The Sexual Contract

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Feminism and the Marriage Contract

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

Marriage, according to the entry under ‘contract’ in the Oxford English Dictionary, has been seen as a contractual relationship since at least the fourteenth century, and Blackstone states that ‘our law considers marriage in no other light than as a civil contract.’ The attraction of contractual marriage for feminists is not hard to see. Feminist criticism takes a ‘contract’ to be an agreement between two equal parties who negotiate until they arrive at terms that are to their mutual advantage. If marriage were a proper contract, women would have to be brought into civil life on exactly the same footing as their husbands. Many feminists, especially in the United States, now advocate what are called ‘intimate contracts’ or ‘marriage contracting’ instead of the marriage contract. Negotiation of a clear-cut agreement, that may even include advance provision for dissolution, has obvious advantages over the marriage contract. Critics of marriage contracting have pointed out that, since few women can earn as much as men, only a few middle-class and professional women are likely to be in a position to negotiate an intimate contract. But the problems with a purely contractual view of marriage run much deeper.

Feminist writers have stressed the deficiencies of a contract in which the parties cannot set the terms themselves. They have also pointed to the respects in which the marriage contract differs from economic contracts, but, by and large, their criticisms offer little insight into why this contract is so curious. Nor have they explained why legal authorities, despite Blackstone’s firm statement, have also expressed similar doubts about the contractual character of marriage.

For example, in Schouler’s A Treatise on the Law of the Domestic Relations we find, ‘we are then to consider marriage, not as a contract in the ordinary acceptation of the term; but as a contract sui generis, if indeed it be a contract at all; as an agreement to enter into a solemn relation which imposes its own terms.’ A few years later, in 1888, a judge in the United States stated:

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

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

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

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

Thompson built model dwellings for his workers on his Cork estate and established mechanics institutes – he argued that women should be admitted to the institutes, to libraries and other educational establishments. He worked out a detailed scheme for co-operative, communal socialism but he died before his plan could be fulfilled. The co-operative or utopian socialists included communal housework in their blueprints for their new communities and, in the Appeal, Thompson emphasizes that provision for children, for instance, would be a communal responsibility. When women contributed to all the work of the community along with men, and could make equal call on communal resources in their own right, the basis of sexual domination would be undermined. When man had ‘no more wealth than woman, and no more influence over the general property, and his superior strength [is] brought down to its just level of utility, he can procure no sexual gratification but from the voluntary affection of woman’. Once women had secured their civil and political rights and were economically independent in the new world of voluntary co-operation, they would have no reason to be subject to men in return for their subsistence and men would have no means to become women’s sexual masters.

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

A contract! where are any of the attributes of contracts, of equal and just contracts, to be found in this transaction? A contract implies the voluntary assent of both the contracting parties. Can even both the parties, man and woman, by agreement alter the terms, as to indissolubility and inequality, of this pretended contract? No. Can any individual man divest himself, were he even so inclined, of his power of despotic control? He cannot. Have women been consulted as to the terms of this pretended contract?
Women were forced to enter into this supposed contract. Social custom and law deprived women of the opportunity to earn their own living, so that marriage was their only hope of a decent life. The marriage 'contract' was just like the contract that the slave-owners in the West Indies imposed on their slaves; marriage was nothing more than the law of the strongest, enforced by men in contempt of the interests of weaker women.

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

Thompson adds the further important observation that, even if a husband renounces his power, his wife's freedom is always contingent on his willingness to continue the renunciation.

Some husbands may, as Thompson puts it, allow their wives equal pleasure to their own. However, the wife's enjoyment depends entirely on the benevolence of her husband and what he does, or does not, permit her to do. The husband can make the marital home into a prison and cut off 'his household slave from all sympathy but with himself, his children, and cats or other household animals'. A wife can be excluded from all intellectual and social intercourse and pleasures, and can be prevented from forming her own friendships; 'is there a wife who dares to form her own acquaintances amongst women or men, without the permission, direct or indirect, of the husband... or to retain them when formed?' If a husband chooses to forego all his legal powers, his wife still has 'but the pleasures of the slave, however varied', because her actions are always contingent upon the permission of her husband. Thompson claims that in these matters wives are worse off than the female slaves of the West Indies, and husbands have wider jurisdiction than slave-masters.

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

Just as wives' social pleasures depend on the benevolence of their husbands, so, Thompson argues, do their sexual pleasures. In his brief conjectural history of the origins of marriage, Thompson speculates that men's sexual desires led them to set up 'isolated breeding establishments, called married life', instead of using women merely as labourers. With the establishment of marriage and the pretence of a contract, men's domination is hidden by the claim that marriage allows equal, consensual sexual enjoyment to both spouses. Husbands, it is held, depend upon the voluntary compliance of their wives for their pleasure. Thompson declares this to be an 'insulting falsehood'; a husband is physically strong enough, and is allowed by public opinion and the law, to compel his wife to submit to him, whether she is willing or not. She, however, has no right to enjoyment at all; she can beg, like a child or a slave, but even that is difficult for women who are not supposed to have sexual desires. Thompson concludes that 'sexual desires increase
tenfold the facility of exercising, and of continuing for life, the despotism of men in marriage.\textsuperscript{19} Thompson's argument implies that, to bring the audacious falsehood of the marriage contract to an end, not only sweeping political and economic changes are required, but also a radical change in what it means to be a masculine or feminine sexual being; the original contract must be declared null and void.

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

Women had a very large hand in both the Appeal and The Subjection of Women. The controversy about the contribution of Harriet Taylor to Mill's works has continued for many years, and offers a fascinating glimpse into the patriarchal bastion of political philosophy, often fiercely defended by women; Diana Trilling, for instance, announced that Harriet Taylor had 'no touch of true femininity', no intellectual substance, and was 'a monument of nasty self-regard, as lacking in charm as in grandeur' – clearly quite unfitted to associate with a male theorist admitted to the pantheon of Great Western Philosophers. Gertrude Himmelfarb has blamed Taylor's undue influence for Mill's lapses from the path of moderation, most notably in his feminism. Philosophers must clearly choose their wives with care or women's natural political subversion will undermine the work of the mind.\textsuperscript{21} As a friend of a writer ignored by political theorists and dismissed by Marxists as utopian, Anna Wheeler has suffered only from neglect. In the 'Introductory Letter to Mrs. Wheeler', with which Thompson opens the Appeal, he states that he had hoped that she would continue the work begun by Mary Wollstonecraft, 'but leisure and resolution to undertake the drudgery of the task were wanting.' Only a few pages were written by Anna Wheeler herself; 'the remainder are our joint property, I being your interpreter and the scribe of your sentiments.'\textsuperscript{22}

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

Mill agrees with Thompson on several issues. He argues, for example, that women have no alternative, they are compelled to marry. 'Wife' is the only position that their upbringing, lack of education and training, and social and legal pressures realistically leave open to them. Mill also distinguishes between the behaviour of individual husbands and the structure of the institution of marriage. He argues that defenders of existing marriage law rely on the example of husbands who refrain from using their legal powers, yet marriage is designed for every man, not merely a benevolent few, and it allows men who physically ill-treat their wives to do so with virtual impunity. Again, like Thompson, Mill argues that to become a wife is tantamount to becoming a slave, and in some ways is worse; a wife is the 'actual bond-servant of her husband: no less so, as far as legal obligation goes, than slaves commonly so called'.\textsuperscript{24} Mill is much more reticent than Thompson about a wife's sexual subjection, although, as I have already noted, he drew attention to the right of a husband to compel his wife to grant his 'conjugal rights'.
Where Mill parts company with Thompson is that he denies that there is any connection between conjugal domination and a wife's position as housewife and economic dependant. Mill calls for reform of marriage law to bring the marriage contract in line with other contracts. Echoing Pufendorf, he notes that 'the most frequent case of voluntary association, next to marriage, is partnership in business', but marriage compares very unfavourably with business. No one thinks that one partner in a business must be the absolute ruler; who would enter a business partnership if that were the case? Yet, if power were placed in the hands of one man, the arrangement would be less dangerous than in marriage, since the subordinate partner can always terminate the contract; such a course is not open to a wife (and Mill, who was very cautious in public on the highly charged question of divorce, adds that even if a wife could withdraw from a marriage she should do so only as a last resort). In business, theory and experience both confirm that the appropriate arrangement is for the conditions of partnership to be negotiated in the articles of agreement. Similarly, Mill argues, in marriage, the 'natural arrangement' is a division of powers between husband and wife, 'each being absolute in the executive branch of their own department, and any change of system and principle requiring the consent of both'.

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

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

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

Most of the reforms to marriage law demanded by feminists in the nineteenth century have now been enacted. Nevertheless, contemporary feminists still emphasize that the marriage contract diverges in significant respects from other contracts. Some of their arguments resemble those of Thompson and Mill, others highlight yet further peculiarities of marriage as a contract. For example, contemporary feminists point out that the marriage contract, unlike other valid contracts, requires that one party gives up the right to self-protection and bodily integrity. They have also pointed out that the marriage contract does not exist as a written document that is read and then
signed by the contracting parties. Generally, a contract is valid only if the parties have read and understood its terms before they commit themselves. If very large amounts of property are involved in a marriage today, a contract will sometimes be drawn up that resembles much older documents, common when marriage was a matter for fathers of families and not the free choice of two individuals. The fact that most marriages lack any document of this kind, illustrates one of the most striking features of the marriage contract. There is no paper headed ‘The Marriage Contract’ to be signed. Instead, the unwritten contract of marriage, to which a man and a woman are bound when they become husband and wife, is codified in the law governing marriage and family life.29

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

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

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

Contemporary feminists have also emphasized the fact that a married couple cannot determine the terms of the marriage contract to suit their own circumstances. There is not even a choice available between several different contracts, there is only the marriage contract. Married women first obtained some power to contract for themselves after Married Women’s Property Acts were passed in the nineteenth century – in Britain a wife’s personal liability for contracts was acknowledged by Parliament only in 1935 – but, as Lenore Weitzman has noted, despite major reforms since then, two legal restrictions have been maintained on contract between husband and wife. ‘First, no contract could alter the essential elements of the marital relationship, and second, no contract could be made in contemplation of divorce.’ A married couple cannot contract to change the essentials of marriage, which are seen as ‘the husband’s duty to support his wife, and the wife’s duty to serve her husband’.31

The relation of protection and obedience cannot be altered, so that, for example, a married couple cannot contract for the wife to be paid by her husband for her work as a housewife. Couples do have some scope for making their own arrangements, but it is important to note that William Thompson’s point about the permission of the husband remains relevant; individual variations are made within a relationship of personal dependency. The couple work out together what the husband wants [the wife] to do . . . within certain general parameters’.32 The general parameters are set by the law governing marriage, and feminist legal scholars often follow other legal authorities in arguing that, therefore, marriage is less a contract than a matter of status.

But ‘status’ in which sense? Some discussions suggest that the old world of status has lingered on into the modern world. Thus, in The Subjection of Women, John Stuart Mill argues that ‘the law of servitude in marriage is a monstrous contradiction to all the principles of the modern world’, and that women’s subordination is ‘a single relic of an old world of thought and practice exploded in everything else’. The ‘peculiar character of the modern world . . . [is] that human beings are no longer born to their place in life . . . but are free to employ their faculties, and such favourable chances as offer, to achieve the lot which may appear to them most desirable’.33 At present this principle applies only to men; to be born a woman still entails that a place in life is already waiting. Marriage, Mill argues, must thus be brought into the modern world; the relics of status must be eliminated and marriage must be made from status to contract. In the old world of status, men and women had no choice about the social positions they occupied as husbands and wives. Mary Shanley has remarked of marriage in the seventeenth
century, that the "contractual" element in marriage [was] simply the consent of each party to marry the other. To contract a marriage was to consent to a status which in its essence was hierarchical and unalterable. Feminist critics of the marriage contract often make a similar point about contemporary marriage; for example, the marriage contract is not, in fact, a contract between the spouses, but rather they agree together to accept a certain (externally defined) status.

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

To argue for the assimilation of marriage to the model of economic contract in the heyday of freedom of contract (if such a period ever existed) is to assume that the public and private worlds can be assimilated and to ignore the construction of the opposition between the world of contract and its 'natural foundation' within civil society. Contract appears as the solution to the problem of patriarchal right (status) because contract is seen as a universal category that can include women. Contract in the public world is an exchange between equals (between 'individuals') so it appears that, if contract is extended into the private sphere, inequalities of status between men and women in marriage must disappear. The husband exercises political right over his wife, and only men can be 'husbands'. Status in yet another sense must also be replaced by contract.

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

The completion of the movement from status to contract entails that status as sexual difference should disappear along with 'status' in its other senses. There can be no predetermined limits on contract, so none can be imposed by specifying the sex of the parties. In contract, the fact of being a man or a woman is irrelevant. In a proper marriage contract two 'individuals' would agree on whatever terms were advantageous to them both. The parties to such a contract would not be a 'man' and a 'woman' but two owners of property in their persons who have come to an agreement about their property to their mutual advantage. Until recently, there was no suggestion that status in the sense of sexual difference would also give way to contract. To sweep away the last remnants of status in marriage can have consequences not foreseen by Thompson or Mill who did not
object to the fact that women became wives; they strongly objected to what being a wife entailed. Earlier feminist attacks on the indissoluble marriage contract and its non-negotiable terms were directed at the husband’s conjugal right, not at the sexually ascriptive construction of ‘wife’ and ‘husband’. The contemporary attack on sexual difference, apparently much more radical than older arguments, suffers from an insuperable problem; the ‘individual’ is a patriarchal category. Contract may be the enemy of status, but it is also the mainstay of patriarchy. Marriage as a purely contractual relation remains caught in the contradiction that the subjection of wives is both rejected and presupposed, a point illustrated in the argument over the marriage contract between Kant and Hegel.

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

Kant’s view of marriage offers a particularly clear example of the simultaneous denial and affirmation that women are ‘individuals’, or in Kant’s terminology, ‘persons’. On the one hand, his philosophy rests on the assumption that, by virtue of being human, everyone has reason, and so possesses the capacity to act according to universal moral laws and to participate in civil life. On the other hand, human capacity is sexually differentiated. Women lack political or civil reason. Kant’s rather banal observations on the characters of the sexes owe everything to Rousseau. He tells us that women are creatures of feeling, not reason, so that it is useless to attempt to enlarge women’s morality to encompass universal rules. Women only act if the action is pleasing to them. They are incapable of understanding principles so, for women, the good must be made pleasing. Women know ‘nothing of ought, nothing of must, nothing of due’. The tenaciousness with which male philosophers cling to the sexual contract is illustrated by the recent comment that, ‘whatever Kant’s conclusion about woman’s role, his analysis of her condition is still worthy of his great name.’

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

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

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

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

Kant’s rejection of the idea of property in parts of the person is very odd. If marriage is, as he defines it, nothing more than a contract of mutual sexual use — mutual use of sexual property (faculties) in the person — then there is not the slightest need for him to argue in terms of use of persons, and least of all to argue that persons are used as things. To have right over a person as a thing, as a piece of property, is to have the power of a slave-master — but Kant’s husband does not have such a power. Kant argues that, if both parties to the contract acquire the same right, they each give themselves up and win themselves back. They are simultaneously owner and owned. They become persons again, unified into one will. The reason for all these very unconvincing theoretical manoeuvres becomes clear once the story of the sexual contract has been told.

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

A moral miracle (as William Thompson would call it) turns women’s natural subjection into marital equality. Nature has given us sexual desire so that we will procreate, but this is not the only end for which to marry; ‘enjoyment in the reciprocal use of the sexual endowments is an end of marriage’, and it is legitimate to marry with this end in view. But if men and women wish to use their sexual property they must marry. ‘Matrimony is the only condition in which use can be made of one’s sexuality. If one devotes one’s person to another, one devotes not only sex but the whole person: the two cannot be separated.’ Kant not only declares that mutual
sexual use outside of marriage dehumanizes a man and a woman (they remain as mere property for each other), but that the use is ‘in principle, although not always in effect, on the level of cannibalism’. To consume a body with teeth and mouth instead of a sexual organ merely provides a different form of enjoyment. Only the marriage contract can turn use of sexual property, in which ‘one is really made a res fungibilis to the other’, into the use of a person.\textsuperscript{52} But it is the husband who has use of a person, not the wife. Kant’s marriage contract establishes the husband’s patriarchal right; he possesses his wife’s body, which is to say her person, as a thing, but she has no corresponding right. ‘Personal right’ is the right of a husband as a civil master.

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

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

Although Kant states that, if either spouse ran away, ‘the other is entitled, at any time, and incontestably, to bring such a one back to the former relation, as if that Person were a Thing’, it is clear that the right is only likely to be exercised by the master of the family. The master, Kant says, also has the same right to bring back servants who abscond, ‘even before the reasons that may have led them to run away, . . . have been judicially investigated’.\textsuperscript{54} In amplifying his notion of personal right, Kant uses the revealing example of the difference between pointing to someone and saying ‘this is my father’, which means only that I have a father and here he is, and pointing to someone and saying ‘this is my wife.’ To point to a wife is to refer to ‘a special juridical relation of a possessor to an object viewed as thing, although in this case it is a person’.\textsuperscript{55} Kant notes that personal right is distinct from possessing a man who has lost his civil personality as a slave – but to possess a wife is to possess someone who, naturally, has no civil personality, although she is not called a slave.

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

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

Hegel regards it as shameful to substitute the one-sided, contractual individual as owner, or person—thing, for the complexity of human personality and ethical life. The individual as owner and contract-maker is what Hegel calls an ‘immediate self-subsistent person’, and although this is one element, or ‘moment’, in the individual personality and in social life, it is not and cannot be the whole.\textsuperscript{57} To see marriage as a contract entered into by owners of the sexual property in their persons, or to see spouses as property, is completely to misunderstand marriage and its place in modern civil life. Purely as contract, marriage is open to the contingency, the
whim and caprice, of sexual inclination. The marriage ceremony becomes merely the means to avoid unauthorized use of bodies (or sexual cannibalism). On the contrary, for Hegel, marriage is a distinct form of ethical life – part of the universal family/civil society/state – constituted by a principle of association far removed from contract.

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

A husband and wife are bound together neither by contract, nor sexual inclination, nor even by love, as ‘love’ is usually understood. They are incorporated by ‘ethico-legal love’ which transcends the fickleness of ordinary, romantic love. Hegel states that love is ‘the most tremendous contradiction’. The contradiction comes about because the lovers’ first impulse is to obliterate their individuality in total unification with the loved one. However, in opposition to this desire, they also discover that their sense of themselves as auton-omous beings is strengthened through the relationship with the beloved. The gulf between obliteration and enhancement of self can be overcome by the mutual recognition of the two lovers, through which each gains a deeper sense of unity with the other and sense of autonomy of the self. Love (in Hegel’s sense) both unifies and differentiates. Thus marriage offers a glimpse of the differentiation and particularity of civil (economic) society and the unity and universality necessary to membership in the state.

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

The ‘individual’ at once denies yet presupposes the intersubjective understanding of what it means to enter into a contract. Contract cannot provide a universal basis for social life. Contract must form part of wider non-contractual social institutions. Contracts can be entered into precisely because consciousness is developed and informed within arenas that are non-contractual. If individuals were merely owners they could enter into no contracts at all; strictly, ‘contract’ would be meaningless to them. Hegel, like Durkheim
sometime later, argued that 'a contract supposes something other than itself.' Contract has an appropriate place in social life in the economic sphere — the sphere that Hegel calls 'civil society' — but if contract is extended beyond its own realm, social order is threatened. Contract on its own is an incoherent basis for social life. Hegel, echoing Kant, argues that marriage is an ethical duty; 'marriage, . . . is one of the absolute principles on which the ethical life of a community depends.' Ethical life depends upon marriage because marriage is the origin of the family. In the family, children learn, and adults are continually reminded of, what it means to be a member of a small association based on love and trust; in the private dimension of ethical life they gain experience of a non-contractual association and so are prepared — or, rather, men are prepared — for participation in the universal public sphere of civil society and the state.

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

Women are what they are by nature; men must create themselves and public life, and they are endowed with the masculine capacity to do so. Women must remain in the natural private sphere of the family. The family is represented in public by the husband, the 'one person' created by the marriage contract. Sexual difference also entails a patriarchal division of labour. The husband has the 'prerogative to go out and work for [the family's] living, to attend to its needs, and to control and administer its capital'. Like Rousseau, Hegel sees women as naturally politically subversive. Women brought about the downfall of the ancient world; in the Phenomenology he writes that the ancient community created what it suppresses and what is at the same time essential to it — an internal enemy — womankind in general. Womankind — the everlasting irony in the life of the community — changes by intrigue the universal end of government into a private end, transforms its universal activity into a work of some particular individual, and perverts the universal property of the state into a possession and ornament for the Family.

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

But it is not only if women seize the reins of government that the state is in peril. Women play a substantive part in Hegel's argument. For Hegel, like the classic social contract theorists, marriage and the family provide the natural foundation for civil life, but Hegel goes much further. He also implies that, through their love, husbands and wives play out (in a manner suited to the 'immediate' ethical sphere) the dialectic of mutual acknowledgment that characterizes relations among men as makers of contracts in civil society and as citizens in the state. In contract, men recognize each other as property owners, enjoying an equal standing; as citizens — participants in the social contract — they also recognize their mutual civil equality. Hegel's account of love within marriage suggests that the same process takes place between husband and wife, through the dialectic of autonomy and unity. But one party to the marriage contract is a woman; conjugal relations cannot take the same form as civil relations between men. Sexual difference is political difference, the difference between mastery and subjection; so how can there be mutual acknowledgment by husband and wife as, at one and the same time, particular and universal beings? And if such recognition is impossible, how can marriage and the family constitute a 'moment' of Hegel's social whole of family/civil society/state?
Some feminist interpretations of Hegel, particularly those drawing on Simone de Beauvoir, have turned to his famous passages in the *Phenomenology*, on the opposition between master and slave, as the model for the relation between husband and wife. The comparison of Hegel’s dialectic of mastery and slavery with conjugal relations involves one of the same difficulties as the comparison of husband and wife with employer and worker. The master and slave, like the capitalist and proletarian, are both men. Use of the passages on the master and slave also poses another difficulty. The struggle between these two antagonists is part of Hegel’s story of the development of self-consciousness. Indeed, the master and slave appear at the genesis of self-consciousness. Hegel argues that consciousness of self presupposes consciousness of another self; to be self-conscious is to have one’s consciousness reflected back from another, who, in turn, has his own consciousness confirmed by you. The mutual acknowledgment and confirmation of self, however, is possible only if the two selves have an equal status. The master cannot see his independence reflected back in the self of the slave, all he finds is servility. Self-consciousness must receive acknowledgment from another self of the same kind, and so the master-slave relation must be transcended. The master and slave can, as it were, move through the ‘moments’ of Hegel’s great story and eventually meet as equals in the civil society of the *Philosophy of Right*. The men’s story can be completed once the original pact is sealed and civil society brought into being. In the fraternity of civil society each man can obtain self-confirmation and acknowledgment of his equality in the brotherhood. But this is not quite the end of the story.

The original contract is not merely a social contract; it is a sexual contract which constitutes men’s patriarchal right over women. Women are outside the fight to the death between master and slave at the dawn of self-consciousness, but they are part of modern civil society. Hegel’s story of the development of universal freedom requires that men recognize each other as equals; the day of the master and slave is past. But men’s self-consciousness is not purely the consciousness of free civil equals (the story of the social contract) – it is also the consciousness of patriarchal masters (the story of the sexual contract). The ostensible universalism of Hegel’s public world (just like that of the classic contract theorists) gains its meaning when men look from the public world to the private domestic sphere and the subjection of wives. The family (private) and civil society/state (public) are separate and inseparable; civil society is a patriarchal order. As a husband, a man cannot receive acknowledgment as an equal from his wife. But a husband is not engaged in relations with other men, his equals: he is married to a woman, his natural subordinate. Wives do not stand to husbands precisely as slaves do to masters ‘in the beginning’. Slaves are not naturally slaves, but a wife cannot be an ‘individual’ or a citizen, able to participate in the public world. If the family is, simultaneously, to be part of the state and separate from it, constituted through a unique contract, and if patriarchal right is not to be undermined, women’s acknowledgment of men cannot be the same as men’s acknowledgment of their fellow men. Men cease to be masters and slaves, but Hegel’s social order demands a sexually differentiated consciousness (his discussion of ethico-legal love notwithstanding). The recognition that a husband obtains from a wife is precisely what is required in modern patriarchy; recognition as a patriarchal master, which only a woman can provide.

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

Hegel’s argument raises the question in an especially acute form. Why should a theorist who declares that it is shameful to see marriage as merely contractual still insist that marriage originates in a contract? Other forms of non-contractual free agreement exist, to which Hegel could turn; or, more logically, given the patriarchal construction of masculinity and feminity that Hegel shares with the classic contract theorists, the marriage ceremony could provide more than adequate confirmation of the natural subordination of women when they become wives. Of course, Hegel insists that his marriage contract is a unique contract that transcends the standpoint of contract. Hegel has to make this move in order to posit the requisite form of consciousness within the private sphere. From the standpoint of contract, spouses are related only by the mutual
advantage of property owners. As owners, their selves are always external to the conjugal relation and so no dialectic of consciousness can take place. Even the bond of mutual use is illusory because it cannot exist over time without the trust and faith which the standpoint of contract eliminates. Hegel’s special marriage contract transcends the contractarian standpoint – but it cannot transcend the sexual contract.

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

Modern civil society is an order of universal freedom and so stands opposed to the old world of status. All inhabitants of civil society enjoy the same standing – and, when marriage is created through a contract, we can be confident that this is the case. The marriage contract, however, also involves a variant of the contradiction of slavery. The social contract story requires that some clear indication is present that women are part of civil society and capable of entering into contracts (slaves must be seen as part of humanity). Women must enter into the marriage contract. But the sexual contract requires that women are incorporated into civil society on a different basis from men. Men create patriarchal civil society and the new social order is structured into two spheres. The private sphere is separated from civil public life; the private sphere both is and is not part of civil society – and women both are and are not part of the civil order. Women are not incorporated as ‘individuals’ but as women, which, in the story of the original contract, means as natural subordinates (slaves are property). The original contract can be upheld, and men can receive acknowledgment of their patriarchal right, only if women’s subjection is secured in civil society.

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

The difference between the marriage contract and other contracts has always been indicated plainly enough. Contemporary feminists have paid relatively little attention to the vow of obedience (perhaps because it is not always now included in the speech acts of the marriage ceremony), and when half the story of the original contract is repressed, even an explicit commitment to obey can be overlooked by other critics of contract theory. The employment contract gives an employer right of command over the worker and his labour. Workers must obey directives of employers, but in contracts about property in men’s persons, silence is maintained on the matter of obedience. Only the marriage contract – the contract into which women must enter, women who lack the standing of owners – includes the explicit commitment to obey. If the promise of universal freedom heralded by the story of an original contract is not to appear fraudulent from the start, women must take part in contract in the new civil order. If men’s civil status as equals and patriarchal
masters is to be maintained, the contract into which women enter must be separated from other contracts. A woman agrees to obey her husband when she becomes a wife; what better way of giving public affirmation that men are sexual masters, exercising the law of male sex-right, in their private lives?

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

In chapter 3, I noted that Hobbes’ self-interested female individual in the state of nature would have little or no incentive to make a contract to ‘breed up’ an infant. Of course, without Hobbes’ war of all against all the disincentive would be less, since an infant would not endanger personal safety. Nevertheless, from the standpoint of contract, can an infant be seen as anything more than an encumbrance? The question is more pressing when contract demands that, just as soon as the infant is sufficiently grown to make contracts for itself, the parent–child relationship should be placed on an explicitly contractual basis. How can any parents be sure that their trouble will not be wasted and their child will not make a more advantageous contract elsewhere? Again, would anyone want to contract with a child; or would the only contracts open to a small, relatively resourceless contractor be slave contracts? I am concerned with adult heterosexual relations not parent–child relations, so I shall merely raise and not pursue such questions.

There is a closely related point, however, which is directly relevant to my theme. One of Hegel’s objections to marriage as a contract is that it leaves the relationship at the mercy of the whims and capricious wills of the contractors. Similarly, Durkheim emphasizes that the bond created by contract is both external and of short duration; it leads to ‘transient relations and passing associations’. A contract of mutual advantage and reciprocal use will last only as long as it appears advantageous to either party. A new contract with a different partner will always appear as a possible and enticing alternative. That is to say, exit from the marriage contract becomes as important as entry. Contemporary advocates of marriage contracting stress that one advantage is that the contract can be for a limited term, and run for, say, five years in the first instance. Nor is it accidental that current controversy over slave contracts and paternalism emphasizes the crucial importance of dissoluble contracts. The way in which popular advice-books on marriage and sexual matters present divorce illustrates the influence of a contractual view of marriage; divorce is seen as something that can be ‘pre-considered in terms of personal upward mobility, with stress... on what lies ahead that may be incorporated into a new and better image’. When the contract is made only for mutual use and advantage, its real point becomes ‘to anticipate and provide for divorce’. To anticipate the termination of the marriage contract in the very act of contracting has become possible only quite recently. In England, for example, there was no divorce before 1700 (a divorce a mensa et thoro could be obtained from an ecclesiastical court but it did not permit remarriage) and until 1857 divorce could only be granted through a private Act of Parliament. Not until 1969, when the ground for divorce became the irretrievable breakdown of the marriage, were divorces obtained relatively easily by both wives and husbands and by members of all social classes. Only recently, too, have divorce and divorced persons ceased to be a scandal. Many nineteenth-century feminists who favoured divorce, in particular as the best means for a wife to escape from a brutal husband, steered clear of the subject for fear of compromising their goals; other feminists were opposed to divorce, fearing that the
Consequence would be to enable husbands to abandon their wives and children more readily. Divorce is usually seen as the opposite of marriage, but Christine Delphy argues that divorce today is, rather, the transformation of marriage. She argues that, since divorced wives almost always continue to look after the children of the marriage, marriage and divorce can be considered as two ways of obtaining a similar result: the collective attribution to women of the care of children and the collective exemption of men from the same responsibility.\textsuperscript{74} However, it is far from clear, from the standpoint of contract, whether such a responsibility would continue to arise.

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

The Beatles used to sing that ‘All You Need is Love.’ The objection that contract will never be victorious because love will stand in the way has been anticipated already; love has been reduced to another external relation, or aspect of property in persons, and defined, for example, as a ‘particular non-marketable household commodity’.\textsuperscript{75} To draw attention to such arguments is not to imply that contract is invincible, but to illustrate the incongruous character of an alliance between feminism and contract. The victory of contract has a considerable appeal for feminists, given the long sway of coverture and the various social and legal means still used to deny women ownership of property in their persons. The conclusion is easy to draw that the denial of equal property to women means that the feminist aspiration must be to win acknowledgment for women as ‘individuals’. Such an aspiration can never be fulfilled. The ‘individual’ is a patriarchal category. The individual is masculine and his sexuality is understood accordingly (if, indeed, ‘sexuality’ is a term that can be used of a self that is externally related to the body and sexual property). The patriarchal construction of sexuality, what it means to be a sexual being, is to possess and to have access to sexual property. How access is gained and how the property is used is made clear in the story of the demand of the brothers for equal access to women’s bodies. In modern patriarchy, masculinity provides the paradigm for sexuality; and masculinity means sexual mastery. The ‘individual’ is a man who makes use of a woman’s body (sexual property); the converse is much harder to imagine.

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

More recently, contract argument has been used to bring other forms of hetero- and homosexual activity within the ambit of the ‘sexual revolution’. Hardly coincidentally, when the slave contract is defended by the argument that only the individual can decide in what way to contract out his property, contract doctrine has also been used recently to defend sado-masochism, or what might be called a fantasy slave contract. Some feminists defend sado-masochism on the ground that ‘it is a consensual activity. . . . The key word to understanding S/M is \textit{fantasy}. The roles, dialogue, \textit{fetish} costumes, and sexual activity are part of a drama or \textit{ritual} . . .
relationships are usually egalitarian." Feminists who object to sado-masochism have been dismissed as moralistic and as failing to appreciate the element of parody in fetish costumes. Be that as it may, sado-masochism is less a rebellious or revolutionary fantasy than a dramatic exhibition of the logic of contract and of the full implications of the sexuality of the patriarchal masculine 'individual'.

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

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

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

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

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

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

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

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