

Michigan Law Review

Volume 88 | Issue 6

1990

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Recommended Citation

Elizabeth S. Anderson, *Women and Contracts: No New Deal*, 88 MICH. L. REV. 1792 (1990).

Available at: <https://repository.law.umich.edu/mlr/vol88/iss6/32>

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WOMEN AND CONTRACTS: NO NEW DEAL

*Elizabeth S. Anderson**

THE SEXUAL CONTRACT. By *Carole Pateman*. Stanford: Stanford University Press. 1988. Pp. xi, 264. \$12.95.

Is contractarian political theory inherently patriarchal? Does it inevitably legitimate men's domination of women? In *The Sexual Contract*, Carole Pateman¹ exposes the patriarchal origins of classical social contract theory, and argues that these origins cannot be overcome in modern versions of the theory. According to Pateman, contracts do not enable men and women to enter into cooperative relations on terms of equality. Rather, their function is to legitimate patriarchal and other forms of domination under the guise of equality. If Pateman's thesis is true, one of the most important strains of liberal political theory is seriously undermined. For liberalism aims to give every member of liberal society good reasons to accept its institutions, while Pateman's arguments imply that women, at least, have good reasons to reject contractarian justifications of liberal institutions.

Pateman's book is not only directed against liberalism as such. She also aims to persuade feminists to change the terms of political discourse which structure many feminist debates. Feminist theory today appears to be caught between the seemingly mutually exclusive and exhaustive alternatives of seeking "equality" with men, on the one hand, and seeking respect and space for "difference" from men, on the other. Each alternative poses its characteristic difficulties. The "equality" perspective, usually called liberal feminism, identifies the feminist goal with achieving equal rights, opportunities, and powers relative to men.² In practice, the equality view calls upon women to become more like men, for it accepts rather than challenges prevailing (male) standards of evaluation and qualification for offices, opportunities, and rights. This position accepts the social devaluation of the practices, characteristics, and values that society labels "feminine," or at least their irrelevance for determining the allocation of rights, opportunities, and powers traditionally reserved for men.

Although the bulk of Pateman's argument is directed against the equality perspective, because of its focus on contracts as a means for women to achieve equality, she opposes the "difference" perspective as

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2. For discussions of the equality view, see A. PHILLIPS, *FEMINISM AND EQUALITY* (1987).

well. The "difference" perspective celebrates the distinctive views, achievements, and dispositions which supposedly characterize women, and aims to give them larger social spaces in which to function.³ But since women's differences have been created under conditions of oppression, the difference perspective in practice affirms characteristics which bear the marks of adaptation and resignation to oppression, and thereby encourages women to opt out of activities that challenge men's domination.⁴

Pateman argues that these two apparently exclusive and exhaustive alternatives are in fact mutually complementary constructions within modern liberal patriarchal society. The liberal division between public and private spheres of life, legitimated by social contract theory, is responsible for offering women both alternatives: difference and subordination in the private sphere, and (ostensibly) equality and sameness with men in the public sphere (pp. 226-27). To escape this unproductive framing of the issues, feminists must understand their primary task to be the elimination of patriarchal oppression of women, which requires a repudiation of the liberal distinction between public and private spheres. How this repudiation is to be understood, however, and how it will enable women to participate fully in society *as women* without being oppressed, are matters Pateman does not reveal to us in *The Sexual Contract*.

So Pateman's critique of social contract theory is incomplete: theories are only fully refuted by exhibiting a superior alternative. However, the incompleteness of her critique does not take away its significance. If it is sound, it offers us compelling reasons to look beyond social contract theory for political guidance. The rest of this review scrutinizes Pateman's critique of social contract theory by means of two questions: How accurate is her analysis of the patriarchal character of classical social contract theory? Does she successfully argue that no modern social contract theory can overcome these patriarchal origins?

I. CLASSICAL SOCIAL CONTRACT THEORY

The aims of classical social contract theory are to determine the legitimate forms of government, and to determine the grounds of any given individual's obligation to obey a legitimate state. All social contract theorists assume that the political order is a social construct, not a natural form of association. It is legitimate if and only if it is (or

3. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982); N. NODDINGS, *CARING* (1984).

4. The recent Sears employment discrimination case, *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *affid.*, 839 F.2d 302 (7th Cir. 1988), in which feminists testified for both sides, illustrates some of the conflicts between the equality and difference perspectives. For critiques of this dichotomy with reference to the *Sears* case, see Scott, *Reconstructing Equality-versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 *FEM. STUD.* 33 (1988); Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797, 813-21 (1989).

could be) the outcome of a collective agreement of free, equal, and rational individuals. And a given individual is obligated to obey a particular state if and only if he has actually consented to its authority. In the absence of a political order, individuals stand in a "state of nature" in relation to one another — without any common political authority (*i.e.*, a state) in existence to adjudicate their disputes. All legitimate powers of the state are derived from such individuals, who agree to transfer their natural rights and liberties to the state (and thereby agree to obey it) in return for the benefits of political order, mainly protection of their lives and property. The versions of classical contractarian theory are distinguished by how they understand the freedom, equality, and rationality of individuals, what the conditions of the state of nature which motivate individuals to form a political order would be like, and what actions constitute consent.

Social contract theory would, at first glance, seem an ideally suited vehicle for *attacking* patriarchy, or the political power of men over women. Patriarchy is traditionally legitimated by appeals to natural differences between men and women, whereas social contract theory denies that political power is based upon natural differences. Patriarchy is traditionally assumed to be a matter of the lower status ascribed to women without their consent: If men could assert legitimate power over women only by their consent in a valid contract, how could men have such power at all? Finally, patriarchy traditionally depends upon an analogy between the legitimate authority of the father as the head of a household and the authority of the ruler as the head of state. But social contract theory sharply separates the public and private spheres, and denies the analogy between paternal and political power.

Pateman argues that patriarchy was not really rejected by classical social contract theory, but simply continued in a specifically modern form. This fact has been obscured by the patriarchal conceptual framework that social contract theory uses to present itself. The specifically modern form of patriarchy is not that of the rule of fathers over other members of the household, but the rule of men over their wives or other women to which they have sexual access. In particular, it consists in the conjugal right of men to sexual access to their wives or female servants (p. 9).

Classical social contract theory challenges the identification of political power with paternal power, and hence rejects traditional patriarchy based upon father-right. This gives it the appearance of being an anti-patriarchal theory. But it accepts the traditional pre-contractarian assumption that men have legitimate authority over and unrestricted sexual access to their wives and female servants, and hence accepts patriarchy based upon male sex-right (pp. 2-3). And it attempts to show that, if this authority is not a natural one, it is

grounded in women's consent in a sexual contract. Thus, contract is the specifically modern means by which patriarchy is legitimated. Furthermore, the key to men's domination of women in the political sphere lies in the sexual contract.⁵ Classical contractarian theory obscures this fact because most versions of it sharply distinguish private, domestic power from political power. In fact, however, it uses the fact that men exercise domestic power over women in the private sphere to legitimate women's exclusion from participation in the political sphere.

A key problem of classical social contract theory is to explain how women are subject to the political authority of the state if they are excluded from political participation. According to the classical theory, all individuals are born free and equal. That is, they are not politically subject to anyone else's authority, and they equally enjoy certain natural powers and liberties, notably, to acquire property, to defend themselves by whatever means they deem reasonable, and to judge the merits of their own case in disputes with others. The political authority of the state is derived solely from a contract whereby each individual agrees to surrender his natural liberties and obey the state in return for protection of his life and property. But no classical contractarian included women in the social contract which gives rise to the state. How, then, are women incorporated into civil society? If women have not given their consent to be ruled in the social contract, why are they nevertheless subject to the state's authority? The general answer to this question is that women are incorporated into civil society through their husbands or male masters.⁶ The universal scope of the authority of the state is ensured only by presupposing the universality of the marriage or *sexual contract*, by which women have already subordinated themselves to men before the state is constructed. When men enter the social contract, therefore, they dispose of both their own and their wives' natural liberties.

Pateman's distinctive contribution to our understanding of classical social contract theory is her analysis of the various means by which the sexual contract is used to ensure the political subordination of women to men before the social contract is made. In general, there are three contractarian strategies for ensuring this, corresponding to the

5. The sexual contract includes any agreement by which men gain rights over women's sexual and reproductive capacities. The marriage contract is its typical, but not universal, form.

6. G. SCHOCHET, *PATRIARCHALISM IN POLITICAL THOUGHT* (1975). As Schochet demonstrates, classical social contract theory does not even assume that all men participate in the construction of the state. Only heads of households do so; all family dependents, including children, adult servants, apprentices, slaves, and wives are incorporated into civil society by their domestic rulers. *Id.* at 12. Schochet thus demonstrates the falsehood of the conventional atomistic interpretation of the social contract theorists, according to which only individuals exist in the state of nature and make the social contract. Households are the fundamental units in the state of nature, and the parties to the social contract act not as individuals, but as heads of households, in consenting to the authority of the state. *Id.* at 56, 254-55.

strategies of Hobbes, Rousseau, and Locke, respectively: (1) assume the strict equality of men and women and allow conquest to count as a legitimate form of consent; (2) abandon the assumption of sexual equality, and ground women's subordination to men directly in an assumption of women's natural inferiority and incapacity to participate in political affairs, regardless of their consent; (3) assume that women are naturally inferior to men in a way that gives women rationally compelling grounds for consenting to their subordination in marriage. Each of these strategies, we shall see, manages to secure patriarchy for classical social contract theorists only in highly contingent, untenable, or contradictory ways.

Consider first the Hobbesian solution. Hobbes was alone among the classical social contract theorists in assuming strict equality between men and women, and denying that there is any natural subjection between human beings. All subjection, Hobbes argued, even of children to their mother, is achieved through consent.⁷ But this just goes to show how weak a notion "consent" is in Hobbes' theory. Submission to an overwhelming power, as in the cases of conquest and maternal authority over children, counts as consent in Hobbes' view just as much as do contracts made without threats or duress. This is important, for in the state of nature no contracts are valid, because there is no common political authority with the power to enforce them. So families in the state of nature are founded not upon a marriage contract but upon conquest. And all conquest creates relations of political subordination. When a man conquers his wife, she consents to relinquish all of her rights (except that of self-defense, which is inalienable) to her husband. His political power over her in the state of nature is just as great as Leviathan's over his subjects in civil society. On the assumption that all women are conquered by men and incorporated into a family before the social contract, Hobbes had no difficulty in accounting for the political subjection of women to men in civil society. Since men form the commonwealth, they make sure that the civil laws of marriage endorse the terms of the original sexual conquest.⁸

The basic problem with Hobbes' derivation of patriarchy from the social contract is that he has no argument to show that all women will be conquered by men in the state of nature. What about unmarried women, widows, and dominant women who form their own households through conquest? As Pateman points out, Hobbes rejected the assumption that there are any natural sexual differences which ensure the universal subjection of women to men.⁹ Hobbes himself believed

7. T. HOBBS, *LEVIATHAN* pt. II, ch. 20, paras. 1, 2, 4, 11 (Penguin English Library rev. ed. 1981) (1651).

8. *Id.*, at para. 4.

9. Pateman considers the possibility that women become competitively disadvantaged be-

that some commonwealths are founded by women, so he admitted that his derivation of patriarchy from the social contract is entirely contingent.¹⁰ At the same time, however, Hobbes seemed to assume without argument that men and women never jointly found commonwealths. It is difficult to square this assumption, or the assumption that men almost always found commonwealths, with his original assumption of strict natural sexual equality. According to Pateman, Hobbes' derivation of patriarchy would not have suited modern liberal political theory anyway: not only is his egalitarianism too uncompromising to support confidently a patriarchal order, but he equated sexual with political subjection in a way that prevented any robust differentiation of public and private spheres, and exposed the coercive foundation of sexual subjection too openly to legitimate it for those who refused to equate conquest with consent (p. 44).

Rousseau secured patriarchy by overtly excluding women from the original assumptions of social contract theory. Only men are born free and equal in the state of nature; women are naturally inferior and born into subjection. They must be subject to men, because they lack the capacities for rational self-restraint and self-government to participate in political affairs.¹¹ In *The Sexual Contract*, Pateman interprets Rousseau as claiming that men enjoy a natural authority over women which does not need to be validated by women's consent (p. 98). Elsewhere she has suggested a more interesting line of interpretation: Rousseau as a founder of an ideology of rape, whereby men are the sole arbiters of whether a woman has given her consent to sexual subjection.¹² Either line of argument supports a patriarchal order, but only through a fundamental betrayal of the basic commitments of social contract theory. The theoretical power of social contract theory depends upon its rejection of any arguments for natural subjection of some adults to others. If the domination of men over women is natural, why not the domination of a king over his subjects? If some adults can be the sole arbiters of whether others have consented, why can't a king assert an authoritative claim to determine whether his subjects have consented to his rule?¹³

cause they have children. But on Hobbes' egoist assumptions, women would simply abandon their children rather than submit to conquest by a man if doing so would enable them to preserve their liberty. P. 49.

10. T. HOBBS, *supra* note 7, at pt. II, ch. 20, para. 4.

11. J. ROUSSEAU, EMILE OR ON EDUCATION 364, 370, 396 (A. Bloom tr. 1979).

12. Pateman, *Women and Consent*, 8 POL. THEORY 149, 154-55 (1980). According to Rousseau, women must be trained to be modest — to be taught to say "no" to a sexual advance even when they mean "yes." It is up to the man to decide when a woman's "no" means "yes." J. ROUSSEAU, *supra* note 11, at 348. This raises the problem: If women's incapacity to govern themselves and restrain their passions is the basis for their exclusion from political participation, then wouldn't it also make their training in modesty impossible?

13. This last point is one on which the classical theorists are especially vulnerable, because of their need to define consent very weakly in order to ensure its universality. Hence Hobbes'

Locke's strategy is the most interesting of the three, attempting to combine an assumption of natural sexual inequality with the need for consent to legitimate all forms of authority between adults. Unfortunately, Pateman sometimes assimilates Locke's strategy to Rousseau's, flatly ascribing to Locke the view that women are naturally subordinate to men and inherently incapable of participating in political affairs; never free and equal but "born into subjection."¹⁴ Locke, in a passage ignored by Pateman, explicitly repudiates any naturalistic basis of women's subjection, pointing out that if this were so, queens could not be rulers, and if husbandly authority were political authority, then queens would lose their sovereignty upon marriage.¹⁵

In fact, it is clear from the *Second Treatise* that Locke believed that men gain authority over their wives only through consent, and that this authority is strictly limited. Locke insisted that marriage in the state of nature grants husband and wife equal authority over their children; moreover, the wife retains her right to own property, is free to divorce her husband once their children are grown, and is subject to her husband only in matters of common interest in the marriage.¹⁶ A more consistent reading of Locke than Pateman's would suggest that, while he believed that women have the same natural liberties as men and hence are legitimately subject to another adult only through their consent, their natural weakness makes it rational for them to consent to partial subjection to their husbands in marriage.

Nevertheless, Pateman rightly argues that Locke achieves the appearance of anti-patriarchalism while legitimizing a new form of it in the *Treatises* (pp. 91-94). The appearance is achieved through Locke's sharp distinction between paternal and conjugal rights and political rights. The power of a father over his children cannot be the basis for political authority, Locke argued, for mothers have equal power over

assumption that submission to conquest counts as consent, see T. HOBBS, *supra* note 7, at para. 11, and Locke's that merely walking on the roads of a state counts as consent, J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* in *TWO TREATISES OF GOVERNMENT* § 119 (P. Laslett ed. 1965). Hume offers a devastating critique of attempts to found obligation on so weak a notion of consent. Hume, *Of the Original Contract*, in *ESSAYS, MORAL, POLITICAL, AND LITERARY* ch. 12 (E.F. Miller ed. 1985). For a novel reconstruction of consent theory sensitive to Hume's concerns, see D. HERZOG, *HAPPY SLAVES* (1989).

14. Pp. 52, 53. The textual basis for this claim is very thin: a sentence in Locke's *First Treatise* where Locke admits that women's subordination to their husbands has a "foundation in nature." J. LOCKE, *THE FIRST TREATISE OF GOVERNMENT* in *TWO TREATISES OF GOVERNMENT*, *supra* note 13, at § 47. It is one thing to claim that once a woman consents to marriage, her natural lot is to be subordinate to her husband, given the need for a supreme voice in the household, as Locke has suggested in this passage and in his *Second Treatise*. See J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, *supra* note 13, at § 82. It is quite another to argue that every woman is "born into subjection" to men, regardless of her consent to enter into a particular marriage. Pateman sometimes acknowledges that the view of women's natural subjection does not adequately account for the claims of Locke and other social contract theorists. Pp. 39-40, 50.

15. J. LOCKE, *THE FIRST TREATISE OF GOVERNMENT*, *supra* note 13, at § 47. Locke also denies in this passage that women have a moral obligation to consent to subjection in marriage.

16. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, *supra* note 13, at §§ 78, 81-83.

the children. And the conjugal power of a husband over his wife cannot be the basis for political authority, for this power is limited to the concerns of marriage and excludes the specifically political form of power — the right to exact penalties of death, and hence all lesser penalties, for infractions of the law.¹⁷ Pateman points out that Locke does not question the husband's conjugal authority over his wife, he merely labels it "nonpolitical" and hence not of concern to the state (p. 91). But this patriarchal power, however "nonpolitical," still reaches deeply — right into women's bodies.¹⁸

Does Locke's legitimation of patriarchy run into problems as deep as those encountered by Hobbes and Rousseau? Pateman argues that it does: the central contradiction of social contract theory is that it must simultaneously assume that women lack and possess the capacity to make and uphold contracts. Women need to be able to make contracts, or else they would not be incorporated into civil society through the marriage or sexual contract. And yet they cannot make contracts, or else they would possess the essential capacity needed to qualify for participation in the creation of political order (p. 54). Contractual relations presuppose the natural equality of the parties to a contract: otherwise one party would be able to assert the right to rule based upon natural difference. But if the parties to any contract are natural equals, why should it be that women always consent to subjection? Some assumption of natural inequality needs to be slipped in to support the assumption of the universality of the marriage contract, which ensures that all women are incorporated into civil society without their participation in the social contract (pp. 6, 54, 179).

Pateman's analysis captures one, but overlooks a second contradiction of Locke's social contract theory. In entering the social contract on behalf of their dependents, heads of households dispose of natural liberties which they do not possess. The social contract theorists (except Hobbes) distinguish between political power and the power of a husband over his wife or a master over his servant. These pre-political relations do not transfer the subordinates' properly political liberties to the dominant party in the contract: wives and servants retain the

17. *Id.* at §§ 3, 82, 86.

18. Pateman does not spell out what is at stake in her claim that patriarchal right in marriage is a form of political power. Her argument needs to be completed by an account of the state, such as the one offered recently by Catharine MacKinnon. C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989). Social contract theory, like liberal theory generally, sharply separates the private from the public spheres. The private sphere is supposed to be a realm of freedom, not subject to state control. Hence liberal theory places strong obstacles in front of state action to eliminate inequalities found there. But inequalities in the private sphere are themselves political in nature, since they are enforced by violence against women, and such inequalities serve to support inequalities in the public sphere as well. *Id.* at ch. 8. This fact is not recognized by the liberal state: in modern liberal theory, private (domestic) inequality is supposed to be irrelevant to the establishment of political (public) equality. (In classical social contract theory, domestic inequality simply legitimates the exclusion of women from the political sphere altogether, allowing the remaining participants in it to be "equals.")

right to self-defense and to enforce the laws of nature; they also retain all natural liberties which are not a part of the narrow contract with their superiors in matters of common interest. Since they do not possess their dependents' political liberties, heads of households do not have the power to transfer these liberties to the state and hence do not have the right to incorporate their dependents into civil society. If they did have the right to dispose of their dependents' natural liberties, then their domestic power would be identical with complete political power, and there would be no distinction between public and private spheres of life.

This contradiction remains submerged in classical social contract theory because it equivocates on the meaning of political equality. It is an axiom of modern political theory that politics takes place only among equals. But equals in what respect? On a minimalist reading, equality just means equality of certain political rights or powers. To Locke, these are rights of self-defense and self-enforcement of the laws of nature.¹⁹ Since these rights are never alienated in any pre-political relation,²⁰ everyone is eligible to participate in the social contract upon reaching adulthood. On a maximalist reading, equality means complete independence from anyone else's will; it requires economic self-sufficiency. Any contract that requires one person to obey another in return for subsistence disables that person from political participation. But classical contract theory cannot explain how nonpolitical dependence can disqualify one from politics without imputing political power to the superior in a supposedly private, nonpolitical relationship.

Thus, it appears that social contract theory provides only unconvincing and contingent justifications for the patriarchal exclusion of women from politics, or else self-contradictory justifications for it. This conclusion is supported by Pateman's arguments and is further strengthened by the observations just made. The classical social contract theorists did try to justify patriarchy, but their theory makes it an awkward and ultimately untenable project. Shouldn't we conclude, then, that contractarian theory promises to be a far more useful tool for *attacking* patriarchy than for *defending* it?²¹ Pateman argues that

19. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT, *supra* note 13, at §§ 6-7.

20. Hobbes does not distinguish political power from domestic power, so his version of the theory is not subject to these criticisms.

21. Cf. Z. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM (1981) (Liberal theory, properly applied, subverts patriarchal institutions traditionally defended by liberals.). Pateman, in earlier works, seems to be of two minds on this issue. In one article, she claims that the classical consent theorists successfully justified patriarchy in their own terms. Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in FEMINISM AND EQUALITY 105 (A. Phillips ed. 1987). In *Women and Consent*, however, she claims that consent theory has ignored or suppressed its most radical implications, suggesting that a deeper understanding of it will undermine modern patriarchy. Pateman, *supra* note 12, at 163.

Her argument in *Women and Consent* exhibits a more sophisticated and nuanced understand-

this is not so: while contractarian theory has seduced many feminists into thinking that it provides a viable route to the achievement of equality, in fact, it is an inherently patriarchal theory (pp. 14-17). How does she reach this conclusion?

II. MODERN SOCIAL CONTRACT THEORY

According to Pateman, the key to unlocking the inherently patriarchal character of social contract theory lies in its conception of the "individual." Pateman identifies the "individual" in social contract theory as "possessive": as a person who is related to his body as an owner is to a piece of property.²² These individuals regard their own bodies, and other people's bodies, as alienable property, and they seek to maximize the protection of their own property while seeking the acquisition of more property. Contracts provide the primary means by which individuals protect and acquire property. Once contracts are understood as a vehicle for disposing not merely of property external to the body, but also of property in the body itself — that is, rights to sexual access, to the capacity to labor, and to act — they constitute a powerful tool for creating relations of domination. Expanding the domain of fully contractual relations is not a useful tool for feminists because contracts legitimate the domination of women.²³

ing of consent theory than *The Sexual Contract*. In the earlier piece, she does not fall victim to the confusions noted below, which lead her to reject unequivocally the uses of consent theory for feminist ends. I have confined my remarks to the contractarian exclusion of women from politics. Pateman claims that social contract theory has a deeper purpose: to guarantee contractually that men have access to women's bodies in the domestic sphere. P. 2. The social contract does not simply create civil society; it is a contract among "brothers" to ensure their sexual access to women. Pp. 102-09. Her claim is based upon a reading of Freud's myth of the origins of civilization as really being a myth of the origins of modern civil society. But she does not adequately explain what relationship she sees between Freud and the classical theorists. Is it that Freud's story is needed to complete and make sense of the classical contractarian myths of political origins? Or does it expose the repressed sexual motivations of social contract theorists themselves? At any rate, while the social contract theorists presupposed the empirical universality of marriage and assumed that most states would uphold a patriarchal form of it, they neither generally assumed nor tried to guarantee that every man would have the power and right to subdue some woman, nor that every woman would be permanently obliged to stand in subjection to some man or other. Pp. 102-03, 109. Classical contractarian theory, Rousseau possibly excepted, thus does not guarantee the "law of male sex-right" in the way or to the degree that Pateman supposes.

22. Pp. 14, 55; cf. C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962). Pateman derives her concept of the possessive individual from MacPherson, although she reinterprets it in terms of a feminist analysis of male sexuality.

23. Pateman's criticism of contractarianism can be distinguished from two other critiques familiar in the literature. One comes from the feminist "difference" perspective, which argues that to conceive of the individual as "possessive" and related to others only through self-interested contracts is to privilege illegitimately a peculiarly masculine self-understanding which women do not share. Women, rather, conceive of themselves as essentially related to others through emotional commitments distinct from self-interest. To give space to this self-understanding requires recognition of forms of moral relations to others not founded on masculine ideals of objective, impartial, and universal rules of fairness, but on feminine ideals of caring for specific others in concrete relationships. See C. GILLIGAN, *supra* note 3. Pateman does not consider this argument. And she refuses any help from the standard objection to possessive

There are really two arguments packed into Pateman's analysis, one of which explains why contractarianism legitimates the domination of people generally, and another of which explains why it legitimates the specifically patriarchal domination of women. Consider first the contractarian legitimation of generic domination. The examples of contract typically employed by the defenders of contractarianism to illustrate its advantages involve the exchange of external nonessential goods. I own a heap of corn; you own a little piece of yellow metal; each of us wants what the other has; so we arrange a contract for the exchange of our goods.²⁴ After the exchange, we are as free as before, only better off.

By equating goods in the person with external property, contractarian theory slips in, under a social form which is supposed to preserve the freedom of individuals, a justification for the sustained domination of one person by another (p. 148). The important contracts in social contract theory all involve the exchange of property necessarily embodied in the person in return for protection or subsistence. But to give to another person rights to property necessarily embodied in one's own person is to agree to subjection to that other person. The social contract, whereby people give up their natural liberty and agree to obey the state; the employment contract, whereby people give up their labor-power to the direction of their employers; and the marriage contract, whereby women alienate their sexual and reproductive powers to their husbands, all have the same form. They all involve the exchange of obedience for protection or subsistence. Contract establishes a sustained relation of domination, in which the party providing protection has the right to determine what the other person must do to fulfill her side of the contract.

Pateman rightly argues that a contract into sustained relations of domination requires some further justification than that it was arrived at voluntarily. According to possessive contractarianism, no further justification of such relations is needed. But this line of thinking easily leads to a justification of a society of masters and slaves, all in the name of freedom. Indeed, modern possessive contractarians do not flinch from endorsing contracts into "civil slavery."²⁵ This should

forms of contractarianism, that it ignores the background conditions of inequality and duress which undermine the notion that contracts made in the real world, or in the state of nature as construed by many theorists, are truly voluntary or fair. Pp. 7, 133.

24. See J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, *supra* note 13, at § 37.

25. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 331 (1974). A civil slave differs from a complete slave only in respect of having a civil status entitling her to use the courts to protect her interests. As Pateman notes, the traditional criteria distinguishing free employees from slaves — compensation in wages (a token of free exchange) rather than in kind, temporary rather than permanent subjection, alienation of labor-power rather than the body itself, and civil equality with the employer — have no special status within possessive contractarian theory. Pp. 70-73, 146-47. If all freedoms are necessarily embodied in property rights, and people own their bodies as property, they are only completely free if they can completely alienate their bodies for any-

amount to a *reductio ad absurdum* of possessive contractarian theory, since it conceives of the freedom of the slave as realized through complete subjection to another person, rather than as completely destroyed by it. No conception of the freedom and dignity of persons which is worth defending can endorse this kind of social order.

The above criticisms follow straightforward liberal criticisms of possessive versions of contractarianism.²⁶ Pateman's distinctive criticism of the possessive model of the individual in social contract theory asserts that it legitimates specifically patriarchal domination. She argues that this model of the individual is an inherently patriarchal construction (p. 167) because it is essentially male (pp. 184-85). Her argument for this point is extremely sketchy, and requires reconstruction. Essentially, it amounts to the claim that the specifically male form of (hetero)sexual desire is constituted by the desire to appropriate a woman's body as a piece of property, to exercise mastery over it for one's own sexual use.²⁷ Hence the realization of modern heterosexual masculinity requires a conception of individuals who own their bodies as property and can alienate them to men. Contract is simply the modern means by which men continue to exercise the "law of male sex-right."²⁸ As long as men's access to women's sexual powers is conceived and realized as an essentially contractual matter — whether in marriage, prostitution, surrogate motherhood, or some other arrangement — and as long as this kind of contractual access is conceived of as essential to the realization of masculinity, women will not be able to escape the patriarchal domination of their bodies by men.

thing they please, whether it comes in the form of wages or subsistence in kind. And since labor-power is inherently attached to the laborer's body, it cannot be alienated without (partially) alienating the body. Pateman might have added that while the civil slave still has a civil status, in possessive contractarian theory there is no reason why she cannot effectively alienate this status by agreeing to submit disputes with her owner to an arbitrator designated by him.

26. See pp. 74-75. Indeed, Pateman correctly cites Rousseau, one of the classical contractarians, in opposition to the contractarian justification for civil slavery. P. 75 (citing J. ROUSSEAU, *THE SOCIAL CONTRACT* bk. I, ch. 4, at 58 (M. Cranston ed. 1968)). She could also have cited Locke, who likewise rejected the idea that the condition of slavery can be created legitimately through contract, see J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, *supra* note 13, at § 23, as well as the idea that one person may contractually force another into political subjection by taking advantage of her duress or neediness. J. LOCKE, *THE FIRST TREATISE OF GOVERNMENT* *supra* note 13, at §§ 41-42. This should have suggested to Pateman that not even the classical contractarians, Hobbes excepted, fully endorsed the possessive conception of individuals. See also *infra* note 30.

27. Pateman writes:

The individual [in contractarian theory] is masculine and his sexuality is understood accordingly The patriarchal construction of sexuality, what it means to be a sexual being, is to possess and to have access to sexual property. . . . The "individual" is a man who makes use of a woman's body (sexual property); the converse is much harder to imagine. Pp. 184-85. Pateman's conception of male sexuality is hardly explained well enough here to support the conclusions she draws. Her arguments need to be completed by such accounts as are found in the work of other radical feminists. See, e.g., A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); C. MACKINNON, *FEMINISM UNMODIFIED* (1987).

28. P. 2. The phrase comes from Adrienne Rich. Rich, *Compulsory Heterosexuality and Lesbian Experience*, 5 *SIGNS* 631, 645 (1980).

This leads Pateman to argue that feminists should seek liberation in forms of relationship that go beyond contractual relations, rather than by attempting to perfect the contractual basis of the sexual relations they already have with men.

Speaking as someone who agrees in large measure with the position stated in the last sentence, I wish Pateman's argument were more successful than it is. But it is flawed by two confusions: (1) between particular contracts and contractarian theory; and (2) between possessive contractarian theory and the general form of contractarian theory. The first confusion leads Pateman to suppose that to endorse a particular kind of contractual relationship is necessarily to accept the conception of the possessive individual which is found in contractarian theory. The second confusion leads her to suppose that contractarian theory itself necessarily accepts this conception of the possessive individual.

Pateman is right to condemn the model of the possessive individual as one which legitimates unjust and patriarchal forms of domination. She is right to see in this model one deeply entrenched, patriarchal dimension of modern sexuality. And she is right to point out the continuation of patriarchy in past and present-day contractual forms of marriage, prostitution, surrogate motherhood, and employment (chs. 5-7). But there is a gap between these claims and the rejection of contractual forms as such or contractarian theory in general as useful tools for the liberation of women.

Consider first some differences between contracts and possessive contractarian theory. An unqualified possessive contractarian theory poses few obstacles to the sustained domination of one person by another which can be achieved through the contractual alienation of property in the person. But this does not imply that "contracts about property in the person inevitably create subordination."²⁹ Even in contemporary capitalist economies, labor contracts do not inherently create relations of subordination. Plumbers, academicians, actors, athletes, and professionals of all kinds hire out their labor-power for pay, but this fact does not always, or perhaps even usually, turn them into victims of domination through contract. This is no accident, for no modern capitalist economy does or could accept for its legal system

29. P. 153. Pateman tries to support her claim by citing an argument of Alchian and Demsetz which purports to show that even worker-owned firms founded on contracts will inevitably require a capitalist-style boss to prevent inefficiency and shirking. Pp. 152-53 (citing Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 794-95, 782-83 (1972)). But this argument depends upon accepting as an empirical fact the very conception of possessive individuals which Pateman rejects. She could try to argue that this conception is contingently true of people who govern their relations to one another by contracts, but this claim rests upon the confusion between contracts and the possessive contractarian conception of contracts I am criticizing. It is also empirically false, as the existence of professional partnerships shows. See S. BOWLES & H. GINTIS, *DEMOCRACY AND CAPITALISM* 196-99 (1986), for a critique of the Alchian and Demsetz argument.

an unqualified possessive contractarian conception of contract.³⁰ Even if it could, elite members of the labor force have enough bargaining power to secure high degrees of autonomy for themselves in labor contracts. Pateman needs to offer more discriminating criteria for determining whether a given alienation of a good embodied in the person creates an unjust relation of domination. By attributing domination to the very form of a labor contract as such, Pateman preempts the detailed institutional analysis required to discern those kinds of capitalist labor contracts that do indeed systematically create relations of domination. Such information cannot be deduced from an *a priori* analysis of the concept of the possessive individual or of the contractual alienation of goods embodied in the person. This does not imply that the best system for organizing labor is contractually based. But any argument for a noncontractually based labor system must depend upon an empirical comparison of its advantages to those of the best contractual systems available; it cannot be secured by an *a priori* proof that contractual systems are irremediably evil.

There is a further difference between possessive contractarian theory and particular contracts. Possessive contractarian theory provides us with one understanding of the ethical dimensions and justification of contracts, but it does not exhaust our understandings of what we are doing and why we are justified in entering into or trying to reform particular contractual relationships. People in modern liberal societies do not generally see voluntary contracts as valid regardless of content, as the possessive model implies. But they do see *some* forms of contractual relations as an essential means by which human beings affirm their autonomy and construct themselves as individuals with distinctive personalities and life plans.³¹ While the possessive individual sees contracts as the sole means by which to relate freely to others, individuals with different self-understandings can affirm noncontractual relations while still finding a place for contractual relations in their lives.

The central use Pateman makes of her critique of contracts is to attack feminist attempts to achieve equality in marriage and in prosti-

30. The tendency of the kind of unregulated markets which would be produced by such a system to self-destruct has been a central theme of economic and social theory. For but three of the seminal works defending this thesis (each from a very different theoretical perspective), see J.M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1936); K. MARX, *CAPITAL* (1867); K. POLANYI, *THE GREAT TRANSFORMATION* (1944).

31. Hegel, who unequivocally rejected the conception of the possessive individual, nevertheless argued that property and contracts play an important role in securing freedom and human personality. See G. HEGEL, *THE PHILOSOPHY OF RIGHT* § 40-80 (1896). Even Locke makes use of a nonpossessive conception of the individual to explain the significance of contracts. Locke insists that human beings, as creatures of God, do not have complete self-ownership; for example, they are forbidden to commit suicide. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, *supra* note 13, at § 6. Rather, Locke believes that humans have been placed on earth to carry forth God's mission: to protect human life, multiply, and subdue the earth, bringing forth ever greater production through hard work. Contracts are thus justified as the best way for human beings to achieve God's mission for them.

tution through the perfection of the sexual contract — by placing marriage and prostitution on a completely contractualist basis.³² These contractarian feminists attribute the presently patriarchal character of marriage to the fact that some of the terms of the marriage contract (such as the permissibility of marital rape, legal constraints on acceptable grounds for divorce, and exclusion of provisions for husbands to pay wives for their services) are not negotiable, but are pre-modern remnants of a status society.³³ The view that sexual equality in marriage can be achieved under present conditions by making marriage into a completely contractual relationship is naïve and dangerous. But Pateman's arguments on these points mix important insights with the kinds of confusions discussed above.³⁴ In the following discussion, I shall try to extract the important insights while arguing, contra Pateman, that they do not undermine the very idea of marriage as originally founded on a contract.

The central insight which feminist theory can bring to the critique of contracts is to point out the patriarchal character of the "noncontractual basis of contract" in past and present-day societies.³⁵ Not all norms regulating human behavior can be the product of contracts, for the very capacity of individuals to enter into and sustain contractual relations depends upon their possession of certain self-understandings and motivations, and this in turn depends upon the prior existence of social practices and institutions which reproduce these self-understandings and motivations. Different self-conceptions, motivations, and background social practices make individuals capable of and will-

32. Chs. 6-7. I will not discuss the case of prostitution in this review. Sibyl Schwarzenbach has criticized Pateman's account of prostitution. Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, — N.Y.U. REV. L. & SOC. CHANGE — (forthcoming). Schwarzenbach is similarly critical of Pateman's ahistorical conception of contractual relations as inherently patriarchal, and of Pateman's view that contracts presuppose a possessive individual.

33. L. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* (1981); Barker, *The Regulation of Marriage: Repressive Benevolence*, in *POWER AND THE STATE* (G. Littlejohn, B. Smart, J. Wakeford & N. Yuval-Davis eds. 1978); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207 (1982); Ketchum, *Liberalism and Marriage Law*, in *FEMINISM AND PHILOSOPHY* (M. Vetterling-Braggin, F. Elliston & J. English eds. 1977). This tradition of argument can be traced back to the nineteenth century. See J.S. MILL, *THE SUBJECTION OF WOMEN* (1869); W. THOMPSON, *APPEAL OF ONE HALF OF THE HUMAN RACE, WOMEN, AGAINST THE PRETENSIONS OF THE OTHER HALF, MEN, TO RETAIN THEM IN POLITICAL, AND THENCE IN CIVIL AND DOMESTIC, SLAVERY* (1825).

34. These confusions lead Pateman to slide without transition among characterizations of possessive contractarian theory in the abstract, particular views that present and past contractarian theorists have had about marriage and other contracts (which often depart from strictly possessive views), the actual forms of marriage and other contracts found in the past and present (which always depart from strictly possessive views), and forms of contract envisioned by contractarian feminists, as if the same ahistorical essence informed them all. Nowhere is this flaw more evident than in her critique of the marriage contract. Ch. 6.

35. Hegel demonstrated the incoherence of the idea of a society comprehensively constructed by contractual relations in *The Philosophy of Right*. See G. HEGEL, *supra* note 31, at §§ 71-80. This idea became a central feature of sociological theory through the work of Emile Durkheim, notably in E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1964).

ing to enter into different kinds of contractual relations. Insofar as this noncontractual basis of contract is informed by patriarchal conceptions of gender differences, men and women cannot enter into or abide by marriage (or any other) contracts on terms of complete equality, however much the form of the contract itself is framed in gender-neutral terms.

At least three patriarchal norms presently stand in the way of achieving gender equality in contracts between men and women. First, norms of femininity tend to socialize women as individuals who do not conceive of themselves as aggressive, self-seeking bargainers, and who hence are not motivated to act on such a self-conception. Thus, a woman who identifies herself primarily as a caregiver and understands her actions as directed toward the creation of relationships based on gift exchange is vulnerable to contractual exploitation by men who identify with the possessive model of the individual.³⁶

Second, norms of heterosexual relationships frame the exchange of goods between men and women asymmetrically, giving an inevitable advantage even to men who seek an equal relationship with their female partners. Thus, a man who gives up career advantages in order to take up equal responsibilities for housework and childrearing has made a great sacrifice relative to his peers and has thus "earned" a gratitude from his wife that he does not owe to her, for this arrangement makes her a gainer relative to her peers.³⁷

Third, norms of heterosexual relationships construe the very acts of offer and acceptance asymmetrically. When these norms prescribe that the man initiates all proposals (thereby excluding from consideration those proposals he, but not she, would find only barely acceptable), or when submission to greater power is counted as acceptance and women are trained in submission, sexual agreements between men and women can hardly be expected to make them equals.³⁸ Feminists who fail to recognize, and hence fail to criticize, the noncontractual basis of the marriage contract, inevitably reproduce the patriarchal domination they try to escape when they attempt to place relations with men on a fully contractual basis.

These considerations, not to mention the unequal bargaining power of women derived from their unequal economic standing, make it folly for feminists to seek marital equality solely through the perfection and gender-neutralization of the marriage contract. Pateman goes even further, claiming that the inherently patriarchal character of

36. I have recently explored this problem in relation to surrogate motherhood contracts. See Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990).

37. Arlie Hochschild makes this observation in A. HOCHSCHILD, *THE MANAGED HEART* 85 (1983). Hochschild's book contains a superb study of the asymmetrical norms governing the claims men and women may make on one another in the realm of "emotional labor."

38. Pateman, *supra* note 12, at 156-57.

contract undermines the whole idea of marriage as founded upon a contract. A marriage contract inherently involves a conception of possessive individuals who alienate their sexual property for the exclusive use of their partner. But since it is only the masculine individual who can be imagined as expressing his sexuality through the appropriation of another person's sexual property (p. 185), a marriage contract inherently makes the woman subordinate to the man (p. 168).

Pateman, like the contractarian feminists she criticizes, mistakenly supposes that the only conception of contract available to us is one which relies on a conception of agreement as founded on self-interested bargaining for the exchange of exclusively appropriated goods. But a contract is just a freely established agreement creating obligations between consenting adults. It can take other forms besides a possessive one. It can, for instance, be constituted by a mutual commitment to construct a common life based upon gifts whose value for one party depends on their being shared rather than offered up for exclusive possession. To deny that this kind of relationship can also be recognizably contractual is to deny the variety of understandings we actually bring to different contractual forms.³⁹ Of course, the achievement of such a nonmarket form of a contractually founded relationship cannot be secured simply by the will of the parties. A fundamental revision of "the noncontractual basis of contract," including deep changes in the presently constructed forms of masculinity and femininity, would have to take place before such contracts could be fully realized.⁴⁰

Pateman's analysis not only confuses contracts with contractarian theory, but possessive contractarianism with other forms of the theory. Possessive contractarianism neither exhausts the meanings of contract in modern society, nor the content of modern social contract theory. Modern social contract theory is founded on the idea that the legitimate forms of social or political order are those which are (or could be) agreed to by free, equal, and rational individuals under initial conditions which are fair. It is divided into two general branches: the

39. Indeed, the marriage contract, for all its patriarchal character, rejects the model of possessive individuals which Pateman claims lies at the core of modern patriarchy. Even today, most modern legal systems express a conception of the marriage contract as creating and upholding a form of commitment which transcends the will of the parties — hence the need to cite grounds for divorce beyond mutual consent in order to dissolve the contract. And the social norms of the marriage contract go far beyond its legally enforced norms in departing from a possessive model.

40. In making these claims about marriage, I do not wish to endorse the view that the content of a worthwhile marriage is exhausted by the terms of the original marriage contract. But if marriage is not to be a freely established relation of legal status between two consenting adults, and hence founded originally in a contract, then what is it to be? It might be the case that, given her analysis of heterosexuality as the eroticization of the domination of women, Pateman rejects the institution of heterosexual marriage, however founded, and advocates instead a radical lesbian separatism for women. But she does not go this far in her book. Her critique of marriage is hampered by a failure to offer a rival vision of sexuality and personal community.

possessive versions, which accept the model of the possessive individual as the free individual, along with the idea of free markets as constituting the paradigmatically fair conditions for making contracts,⁴¹ and those versions which reject possessive individuals and markets as appropriate starting points for moral and political inquiry.⁴² Given the tendency of social orders constituted by possessive individuals and free markets to generate systematic forms of human oppression and domination, the possessive models would appear to be among the less promising versions of contractarianism. If modern social contract theory is to be demonstrated to be inherently patriarchal, some attention must be given to those forms of it, such as Rawls', which are arguably more central to the liberal tradition than libertarian forms are, and which explicitly repudiate possessive models of the self. Yet in *The Sexual Contract*, Pateman offers only feeble and well-worn criticisms of Rawlsian social contract theory.⁴³

I do not wish to claim that Rawls' version of contractarianism is beyond feminist criticism,⁴⁴ or that social contract theory is the best tool for feminists to pursue the goal of eradicating sexist oppression. Pateman shows that possessive contractarianism has patriarchal origins, and that it legitimates the patriarchal domination of women through contracts today. She does not show that all contractarian the-

41. See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962); D. GAUTHIER, *MORALS BY AGREEMENT* (1986); R. NOZICK, *supra* note 25.

42. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971); Scanlon, *Contractualism and Utilitarianism*, in *UTILITARIANISM AND BEYOND* (A. Sen & B. Williams eds. 1982).

43. See pp. 42-43. Rawls articulates a clearly nonpossessive model of the individual in Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515 (1980). Pateman equivocates on the meaning of contractarianism. She begins by identifying it with what is known in the United States as libertarianism. P. 14. But full-blooded libertarianism is by now a marginal strain in modern liberal political theory, hardly a big enough target to cast doubt on social contract theory, or liberalism more generally, if it is undermined. Moreover, she goes on to criticize Rawls, as if her analysis applies to him. Pp. 42-43. In fact, her criticisms echo familiar ones in the literature, based on the misunderstanding of Rawls which supposes that his model of the parties in the original contract, who are abstracted from their bodies and from most self-knowledge, represents his theory of the individual. She also supposes, quite mistakenly, that when Rawls conceives of the parties in the original position as heads of families, he must think that only men are represented there. Rawls, *Justice as Fairness: Political, Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 238-40 (1985) (parties in original position are merely political constructs, not intended to give comprehensive theory of persons); J. RAWLS, *supra* note 42, at 128 (parties conceived as heads of families or in some other way concerned about people in future generations).

44. Rawls' assumption that the "basic structure" of society — which is the subject of his theory of justice — excludes the domestic sphere of marriage and the family is particularly vulnerable to feminist critique. See J. RAWLS, *supra* note 42, at 8, 74, 301, 511-12. In excluding from political scrutiny the sexual division of labor in the domestic sphere, as well as the social construction of gender differences which supports relations of sexual domination, Rawls mistakenly assumes that inequalities in the domestic sphere are of a natural and inescapable, rather than a political, nature, and that such inequalities do not unjustly affect the distribution of "primary goods" supposedly in the control of the basic structure. See Pateman, *supra* note 21, at 123 n.6. Recognition of these facts might not change Rawls' formulation of the principles of justice, or undermine his contractarian approach, but it would certainly require a radical reconstruction of the liberal division of public and private spheres which Rawls takes for granted.

ories, or all contracts involving women's sexuality, necessarily suffer from the same fatal flaw. So whether contracts and contractarianism, or political theories which look beyond contracts and contractual justifications, are the best vehicle for feminist projects is a matter which requires a detailed development and comparison of the alternatives. And such a comparison cannot be a matter merely of ideological analysis, but must evaluate how different experiments fare in practice.