Contract and Domination

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On Critics and Contract

Carole Pateman

The thread that has run though all my work is an interest in democratic theory and a concern with democratization; that is, with changes required for the creation of a more democratic society. *The Sexual Contract* (1988) was not couched in terms of democratic theory, but I see it as part of my contribution to this area of scholarship.[1] I have a long-standing interest in early modern theories of an original contract. My first critical study of the subject was *The Problem of Political Obligation*, originally published in 1979 when a major revival of contract theory was already underway in the wake of John Rawls's *A Theory of Justice*, first published in 1971. My two books on contract theory have not often been considered together, but my analysis in *The Problem of Political Obligation* informs my argument about the sexual contract. In 1979, together with Teresa Brennan, I also published "'Mere Auxiliaries to the Commonwealth,'" my first feminist reading of Hobbes and Locke.

[1] I have been very gratified over the years by the large number of scholars from many different disciplinary backgrounds and intellectual persuasions who have read, commented on, criticized, and made use of *The Sexual Contract*. One of the most pleasing developments has been that scholars working in very different cultural milieus have found something of value in my book. Despite the fact that I made clear that my argument was specifically about Anglo-American political theory and societies, scholars of the Middle East have told me that they have found *The Sexual Contract* a valuable source, a Korean translation was published in 2001, it has been used in a paper on Nepal (Tamang 2002), and I recently learnt that it appears in a study of drama in colonial India. It has been read by scholars in disciplines that range from political theory and women's studies, to law, history, literature, French studies, postcolonial studies, and art theory. I have made other responses to critics in, e.g., Pateman (1990a, 1990b), and on a different note (1996); see also Pateman (1997).

Reading critics of my work over the years has made me aware that *The Sexual Contract* is much more complex and contains a much denser argument than I appreciated when I was writing it. I have always been a rigorous editor of my own work, and I have thought for some time now that perhaps my argument was expressed rather too concisely for its own good. As critics have noted, some aspects could have benefited from further explication, and if it had been more leisurely perhaps some of the more bizarre accounts of my argument might have been avoided. Yet I doubt that would have been sufficient to deter critics who try to stuff my book into boxes labeled with conventional classifications in feminism and political theory. I was unlucky, too, that it got caught up in various trends in feminist theory, such as the vogue for hunting out essentialism, an attack on feminism for complicity in the sins of the fathers, and a preoccupation with individual differences and experiences at the expense of institutions and structures of power. Attention thus got distracted from the full scope of my argument and from the concepts around which it was framed. Few commentators have discussed my notions of civil subordination, civil slavery, or my use of the paradox of slavery. Little has been said about my analysis of the employment contract and my argument about subordination and exploitation. Property in the person is mentioned more often, but seldom the reason why I regard it as so important.

The Sexual Contract began from a simple enough starting-point. After Teresa Brennan and I wrote our article, I decided to take a more extensive look at early modern theories of an original contract. I wanted to reassess a major claim of contemporary political theorists: that if we think of our (Anglo-American) society as if it were based on an original contract or, alternatively, if we formulate principles that would be agreed to if we were in the original position, we can see that our major institutions are structured by free relationships in a system of voluntary cooperation.

In *The Problem of Political Obligation* my criticism of this claim was directed at citizenship in the liberal democratic state, one of the three institutions that lie at the heart of modern societies. In *The Sexual Contract* my analysis focused on the other two institutions – marriage and employment. I looked in some detail at the creation of, and relationship between, modern marriage (under coverture) and employment from the seventeenth and eighteenth centuries to the end of their patriarchal heyday, which in Britain covered the period from around 1840 to the end of the 1970s. I was also concerned with the connections between marriage and women's standing, or lack of standing, as citizens.

From *Participation and Democratic Theory* (1970) onward, my primary concern in reading the classic texts of political theory has been with what

we can learn about how we have arrived at where we are today. My use of historical material in *The Sexual Contract* serves a similar purpose. We need theoretical and historical understanding in order to provide insights into how best to move forward to a more democratic future. My interpretation of the early modern theorists of an original contract was thus undertaken in a spirit similar to Moira Gatens's view of genealogy; I was asking "what form of life has been supported . . . by a particular narrative about the origins of a body politic" (Gatens 1996: 30).[2] But Gatens and other critics deny that I was undertaking this form of inquiry. In one of the more peculiar readings of my book, they insist that I was concocting a history of origins (see section III).

Instead of engaging in such a quixotic quest, I investigated the logic of contract theory, or, more exactly, I tried to unravel a number of different aspects of that logic. At the most general level I explored how, once the logic of stories of an original contract is appreciated, it becomes possible to see something of the way in which the sexual contract – the view that men have justified right of government over women in the modern state – has been, so to speak, built into major social institutions.[3] I was concerned too with the logic of stories of an original contract. A very small part of this was the discovery of two logical gaps that I filled with conjectures: first, Hobbes's lack of any explanation of how free and equal women in the state of nature become subject to their husbands in civil society; and, second, the absence of any account of the genesis of the sons over whom fathers rule.

I analyzed the logic of the structural connections between the institutions of marriage, employment, and citizenship in the modern state. I should note here that my approach differs in two crucial respects from Hegel's use of the trilogy of state, civil society, and family. First, my argument is about the institution of marriage, not about the family (see section IV). Second, theorists of an original contract used the term

[2] Gatens (1996: 42) argues that I offer "an incomplete genealogy," so that *The Sexual Contract* "performs" what Nietzsche called a genealogy "of the English kind." Wendy Brown (1995: 138) also wants to turn my historical argument "in the direction of genealogy." Genealogy and Nietzsche have been all the rage for some time, but Jacqueline Stevens has recently argued that the view that genealogy derives from Nietzsche is mistaken, propagated through Gilles Deleuze by a misreading on the part of Michel Foucault. Nietzsche "mocked genealogists and their enterprise"; his objection was to history "used to proffer moralizing, self-righteous, functionalist justifications of the status quo" (Stevens 2003: 559, 560).

[3] Brown argues that my focus on contract involves a "fetish" since "an imaginary social contract" is no longer required to legitimate a "liberal" political order (1995: 137). I want to move away from contract, but the "social contract" is commonly invoked not only by political philosophers but in popular political rhetoric and discussion, so it is necessary to investigate the logic and power of this political fiction.

"civil society" to refer to political society, the modern state (that includes marriage) created through an original contract. Hegel's "civil society" marks out only part of this social order; in particular, it refers to "the market." But the crucial market in modern states is the labor market, without which there can be no institution of employment.

The political fiction of property in the person (the commodity of labor power is one example) is central to another aspect of my argument, in which I teased out the logic of the process through which subordination can be presented as an exemplification of freedom. My analysis was designed to help an understanding of how certain concepts and ideas allow an institution of subordination (say, employment) to be seen as constituted by free relations. Wage labor can then be placed at the opposite pole from unfree labor and treated as an essential part of democratization. This logic demands an appreciation of what, following Hegel, I called the standpoint of contract or contractarianism, the rigorously consistent form of contract theory. An analysis of contractarianism, a form of political argument that, unusually, does not flinch from the view that there are contracts all the way down, shows how subordination can be generated through contract. Let me emphasize that I was concerned with *voluntary* contracts (about property in the person) and the problem of how it is that a contract can be freely entered into, result in (civil) subordination, and yet be seen as creating free relations (see also Ellerman 2005).

My investigation of the classic stories of an original contract is relevant to two widespread misunderstandings of my argument. The first is that my book is about "social contract theory." I have indeed written a book about social contract theory – about the justification of the authority of the modern state over its citizens – but it is not *The Sexual Contract*. I left the social contract to one side in the latter because it was the subject of *The Problem of Political Obligation*.[4] It was not until some years after I had written *The Problem of Political Obligation* that I came to appreciate that the social contract was only *one* dimension of the original contract and that there was another dimension, the sexual contract, to be explicated.[5] Standard interpretations of the texts present the

[4] Not because "solutions to the problem of male competition don't rivet the interest of females": (Caton 1990: 67).

[5] Joanne Wright argues that "[i]t appears that Pateman develops the concept of the sexual contract . . . in the abstract, drawing on a variety of sources including Freud's primal scene narrative, and subsequently applies it, unsuccessfully in my view, to the individual social contract theorists" (2004: 116). I am unclear how I could have possibly arrived at the idea of a sexual contract "in the abstract." It occurred to me after a long process of reading the early modern theorists and thinking about them in relation to feminist and socialist political argument.

creation of civil society as a story of the government of the state. Nothing is said about *men's* claim to political right or about the creation of other social institutions, such as marriage. The implicit assumption seems to be that these are "natural," but the logic of an original contract, the creation of a new social order that then *stands in contrast* to the state of nature, is that all institutions must be "civil" (i.e. conventional or created through contract).

Unfortunately, the habit of treating theories of an original contract as if they were merely one-dimensional and so calling them "social contract theories" still persists among political theorists and political philosophers.[6] This characterization neatly obscures both the sexual and racial contracts and so buries the stories of domination embodied in the original contract. "Social contract theory" can thus continue to be told as a story of freedom, usually embellished today with arguments about distribution and exploitation, and there seems to be nothing at stake about domination and subordination.

This terminological habit is relevant to the second misunderstanding of my argument. Numerous commentators state that I see the sexual contract as prior to the "social contract," i.e. the original contract. The conflation of the original contract with the social contract helps explain why this mistake is made so frequently. If the social contract *is* the original contract then it inevitably appears that I must be claiming that the sexual contract came first. But that is not my argument. Rather, my retelling of the story and analysis of the logic of contract theory entails that the two contracts come into being simultaneously. There is only one original contract, although each theorist provides his own version of the story, and the sexual and social (and racial) contracts come into being together, two (three) dimensions of a single pact that creates civil society.

There are two other misconceptions about my book. Many critics assume that my argument is about liberalism. The enormous influence of Rawls has no doubt contributed to the way in which contract theory disappears into liberalism, but theories of original contracts and the

[6] Rousseau's famous book is, of course, called *The Social Contract*, but that is not sufficient reason, especially in light of his other work, to continue the practice. Paul Hegarty (1999: 293) claims that Rousseau "eludes" my criticism in *The Sexual Contract*, but flattered though I am to have Rousseau read through the lens of my book, the reason that Hegarty reads my argument in this way, if I have understood him correctly, is that he is concerned with the social contract and the origin of "society" as such. He argues that my earlier recognition, i.e. in *The Problem of Political Obligation*, that Rousseau differed from the other theorists has disappeared. But Rousseau's criticism of his fellows is over the *social* contract; he concurs with them on the *sexual* contract.

standpoint of contract are distinct traditions of argument that have little in common with some other theories also called "liberal." The terms "liberalism" and "liberal" are now so overused, and cover such a wide array of theories from Hobbes to Rawls and beyond, that more often than not they are a hindrance rather than a help to theoretical clarity. Second, it is also often assumed that I was writing about consent, but my argument rests on a distinction, which I first drew in *The Problem of Political Obligation*, between contract and consent. Unlike consent, the practice of contract brings something new into being. The original agreement is a contract of creation; it is not consent. A new political order, a civil society, is (said to be) created through the original pact.

I The Original Contract, Contracts, and Institutions

Critics have raised a number of questions about the connection in *The Sexual Contract* between my interpretation of theories of an original contract and actual contracts and about the relationship between contracts and institutions.

Nancy Fraser (1997a) charges that I reduce institutions to a series of "dyadic relations" between a master and subject in which an individual superior commands an individual subordinate. It follows, she argues, that I cannot account for "gendered constraints on women's lives" that involve "processes in which the actions of many people are abstractly or impersonally mediated" (1997a: 227). In a marriage there are two individuals, and, similarly, each worker is subject to a boss, but my interest was not in these "dyads." Rather, my focus was on what it meant, in law and society, to be a "husband" or "wife," "worker" or "employer." Power was exercised by "husbands" within the (patriarchal) institution of marriage, but whether any particular husband availed himself of the power available to him was not the point, as John Stuart Mill recognized.[7] Fraser complains that I overlook workers' varied experiences in

[7] Fraser argues that in my alleged reductionist approach I am following in a line of feminist thinkers beginning with Mary Wollstonecraft and John Stuart Mill. While I am delighted to be placed in such an illustrious lineage, Fraser has misread them too. Neither theorist works with a model of a dyadic power relation; both are concerned with marriage and employment as institutions, although, of course, Mill has a great deal more to say about the latter institution than Wollstonecraft. The statement that Mill composed before his marriage to Harriet Taylor, declaring that he would never use the powers he was about to acquire as a husband, illustrates my point. Mill could not legally divest himself of his power because, in entering into the marriage contract, he did not merely become a member of a "dyad" but a participant in an institution governed by law as well as social mores. I discuss Mill in *The Sexual Contract*, and Wollstonecraft in Pateman (2003).

employment. Within the institution of employment, an institution that manifestly involves processes of abstract or impersonal mediation of individuals' actions, bosses and workers can behave in many different ways, but my interest was not in these varied experiences (that would have been an entirely different book) but in the fact that to be a "boss" is to have power over subordinates.

That is, I was interested in the authority structures within which power is exercised, in the historical importance of mastery and the ways in which its legacy still lingers. Individuals enter into contracts about property in the person and the consequence is that they become "wives" or "workers," "husbands" or "employers," superiors and subordinates, precisely because they then interact within an *institution*. The institution is maintained through these contracts, which create relationships that reproduce "wives," etc. and thus uphold structures. Far from setting up "a binary" of contract and institutions (Gatens 1996: 34), my argument is based on the mutual interaction (dialectic) between contracts and structures.

I have also been criticized for failing to separate contract and institutions. Donna Dickenson argues that contract is "not itself inimical to women's interests" (1997: 64).[8] Her insistence that feminists should embrace contract relies on the assumption that the practice of contract is always politically neutral. She argues that it is not the "mechanism" of contract itself that gives rise to the problems with which I am concerned but the "content" of the contract; namely, that what is at issue is a (sexual) contract about women's bodies (1997: 67). Elizabeth Anderson (1990: 1806–7) offers a similar criticism, arguing that the problem is "patriarchal norms" embedded in the noncontractual basis of contract, not contract as such.

In this line of argument, contract is, once again, being seen as the means to defeat patriarchy – a restatement of the view that I was criticizing in my book. Contract is separated from social relations and institutions and seen as a neutral mechanism, waiting to be filled by content. I emphasized (1988: 57–9) that contracts about property in the person were peculiar in that they do not involve an exchange, or at least do so only in a very special sense. To repeat, these contracts create *relationships* (of subordination) within institutions. The specific form of contract that I analyzed is not an abstract mechanism but inseparable from its relational and institutional context.[9]

[8] For examples of feminist use of contract argument see, e.g., Hirshman and Larson (1998) and Ertman (2001).

[9] Compare my discussion of the separation of rules from social practices, with reference to promising, in *The Problem of Political Obligation* (1985: 26–30).

Another criticism is that I did not adequately account for the connection I drew between early modern political theories and the institutions of marriage and employment. I have been criticized, for example, for "textual essentialism," and "[assuming] a straightforward identity among political philosophy, juridical discourse and practice, and domestic and work relations" (Dean 1992: 130, 127).[10] Gatens argues that "*The Sexual Contract* is a confusing text because Pateman does not convincingly manage to link its two parts: that which concerns the repressed of social contract stories . . . with that which concerns the character of contemporary social institutions" (1996: 42).

The connection I was making seemed unremarkable to me at the time, both in light of the revival of contract theory and the secondary literature which assumes that "the social contract" is relevant for an understanding of our social and political institutions.[11] My argument rests on the belief that the ideas embodied in the classic texts of political theory, including the stories of an original contract, have helped shape our major institutions. Without the ideas of ("natural") individual freedom and equality, modern practices of contract, citizenship, and democracy could not have developed. However, the relationship between texts, ideas, social relations, and institutions is hardly straightforward.

To call upon "freedom" or "equality" without further specification only goes so far. General, abstract ideas have to be given a more detailed interpretation if they are to be politically useful. The interpretations are often bitterly contested and so feed into different institutional structures. Declarations of individual freedom and equality have helped shape the social order since the seventeenth century – but they have shaped both subordination and freedom. Thus I noted that the abolitionists called upon natural freedom to denounce slavery and that another conception of the "individual" and his "freedom" was used to justify civil slavery (Pateman 1988: 65–6). "Freedom" helps emancipate and subordinate.

"All men are born free" is a theoretical premise that has revolutionary implications. The justification of all structures of authority is thrown open to question and (logically) only one basis for legitimate government remains; the governed have to agree to be governed. Theorists of an original contract faced a dilemma. The government of

[10] But compare Nancy Hirschmann (1990: 172) who writes that my discussion of prostitution and "surrogate" motherhood "are the most deconstructive readings in the book, as Pateman takes as her 'texts' the actual, contractual practices."

[11] This seems to be taken for granted in a recent survey of contract theory, which includes Diana Coole's (1994) discussion of feminist interpretations; see Boucher and Kelly (1994b).

the modern state must be based (or must be said to be based) on agreement but, at the same time, the necessity of agreement could be used to challenge power structures, not least that of marriage, that they had no wish to disturb. *The Sexual Contract* can be read as an exploration of the stratagems adopted by the theorists of an original contract to limit the extent of their arguments and of the way in which those limits were embodied in subsequent political theory, law, social custom, and central institutions. Yet the radical implications of the starting-point are always there – feminist political theorists had begun to pursue them by the late seventeenth century – so that propping up relations of subordination in the modern world is a continuing theoretical, as well as a practical, task.

Moreover, my understanding of theories of an original contract is very different from that of the contemporary political philosophers who rely on what Charles Mills calls an ideal contract. Both he and I analyze "the nonideal contract . . . not to ratify it but to use it to explain and expose the inequities of the actual nonideal polity and help us see through the theories and moral justifications offered in defense of them" (Mills 1997: 5). Contemporary contract theorists typically assume that, while there may be a need for some distributive adjustment to achieve a more just society, no institutional or structural change is required.

Thus, *The Sexual Contract* and *The Racial Contract* are set apart from Rawlsian contract theory. The latter is about the principles that should govern a just society and contract becomes "a conceptual device to elicit our intuitions about justice" (Mills 1997: 5). Furthermore, Rawlsian contract theory has developed from Rawls's adherence to the Kantian view that the original contract is an idea of reason and not a portrayal of a (hypothetical or actual) social order, and so the notion of a contract becomes otiose. The focus of Rawlsian argument is moral reasoning. The consequence is made explicit in Hampton's (2001) feminist defense of "Kantian contractarianism." She treats contract as a mere image or metaphor that is useful for effective moral reasoning, yet the reasoning could take place without any reference to contract. As she says, the real work in this mode of argument is done by a conception of the person and equal worth of the person, not the notion of contract, which is not "in any sense foundational, or even necessary" (2001: 357).

In contrast, theories of original contracts were not merely potentially dispensable, heuristic devices to aid moral argument, but *political* theories devised to throw light onto societies of the time and to justify a particular form of political order, a modern "civil society." Their subject matter is human characteristics and relations, social institutions and practices. These theories are part of the "great transformation" (Polanyi 1944), the move from premodern or traditional societies to the modern state, a transformation encapsulated in formulations such as the shift

from *Gemeinschaft* to *Gesellschaft*, from ascription to achievement, from status to contract, or from the state of nature to civil society.[12]

Standard interpretations of the texts of the theorists of an original contract treat the latter transformation as a move from patriarchy to contract. In *The Sexual Contract* I argued that, while traditional and classic (paternal) patriarchy were defeated, a new modern, fraternal form was created through and constituted by contract. The logic of this theoretical form then helps us understand the structure of central institutions (those maintained through contracts about property in the person) in modern Anglo-American societies. A crucial aspect of this logic is that, as I put it in one formulation, there are no feudal relics in civil society. A society is created *de novo* through the original pact; the state of nature is no more.

Fraser denies that this is my argument. She states that in *The Sexual Contract* what "appears to be a major historical transformation in the mode of domination is actually the same old wine of 'male sex-right' in new, contractual, bottles" (1997a: 227). In a similar vein, other critics argue that I present contract theory as the development of "legitimating ideology" to disguise old patriarchal relations (Coole 1990: 26; also Hegarty 1999). But this line of criticism ignores what is conveyed in my conception of *civil subordination*. Old forms of subordination are legitimated by God's word, nature, tradition, and ascription. The new form requires the agreement of the governed and free acts by individuals – a major historical transformation. Hence it has to be constituted through contract within institutions (held to be) constituted by free relations. Civil subordination is generated through contracts about property in the person within a context of juridical and civil freedom and equality.

II Contract, Property in the Person, and Feminism

A number of critics have charged that I seriously underestimate the usefulness of contract theory and the practice of contract for women and feminism. For example, Okin contends that "Pateman gives up too easily on the potential uses of contract for feminism" (1990: 666). Dickenson argues that "[w]hat is *right* with contractarian *theory* is that it insists on women's property in the person, thereby enhancing their moral and political agency" (1997: 77).[13]

[12] The stories of the overthrow of an "original" matriarchy by patriarchs that I discuss in chapter 2 of my book (Pateman 1988) are stories of an event that precedes the transformation of traditional and classic patriarchy into its modern, contractual, or civil form.

[13] Dickenson also objects to my "insistence that contract is to blame for women's subjection" (1997: 74). In *The Sexual Contract* I was not concerned with blame. It is

The denial that wives (women) owned the property in their persons was central to coverture, so it is easy to suppose that the demand that women should be owners and participate in freedom of contract fosters their freedom. Certainly, it was unjust for wives to be unable, for instance, to obtain credit without their husband's signature until the 1970s. But to argue for freedom of contract in the sense that wives should be able to enter into commercial transactions in their own right is by no means the same as arguing that members of both sexes ("individuals") should be conceived of as owners of property in the person.

Dickenson follows Waldron's (1988) reading of Locke and separates property in the person from property in the body.[14] The "person," she argues, refers to the moral person, not the body, and so talk of property in the person is a way of referring to agency, to individuals as creators of their own actions, as initiators of events in the world (Dickenson 1997: 179). To interpret "property in the person" in this way parallels recent discussions of self-ownership which treat the concept as merely a way of talking about moral autonomy (see Pateman 2002). In both cases, the political value and force of the fiction of property in the person vanishes.

The Sexual Contract is about political freedom not moral agency; the latter was presupposed in my argument (1988: 205). The idea of property in the person is a political fiction precisely because in practice "agency," "services," or "labor power" – property in the person – are inseparable from the body. But the fiction that what is available as a commodity for sale or rent in the market is merely a piece of property, just like any other, is necessary if such contracts are to be said to constitute free relations. The owner, exercising freedom or agency, rents out property (in the person) for use by another. But if the property is to be used as required, the body of the owner has to be available too. An abstract moral capacity to initiate actions, or an abstract service, is of no use in itself. Nor can these abstractions be rented out; necessarily, the body has to go along too. To be of use, the owner has to act as directed by the party who has acquired right of usage or the contract is

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pointless to look for someone or some practice to blame for three centuries of political development.

[14] Her criticisms of *The Sexual Contract* are part of a wider argument about women and property. While I can agree with much of her argument about a Hegelian conception of property, such a conception is incompatible with the idea of property in the person. Waldron's discussion is about the problem of how Locke justifies the original appropriation of private property in the state of nature. I discuss the importance of ownership rather than performance in this part of Locke's story of origins in Pateman (2002: 24–5).

pointless. Thus, e.g., an employer acquires right of command over the use of the body of a worker, over his movements, capacities, skills, expertise, labor, and agency.[15]

To make the decision to rent out property in the person is an exercise of freedom, but the consequence of making that decision and entering into a contract is that the individual is subordinated. Anderson (1990: 1804–5) objects that, in the case of employment, not all labor contracts create relations of subordination. She mentions plumbers, actors, and professionals, but my interest was in the institution of employment, not in individual contracts between professionals or tradespeople hired by clients. The latter relationship differs from that between employer and worker, and a full account of labor contracts would need to explore these differences. I agree with Anderson that employment does not require "an unqualified" possessive conception of contract if that means there are no limits to the demands an employer can place on employees. Trade unions have always struggled to have such limits imposed. Yet if an employer does not have (limited) right of command over workers, if "workers" are not subordinates, then he is not an "employer." How, for instance, can what is now euphemistically called downsizing take place without workers' consent if there is no subordination?

To focus on moral agency distracts attention from the political significance of the idea of a "person." The person is a legal and political, not just a moral, term and, significantly, it includes corporations which have rights under the Fourteenth Amendment in the United States. Historically, women and nonwhites were seen as lacking in all kinds of agency and thus excluded from the legal and political standing of "persons," an exclusion that is part of the history of the practice of contract. At the extreme, slaves were property not persons. Under coverture, married women were held to be absorbed into the person of their husbands, and women were barred from professions and the franchise on the grounds that they were not persons. But it does not follow that to become a legal, political, and civil "person" requires that individuals (women or men) be seen as owners of property in the person. A "person" who is a citizen in a democracy can be conceptualized in other ways.

A second prong of the criticism that I underestimate the usefulness of contract for women is that I confuse "all of liberal contract theory with libertarianism" (Okin 1990: 666; see also, e.g., Anderson 1990:

[15] In an example of the frequent careless reading of *The Sexual Contract* by critics, Shannon Bell states that "Pateman equalizes the prostitute and worker on the grounds that neither own property in their persons" (1994: 78). My argument is precisely the opposite. *Only if* workers or prostitutes are seen as "individuals" who own the property in their person can wage labor be seen as free labor, or prostitution be defended on the grounds that prostitutes are renting out a "service," not a body for use.

1808). Perhaps I should have spelt out my argument more fully on this point. I was certainly not suggesting that all the theorists of an original contract, or all contemporary contract theorists, are contractarians (as, e.g., Kymlicka charges (1990: 461)). The importance of contractarianism (as I call libertarianism), the standpoint of contract, is that it reveals the full logic of contract argument. This is why it is essential to read the radical individualist Hobbes, who foreshadowed contemporary contractarianism.

Only by investigating how contractarian arguments work is it possible to understand the vital contemporary political potency of the fiction of property in the person, and to appreciate how individuals can be conceptualized *as if* they can rent out this property without involving themselves. Taking contract seriously as a way of ordering social life – contracts all the way down, or social life as an endless series of discrete "origins" – throws light onto trends that have gained pace rapidly since I wrote *The Sexual Contract*.

The doctrine that all parts of social life and individuals can and should be seen as private property and thus as open to commodification in the market now has global reach. Prevailing domestic and international policy proclaims that everything should be alienable for private profit, from individuals' "agency," to health care, water supplies, and transport; from animals, seeds, and plant life to genetic materials (and there is a flourishing underground trade in bodily organs).[16] All relations should be seen through the lens of contract and private property, so teachers make contracts with pupils, social workers with clients, and governments treat their citizens as consumers of public services rather than citizens who share in decisions about, and have a *right* to, those services.

As these trends illustrate, the belief that the practice of contract *is* freedom is now more widespread than when I wrote *The Sexual Contract*. Anderson claims that I see all contract as a self-interested exchange of private property. Indeed, that is the standpoint of contract, although, as I have stressed, relationships not exchanges are at issue. A contract, she argues, "is just a freely established agreement creating obligations between consenting adults" (1990: 1808; see also, e.g., Jaquette 1998: 218). To make contract appear as the exemplification of freedom is the brilliance of the theoretical tradition I was analyzing. Contract is one way of creating an agreement, but, despite the widely held assumption among political theorists and philosophers as well as neoliberal ideologues, it is not the only way.

[16] For some brief comments on property in the person and alienability, see Pateman (2002: 26–7).

This is a point about which I should have said more in *The Sexual Contract*. Underlying my argument about the sexual contract is a view, albeit undeveloped, of freedom. It is too often taken for granted that contract exhausts the ways of entering into free agreements or constituting free relations. I challenged this assumption in *The Problem of Political Obligation*.[17] In *The Sexual Contract* I made a similar challenge to the claim that marriage and employment embodied free relations because they "originate" in a contract. I did not spell out an argument about contract and free agreement in any detail and only noted that there "are other forms of free agreement through which women and men can constitute political relations" (1988: 232). I assumed, once more in an overly optimistic fashion, that my discussion as a whole made it clear that more work was needed on developing alternative conceptions of freedom, conceptions that abandon the political fiction of property in the person.

III Hobbes, Locke, and Freud

My interpretation of the classic texts, in particular Hobbes and Locke, has come under fire and critics have also taken issue with what I have to say about Freud.[18] I was alerted to the relevance of Freud's argument, as I noted, by Phillip Rieff and Norman O. Brown, who see Freud as providing a version of the story of an original contract; Freud states that the pact made by the brothers is "a sort of social contract" (Pateman 1988: 103). He is in my book because he offers a version of the story that comes from another theoretical tradition. This helps highlight, for example, that marriage and, more generally, the private sphere, is created through the original contract and so is a political contrivance not a natural fact.[19]

[17] In *The Problem of Political Obligation* I took promising to provide an alternative to contract as a practice of free agreement and a way to create new relationships. In that book I was concerned with freedom as voluntarily assumed political obligation, and I argued that a democratic theory and practice of political (self-assumed) obligation would not take the form of contract.

[18] My discussion of the early modern theorists built on my analysis in *The Problem of Political Obligation*. For different readings of Rousseau, see, e.g., Lange (2002) and Wingrove (2000). Mary Severance (2000: 509 n91) writes of my acceptance of a "conflation between Hobbes and Locke." In both books I take pains to emphasize the *difference* between the theoretical assumptions (not least over women's natural freedom) and views of the state of nature and civil society of Hobbes and Locke.

[19] That the early modern theorists, save Hobbes, present "the family" as natural makes it all the more difficult to see the sexual contract. Theorists then have no need to tell a story about origins of marriage, whereas private property must be justified (the "original" holdings are communal) and so must the modern state. The theoretical waters are muddied further by conjectural histories that tell how patriarchal families become political entities.

Okin (1990: 661–2) argues that I misread Freud by ignoring his statement that a matriarchate followed the incest taboo. Freud also talks about the overthrow of mother-right and the institution of patriarchy (Pateman 1988: 103), but he does not tell a story about it in the manner of the other theorists I discussed. I took Freud's account of the establishment of patriarchy, when the sons built on the new rules established after the parricide, as the equivalent of the creation of civil society and I interpreted his remarks about the origin of the incest taboo and the laws of exogamy ("kinship") as a story about the origin of civil society and (modern) marriage.[20] Freud's story is complicated in being brief and not just about the origins of morality and society, as are the classic accounts of an original contract (see Boucher and Kelly 1994b: ch. 1), but about the origin of religion, an aspect I did not discuss.

In "Mere Auxiliaries to the Commonwealth," Teresa Brennan and I (1979) were, I believe, the first to notice the embarrassment that wives posed for Hobbes and Locke. The same problem lies at the heart of *The Sexual Contract*. Theories of an original contract involve an endemic problem about marriage. Both Hobbes and Locke broke with the idea of a natural hierarchy in favor of convention and then faced the difficulty that their premise of natural freedom and equality provides no basis for women's subjection other than free agreement on their part. Yet that premise also makes it impossible to find a good reason why all free and equal women should voluntarily subordinate themselves to men within marriage. Many of the theorists' maneuverings to get round this knotty theoretical problem can be found in their conjectural histories of the development of the state of nature, but my critics pay little attention to this side of their argument.

The problem was particularly acute for Hobbes. He is the only theorist of an original contract who begins, quite explicitly, from the very radical assumption that both sexes are free and equal in the state of nature. Women share all of the characteristics of men, including the ability to kill other men and women if they (are perceived to) become enemies. Unless Hobbes was to disregard his own method of reconstituting his entities in perpetual motion into human figures, he could not differentiate between women and men in the natural condition – except in one respect, or they would not have been human. Women, but not men, can bear children. And this leads him to an even more radical conclusion; in the state of nature it is mothers who exercise dominion,

[20] Okin objects that Freud's stories are about "primitive or ancient people," not civil society. In *The Sexual Contract* I focus on the early modern theorists as tellers of stories of the origin of civil society, but as recent discussions of Locke have shown (e.g., Tully 1993b) they were also concerned with "primitive" people, especially in America. See also my discussion of Locke in chapter 2 in the present volume.

they are lords.[21] As Gabriella Slomp notes, Hobbes's assumption of maternal dominion "destroys the entire basis for natural patriarchy" (2000: 102).

But what of civil patriarchy? It is here that there is a large gap in Hobbes's otherwise rigorous logic. Men's conjugal power in civil society is based neither on nature nor custom; it is conventional, created by Leviathan, by the state and its civil laws. Hobbes provides no answer to the question of how and why women, who are free, equal, and lords as mothers, agree to subjection to their husbands after the original pact has been concluded. Thus, I offered a logical conjecture to fill this gap; namely, that if free women were to become "wives" (i.e. civil subordinates) men would have had to obtain power over them before the original contract was concluded. Theories of an original contract are full of conjectural histories about the origins of political society; Hobbes's demonstration of the necessity of Leviathan, for example, is accompanied by his own conjectural history of how families form kingdoms in the state of nature, so it seemed only appropriate to suggest another.

Wright accuses me of presenting an account of Hobbes that rests on "a general lack of historical and textual specificity," and "bears only a tangential relationship to Hobbes's texts" (2004: 110, 116). She asserts, for instance, that I produce no "satisfactory evidence from Hobbes's texts, or from [my] reconstructive exercise, to substantiate [my] claim or to show how the transformation" from women's freedom in the state of nature to their subordination as wives occurs (2004: 115). But – of course – there is no evidence from Hobbes's texts; if such evidence were available there would be no logical gap in Hobbes's argument and my little exercise in conjectural history would have been unnecessary![22]

My discussion of Hobbes drew, first, on my work with Teresa Brennan, in which we drew attention to the oddity of Hobbes's descriptions of the family where, except for his account in the *Elements of Law*,

[21] In the state of nature there are no matrimonial laws so there is no certain way of designating paternity. Therefore, the child belongs to the mother and because it is in her power she makes the decision whether or not to rear it. The infant, like any human faced with a choice between life or death, "consents" to her dominion to preserve itself: "every man is supposed to promise obedience, to him [or her], in whose power it is to save, or destroy him" (Hobbes 1996: 140).

[22] She takes my earlier analysis of the public and the private (Pateman 1983) and declares that it is "inapplicable to Hobbes" (Wright 2004: 109) – but I did not "apply" this to Hobbes. Wright makes no mention of my actual point; namely, that since there are no matrimonial laws in his natural condition, he shows very clearly that the "private" has to be created along with the rest of the modern civil order through the original contract, and that the patriarchal relationship between husbands and wives is thus a *political* construct. Nor do I make any claims about Hobbes's own view of his theory.

the inhabitants are entirely male. Second, I drew on my reading of his radical individualism in *The Problem of Political Obligation*. In 1989, I published an extended version of my reading of Hobbes, including discussion of commentaries presenting him as a patriarchalist – notwithstanding that he turned Filmer's universe of natural relations upside down into an entirely conventional world – which I believe I was the first to analyze. These commentaries ignored his proclamation of sexual equality in the natural condition, so no attention was paid to his endorsement of the subordination of wives in civil society and thus the logical gap remained unnoticed (Pateman 1989b).

Wright, the most strident of the critics who insist that *The Sexual Contract* is itself a story of origins, proclaims that moved by my "political desire" and despite my own intention in filling "Hobbes's textual silences," I produced "An Origin Story of [My] Own" (2004: 105–6, 122; see also J. Boucher 2003). According to Gatens, for example, my motivation was a "desire to know . . . the 'prime mover' of history," so that instead of writing a critical history "in the service of the future," I sought "to *discover* origins" (Gatens 1996: 40, 42–3). If I were interested in a prime mover I would not be a political theorist but a theologian. I was analyzing texts that contain stories of origins – what else are theories of an original contract? – but that does not mean that I, any more than the political theorists who have contributed to the voluminous literature on contract theory since the early 1970s, followed the same path. In fact, I stated explicitly that I was not interested in producing another account of origins (Pateman 1988: 18, 220, 232). However, my own statements are either ignored or acknowledged only to be dismissed (Miriam 2005 is one exception).

Wright's failure to engage with my conceptual framework allows her to claim to uncover the real reason why I wrote *The Sexual Contract*. I wanted to "prove conquest," and this is the theme of my book (Wright 2004: 122, 125).[23] There is, however, a major problem with this "discovery." Far from being about conquest, my argument is about contract (agreement). I attempted to show why even *voluntary* contracts about property in the person create relations of subordination. Such a travesty of my argument is possible because, like some other critics, Wright makes the strange assertion that I am really writing about Freud, not Hobbes or Locke. Okin was the first to claim that I "superimpose"

[23] For an argument about Hobbes and conquest see Lott (2002). Joanne Boucher (2003: 31) makes the same claim about my reading of Locke. My argument, she asserts, is that Locke disguises a "*specific secret*," namely "conquest." But when I state that conjugal right is hidden in Locke (Pateman 1988: 92–3) I am *not* discussing conquest but writing about Locke's conjectural history and how the subjection of wives vanishes as he separates the "paternal" sphere from the political sphere.

Freud's account back onto the classic theories. Not surprisingly, she finds this puzzling – as I would do myself were I to encounter such a procedure. But others have repeated this; Drucilla Cornell, for example, writes that my "ultimate argument" is that we should "understand the social pact through Freud's account in *Moses and Monotheism*" (1992: 74). Wright announces that, via Freud's primal scene, *The Sexual Contract* is "a story about primal rape" (2004: 115).

Critics introduced rape very early. The first review that I saw of *The Sexual Contract* was depressing in its misunderstandings.[24] Linda Zerilli (1989) wrote that "Pateman tells us, in the beginning there was rape," and she suggests that this is part of my account of history. Okin (1990: 661) also argued that I offered "a very unusual interpretation" of Freud's primal scene as rape. On the contrary, my point about the primal scene is that it is inherently ambiguous. The young boy is usually taken to be making a mistake about what he sees. But, given the power accorded to husbands by law and views about sexual difference when Freud was writing, it is not possible to know whether the boy observed a loving act of conjugal intercourse or a husband (lawfully) exercising what used to be called conjugal rights when his wife was unwilling.

I introduced the primal scene to fill another logical gap.[25] All the classic theorists assume that the fathers already exist and there is no story of how they became patriarchs: "All the stories lack a political book of genesis" (Pateman 1988: 105). Given the power attributed to the fathers – Filmer's *patria potestas*, Locke's father-monarchs, Freud's ruler of the horde – they were, logically, unlikely to be much bothered with the niceties of a woman's consent once they had decided they needed a son. My reference to the "true origin" of political right (1988: 105) when introducing the primal scene, and my subsequent references, were ironical. Perhaps I was too early in this; irony only became fashionable later in the 1990s. When I was writing my book I thought it amusing to fill in that particular logical absence by using Freud's primal scene. It did not occur to me that anyone would think I was so stupid as to make "conquest" or "primal rape" the basis of a book in which I argued that contracts about property in the person, a form *of voluntary agreement*, were the mechanism of modern civil subordination.

[24] I do not know if this was the first review published, but it was a very early one – with the title "In the Beginning, Rape." For the record, Joan Acker wrote a letter critical of the review to the editor of the *Women's Review of Books*, but her letter was not published.

[25] Gatens (1996: 42), in another bizarre assertion about the primal scene, argues that it provides the missing link between my reading of the texts and my discussion of institutions. Her belief that such a link is required derives from her claim that I am searching for "origins."

Okin's view is that I come "very close" to proclaiming that "marital sexual intercourse is typically, if not always, rape" (1990: 660, 662). She argues that "presumably" my reading of the classic texts means that we must "accept that all their theories depend, and cannot but depend, on rape" and that Hobbes and Locke are "legitimizers of marital rape on a day-to-day basis" (1990: 663).[26] Odd though it is to have to do so, let me state explicitly that neither such a view of marital sexual relations nor of Hobbes or Locke is part of my argument. Okin is making the mistake of assuming that the behavior of individuals can be inferred from the existence of a law (coverture), the absence of a law (about rape within marriage), and an analysis of the structure of an institution (marriage). My argument implies nothing about how often husbands took advantage of their power over wives, or, come to that, how often wives initiated sexual relations.

One reason for this peculiar vein of criticism is the determination of some commentators to force my book into a container labeled "radical feminism." According to Wright, for example, "in turning to a feminist origin story, Pateman is repeating a pattern laid out by radical feminists in the late 1960s and early 1970s" (2004: 123).[27] After *The Problem of*

[26] Of the theorists I discuss, Rousseau comes closest to justifying rape; see *Emile* (Rousseau 1979: bk V, 558–60); and Wingrove (2000: ch. 6) on the story of Le Lévite d'Ephraim. I have published an article about consent that deals with rape: Pateman (1980). To avoid further misunderstanding, let me stress that my comments here do not mean that rape is irrelevant to my argument, or that a construction of sexual difference in which masculinity and femininity are identified respectively with freedom (as mastery) and subjection is not central to the struggle that has had to be waged to place enforced sexual submission, whether in or out of marriage, on the same criminal footing as other forms of assault, but this is not the subject matter of my book. Rape remains an enormous problem for girls and women, from infancy to old age. Since I wrote *The Sexual Contract* public awareness of the problem has grown, including the very high incidence of organized rape in warfare and newer forms such as "date rape" facilitated by drugs. But increased concern and publicity does not, in itself, lead to remedies, and rape is a crime easy to get away with. In Britain, for example, the conviction rate for rape dropped from 25% in 1985 to 5.5% in 2004–5. In 2006 it was revealed that some convicted rapists merely receive a caution. In a discussion of (more) legal reforms it has been seen as necessary to emphasize that consent is to be deemed absent where a woman is unconscious (Travis 2002). However, the question of why men would want sexual intercourse with an unconscious woman and what that tells us about "masculinity" and ideas about sexuality is rarely asked. Many of the beliefs and attitudes (held by both men and women) that I discussed in my 1980 article, and are part of the political construction of sexual difference I emphasize in my book, are still very much with us.

[27] She even makes the ludicrous assertion that "[t]he underlying assumption of . . . Pateman and others, is that without a dramatic story of victimization – original rape, mass slaughter of witches, or a worldwide historical conquest of women – feminism is not justified" (Wright 2004: 152).

Political Obligation I "was increasingly influenced by radical feminism," and she refers in a footnote to the preface of *The Sexual Contract* (Wright 2004: 122). I wrote that some of my arguments were "prompted by writers customarily labeled radical feminist" (Pateman 1988: x), but this was not to signal my adherence to a school of argument. Rather, I wanted to indicate that I had been alerted to the political significance of questions ignored in mainstream political theory, about marriage, the subordination of wives, and sexual relations, by writers called radical feminists, and I appropriated Rich's term "the law of male sex right." Anyone with some knowledge of the intellectual history of the left knows the provenance of a concern with subordination, but reading these writers set me thinking in new ways, and thus helped me formulate both a feminist perspective on theories of original contracts and some criticisms of socialist arguments. Unfortunately, seeing the words "radical feminism" in my preface sparked off a set of associations on the part of some critics that has nothing to do with my actual argument.[28]

Indeed, since I have always found the common classification of feminist theory into "radical," "liberal," etc. of very little help in understanding what is distinctive about feminist argument – and very misleading about the history of feminist political theory – there was no reason for me to place myself in a particular camp. Over the years, it has seemed to me that my book has been criticized from so many different directions precisely because it cannot be neatly slotted into the conventional classifications of either feminist theory or political theory. With hindsight, I can see that I made a mistake in not also stating that the way in which my argument in *The Sexual Contract* was developed was greatly influenced by the new techniques of theoretical analysis that were being used by deconstructionists and postmodernists in the 1980s.

Be that as it may, I now want to say something about criticism of my interpretation of Locke. Several critics argue that I am far too unsympathetic to Locke. For example, according to Dickenson, I "handicap" women "by ignoring the emancipatory aspects of Locke's theory"

[28] I did not know when I was writing *The Sexual Contract* that so much animosity would come to be directed toward "radical feminism" or I might not have used the words! Wright's book exemplifies how *The Sexual Contract* is sometimes criticized through a process of guilt by association. The two writers most prominently linked to radical feminism (and the focus of a good deal of hostile criticism) are Catharine MacKinnon and Andrea Dworkin, and their names are sometimes raised in discussions of my book. Gatens (1996: 32–3), for instance, brings in MacKinnon and Dworkin and "forcible violation of women" *before* turning to my book. For my views of MacKinnon's *Feminism Unmodified* (1987), see Pateman (1990c); for a very different view of MacKinnon than the stereotypical "radical feminist" see Laden (2003). And, let me confess here, I have never been able to read more than a few pages of Dworkin's work.

(1997: 70) and Kate Nash (1998) claims that I recognize, but repress, the ambiguities in Locke's argument and so ignore the "undecidability" of women in his text.[29]

I drew attention (Pateman 1988: 52) to Locke's insistence that a mother has authority over her children, that a wife can own property, and that he contemplates the possibility of divorce. He also states that "Community of Goods, and the Power over them, mutual Assistance, and Maintenance, and other things belonging to *Conjugal Society*, might be varied and regulated by that Contract, which unites Man and Wife" (*Second Treatise*, henceforth II, §83; 1988: 322). Such passages suggest that Locke extended his arguments about individual freedom and equality to women as well as men. The question is how far to emphasize this emancipatory side of Locke. My view remains that in the context of his theory as a whole, including his conjectural history of the state of nature and his division of social life between the "paternal" private sphere and the political realm, these passages, while certainly noteworthy, are outweighed by the other Locke.

He not only writes of the natural foundation for a wife's subjection to her husband, but he begins the *Second Treatise* (II, §1; 1988: 267–8) by setting down, in the context of a summary of his conclusions in the *First Treatise*, "what I take to be Political Power." He separates "the Power of a *Magistrate* over a subject" from four other examples of power (which could all be in the hands of one man), one of which is "a *Husband* over his Wife." Therefore, even before Locke has begun his argument in the *Second Treatise*, he lays down as a premise that a husband has power over his wife. Indeed, he had already established this point in the *First Treatise* (henceforth I, §48; 1988: 174). Despite his remark about the possibility of varying the terms of the marriage contract, Locke's point is not that conjugal power should be questioned or negotiated but that it is not *political* power.

Dickenson's picture of Locke as the enemy of (conjugal) patriarchy relies on a move that parallels her attempt to separate the mechanism of contract from its content. The problem about marriage, she argues, lies not within Locke's theory but within the legal doctrine of coverture. Contract does not disadvantage women, but, rather, the problem is "liberalism's *failure* to extend contract far enough" (1997: 87). Women are disadvantaged because marriage "is *exempt* from the contractual way

[29] Nash focuses on my earlier work although she obviously means her criticisms to apply to *The Sexual Contract* as well. The few references to my book appear to have been added after her main argument was written, which leads her to remark, for example, that I do not mention Mill's argument that whichever spouse brings home the means of support will have more voice; I refer to it on p. 162.

of looking at the world." The intensification of coverture after Locke's time should be seen as a backlash against the "triumphal progress" of liberalism (1997: 76, 88).[30]

To try and detach contract and Locke from coverture is to do what Dickenson accuses me of doing; namely, to give no weight to one side of Locke's argument. The practice of contract does not exist in a vacuum, but is regulated by law. In a series of cases in the seventeenth and eighteen centuries it was admitted that a wife was a legal individual, but in the early nineteenth century the unity of spouses was reaffirmed (see Todd 1998). The legal position of wives was at its nadir in the nineteenth century, which is why the marriage contract and coverture were central to the women's movement from the 1860s. As I discussed in *The Sexual Contract*, many feminists have argued, like Dickenson, that the solution was for the marriage contract to be more like other contracts. But that route runs into the problem of the idea of property in the person and subordination. Moreover, even with all its peculiarities and limitations on who could enter it, marriage was within the practice of contract.[31] I took my lead from the authority of Blackstone who stated that "our law considers marriage in no other light than as a civil contract" (1899: 154).

For Locke, a husband exercises a limited, civil power, but that is not to say that the glimpses he gives of a wife's freedom are irrelevant. A crucial plank of my analysis of the texts is that the meaning of "women" is not "decided" at all. The classic theorists use the language of nature, but they are constructing a political argument about a civil society that is (held to be) an order of freedom. This means that all inhabitants must participate in some fashion in the practice, contract, that signifies freedom (a point that also casts doubt on Dickenson's argument that marriage stood outside contract). Women cannot be left

[30] Dickenson also claims that "[i]nvoluntarily, through an improper jump from the marriage 'contract' under coverture to *all* contract, Pateman has given aid and comfort to the enemy" (1997: 70). But far from generalizing from the marriage contract, I spend a good deal of time in *The Sexual Contract* spelling out why the marriage contract is such an odd "contract," and I discuss, e.g., how it differs from the employment contract.

[31] Dickenson (1997: 88) argues that after the Hardwicke Marriage Act of 1753 "there was no such thing as contractual marriage," although the term "marriage contract" persisted in popular usage. I am uncertain of her point here. The 1753 Act concerned clandestine marriages and "contract marriage" in which the two parties said "I take you John/Jane to be my husband/wife." In church law this verbal exchange constituted a valid marriage, but in common law such a contract had no standing and gave the husband no rights. However, these marriages were usually elopements, i.e. clandestine, and so have relatively little importance for the marriage contract more generally. I am grateful to Molly Shanley for clarifying this for me.

in the state of nature or be involuntary participants in the civil order, or universal freedom is too obviously compromised.[32] Women are not parties to the original contract but they are parties to a civil contract, namely, the marriage contract. To enter into a contract women must retain their natural freedom. But once having entered the marriage contract (under coverture) their freedom is denied; they are "wives." Thus, as I emphasized, the freedom of women is at one and the same time *denied and affirmed.*

According to Anderson, this line of argument leads to the conclusion that contract theory is a tool for attacking patriarchy. She draws attention to the fact that if heads of households are the parties to the original contract they are disposing of natural liberties of household members, but these liberties are not rightfully theirs. Heads of households, she argues, do not exercise political power (necessary if they are to transfer the liberties of others) in the state of nature (1990: 1799–800). In Locke's theory, however, this problem is solved in his conjectural history of the state of nature.[33] The conjectural history sets out the process through which fathers become monarchs and so exercise political power in their households – yet somehow they lose *political* power as husbands in civil society but still retain *conjugal* power. But, even if women retain their natural liberties, it does not follow that contract is the enemy of patriarchy. This is, once again, to identify freedom with contract.

IV Marriage and Prostitution

Mary Lyndon Shanley (1979) showed a long time ago that marriage occupied a crucial place in political argument in the seventeenth century. The analogy between government in marriage and government in the state was the stock-in-trade of political battles. Since the early modern period, the institution of marriage has not only shaped wives' economic and political standing, but "other women have lived in the *shadow of marriage*, regulated by marriage's normative framework even as they have inhabited terrain outside of its formal boundaries" (Dubler 2003: 1646). In a recent study of the United States, Nancy Cott has shown how the "laws of marriage . . . sculpt the body politic" (2000: 5). A report in 1996 from the US General Accounting Office showed that

[32] Boucher (2003: 25), in another example of careless reading of my book, writes that I conceptualize women "as belonging to and remaining in a natural, pre-political world as men enter civil society," a view I explicitly reject.

[33] I first discussed the conjectural history in Pateman (1975); see also Brennan and Pateman (1979).

there are more than "*one thousand* places in the corpus of federal law where legal marriage conferred a distinctive status, right, or benefit." Cott concludes that "the traditional marriage bargain survived in skeleton form to the end of the twentieth century" (2000: 2, 210).

Yet critics of my book suggest that I should have been writing not about marriage but about the family. This criticism overlooks a crucial conceptual point in my analysis. My argument rests upon a *distinction* between marriage and family. "Marriage," the union of a man and woman, is not the same as a "family" or "household," but all too often they are conflated, as they are by many of my critics. *The Sexual Contract* is about marriage and so is about relationships between adults. The family is constituted by relations between parents and children as well as between the adult spouses and these are different forms of relationships. A child eventually becomes a political equal along with his or her parents but there is no similar path of growth and change of political status among adults.

Okin (followed, for example, by Kymlicka (1990) and Fraser (1997a)) claims that I pay insufficient attention to the division of labor between the sexes and so fail to appreciate that it is the fact that women undertake most of the unpaid work in the household, especially childcare, that accounts for the continuation of patriarchal power. Children, she states, "are virtually absent" from my argument. They do not even appear when I discuss the domestic division of labor or so-called surrogate mothering; "the fact that women have been and continue to be primary parents is inseparable from their subordination" (Okin 1990: 665).[34] I would not disagree but I was not concerned with parental responsibilities, so children rarely appear explicitly (but they are part of my argument on pp. 91–2 and pp. 182–3).

Focus on the family diverts attention from the standing of wives and makes it easier for political theorists to ignore the interconnections between marriage, employment, and citizenship. That neglect, in turn, reinforces the disappearance of marriage into the family. To be sure, until recently the only legitimate way for a family to be formed was through (heterosexual) marriage. The "family" arose as a consequence of marriage – the marriage contract was the "origin" of the family – and, in the past, a household commonly contained not just the spouses and their children but other relatives, servants, apprentices and, in the American South, slaves. The sexual division of labor within the family, including the care of children, *followed* from marriage. I discussed the private and public sexual division of labor in chapter 5, which is devoted

[34] In *Justice, Gender, and the Family* (1989), Okin discusses "vulnerability through marriage."

to slaves, servants, wives, and workers.[35] I explored how performance of household tasks, without pay, was part of what being a "wife" meant, with the corollary that to be a "husband" was to be the "breadwinner" or a "good provider"; that is to say, I looked at the connection between the institutions of marriage and employment.

I argued in *The Sexual Contract* that the story of an original contract made it possible to see how marriage provided all men with legitimate and orderly access to the labor and bodies of wives. Access to women's bodies is also available through prostitution, and my analysis of the latter aimed to raise some neglected questions about the ideas and beliefs required for the market in women's bodies to be seen as, and during the 1980s come to be defended as, part of a free social order and part of women's autonomy.

As I emphasized above in chapter 5, the global sex industry has grown dramatically since the early 1990s. In the past, prostitution was excused as a necessary evil; the new departure was that in the 1980s it began to be justified in terms of women's freedom and defended by contractarian arguments. More recently, the defense has been extended by some feminists who claim that prostitution is "transgressive," that it is empowering for women and provides an example of women's agency. It is presented "as though it can represent a form of resistance to [social] inequalities" (Davidson 2002: 87).[36] The focus of much recent discussion is about the experiences of prostitutes – but whose experiences are to be treated as authoritative: those, say, of a high-end call girl in New York, of a woman brought into France with her passport retained by her trafficker, of a woman in a refugee camp, or of a young girl in an Indian or Thai brothel? The assumption has also gained ground that to support improvements in working conditions, decriminalization, or the extension to prostitutes of rights accorded to other workers necessarily implies that nothing is wrong with prostitution (e.g. B. Sullivan 1995, 1997).

That is to say, it is being assumed that no distinction can be made between discussion of women who work as prostitutes and prostitution; the *institution* of prostitution, which was my subject, is placed beyond

[35] Boucher (2003: 33) accuses me of ignoring "the central significance of the servant in the patriarchal family of the era and in Locke's theory." I do not discuss servants in my analysis of Locke but in chapter 5; my book was not designed to be read as a series of discrete chapters.

[36] Feminists are now deeply divided over prostitution. Davidson (2002) provides a recent account of the controversies. Curiously, prostitution still seems to be taken to be about women (the supply), with few questions asked about the demand from men, apart from the resurrection of old claims about human needs and the provision of a valuable service to the disabled, etc.

question (cf. Overall 1992: 708). Criticism of prostitution is then (invalidly) taken to be criticism of, or to show contempt for, prostitutes. So Sullivan invokes the slippery slope and claims that "arguments about the inherent 'wrongness' of prostitution lead *inevitably* to arguments about the 'wrongness' of sex workers" (1995: 194; my emphasis).[37] I am said to argue that all prostitutes are mere victims, lacking agency, but, to repeat a point I have already made, criticism of an institution is not the same as criticism of individuals or their agency. My argument presupposed moral agency; it presupposed that individuals, including prostitutes, have the "agency" to enter contracts. I took it for granted that all humans have a capacity for freedom, but whether or not, and how far, they can exercise it (whether or not they are coerced victims or prostitutes by choice) depends on their circumstances. That is an empirical matter.

Barbara Sullivan contends that I "oppose" calling prostitution "sex work" because "in [Pateman's] view, it is not work but sexual slavery" (1997: 239). Let me take the point about slavery first. Earlier she claimed that I argued that prostitution only appears like sexual slavery (Sullivan 1995: 189). More recently, Ruth Sample has made a similar move from the statement that I argued that the "purchase of a woman's body, even only for a time, is in this case just like slavery," to the statement that I argued that "prostitution is essentially slavery" (2003b: 203, 208). I argued no such thing. I tried to put prostitution into some historical and cultural context to make clear that I was interested only in a form that has been defended as the voluntary sale of an abstract service, i.e. sale of property in the person. Only then can prostitution be presented as an example of women's freedom. I was not concerned with prostitutes who were coerced into the trade or held as slaves (for an example of the latter, see Bales 2002). My analysis was of prostitution as part of the wider trade in property in the person, a trade that rests on juridical and civil freedom and equality.

My argument was not that prostitution is slavery but that it is an example of civil subordination. Sample, like most other critics, has not examined my notion of civil subordination and (incorrectly) translates it as "slavery." She does so because she follows a familiar path on the left, a path from which I explicitly diverged in *The Sexual Contract*, and argues that what is wrong with prostitution is that it involves exploitation. She sees only two alternatives: exploitation or slavery. I am not

[37] Such statements fail to address the point that I made in *The Sexual Contract* that socialists and trade unionists who criticized capitalism did not hold workers in contempt; on the contrary they were their advocates. In recent discussions of prostitution the equivalent of their critique is missing, and only working conditions are criticized.

aware of any critic who has discussed my departure from the prevailing wisdom that exploitation is the major issue or my argument that exploitation follows from civil subordination.

As an example of civil subordination, prostitution is like employment. Thus (to come to Sullivan's other point) it, too, is "work." I did not use the term "sex work" because it is a general term, encompassing a wide range of activities in the global sex industry, and I used "prostitution" in a specific sense (Pateman 1988: 199–200). I also discussed how prostitution differs from employment. I argued that both involve use of persons, not abstract services, but in prostitution a woman's body is used differently from individuals' bodies in employment. A prostitute's body becomes a commodity for sale in the market for different reasons than labor power. No doubt my answer to the question of what is wrong with prostitution can be improved upon, but my analysis cannot be dismissed, as critics seem to suppose, without engaging with my concepts of property in the person and civil subordination.

Another problem with my analysis, according to Sample (2003b: 206, 202), is that I "have a tremendously flat-footed understanding of sexuality." This is because, she claims, I argued "that the need for sexual relations is not a genuine need." But I was not questioning that all human beings need contact with others, including sexual relations. My actual argument was twofold: first, that, unlike, e.g., the need for food, the need for sexual relations can go unmet for lengthy periods (even a lifetime!) without the death of the individual concerned; second, that how human needs are met can vary, and that, again unlike the need for food, individuals can themselves always assuage their sexual pangs (cost-free) – and here Sample flat-footedly misses my joke about "hand relief" (Pateman 1988: 259 n32). The serious point was that commodification of hand relief in the sex industry surely tells us something about prevailing conceptions of masculinity and femininity.

I noted in *The Sexual Contract* that many feminists have seen marriage as merely a legal form of the exchange of sex for subsistence but with one man instead of many men. Bell (1994: 79) takes me to task for suggesting that marriage could be reformed but that prostitution is inseparable from the subordination of women. Similarly, Sullivan writes that I am "explicit in [my] condemnation of prostitution and considerably less forthright about the institution of marriage" (1995: 190). I am not sure how much more forthright I could have been, given the many pages I devoted to coverture and the power of husbands. But possibilities for changing marriage are much greater than for prostitution. Prostitution could be reformed in the sense that it could be made more like any other occupation in its conditions, the status of the workers, the way it is regulated and so on. However, "prostitution" would remain

payment for unilateral use of a woman's body without any desire or erotic attraction on her part. In contrast, unless the term "marriage" refers only to patriarchal forms, the possibility exists for intimate association to become a free relationship between two equals, based on mutual desire, mutual respect, and the well-being of both partners.

V No Way Out?

I have been criticized for not providing details of an alternative to contract, and doing little more than gesturing toward a noncontractual social order. My response is that I did what I set out to do. To the best of my knowledge I was breaking new ground; no one else had discussed the original contract, the sexual contract, and the institutions that I analyzed from the perspective I adopted. It was very hard work and I had done enough, I thought, for one book.

One line of criticism, however, suggests that it would have been impossible for me to provide such an alternative. This is the criticism that has surprised me the most and that I have found the most difficult to understand. The message of *The Sexual Contract*, it is held, is that nothing can be changed. Some critics write of my tone of "despair," "fatalism," or "pessimism" (e.g., Dean 1992; Dickenson 1997), and Schochet argues that my assessment is that patriarchal structures "*necessarily* sustain a sexual oppression that cannot be overcome" (1998: 241; see also I. Shapiro 1999: 113; Cornell 1992: 75). This was certainly not my view, or the conclusion that I expected readers to reach. I am puzzled why critics suppose that I would have bothered to undertake my analysis if I had thought that social and political transformation was out of the question.

This reading of my argument is connected to the preoccupation with essentialism in the 1990s. For example, critics of my reading of Locke have claimed that it was essentialist. Nash argues that I treat "liberalism," exemplified by Locke, as "*essentially* masculinist" and "necessarily . . . exclusionary of women's claims" (1998: 35). Similarly, Dickenson writes that I "risk essentialism" by mistaking a particular form of property holding for "universal and inevitable subordination" (1997: 80). Gatens states that *The Sexual Contract* is "far too complex to be consistently characterised as essentialist" (1996: 34), but, nevertheless, she goes on to play the essentialist card.

"Essentialism" has a number of meanings (see Martin 1994), but my critics seem to have two senses in mind. The first is that I treated the sexual contract as an historically necessary and inevitable development that cannot be undone, and it therefore follows that women's subjection cannot be changed. I argued that the sexual contract was integral to the historical changes that led to the consolidation of the modern state and

its institutions. But nothing in my argument implied that such a development was necessary or inevitable or that we are stuck with it. I argued that modern patriarchy is historically and culturally specific, not universal. I took it for granted that because all political orders are created by humans during particular time periods, in particular places and cultures, they are not unchanging features of the world. They are historical and social, not natural, entities. They can be refashioned – and they all have been and will be.[38] Indeed, I noted explicitly that the underpinnings of the patriarchal structures I had traced were already beginning to crumble (Pateman 1988: 233). I wrote my book because I believed that men's power could be undermined. My analysis of the logic of contractual argument was designed to show that an understanding of interconnecting, but neglected, ideas and political structures was central to any democratic transformation.

The second sense in which I am taken to be an "essentialist" is that I hold a biological, and hence unchangeable, view of sexual difference. Sullivan, for example, argues that my analysis of prostitution rests on a conception of masculine identity as "fixed and given" (1995: 190), Chantal Mouffe states that I "postulat[e] the existence of some kind of essence corresponding to women *as* women" (1993: 81),[39] and Severance asserts that I assume "that the sexed individuals who are covered by the social contract pre-exist the social order" it creates (2000: 479). I learned many years ago from C. B. Macpherson (1962) that Hobbes and Locke were dealing in social constructs, and contract is a conventional device. These theorists used the "essentialist" language of nature, but they set up a conventional *political* division between the sexes as the difference between freedom and subordination.[40] Some critics seem unable to distinguish a discussion of the logical requirements of arguments of political theorists, or an analysis of the conception of masculinity and femininity required by coverture, from (supposed) views held by the writer. Gatens comments that there are

[38] A theme of *The Problem of Political Obligation* was that political theorists tend to treat the modern state as a natural feature of the world rather than a political creation that might be changed. "The market" is now widely treated as if it were a natural object rather than a political construction, as is "marriage" by fundamentalists of all stripes.

[39] She continues that I identify "women *as* women with motherhood," whereas other critics, as I indicated above, complain that I ignore mothers and children.

[40] According to Laqueur (1990: ch. 5), "sex" in the sense of an incommensurable difference between men and women was invented, out of an interpretation of new scientific discoveries, during the period in which theorists of an original contract were at work. He writes: "Anatomy, and nature as we know it more generally, is . . . a richly complicated construction based not only on observation, and on a variety of social and cultural constraints on the practice of science, but on an aesthetics of representation as well" (1990: 163–4).

"points in her text" where I seem to be describing the views of others about sexual difference rather than providing my view "of natural and immutable sexual difference" (1996: 35). Quite so. I was analyzing a tradition of political theory, not offering a litany of my own opinions.

A related criticism is that I believe that "nothing can be salvaged from the liberal tradition" (Phillips 1989: 40). In *The Sexual Contract*, I wrote that "to move outside the structure of oppositions established through the story of the original contract . . . would not diminish the importance of juridical freedom" (1988: 231), a statement which hardly dismisses out of hand "the liberal tradition" (however that is understood). My distinction between *emancipation* from the old structures of subordination and freedom as *autonomy* (1988: 228–9) is a version of the familiar point that civil and political freedoms are necessary but not sufficient for democratization, a point accepted by some theorists who call themselves "liberals."

Finally, it has been claimed that I reject the possibility that women could "empower themselves by defining reality in their own terms" (Hirschmann 1990: 173). On the contrary, one reason for moving away from civil subordination toward a more robust democracy is to open up more possibilities for women to act autonomously. I argued that in the theories I analyzed the freedom of women must always simultaneously be denied and affirmed. This means that individual freedom is (to use a different idiom) always already present, and so the potential for women to use that freedom to bring about change is always there too. Since the seventeenth century, feminist political theorists have criticized the champions of natural freedom who denied that freedom to women, and have used theoretical weapons provided by those same theorists. For four centuries women have empowered themselves and been active in politics, including in the women's movement where they fought against the ideas and structures I discussed. I was not telling their story but looking at the context in which their activities took place. Nevertheless, without being able to draw on their legacy I could not have written *The Sexual Contract*.

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