The Sexual Contract

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1

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Telling stories of all kinds is the major way that human beings have endeavoured to make sense of themselves and their social world. The most famous and influential political story of modern times is found in the writings of the social contract theorists. The story, or conjectural history, tells how a new civil society and a new form of political right is created through an original contract. An explanation for the binding authority of the state and civil law, and for the legitimacy of modern civil government is to be found by treating our society as if it had originated in a contract. The attraction of the idea of an original contract and of contract theory in a more general sense, a theory that claims that free social relations take a contractual form, is probably greater now than at any time since the seventeenth and eighteenth centuries when the classic writers told their tales. But today, invariably, only half the story is told. We hear an enormous amount about the *social* contract; a deep silence is maintained about the *sexual* contract.

The original contract is a sexual-social pact, but the story of the sexual contract has been repressed. Standard accounts of social contract theory do not discuss the whole story and contemporary contract theorists give no indication that half the agreement is missing. The story of the sexual contract is also about the genesis of political right, and explains why exercise of the right is legitimate – but this story is about political right as *patriarchal right* or sex-right, the power that men exercise over women. The missing half of the story tells how a specifically modern form of patriarchy is established. The new civil society created through the original contract is a patriarchal social order.

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Social contract theory is conventionally presented as a story about freedom. One interpretation of the original contract is that the inhabitants of the state of nature exchange the insecurities of natural freedom for equal, civil freedom which is protected by the state. In civil society freedom is universal; all adults enjoy the same civil standing and can exercise their freedom by, as it were, replicating the original contract when, for example, they enter into the employment contract or the marriage contract. Another interpretation, which takes into account conjectural histories of the state of nature in the classic texts, is that freedom is won by sons who cast off their natural subjection to their fathers and replace paternal rule by civil government. Political right as paternal right is inconsistent with modern civil society. In this version of the story, civil society is created through the original contract after paternal rule – or patriarchy – is overthrown. The new civil order, therefore, appears to be anti-patriarchal or post-patriarchal. Civil society is created through contract so that contract and patriarchy appear to be irrevocably opposed.

These familiar readings of the classic stories fail to mention that a good deal more than freedom is at stake. Men's domination over women, and the right of men to enjoy equal sexual access to women, is at issue in the making of the original pact. The social contract is a story of freedom; the sexual contract is a story of subjection. The original contract constitutes both freedom and domination. Men's freedom and women's subjection are created through the original contract – and the character of civil freedom cannot be understood without the missing half of the story that reveals how men's patriarchal right over women is established through contract. Civil freedom is not universal. Civil freedom is a masculine attribute and depends upon patriarchal right. The sons overturn paternal rule not merely to gain their liberty but to secure women for themselves. Their success in this endeavour is chronicled in the story of the sexual contract. The original pact is a sexual as well as a social contract: it is sexual in the sense of patriarchal – that is, the contract establishes men's political right over women – and also sexual in the sense of establishing orderly access by men to women's bodies. The original contract creates what I shall call, following Adrienne Rich, 'the law of male sex-right'.[1] Contract is far from being opposed to patriarchy; contract is the means through which modern patriarchy is constituted.

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One reason why political theorists so rarely notice that half the story of the original contract is missing, or that civil society is patriarchal, is that 'patriarchy' is usually interpreted patriarchally as paternal rule (the literal meaning of the term). So, for example, in the standard reading of the theoretical battle in the seventeenth century between the patriarchalists and social contract theorists, patriarchy is assumed to refer only to paternal right. Sir Robert Filmer claimed that political power was paternal power and that the procreative power of the father was the origin of political right. Locke and his fellow contract theorists insisted that paternal and political power were not the same and that contract was the genesis of political right. The contract theorists were victorious on this point; the standard interpretation is on firm ground – as far as it goes. Once more, a crucial portion of the story is missing. The true origin of political right is overlooked in this interpretation; no stories are told about its genesis (I attempt to remedy the omission in chapter 4). Political right originates in sex-right or conjugal right. Paternal right is only one, and not the original, dimension of patriarchal power. A man's power as a father comes after he has exercised the patriarchal right of a man (a husband) over a woman (wife). The contract theorists had no wish to challenge the original patriarchal right in their onslaught on paternal right. Instead, they incorporated conjugal right into their theories and, in so doing, transformed the law of male sex-right into its modern contractual form. Patriarchy ceased to be paternal long ago. Modern civil society is not structured by kinship and the power of fathers; in the modern world, women are subordinated to men *as men*, or to men as a fraternity. The original contract takes place after the political defeat of the father and creates modern *fraternal patriarchy*.

Another reason for the omission of the story of the sexual contract is that conventional approaches to the classic texts, whether those of mainstream political theorists or their socialist critics, give a misleading picture of a distinctive feature of the civil society created through the original pact. Patriarchal civil society is divided into two spheres, but attention is directed to one sphere only. The story of the social contract is treated as an account of the creation of the public sphere of civil freedom. The other, private, sphere is not seen as politically relevant. Marriage and the marriage contract are, therefore, also deemed politically irrelevant. To ignore the marriage contract is to ignore half the original contract. In the classic texts,

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as I shall show in some detail, the sexual contract is displaced onto the marriage contract. The displacement creates a difficulty in retrieving and recounting the lost story. All too easily, the impression can be given that the sexual contract and the social contract are two separate, albeit related, contracts, and that the sexual contract concerns the private sphere. Patriarchy then appears to have no relevance to the public world. On the contrary, patriarchal right extends throughout civil society. The employment contract and (what I shall call) the prostitution contract, both of which are entered into in the public, capitalist market, uphold men's right as firmly as the marriage contract. The two spheres of civil society are at once separate and inseparable. The public realm cannot be fully understood in the absence of the private sphere, and, similarly, the meaning of the original contract is misinterpreted without both, mutually dependent, halves of the story. Civil freedom depends on patriarchal right.

My interest in the sexual contract is not primarily in interpreting texts, although the classic works of social contract theory figure largely in my discussion. I am resurrecting the story in order to throw light onto the present-day structure of major social institutions in Britain, Australia and the United States – societies which, we are told, can properly be seen as if they had originated in a social contract. The sense in which these societies are patriarchal can be elucidated through the full story of the original contract; they have enough in common historically and culturally to enable the same story to be told (and many of my general arguments will also be relevant to other developed Western countries). The manner in which patriarchal domination differs from other forms of domination in the late twentieth century becomes much clearer once the sexual contract has been retrieved from oblivion. The connection between patriarchy and contract has been little explored, even by feminists, despite the fact that, in modern civil society, crucially important institutions are constituted and maintained through contract.

The relationship between employer and worker is contractual, and for many contract theorists the employment contract is the exemplary contract. Marriage also begins in a contract. Feminists have been greatly concerned with the marriage contract but their writings and activities have been ignored for the most part, even by most socialist critics of contract theory and the employment contract who might have been expected to be keenly interested in feminist

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arguments. (Except where specified, I shall use 'socialist' very broadly to include Marxists, social democrats, anarchists and so on.) In addition to the marriage and employment contracts, I shall also examine the contract between prostitute and client and have something to say about the slave contract (or, more precisely, as I shall discuss in chapter 3, what should be called the civil slave contract). At the end of chapter 7, I shall look at a more recent development, the contract entered by the so-called surrogate mother. These contracts are either regulated or prohibited by law and I shall touch upon the legal standing of parties to the contracts at various points in my discussion. I am not, however, writing about contract law. My concern is with contract as a principle of social association and one of the most important means of creating social relationships, such as the relation between husband and wife or capitalist and worker. Nor is my argument about property in the sense in which 'property' commonly enters into discussions of contract theory. Proponents and critics of contract theory tend to concentrate on property either as material goods, land and capital, or as the interest (the property) that individuals can be said to have in civil freedom. The subject of all the contracts with which I am concerned is a very special kind of property, the property that individuals are held to own in their persons.

Some knowledge of the story of the sexual contract helps explain why singular problems arise about contracts to which women are a party. The problems are never mentioned in most discussions of the classic texts or by contemporary contract theorists. Feminists have been pointing out the peculiarities of the marriage contract for at least a century and a half, but to no avail. The standard commentaries on the classic stories of the original contract do not usually mention that women are *excluded* from the original pact. Men make the original contract. The device of the state of nature is used to explain why, given the characteristics of the inhabitants of the natural condition, entry into the original contract is a rational act. The crucial point that is omitted is that the inhabitants are sexually differentiated and, for all the classic writers (except Hobbes), a difference in rationality follows from natural sexual difference. Commentaries on the texts gloss over the fact that the classic theorists construct a patriarchal account of masculinity and femininity, of what it is to be men and women. Only masculine beings are endowed with the attributes and capacities necessary to

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enter into contracts, the most important of which is ownership of property in the person; only men, that is to say, are 'individuals'.

In the natural condition 'all men are born free' and are equal to each other; they are 'individuals'. This presupposition of contract doctrine generates a profound problem: how in such a condition can the government of one man by another ever be legitimate; how can political right exist? Only one answer is possible without denying the initial assumption of freedom and equality. The relationship must arise through agreement and, for reasons which I shall explore in chapter 3, contract is seen as the paradigm of free agreement. But women are not born free; women have no natural freedom. The classic pictures of the state of nature also contain an order of subjection – between men and women. With the exception of Hobbes, the classic theorists claim that women naturally lack the attributes and capacities of 'individuals'. Sexual difference is political difference; sexual difference is the difference between freedom and subjection. Women are not party to the original contract through which men transform their natural freedom into the security of civil freedom. Women are the subject of the contract. The (sexual) contract is the vehicle through which men transform their natural right over women into the security of civil patriarchal right. But if women have no part in the original contract, if they can have no part, why do the classic social contract theorists (again with the exception of Hobbes) make marriage and the marriage contract part of the natural condition? How can beings who lack the capacities to make contracts nevertheless be supposed always to enter into this contract? Why, moreover, do all the classic theorists (including Hobbes) insist that, in civil society, women not only can but must enter into the marriage contract?

The construction of the difference between the sexes as the difference between freedom and subjection is not merely central to a famous political story. The structure of our society and our everyday lives incorporates the patriarchal conception of sexual difference. I shall show how the exclusion of women from the central category of the 'individual' has been given social and legal expression and how the exclusion has structured the contracts with which I am concerned. Despite many recent legal reforms and wider changes in the social position of women, we still do not have the same civil standing as men, yet this central political fact about our societies has rarely entered into contemporary discussions of contract theory and the

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practice of contract. Husbands no longer enjoy the extensive right over their wives that they possessed in the mid-nineteenth century when wives had the legal standing of property. But, in the 1980s, this aspect of conjugal subjection lingers on in legal jurisdictions that still refuse to admit any limitation to a husband's access to his wife's body and so deny that rape is possible within marriage. A common response is to dismiss this matter as of no relevance to *political* theorists and *political* activists. The possibility that women's standing in marriage may reflect much deeper problems about women and contract, or that the structure of the marriage contract may be very similar to other contracts, is thereby also dismissed from consideration. The refusal to admit that marital domination is politically significant obviates the need to consider whether there is any connection between the marriage contract and other contracts involving women.

Surprisingly little attention has been given to the connection between the original contract – which is generally agreed to be a political fiction – and actual contracts. The social contract, so the story goes, creates a society in which individuals can make contracts secure in the knowledge that their actions are regulated by civil law and that, if necessary, the state will enforce their agreements. Actual contracts thus appear to exemplify the freedom that individuals exercise when they make the original pact. According to contemporary contract theorists, social conditions are such that it is always reasonable for individuals to exercise their freedom and enter into the marriage contract or employment contract or even, according to some classic and contemporary writers, a (civil) slave contract. Another way of reading the story (as Rousseau saw) is that the social contract enables individuals voluntarily to subject themselves to the state and civil law; freedom becomes obedience and, in exchange, protection is provided. On this reading, the actual contracts of everyday life also mirror the original contract, but now they involve an exchange of obedience for protection; they create what I shall call *civil mastery* and *civil subordination*.

One reason why patriarchal domination and subordination has seldom received the attention it deserves is that *subordination* has all too often been a minor theme among critics of contract. A great deal of attention has been paid to the conditions under which contracts are entered into and to the question of exploitation once a contract has been made. Proponents of contract doctrine claim that contracts

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in everyday life match up well enough to the model of the original contract in which equal parties freely agree to the terms; actual contracts thus provide examples of individual freedom. Their critics, whether socialists concerned with the employment contract, or feminists concerned with the marriage contract or prostitution contract, have countered this claim by pointing to the often grossly unequal position of the relevant parties and to the economic and other constraints facing workers, wives and women in general. But concentration on coerced entry into contracts, important though this is, can obscure an important question; does contract immediately become attractive to feminists or socialists if entry is truly voluntary, without coercion?

Criticism has also been directed at exploitation, both in the technical Marxist sense of the extraction of surplus value and in the more popular sense that workers are not paid a fair wage for their labour and endure harsh working conditions, or that wives are not paid at all for their labour in the home, or that prostitutes are reviled and subject to physical violence. Again, exploitation is important, but the conjectural history of the origins of patriarchy contained in classic contract theory also directs attention to the creation of relations of domination and subordination. Since the seventeenth century, feminists have been well aware that wives are subordinate to their husbands but their criticism of (conjugal) domination is much less well known than socialist arguments that subsume subordination under exploitation. However, exploitation is possible precisely because, as I shall show, contracts about property in the person place right of command in the hands of one party to the contract. Capitalists can exploit workers and husbands can exploit wives because workers and wives are constituted as subordinates through the employment contract and the marriage contract. The genius of contract theorists has been to present both the original contract and actual contracts as exemplifying and securing individual freedom. On the contrary, in contract theory universal freedom is always an hypothesis, a story, a political fiction. Contract always generates political right in the form of relations of domination and subordination.

In 1919, G. D. H. Cole proclaimed that the wrong reply was usually given when people tried to answer the question of what was wrong with the capitalist organization of production; 'they would answer poverty [inequality], when they ought to answer slavery'.[2]

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Cole exaggerated for polemical purposes. When individuals are juridically free and civil equals, the problem is not literally one of slavery; no one can, simultaneously, be human property and a citizen. However, Cole's point is that critics of capitalism – and contract – focus on exploitation (inequality) and thus overlook subordination, or the extent to which institutions held to be constituted by free relationships resemble that of master and slave. Rousseau criticized earlier contract theorists for advocating an original agreement that was tantamount to a slave contract. (I examined the question of the alienation of political power to representatives and the state, a matter central to the social contract, in *The Problem of Political Obligation.*) Rousseau is the only classic contract theorist who flatly rejects slavery and any contract – save the sexual contract – that bears a family resemblance to a slave contract. Differences between the classic writers become less important than their collective endorsement of patriarchy only from outside the confines of mainstream political theory. Patriarchal subordination is central to the theories of all the classic writers but has been almost entirely neglected by radical political theorists and activists (whether liberal or socialist, like G. D. H. Cole); feminist voices have gone unheeded.

The revival of the organized feminist movement from the late 1960s has also revived the term 'patriarchy'. There is no consensus about its meaning, and I shall examine the current feminist controversies in the next chapter. Debates about patriarchy are dogged by patriarchal interpretations, among the most important and persistent being two related arguments: that 'patriarchy' must be interpreted literally, and that patriarchy is a relic of the old world of status, or a natural order of subjection; in short, a remnant of the old world of paternal right that preceded the new civil world of contract. Patriarchy, that is, is seen as synonymous with the 'status' in Sir Henry Maine's famous characterization of the transformation of the old world into the new as a 'movement *from Status to Contract*'.[3] Contract thus gains its meaning as freedom in contrast to, and in opposition to, the order of subjection of status or patriarchy. The name of Sir Henry Maine and his famous aphorism are more often evoked in discussions of contract than closely examined. Maine's argument was concerned with the replacement of status, in the sense of absolute paternal jurisdiction in the patriarchal family, by contractual relations, and the replacement of the family by the

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individual as the fundamental 'unit' of society. 'Status' in Maine's sense overlaps with one of two other senses in which the term is often used today.

'Status' is sometimes used to refer more generally to ascription; human beings are born into certain social positions by virtue of their ascribed characteristics, such as sex, colour, age and so on. John Stuart Mill's criticism in *The Subjection of Women* of the insufficiently contractual marriage contract, which presupposed that one party, the wife, is born into a certain condition, rests on an implicit contrast between contract and status in this broad sense. Contemporary legal writers also use 'status' in a quite different fashion. For legal writers, 'contract' refers to a *laissez-faire* economic order, an order 'of freedom of contract', in which substantive individual characteristics and the specific subject of an agreement are irrelevant. Contract in this sense stands opposed to 'status' as legal (state) regulation. The regulation hedges contract about with limitations and special conditions that take into account precisely *who* is making a contract about *what* and under what *circumstances*. The development of a vast system of such regulation has led Patrick Atiyah to declare, in *The Rise and Fall of Freedom of Contract*, that it has 'become a cliché to say that there has been a reversion from "contract" to "status", a movement contrary to that perceived and described by Maine in 1861'.[4] However, Maine's and Atiyah's movements are located in very different historical contexts. 'Status' in the 1980s is far removed from Maine's status. I shall come back to the meaning of status and its connection to patriarchy and contract at various points in my argument.

The perception of civil society as a post-patriarchal social order also depends on the inherent ambiguity of the term 'civil society'. From one perspective, civil society is the contractual order that follows the pre-modern order of status, or the civil order of constitutional, limited government replaces political absolutism. From another perspective, civil society replaces the state of nature; and, yet again, 'civil' also refers to one of the spheres, the public sphere, of 'civil society'. Most advocates and opponents of contract theory trade on the ambiguity of 'civil'. 'Civil society' is distinguished from other forms of social order by the separation of the private from the public sphere; civil society is divided into two opposing realms, each with a distinctive and contrasting mode of association. Yet attention is focused on one sphere, which is treated

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as the only realm of political interest. Questions are rarely asked about the political significance of the existence of two spheres, or about how both spheres are brought into being. The origin of the public sphere is no mystery. The social contract brings the public world of civil law, civil freedom and equality, contract and the individual into being. What is the (conjectural) history of the origin of the private sphere?

To understand any classic theorist's picture of either the natural condition or the civil state, both must be considered together. 'Natural' and 'civil' are at once opposed to each other and mutually dependent. The two terms gain their meaning from their relationship to each other; what is 'natural' excludes what is 'civil' and vice versa. To draw attention to the mutual dependence of the state of nature/civil society does not explain why, after the original pact, the term 'civil' shifts and is used to refer not to the whole of 'civil society' but to one of its parts. To explain the shift, a double opposition and dependence between 'natural' and 'civil' must be taken into account. Once the original contract is entered into, the relevant dichotomy is between the private sphere and the civil, public sphere – a dichotomy that reflects the order of sexual difference in the natural condition, which is also a political difference. Women have no part in the original contract, but they are not left behind in the state of nature – that would defeat the purpose of the sexual contract! Women are incorporated into a sphere that both is and is not in civil society. The private sphere is part of civil society but is separated from the 'civil' sphere. The antinomy private/public is another expression of natural/civil and women/men. The private, womanly sphere (natural) and the public, masculine sphere (civil) are opposed but gain their meaning from each other, and the meaning of the civil freedom of public life is thrown into relief when counterposed to the natural subjection that characterizes the private realm (Locke misleads by presenting the contrast in partriarchal terms as between paternal and political power). What it means to be an 'individual', a maker of contracts and civilly free, is revealed by the subjection of women within the private sphere.

The private sphere is typically presupposed as a necessary, natural foundation for civil, i.e., public life, but treated as irrelevant to the concerns of political theorists and political activists. Since at least 1792 when Mary Wollstonecraft's *A Vindication of the Rights*

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of Woman appeared, feminists have persistently pointed to the complex interdependence between the two spheres, but, nearly two centuries later, 'civil' society is still usually treated as a realm that subsists independently. The origin of the private sphere thus remains shrouded in mystery. The mystery is deepened because discussions of social contract theory almost always pass directly from the eighteenth century to the present day and John Rawls' contemporary reformulation of the (social) contract story. Yet Sigmund Freud also (re)wrote more than one version of the story of the original contract. He is rarely mentioned, but perhaps there is good reason for the absence of Freud's name. Freud's stories make explicit that power over women and not only freedom is at issue before the original agreement is made, and he also makes clear that two realms are created through the original pact. In the classic texts (except for those of Hobbes) it can easily seem at first sight that there is no need to create the private sphere, since sexual relations between men and women, marriage and the family already exist in the state of nature. But the original contract brings 'civil society' into being, and the story of the sexual contract must be told in order to elucidate how the private realm (is held to be) established and why the separation from the public sphere is necessary.

The sexual contract, it must be emphasized, is not associated only with the private sphere. Patriarchy is not merely familial or located in the private sphere. The original contract creates the modern social whole of patriarchal civil society. Men pass back and forth between the private and public spheres and the writ of the law of male sex-right runs in both realms. Civil society is bifurcated but the unity of the social order is maintained, in large part, through the structure of patriarchal relations. In chapters 5 and 7 I shall examine some aspects of the public face of patriarchy and explore some of the connections between patriarchal domination in the two spheres. The dichotomy private/public, like natural/civil, takes a double form and so systematically obscures these connections.

Most contemporary controversy between liberals and socialists about the private and the public is not about the *patriarchal* division between natural and civil. The private sphere is 'forgotten' so that the 'private' shifts to the civil world and the *class* division between private and public. The division is then made within the 'civil' realm itself, between the private, capitalist economy or private enterprise and the public or political state, and the familiar debates

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ensue. Indeed, the general public now recognizes the term 'social contract' because it has been used to refer to relations between government, labour and capital in the 'civil' realm. In the 1970s in Britain, Labour governments made much of their social contract with the trades union movement, and the Accord between the state, capital and labour in Australia, forged in 1983, is often called a social contract. In the 1980s, books about the Reagan administration's economic policy have also been appearing in the United States with 'social contract' in the title.[5] Thus the liberal defence and socialist criticism of this variant of the private/public antinomy either defend or attack class domination and the employment contract. Patriarchal domination lies outside their frame of reference, along with questions about the relation between the marriage contract and employment contract and any hint that the employment contract, too, is part of the structure of patriarchy.

Over the past decade, the familiar terms of debate between liberals and socialists and among socialists themselves have become increasingly problematic. The inadequacy has been revealed in the face of a range of political, economic and intellectual developments, only one of which I want to touch on here. Feminists have shown how the proponents in these long-standing debates, often bitterly opposed to each other, share some important assumptions in common. The fundamental assumption is that the patriarchal separation of the private/natural sphere from the public/civil realm is irrelevant to political life. But the common ground extends further still. The complex relation between patriarchy, contract, socialism and feminism is relatively little explored. An examination of this area through the story of the sexual contract shows how certain current trends in socialism and feminism join hands with the most radical contract theory. The intersection is at the idea that, in Locke's famous formulation, 'every Man has a *Property* in his own *Person*';[6] all individuals are owners, everyone owns the property in their capacities and attributes.

The idea that individuals own property in their persons has been central to the struggle against class and patriarchal domination. Marx could not have written *Capital* and formulated the concept of labour power without it; but nor could he have called for the abolition of wage labour and capitalism, or what, in older socialist terminology, is called wage slavery, if he had not also rejected this view of individuals and the corollary that freedom is contract and

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ownership. That Marx, necessarily, had to use the idea of property ownership in the person in order to reject both this conception and the form of social order to which it contributed, is now in danger of being forgotten in the current popularity of market socialism and, in academic circles, rational choice or analytic Marxism. Similarly, the claim that women own the property in their persons has animated many feminist campaigns past and present, from attempts to reform marriage law and to win citizenship to demands for abortion rights. The appeal of the idea for feminists is easy to see when the common law doctrine of coverture laid down that wives were the property of their husbands and men still eagerly press for the enforcement of the law of male sex-right and demand that women's bodies, in the flesh and in representation, should be publicly available to them. To win acknowledgment that women own the property in their persons thus seems to strike a decisive blow against patriarchy, but, historically, while the feminist movement campaigned around issues that could easily be formulated in the language of ownership of the person, the predominant feminist argument was that women required civil freedom *as women*, not as pale reflections of men. The argument thus rested on an implicit rejection of the patriarchal construction of the individual as a masculine owner.

Today, however, many feminists appear to see only the advantages in the current political climate in making feminist demands in contractual terms, and to be unaware that the 'individual' as owner is the fulcrum on which modern patriarchy turns. This is especially true in the United States, where socialist arguments are now rarely heard and where the most radical form of contract doctrine is influential. I shall refer to the latter, which has its classical expression in Hobbes' theory, as *contractarian* theory or *contractarianism* (in the United States it is usually called libertarianism, but in Europe and Australia 'libertarian' refers to the anarchist wing of the socialist movement; since my discussion owes something to that source I shall maintain un-American usage). The 'individual' is the bedrock from which contractarian doctrine is constructed, and to the extent that socialism and feminism now look to the 'individual' they have joined hands with contractarians. When socialists forget that both acceptance *and* rejection of the individual as owner is necessary for their arguments, subordination (wage slavery) disappears and only exploitation is visible. When feminists forget that, though acceptance of the 'individual' may be politically necessary, so also is

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rejection, they acquiesce in the patriarchal construction of womanhood.

For contemporary contractarians, or, following Hegel, from what I shall call 'the standpoint of contract',[7] social life and relationships not only originate from a social contract but, properly, are seen as an endless series of discrete contracts. The implication of this view can be seen by considering an old philosophical conundrum. An ancient belief is that the universe rests on an elephant, which, in turn, stands on the back of a turtle; but what supports the turtle? One uncompromising answer is that there are turtles all the way down. From the standpoint of contract, in social life there are contracts all the way down. Moreover, no limits can be placed on contract and contractual relations; even the ultimate form of civil subordination, the slave contract, is legitimate. A civil slave contract is not significantly different from any other contract. That individual freedom, through contract, can be exemplified in slavery should give socialists and feminists pause when they make use of the idea of contract and the individual as owner.

Familiar arguments against contract, whether from the Left or those of Hegel, the greatest theoretical critic of contract, are all thrown into a different light once the story of the sexual contract is retrieved. Ironically, the critics, too, operate within parameters set by the original patriarchal contract and thus their criticisms are always partial. For example, marital subjection is either endorsed or ignored, the patriarchal construction of the 'worker' never recognized and the implications of the civil slave contract are never pursued. This is not to say that an examination of patriarchy from the perspective of the sexual contract is a straightforward task; misunderstandings can easily arise. For instance, some feminists have justifiably become concerned at the widespread portrayal of women as merely the subjects of men's power, as passive victims, and to focus on patriarchal subordination might appear to reinforce this portrayal. However, to emphasize that patriarchal subordination originates in contract entails no assumption that women have merely accepted their position. On the contrary, an understanding of the way in which contract is presented as freedom and as anti-patriarchal, while being a major mechanism through which sex-right is renewed and maintained, is only possible because women (and some men) have resisted and criticized patriarchal relations since the seventeenth century. This study depends on their resist-

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ance, and I shall refer to some of their neglected criticisms of contract.

Attention to the subordination constituted by original contract, and by contract more generally, is itself another possible source of misunderstanding. Michel Foucault's influential studies might suggest that the story of the sexual contract will generate a view of power and domination that remains stuck in an old juridical formulation 'centered on nothing more than the statement of the law and the operation of taboos'.[8] Certainly, law and contract, and obedience and contract, go hand in hand, but it does not follow that contract is concerned only with law and not also, in Foucault's terminology, with discipline, normalization and control. In the *History of Sexuality* Foucault remarks that 'beginning in the eighteenth century, [new power mechanisms] took charge of men's existence, men as living bodies'.[9] But beginning in the seventeenth century, when stories of the original contract were first told, a new mechanism of subordination and discipline enabled men to take charge of women's bodies and women's lives. The original contract (is said to have) brought a modern form of law into existence, and the actual contracts entered into in everyday life form a specifically modern method of creating local power relations within sexuality, marriage and employment. The civil state and law and (patriarchical) discipline are not two forms of power but dimensions of the complex, multifaceted structure of domination in modern patriarchy.

To tell the story of the sexual contract is to show how sexual difference, what it is to be a 'man' or 'woman', and the construction of sexual difference as political difference, is central to civil society. Feminism has always been vitally concerned with sexual difference and feminists now face a very complex problem. In modern patriarchy the difference between the sexes is presented as the quintessentially natural difference. Men's patriarchal right over women is presented as reflecting the proper order of nature. How then should feminists deal with sexual difference? The problem is that, in a period when contract has a wide appeal, the patriarchal insistence that sexual difference is politically relevant all too easily suggests that arguments that refer to women *as women* reinforce the patriarchal appeal to nature. The appropriate feminist response then seems to be to work for the elimination of all reference to the difference between men and women in political life; so, for example, all laws and policies should be 'gender neutral'. I shall say something about the now ubiquitous

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terminology of 'gender' in the final chapter. Such a response assumes that 'individuals' can be separated from sexually differentiated bodies. Contract doctrine relies on the same assumption in order to claim that all examples of contract involving property in the person establish free relations. The problem is that the assumption relies on a political fiction (an argument I shall present in some detail in chapters 5 and 7).

When feminism uncritically occupies the same terrain as contract, a response to patriarchy that appears to confront the subjection of women head-on also serves to consolidate the peculiarly modern form of patriarchal right. To argue that patriarchy is best confronted by endeavouring to render sexual difference politically irrelevant is to accept the view that the civil (public) realm and the 'individual' are uncontaminated by patriarchal subordination. Patriarchy is then seen as a private familial problem that can be overcome if public laws and policies treat women as if they were exactly the same as men. However, modern patriarchy is not, first and foremost, about women's familial subjection. Women engage in sexual relations with men and are wives before they become mothers in families. The story of the sexual contract is about (hetero)sexual relations and women as embodied sexual beings. The story helps us understand the mechanisms through which men claim right of sexual access to women's bodies and claim right of command over the use of women's bodies. Moreover, heterosexual relations are not confined to private life. The most dramatic example of the public aspect of patriarchal right is that men demand that women's bodies are for sale as commodities in the capitalist market; prostitution is a major capitalist industry.

Some feminists fear that references to 'men' and 'women' merely reinforce the patriarchal claim that 'Woman' is a natural and timeless category, defined by certain innate, biological characteristics. To talk about Woman, however, is not at all the same thing as talking about women. 'The eternal Woman' is a figment of the patriarchal imagination. The constructions of the classical contract theorists no doubt are influenced by the figure of Woman and they have a good deal to say about natural capacities. Nonetheless, they develop a social and political, albeit patriarchal, construction of what it means to be masculine or feminine in modern civil society. To draw out the way in which the meaning of 'men' and 'women' has helped structure major social institutions is not to fall back on

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purely natural categories. Nor is it to deny that there are many important differences between women and that, for example, the life of a young Aboriginal woman in inner Sydney will be markedly different from the life of the wife of a wealthy white banker in Princeton. At various points in my argument I shall make specific reference, say, to working-class women, but, in an exploration of contract and patriarchal right, the fact that women are *women* is more relevant than the differences between them. For example, the social and legal meaning of what it is to be a 'wife' stretches across class and racial differences. Of course, not all married couples behave in the same way as 'wives' and 'husbands', but the story of the sexual contract throws light onto the *institution* of marriage; however hard any couple may try to avoid replicating patriarchal marital relations, none of us can entirely escape the social and legal consequences of entering into the marriage contract.

Finally, let me make clear that although I shall be (re)telling conjectural histories of the origins of political right and repairing some omissions in the stories, I am not advocating the replacement of patriarchal tales with feminist stories of origins.

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