobs are located in only 20 of the 420 occupations listed by the Department of Labor, and in Australia in 1986, in only 69 out of 267 occupational categories did the proportion of women reach a third or more.
- 60 Cited in W. Leach, *True Love and Perfect Union: The Feminist Reform of Sex and Society* (New York, Basic Books, 1980), p. 192.
- 61 P. Rothenberg, 'The Political Nature of Relations between the Sexes', in *Beyond Domination: New Perspectives on Women and Philosophy*, ed. C. C. Gould (Totowa, NJ, Rowman and Allanheld, 1984), p. 213.
- 62 H. Hartmann, 'The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union', in *Women and Revolution*, ed. L. Sargent (Boston, South End Press, 1981), p. 15.
- 63 C. Delphy, *Close to Home*, pp. 94, 95.
- 64 F. Engels, *The Origin of the Family, Private Property and the State* (New York, International Publishers, 1942), pp. 58, 65-6.
- 65 The domestic labour debate can be followed in E. Malos (ed.), *The Politics of Housework* (London, Alison and Busby, 1980).

- 66 See B. Taylor, *Eve and the New Jerusalem* (London, Virago Press, 1983), esp. ch. VIII.
- 67 I have taken the term 'employment society' from J. Keane and J. Owens, *After Full Employment* (London, Hutchinson, 1986). I have explored the link between work, masculinity and citizenship in 'The Patriarchal Welfare State', in *Democracy and the Welfare State*, ed. A. Gutmann (Princeton, Princeton University Press, 1987).
- 68 Cited in Cohen, 'The Structure of Proletarian Unfreedom', p. 13. (From Brecht's 'Song of the United Front').
- 69 See D. Deacon, 'Political Arithmetic: The Nineteenth-Century Australian Census and the Construction of the Dependent Woman', *Signs*, 11, 1 (1985); the quotation is from p. 34.
- 70 M. Barrett and M. McIntosh, 'The "Family Wage": Some Problems for Socialists and Feminists', *Capital and Class*, 11 (1980), p. 51.
- 71 I owe this point to J. W. Scott, "'L'Ouvrière! Mot impie, sordide . . .": Women Workers in the Discourse of French Political Economy (1840-1860)', in *The Historical Meanings of Work*, ed. P. Joyce (Cambridge, Cambridge University Press, forthcoming).
- 72 A. Hacker, "'Welfare": The Future of an Illusion', *New York Review of Books* (28 February 1985), p. 41.
- 73 Campbell, *Wigan Pier Revisited*, p. 101.
- 74 Cited in Land, 'The Family Wage', p. 58.
- 75 Cited in S. Okin, *Women in Western Political Thought* (Princeton, Princeton University Press, 1979), p. 258; and A. C. Hill, 'Protection of Women Workers and the Courts: A Legal Case History', *Feminist Studies*, 5, 2 (1979), p. 253.
- 76 M. Porter, *Home, Work and Class Consciousness* (Manchester, Manchester University Press, 1983), p. 123. Forty-two per cent of the male workers interviewed in a Queensland mining town regarded it as the husband's prerogative to decide if a wife should work, only 28 per cent of wives agreed; C. Williams, *Open Cut: The Working Class in an Australian Mining Town* (Sydney, George Allen and Unwin, 1981), p. 149. On outwork, see S. Allen and C. Wolkowitz, 'The Control of Women's Labour: The Case of Homeworking', *Feminist Review*, 22 (1986), esp. p. 41. Recent feminist investigations of outwork and the 'informal' economy suggest that the number of full-time housewives in the past has been overestimated.
- 77 J. Smith, 'The Paradox of Women's Poverty: Wage-Earning Women and Economic Transformation', *Signs*, 10, 2 (1984), p. 304.
- 78 Hartmann, 'Family as Locus', p. 379. In the Old South, married women (slave) field-hands also worked longer than their husbands, undertaking household tasks when they left the field; Genovese, *Roll, Jordan, Roll*, p. 495.
- 79 Porter, *Home, Work and Class Consciousness*, p. 128.

- 80 C. Cockburn, *Brothers: Male Dominance and Technological Change* (London, Pluto Press, 1983), p. 17; on skill, see pp. 112-22.
- 81 A. Pollert, *Girls, Wives and Factory Lives* (London, Macmillan, 1981), p. 111.
- 82 Porter, *Home, Work and Class Consciousness*, p. 124.
- 83 J. Wajcman, *Women in Control: Dilemmas of a Workers' Cooperative* (New York, St Martin's Press, 1983), pp. 149, 154, 137.
- 84 Cockburn, *Brothers*, p. 134.
- 85 Pollert, *Girls, Wives and Factory Lives*, p. 140.
- 86 Cited in J. Walvin, *Black and White: The Negro and English Society 1555-1945* (London, Allen Lane The Penguin Press, 1973), p. 50.
- 87 Cited in Walvin, p. 39. Walvin discusses the number of slaves on pp. 46-50.
- 88 Cited in Walvin, pp. 111, 112.
- 89 Cited in Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Ithaca and London, Cornell University Press, 1975), p. 488.
- 90 The case for Blackstone's tergiversation is made in F. O. Shyllon, *Black Slaves in Britain* (London, Oxford University Press, for the Institute of Race Relations, 1974), ch. 5. Shyllon provides details of textual changes and dates of publication of the various editions.
- 91 Sir W. Blackstone, *Commentaries on the Laws of England*, 4th edn, ed. J. DeWitt Andrews (Chicago, Callaghan and Company, 1899), vol. I, bk I, ch. 14, pp. 424-5.
- 92 J. Feinberg, 'Legal Paternalism', *Canadian Journal of Philosophy*, 1, 1 (1971), p. 121.
- 93 G. W. F. Hegel, *Philosophy of Right*, tr. T. M. Knox (Oxford, Oxford University Press, 1952), §67.
- 94 Williams, *Open Cut*, p. 116.
- 95 R. Edwards, *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (New York, Basic Books, 1979), pp. 139-41.
- 96 K. Marx, *Grundrisse: Foundations of the Critique of Political Economy*, tr. M. Nicolaus, London, Allen Lane, 1973), pp. 274-5.
- 97 H. Benyon, *Working for Ford* (Harmondsworth, Penguin Books, 1973), p. 253.
- 98 A. Fox, *Beyond Contract: Work, Power and Trust Relations* (London, Faber and Faber, 1974), p. 183.
- 99 K. Marx, 'Critique of the Gotha Program', in *The Marx-Engels Reader*, 2nd edn, ed. R. C. Tucker (New York, W. W. Norton and Co., 1978), p. 535 [my emphasis].
- 100 C. Arthur, 'Personality and the Dialectic of Labour and Property - Locke, Hegel, Marx', *Radical Philosophy*, 26 (1980), p. 14.
- 101 T. H. Green, 'Lecture on "Liberal Legislation and Freedom of Contract"', in *Lectures on the Principle of Political Obligation and Other*

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- 102 H. Gintis and S. Bowles, 'Structure and Practice in the Labor Theory of Value', *The Review of Radical Political Economics*, 12, 4 (1981), pp. 14-15.
- 103 A. A. Alchian and H. Demsetz, 'Production, Information Costs, and Economic Organization', *The American Economic Review*, 62 (1972), pp. 794-5, 782-3.

6 Feminism and the Marriage Contract

- 1 Cited in E. Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton* (New York, Oxford University Press, 1984), p. 104.
- 2 M. McMurtry, 'Monogamy: A Critique', in *Philosophy and Sex*, ed. R. Baker and F. Elliston, (Buffalo, Prometheus Books, 1975), p. 173.
- 3 M. M. Shultz, 'Contractual Ordering of Marriage: A New Model for State Policy', *California Law Review*, 70, 2 (1982), p. 311. (I am grateful to Herma Hill Kay for drawing this article to my attention.)
- 4 Sir W. Blackstone, *Commentaries on the Laws of England*, 4th edn, ed. J. Dewitt Andrews (Chicago, Callaghan and Company, 1899), vol. I, bk I, ch. XV, p. 433.
- 5 The terms 'intimate contract' and 'marriage contracting' are used by, respectively, L. J. Weitzman, *The Marriage Contract: Spouses, Lovers, and the Law* (New York, Free Press, 1981); and Shultz, 'Contractual Ordering of Marriage'.
- 6 J. Shouler, *A Treatise on the Law of the Domestic Relations*, 2nd edn (Boston, Little Brown and Company, 1874), pt II, ch. 1, p. 23.
- 7 Cited in Shultz, 'Contractual Ordering of Marriage', p. 226, note 45.
- 8 P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979), p. 759.
- 9 Blackstone, *Commentaries*, bk I, ch. 15, p. 442.
- 10 W. Thompson, *Appeal of One Half the Human Race, Women, Against the Pretensions of the Other Half, Men, to Retain them in Political, and Thence in Civil and Domestic, Slavery* (New York, Source Book Press, 1970), p. 172.
- 11 *Ibid.*, p. 201.
- 12 *Ibid.*, p. 60.
- 13 *Ibid.*, pp. 55-6.
- 14 C. Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (Amherst, University of Massachusetts Press, 1984), p. 116.
- 15 Thompson, *Appeal*, pp. 79, 84. Compare one of Clarissa's objections to marriage, S. Richardson, *Clarissa* (Harmondsworth, Penguin Books, 1985 [1747-8]) letter 32, p. 149.

- 16 Thompson, *Appeal*, p. 89.
- 17 Ibid., p. 65-6.
- 18 Ibid., pp. 104-5.
- 19 Ibid., p. 62.
- 20 T. Ball, 'Utilitarianism, Feminism, and the Franchise: James Mill and His Critics', *History of Political Thought*, 1, 1 (1980), p. 115.
- 21 Trilling is cited by Alice Rossi in her 'Introduction' to J. S. Mill and H. Taylor Mill, *Essays on Sex Equality* (Chicago, University of Chicago Press, 1970), p. 35; and G. Himmelfarb, *On Liberty and Liberalism* (New York, Alfred A. Knopf, 1974), chs 9, 10.
- 22 Thompson, *Appeal*, p. vii.
- 23 Cited by Rossi in Mill and Taylor Mill, *Essays on Sex Equality*, pp. 45-6.
- 24 J. S. Mill, 'The Subjection of Women', in *Essays on Sex Equality*, p. 158.
- 25 Ibid., pp. 168-70.
- 26 Ibid., pp. 178-9.
- 27 H. Taylor Mill, 'The Enfranchisement of Women', in *Essays on Sex Equality*, pp. 104-5.
- 28 For examples of feminist argument, in addition to Weitzman, *Marriage Contract*; and Shultz, 'Contractual Ordering of Marriage'; see S. A. Ketchum, 'Liberalism and Marriage Law', in *Feminism and Philosophy* ed. M. Vetterling-Braggin, F. A. Elliston and J. English (Totowa, NJ, Littlefield, Adams, 1977); and D. L. Barker, 'The Regulation of Marriage: Repressive Benevolence', in *Power and the State*, ed. G. Littlejohn, B. Smart, J. Wakeford and N. Yuval-Davis (London, Croom Helm, 1978). For a discussion of the empirical evidence on the deleterious effects of marriage for women, see J. Bernard, *The Future of Marriage* (New York, Bantam Books, 1974).
- 29 See Weitzman, *Marriage Contract*, p. xvii.
- 30 I. Kant, *The Philosophy of Law*, tr. W. Hastie (Edinburgh, T. and T. Clark, 1887), chapter second, §27, p. 113.
- 31 Weitzman, *Marriage Contract*, p. 338.
- 32 Barker, 'Regulation of Marriage', p. 242.
- 33 Mill, 'Subjection of Women', pp. 217, 146, 142-3.
- 34 M. L. Shanley, 'Marriage Contract and Social Contract in Seventeenth-Century English Political Thought', *Western Political Quarterly*, 32, 1 (1979), p. 79.
- 35 Barker, 'Regulation of Marriage', p. 254.
- 36 Weitzman, *Marriage Contract*, p. xix.
- 37 Shultz, 'Contractual Ordering of Marriage', pp. 303-4, and p. 248, footnote 373.
- 38 Kant, *Philosophy of Law*, §24, p. 110.
- 39 J. Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge, Cambridge University Press, 1967), II, §78.

- 40 I. Kant, 'Observations on the Feeling of the Beautiful and Sublime', in *Woman in Western Thought*, ed. M. L. Osborne, (New York, Random House, 1979), p. 157.
- 41 H. Williams, *Kant's Political Philosophy* (Oxford, Basil Blackwell, 1983), p. 121.
- 42 I. Kant, *Political Writings*, ed. H. Reiss (Cambridge, Cambridge University Press, 1970), p. 78. This edition of Kant's writings is very widely used, and the book provides interesting confirmation that conjugal right is still seen as outside the 'public' matters properly discussed by political theorists - sections dealing with 'private right', including marriage, are omitted from the extracts from *The Metaphysics of Morals* (*The Philosophy of Law*), whereas sections on 'public right' are included.
- 43 Ibid., p. 139.
- 44 Ibid., p. 76.
- 45 Kant, *Philosophy of Law*, chapter second, third section, §22, p. 108.
- 46 Ibid., §23, p. 109.
- 47 I. Kant, *Lectures on Ethics*, tr. L. Infield (New York, Harper and Row, 1963), p. 164.
- 48 Kant, *Philosophy of Law*, §25, p. 111.
- 49 Kant, *Lectures on Ethics*, pp. 166-7.
- 50 Kant, *Philosophy of Law*, §24, p. 110.
- 51 Kant, *Lectures on Ethics*, p. 167.
- 52 Kant, *Philosophy of Law*, p. 239.
- 53 Ibid., §26, pp. 111-12.
- 54 Ibid., §25, pp. 111.
- 55 Ibid., 'Supplementary Explanations of the Principles of Right', p. 238, footnote 1.
- 56 G. W. F. Hegel, *Philosophy of Right*, tr. T. M. Knox (Oxford, Clarendon Press, 1952), §75, and addition to §161.
- 57 Ibid., §75.
- 58 Ibid., §163.
- 59 Ibid., §162.
- 60 Ibid., §163.
- 61 Ibid., addition to §161.
- 62 Ibid., addition to §158.
- 63 E. Durkheim, *The Division of Labor in Society* (New York, Free Press, 1964), p. 381.
- 64 Hegel, *Philosophy of Right*, §167.
- 65 Ibid., §165.
- 66 Ibid., §166 and addition.
- 67 Ibid., §171.
- 68 G. W. F. Hegel, *Phenomenology of Spirit*, tr. A. V. Miller (Oxford, Oxford University Press, 1977), §475, p. 288.

- 69 Hegel, *Philosophy of Right*, addition to §166.
- 70 Durkheim, *Division of Labor*, p. 204.
- 71 Cited in B. Ehrenreich and D. English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (New York, Anchor Press, 1978), p. 276. On the advice manuals see E. Ross, '“The Love Crisis”: Couples Advice Books of Late 1970s', *Signs*, 6, 1, (1980) pp. 109-22.
- 72 B. Barber, *Liberating Feminism* (New York, The Seabury Press, 1975), pp. 62-3.
- 73 For a fascinating study of the divorces obtained under private Acts (applicants included clergymen, who were conspicuous among adulterers), see S. Wolfram, 'Divorce in England 1700-1857', *Oxford Journal of Legal Studies*, 5, 2, (1985), pp. 155-86.
- 74 Delphy, *Close to Home*, p. 102.
- 75 G. S. Becker, 'A Theory of Marriage: Part II', *Journal of Political Economy*, 82, 2, pt II, (1974), p. 12.
- 76 Shultz, 'Contractual Ordering of Marriage', p. 280.
- 77 P. Califia, 'Feminism and Sadomasochism', *Heresies*, 12 (1981), p. 31. For further discussion and references see 'Forum: The Feminist Sexuality Debates', *Signs*, 10, 1 (1984), pp. 106-35.
- 78 Califia, 'Feminism and Sadomasochism', p. 32.
- 79 Passages cited in A. Carter, *The Sadeian Woman and the Ideology of Pornography* (New York, Harper and Row, 1980), pp. 119, 98.
- 80 Califia, 'Feminism and Sadomasochism', p. 32.
- 81 The point is emphasized by J. Benjamin, 'The Bonds of Love: Rational Violence and Erotic Domination', *Feminist Studies*, 6, 1 (1980), p. 157.

7 What's Wrong with Prostitution?

- 1 E. McLeod, *Women Working: Prostitution Now* (London and Canberra, Croom Helm, 1982), pp. 12-13; table 1.1.
- 2 Figure cited in M. A. Jennings, 'The Victim as Criminal: A Consideration of California's Prostitution Law', *California Law Review*, 64, 5 (1976), p. 1251.
- 3 Cited in *San Francisco Examiner* (3 February 1985).
- 4 McLeod, *Women Working*, p. 43.
- 5 M. Wollstonecraft, 'A Vindication of the Rights of Men' in *A Mary Wollstonecraft Reader*, ed. B. H. Solomon and P. S. Berggren (New York, New American Library, 1983), p. 247. She also uses the phrase in *A Vindication of the Rights of Woman* (New York, W. W. Norton and Co., 1975) [1792], p. 148. According to her biographer Clair Tomalin, Wollstonecraft was the first to use the phrase 'legal prostitution' to refer to marriage.

- 6 E. Goldman, 'The Traffic in Women', in *Anarchism and Other Essays* (New York, Dover Publications, 1969), p. 179.
- 7 S. de Beauvoir, *The Second Sex*, tr. H. M. Parshley, (New York, Vintage Books, 1974), p. 619.
- 8 C. Hamilton, *Marriage as a Trade* (London, The Women's Press, 1981), p. 37.
- 9 They are so instructed by J. Radcliffe Richards, *The Sceptical Feminist: A Philosophical Enquiry* (Harmondsworth, Penguin Books, 1980), p. 246.
- 10 D. A. J. Richards, *Sex, Drugs, Death, and the Law: An Essay on Human Rights and Decriminalization*, (Totowa, NJ, Rowman and Littlefield, 1982), p. 121.
- 11 The term is used by L. Ericsson, 'Charges Against Prostitution: An Attempt at a Philosophical Assessment', *Ethics*, 90 (1980), pp. 335-66.
- 12 D. A. J. Richards, *Sex, Drugs, Death, and the Law*, p. 115; also p. 108.
- 13 Ericsson, 'Charges Against Prostitution', p. 342.
- 14 The example comes from M. McIntosh, 'Who Needs Prostitutes? The Ideology of Male Sexual Needs', in *Women, Sexuality and Social Control*, ed. C. Smart and B. Smart (London, Routledge and Kegan Paul, 1978), p. 54.
- 15 M. Frye, *The Politics of Reality: Essays in Feminist Theory* (Trumansburg, NY, The Crossing Press, 1983), p. 143. Where men are confined together and prevented from obtaining access to women (as in prison) the 'taboo' is not observed; masculinity is then exhibited by using other men, usually young men, as if they were women.
- 16 Ericsson, 'Charges Against Prostitution', p. 363, argues (unconvincingly) that 'paternalism' does not conflict with his contractual defence of sound adult prostitution and that prostitution by minors should be prevented. He poses the problem as one of the causes (the supply) of child prostitutes, but fails to mention the problem of the demand. Why do men demand to have sexual relations with (sometimes very young) children? Why do resorts like Pagsanjan in the Philippines exist to cater for this demand? This question falls outside my concerns here, but a recent survey of investigations of 'incest' (father-daughter is the most common form) notes that in conjugal relations, 'many men are accustomed to the experience of sex with a weaker and unwilling partner': W. Breines and L. Gordon, 'The New Scholarship on Family Violence', *Signs*, 8, 3 (1983), p. 527.
- 17 Cited E. McLeod, 'Man-Made Laws for Men? The Street Prostitutes' Campaign Against Control', in *Controlling Women: The Normal and the Deviant*, ed. B. Hutter and G. Williams (London, Croom Helm, 1981), p. 63.
- 18 Cited in E. M. Sigsworth and T. J. Wyke, 'A Study of Victorian Prostitution and Venereal Disease', in *Suffer and Be Still: Women in the Victorian Age*, ed. M. Vicinus, (Bloomington, Indiana University