

The **Sexual**  
***Contract***

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30<sup>TH</sup> ANNIVERSARY EDITION

CAROLE PATEMAN

## The Sexual Contract



# The Sexual Contract

Thirtieth Anniversary Edition

*Carole Pateman*

Polity Press

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*In memory of my father  
Ronald Bennett*

A ring of gold with the sun in it?  
Lies, lies and a grief

Sylvia Plath *The Couriers*

. . . the man remains  
Sceptreless, free, uncircumscribed, but man  
Equal, unclassed, tribeless, and nationless,  
Exempt from awe, worship, degree, the king  
Over himself;

Percy Bysshe Shelley *Prometheus Unbound*

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# Preface to the Thirtieth Anniversary Edition

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I find it hard to believe that thirty years have passed since the publication of *The Sexual Contract*, but I am delighted that Polity are reissuing it to mark the occasion. I am also gratified that, although my argument refers specifically to Anglo-American societies, more people from different cultures around the world have read my book than I could ever have imagined in 1988. The term ‘the sexual contract’ also appears to have taken on something of a life of its own.

Thirty years is a long time, and there has been very considerable social, economic and political change since my book was published. In addition, there have been rapid technological advances, notably the development of the internet, which my book pre-dates, providing both new opportunities and problems for women. Thus it is not surprising that I am often asked whether my arguments in *The Sexual Contract* are still relevant – although Polity clearly thinks they are. What the questioners today usually have in mind is only one aspect of my argument. They focus in particular on one institution fundamental to social life, the marriage contract and marriage; the other basic institution I discuss, employment and the employment contract, receives much less attention. And the part of my book devoted to analysis and interpretation of the work of the classic theorists of an original contract, subject to criticism after it was published, is now rarely scrutinized. My interpretation of the classic texts forms the basis for my discussion of the period between (roughly) 1840 and 1980, when marriage existed in its traditional form and there was employment for male breadwinners.

I believe I was the first to read the theorists of an original contract from a feminist perspective and to argue that social contract theory was misnamed and that the original contract had two dimensions

– the social contract and the sexual contract. Stories of original contracts are not only about the legitimation of government of citizens by the modern state but also about the justification of the government of women by men within that state. In almost all the accounts of the state of nature (held to precede the original contract) families exist and wives are held naturally to be subject to husbands. The striking exception is Hobbes, in whose portrayal of the state of nature women are as free as, and equal to, men. Nevertheless, after the original contract they are assumed to subordinate themselves to their husbands.

Now, however, women have gained the remaining civil and legal rights still lacking in the 1980s and are formally equal citizens; marriage law has been reformed, even extended to same-sex couples in some jurisdictions, so the question of contemporary relevance inevitably presents itself. Despite the transformed context, not all the problems surrounding marriage and the marriage contract, including those that I discuss, have disappeared. Most notably, domestic violence continues to be endemic. This is a complicated problem, but one reason for its persistence is that ideas about what it is to be masculine or feminine are deep-seated and slow to change, not least in the highly sexualized culture in which we now live.

The economy has been transformed over the past thirty years and the employment contract along with it. *The Sexual Contract* was published before the full impact was felt of globalization, privatization and the central place of finance capital; what the consequences will be of the very recent emergence of a ‘gig economy’ remains to be seen. What is clear is that the male breadwinner is a vanishing figure. New jobs tend to be contingent, low paid and with few or no benefits, and to make ends meet both spouses now need to be in the workforce. Thus, whether from necessity or choice, most wives are employed, albeit often part-time, but one aspect of the employment contract has not changed; in general, women earn less than men. They also continue to do more housework and childcare than their spouses. An economic power imbalance within the household still remains. As does the sexual harassment of women by men in the workplace. Indeed, as I write, sexual harassment in the otherwise atypical workplace of Hollywood is in the news because of the involvement of famous people, yet little publicity is given to the multitude of everyday examples in familiar, ordinary workplaces.

Rather to my surprise, some feminist critics took great exception to my discussion of prostitution. The global sex industry has expanded enormously since 1988, fuelled, for example, by the internet, by the collapse of the Soviet Union, by the proliferation of wars and ethnic cleansing that has driven women and girls into displaced people's camps and into the ranks of fleeing refugees, and by neoliberal economic policies that have increased poverty. I am not sure how much of all this feminist critics have in mind when they see prostitution as empowering for women or as transgressive. I have been accused of contempt for prostitutes, but none of my arguments in *The Sexual Contract* are about individuals; they are about institutions (marriage, employment, prostitution) which are open to reform and major change.

The problems of women in Anglo-American countries notwithstanding, we are privileged compared to women in some other countries around the world where women are, for example, still struggling for access to adequate nutrition and sanitation, against child marriage, for a proper education, to be able to inherit land, and for other requirements for a decent, dignified existence. In 2018 there still is a long way to go before the sexual contract becomes irrelevant, but I hope that a great deal more progress will be made to that end before another thirty years go by.



# Preface

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There has been a major revival of interest in contract theory since the early 1970s that shows no immediate signs of abating. New, sophisticated formulations of the idea of a social contract are accompanied by some highly technical and, in many cases, very elegant developments of contract argument, some of which are presented by Marxists, once firm opponents of the theoretical assumptions and practical implications of contract doctrine. My reason for adding a very different contribution to the literature is that something vital is missing from the current discussion. The sexual contract is never mentioned. The sexual contract is a repressed dimension of contract theory, an integral part of the rational choice of the familiar, original agreement. The original contract as typically understood today is only part of the act of political genesis depicted in the pages of the classic contract theorists of the seventeenth and eighteenth centuries. The aim of my study is to begin to break through the layers of theoretical self-censorship.

In one sense, this is an auspicious moment to write about the sexual contract. The extraordinarily widespread influence of contract doctrine means that the full ramifications of contract can now be glimpsed. In another sense, the moment is inauspicious; the very influence of contract theory threatens to bury the sexual contract more deeply than before and further to marginalize feminist argument critical of contract. That contract theory now has a new lease of life is not merely a consequence of the internal evolution of political theory but bound up with wider political developments centred on an interpretation of democracy as individual initiative (or choice), which can be summed up succinctly in the slogans of private enterprise and privatization. The whole political package is

marketed under the name of freedom. Sales (at least until late 1987) have been spectacularly successful, with buyers coming from regions once resistant to such political advertisements. The old socialist arguments against contract have lost much of their cogency in the present political context and, if new forms of criticism are to be developed, a new look at contract theory is required. Contract theory is concerned with more than fictions of original agreements; contract theorists claim to show how major political institutions should properly be understood. Citizenship, employment and marriage are all contractual, but since they are seen through the lens of a drastically truncated contract theory – indeed, a theory that has literally been emasculated – the social contract and the employment contract are systematically misrepresented and the marriage contract is usually ignored.

I became aware that the social contract presupposed the sexual contract, and that civil freedom presupposed patriarchal right, only after several years' work on classical contract theory and associated theoretical and practical problems of consent. I was interested initially in political obligation and although my conclusions on that subject (published in *The Problem of Political Obligation*) diverged from many accounts, my argument largely remained within conventional boundaries. My discussion began to push against the confines of social contract theory by noting that the classic theorists had left a legacy of problems about women's incorporation into, and obligation within, civil society that contemporary arguments failed to acknowledge. I began to appreciate the depth and character of the failure only when I asked specifically feminist questions about the texts and about actual examples of contractual relations, instead of trying to deal with the problem of women's incorporation from within mainstream political theory. Conventional approaches cannot show why the problem is so persistent and intractable, or why the critics as well as the advocates of contract cannot take feminism seriously without undermining their construction of the 'political' and 'political' relations.

Some of my arguments have been prompted by writers customarily labelled radical feminists, but the classification of feminists into radicals, liberals and socialists suggests that feminism is always secondary, a supplement to other doctrines. Feminism, like socialism, is implicated to some degree in contract and, despite controversy for more than a decade among feminists about the

concept of patriarchy, remarkably little attention has been paid to the contractual character of modern patriarchy. Nonetheless, my deepest intellectual debt is to the arguments and activities of the feminist movement, which has transformed my view both of political theory and of political life.

This book has been some years in the making and has benefited from many conversations, often on apparently unrelated topics, and discussions of papers and lectures in Australia and the United States, and I am grateful to all the participants. The writing was less protracted. I decided to attempt to draw together one strand of my work, and I wrote drafts of some of the material, while I was a Fellow at the Center for Advanced Study in the Behavioral Sciences at Stanford in 1984–5. I was fortunate to have such exceptionally congenial intellectual and physical surroundings and the assistance of the friendly, efficient staff while I was trying to get my thoughts in order. I was just as fortunate during 1986–7 when I was a Member of the School of Social Science at the Institute for Advanced Study at Princeton. At the Institute, I was in a very different but exceptionally tranquil yet stimulating intellectual environment. The whole of the present text was written in the private affluence of the Institute for Advanced Study, except for the final chapter, which was completed amid the public stringency of the University of Sydney.

I am especially grateful to Joan Scott for reading and commenting on chapters 1 to 4, to Itsie Hull for detailed comments on chapter 5 and to both of them and Giovanna Procacci for our lunch-time discussions of my work. I also owe thanks to Sandy Levinson for assistance with legal questions. I owe a different kind of debt to Maria Vigilante for relieving me of many of the tedious tasks associated with writing a book and for her critical enthusiasm, and to Peg Clarke and Lucille Allsen without whom, in this case, the book could not have been written. Their skills, acts of supererogation and cheerfulness in the face of a mess of sinister longhand and ill-typed pages rescued me and the book from a recurrence of repetitive strain injury. My husband transferred chapter 8 and this Preface to the computer and, once again, has given support to my academic work and has been an acute critic. I should also like to thank David Held for his encouragement and exemplary editorial efficiency.





# Contracting In

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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