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**Selves, Persons, Individuals:  
A Feminist Critique in the Context of the Law of  
Obligations**

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of Philosophy in Philosophy.

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## Declaration

In accordance with the University of Warwick Senate's resolution on published material, I declare that some work that appears in this thesis has been published during the period of study. Part of Chapter 3 contains, in a modified form, part of a book chapter:

J. Richardson, 'A Refrain: Feminist Metaphysics and Law' in J. Richardson and R. Sandland, eds., *Feminist Perspectives on Law and Theory* (London: Cavendish, 2000) pp.119-134.

Whilst there is footnoted reference to other papers, the contents of these are not reproduced in the thesis. In any event, these were published within the duration of the thesis. These papers are:

J. Richardson, 'Jamming the Machines: "Woman" in the Work of Irigaray and Deleuze' in *Law and Critique* Vol. IX, No. 1, 1998a, pp. 89-115.

J. Richardson, 'Beyond Equality or Difference: Sexual Difference in the work of Adriana Cavarero' in *Feminist Legal Studies* Vol. VI, No. 1, 1998b, pp. 105-120.

J. Richardson, 'A Burglar in the House of Philosophy: Theodor Adorno, Drucilla Cornell and Hate Speech' in *Feminist Legal Studies* Vol. VII, No. 1, 1999, pp. 3-31.

This thesis has not been previously submitted as a whole, or part, of any other thesis or award.

## Abstract

This thesis examines some of the contested meanings of what it is to be a self, person and individual. The law of obligations sets the context for this examination. One of the important aspects of contemporary feminist philosophy has been its move beyond highlighting inconsistencies in political and legal theory, in which theoretical frameworks can be shown to rely upon an ambiguous treatment of women. The feminist theorists whose work is considered use these theoretical weaknesses as a point of departure to propose different conceptual frameworks.

I start by analysing contemporary work on the self from within both philosophy of science and feminist metaphysics to draw out common approaches from these diverse positions. These themes are then discussed in the context of the law. I then critically examine the concept of legal personhood in the work of Drucilla Cornell and her proposals for the amendment of tort law. This is juxtaposed with an analysis of the practical operation of tort law by adapting François Ewald's work on risk and insurance to English law. I concentrate on women's ambiguous position with regard to both risk and to the image of the individual that is the subject of Ewald's critique.

This is followed by an examination of the changing position of women with regard to 'possessive individualism', 'self-ownership or 'property in the person' in relation to contract law and social contract theory. There are a number of different social contracts discussed in the thesis: Cornell's reworking of John Rawls and the stories of Thomas Hobbes and of Carole Pateman. The final 'social contract' to be discussed is that of 'new contractualism', the employment of contract as a technique of government. I argue that Pateman's critique of possessive individualism continues to be relevant at a time when the breadwinner/housewife model has broken down.

## Chapter One: Introduction

This thesis examines some of the contested meanings of what it is to be a self, person or individual in relation to the law of obligations. There is a political issue at stake: a concern with the way in which the question of what it is to be a woman has been problematised within recent feminist legal theory. In order to overcome what appears to be a block in feminist legal theory, I turn to areas of philosophy that, with some exceptions, are not usually discussed within feminist legal theory. In trying to bring philosophy to bear on law, I draw upon an unusual background of spending six years working in civil litigation, as a solicitor for trade unions, followed by seven years in a philosophy department, studying continental philosophy at masters level and as part of this thesis. This is therefore a thesis in *philosophy* from a feminist perspective with law setting the context for the exploration of what it is to be a self, person and individual.

An important move in feminist philosophy has been to show that the supposedly neutral, universal terms: self, person and individual, have actually referred to males; male bodies and traditional lifestyles, as the paradigmatic case. In legal theory, the fact that these supposedly neutral terms actually took men as the norm has given rise to, what has become known as, ‘the equality/difference debate’. The terms of this debate describe a dilemma that is faced by women upon entering political institutions, workplaces and social organisations that were initially made by and for men. They can either gain rights by appearing to be like men or can argue that they should be treated differently. Luce Irigaray,<sup>1</sup> amongst other feminist philosophers, has argued that men should not provide the neutral measure against whom women are judged. The dilemma posed by the

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<sup>1</sup> L. Irigaray, *Je, Tu, Nous* (London: Routledge, 1993b) p. 12.



quality/difference debate can therefore be understood as operating in practice, when women enter the male dominated legal profession for example, and within philosophy when theoretical structures are shown to be built upon the assumption that males represent the universal category of what it is to be a self, person or individual.

The dilemma of equality/difference debate has been explored in ways that cut across both theory and practice.<sup>2</sup> Scott,<sup>3</sup> for example, has traced the way in which the equality/difference problem has dogged feminist activists in French history. She illustrates how the theoretical terms of the debate have changed. Sometimes the faculty of imagination was viewed as important, sometimes it was the ability to reason, but whatever was viewed as the defining characteristic of personhood, it is males who were deemed to be proficient and women as lacking this ability. Scott draws an interesting conclusion, one which provides a challenge to feminist theory and marks the starting point for this thesis. It is Scott's view that the paradox of women's position, that is summed up within the equality/difference debate, is not one that can be resolved; not even by changing the conceptual framework in which the debate has arisen. It is implicit within the position of feminism as an historical movement. She concludes,

[I]n the case of feminism, the problem that has been deemed so central (equality versus difference) cannot be resolved as it has been posed. But can it be resolved otherwise? Would there be a feminism without the discourse of individual rights that represses sexual difference? I think not. Can there be a feminist politics that exploits that tension without expecting finally to resolve it? I think so; the point of this book has been to say that feminists have been doing just that for at least two centuries.<sup>4</sup>

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<sup>2</sup> Feminism generally and feminist legal theory in particular has been conscious of the need to hold together concerns about both theory and practice. See, for example, C. McGlynn, *Legal Feminisms: Theory and Practice* (Aldershot: Dartmouth, 1998); A. Bottomley and J. Conaghan, *Feminist Theory and Legal Strategy* (Oxford: Blackwell, 1993).

<sup>3</sup> J.W. Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (London: Harvard University Press, 1996).

<sup>4</sup> Scott (1996) pp. 174-175.

agree that the equality/difference debate cannot be resolved as it is posed. The question of whether this can be resolved by employing different frameworks is partly what this thesis is about. Whilst both have been described as paradigmatically male, it is necessary to distinguish between the self and legal personhood. What it is to be a self is an ontological concept, whereas 'personhood' denotes a moral and legal concept. Historically, women have been denied legal personhood, the ability to sue and be sued in the courts. I want to explore different ways of thinking about the self (starting in Chapter 2) and legal personhood (starting in Chapter 3) that do not take men as the norm against whom women are measured. This involves thinking about a model of selfhood that takes the bodies and lives of women as the norm rather than as an aberration. I will also examine a model of legal personhood, provided by the work of Cornell, that aims to move beyond the equality/difference problem.

The paradoxical position of women with regard to individualism, and the problems with individualism, are examined in Chapters 5 and 6 in the light of these earlier chapters. My reference to individualism and 'possessive individualism' focuses upon the ontological and political arguments of Thomas Hobbes and Robert Nozick. They share a perspective which views the self as the owner of his (and her?) abilities and owing nothing to society for them. This image of the self is associated with the arguments in political theory about 'self-ownership' and 'property in the person' which are discussed in the final two chapters in relation to employment contracts and marriage contracts.

## Recent History of Feminist Legal Studies

Recent Australian work by Ngaire Naffine and Rosemary J. Owens,<sup>5</sup> *Sexing the Subject of Law*, initially appears to have some similarities to my project of looking at the question of the self and of the person in a legal context. In their introduction, Naffine and Owens state,

This book reflects a central concern of modern social theory, which is the nature of identity. What does it mean to be a human subject or self? What is the nature of (legal) personhood?...The legal person, or legal subject, plays an absolutely critical role in law. The attributes accorded by law to its subject serve to justify and rationalise law's very forms and priorities. If feminists are to change the law, then, it is vital that they deal with the implicit as well as explicit sexing of the legal person. The aim of this book, then, is to bring together for the first time a diverse group of legal scholars whose task is to engage in a sustained critique of the legal person.<sup>6</sup>

However, after examination, it is clear that we are employing very different theoretical perspectives. As I will discuss below, it is my aim to try to open up more promising philosophical frameworks in order to move beyond the discomfort about talking about women that pervades *Sexing the Subject of Law*.

To situate their work, Naffine and Owens<sup>7</sup> trace the following recent history of feminist legal theory. They point out that well into the 1980s the discipline of law was resistant to feminist theory because of law's history of being viewed as 'autonomous, self-defining and possessed of its own internal logic'.<sup>8</sup> Legal formalists continue to view law as merely a description of rules drawn from cases and statutes. When these rules are viewed as autonomous and as abstracted from their social context, law is cast as a type of quasi-mathematics that involves the search for the right rule.<sup>9</sup>

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<sup>5</sup> N. Naffine and R.J. Owens, *Sexing the Subject of Law* (London: Sweet and Maxwell, 1997).

<sup>6</sup> Naffine and Owens (1997) pp. 6-7.

<sup>7</sup> Naffine and Owens (1997) pp. 3-14.

<sup>8</sup> Naffine and Owens (1997) p. 3.

<sup>9</sup> For a discussion of legal method, see for example, M.J. Mossman, 'Feminism and Legal Method: The Difference It Makes' in *Australian Journal of Law and Society* Vol. 3, 1986, pp. 30-52. Reprinted in M.A. Fineman and N.S. Thomadsen, eds., *At the Boundaries of the Law: Feminism and Legal Theory* (London: Routledge, 1991) pp. 287-388.

Although Naffine and Owens are writing from an Australian perspective the points that they make about the background of feminist legal theory have general application. Inevitably any attempt to draw out a brief history of feminist legal theory is contentious. I will continue to follow Naffine and Owens' account because it is written with a view to thinking about the self, person and individual, which is the focus of my own project, but will point to particularly English concerns where relevant.

When feminism did have an impact upon legal theory it took the form of liberal feminism, which Naffine and Owens link with an acceptance of the nature/culture divide:

Humanity was regarded as naturally and self-evidently divided into two sexes: the ordering of human life into men and women was part of nature, not culture, and so the concern of feminists was necessarily limited to the treatment of women once they had entered the cultural order.<sup>10</sup>

They sketch this version of 'liberal feminism' as taking for granted a split between nature and culture. The sex/gender distinction – one that has been undermined in recent years<sup>11</sup> – was mapped onto this split such that 'gender' was viewed as a social construct whereas 'sex' was viewed as biological. Here 'biology' was viewed as something that could not easily be altered – a point that is now contentious, as illustrated by the work of Susan Oyama discussed in Chapter 2. Similarly, in the UK, early feminist legal theory highlighted some of the problems women encountered with the operation of the law.<sup>12</sup>

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<sup>10</sup> N. Naffine and R.J. Owens, 'Sexing Law' in Naffine and Owens (1997) p. 4.

<sup>11</sup> For the way in which this nature/culture split has been challenged by poststructuralism with the argument that the way that we think about nature is also socially constructed, see J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (London: Routledge, 1990); J. Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (London: Routledge, 1993); J. Butler, *The Psychic Life of Power* (Stanford: Stanford University Press, 1997). This nature/culture split has also been subject to a more compelling challenge from within the philosophy of biology, see S. Oyama, *Evolution's Eye: A Systems View of the Biology-Culture Divide* (Durham: Duke University, 2000a); S. Oyama, *The Ontology of Information: Developmental Systems and Evolution* (Durham: Duke University Press, 2000b).

<sup>12</sup> See for example, A. Sachs and J.H. Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (Oxford: Martin Robertson, 1978); S. Atkins and B. Hoggett, *Women and the Law* (Oxford: Blackwell, 1984); J. Brophy and C. Smart, eds., *Women in Law* (London: Routledge and

Naffine and Owens<sup>13</sup> detect a major shift away from the dominance of liberal feminist legal theory in the 1980s with the influence of the US lawyer, Catherine MacKinnon. MacKinnon's radical feminism has also been an important influence upon English feminist legal theory. Central to her argument is an analogy with Marxism that,

sexuality is to feminism what work is to marxism: that which is most one's own yet most taken away.<sup>14</sup>

For MacKinnon, sexuality was central to identity such that the way to reconstruct what it means to be a 'woman' was to use 'consciousness raising' to show the way in which women are oppressed. Despite the fact that MacKinnon's work appears to position women as always exploited, she has taken legal cases and influenced the development of the law in areas such as sexual harassment<sup>15</sup> and, more contentiously amongst US feminists,<sup>16</sup> the regulation of pornography.<sup>17</sup>

MacKinnon's inclusion in Naffine and Owens' outline of the recent history of feminist legal theory works to pinpoint areas of particular concern for their position. They argue that MacKinnon produces a shift in thinking about sex/gender, or nature/culture, by viewing the category of 'woman' as a matter of social construction.

There was nothing natural or positive about the female sex: the meaning of woman was very much the cultural work of men who had crafted women according to their sexual interests.<sup>18</sup>

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Kegan Paul, 1985). In the area of sexuality, see for example: S. Edwards, *Female Sexuality and the Law* (Oxford: Martin Robertson, 1981); Z. Adler, *Rape on Trial* (London: Routledge and Kegan Paul, 1987).

<sup>13</sup> Naffine and Owens (1997) pp. 5-6.

<sup>14</sup> C.A. MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' in *Signs: Journal of Women in Culture and Society*, Vol. 7, No. 3, 1982, pp. 515-544. See also C.A. MacKinnon, *Feminism, Marxism, Method and State: Towards Feminist Jurisprudence* in *Signs: Journal of Women in Culture and Society*, Vol. 8, No. 4, 1983, pp. 635-658.

<sup>15</sup> C.A. MacKinnon, *The Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979).

<sup>16</sup> For the debate about pornography see, for example, D. Cornell, ed., *Feminism and Pornography* (Oxford University Press, 2000b).

<sup>17</sup> A. Dworkin and C.A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Minneapolis: Organising Against Pornography, 1988).

<sup>18</sup> Naffine and Owens (1997) p. 5.

s they point out, this is subject to the criticism that it reduces women to a debased sex.<sup>19</sup> This criticism has been linked with a further attack upon MacKinnon: that she produces a ‘universal’ view of women. It is this point that is central to much of contemporary feminist legal theory. I will return to this argument in the next section.

Naffine and Owens argue that MacKinnon’s work questioned the naturalness and fixity of the idea of sexual identity.<sup>20</sup> They then cite the work of US feminist legal theorist Cornell, as ‘producing a deeper fracture’ in the category of ‘woman’. The reference to ‘fracture’ presumably means that there is a further attack on the idea that there can be a universally accepted view of what it is to be a woman – as Cornell does not view what it is to be a self or a person as fractured. Cornell is described as influenced by Derrida. She is characterised as making the move that,

The masculine language, through which women were constructed, was always open to subversion because it was, of its very nature, metaphorical, contingent and fluid. It did not have the power to encapsulate women because it could always be undermined and manipulated by such strategies as irony, satire and mimesis.<sup>21</sup>

It is understandable that Cornell’s engagement with Derrida and with Lacan should mean that she is characterised as poststructuralist, particularly in 1997. Whilst this was written after Cornell had published *The Imaginary Domain*,<sup>22</sup> in which she develops her own theoretical framework from which her legal principles are derived, it was written before her further development of this approach in her later books.<sup>23</sup> Cornell’s developed conceptual framework is more

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<sup>19</sup> For UK criticisms of MacKinnon, see for example S.L. Roach Anleu, ‘Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory’ in *Journal of Law and Society*, Vol. 19, No. 4, 1992, pp. 423-440; E. Jackson, ‘Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal’ in *Journal of Law and Society*, Vol. 19, No. 2, 1992, pp. 195-213.

<sup>20</sup> Naffine and Owens (1997) p. 6.

<sup>21</sup> Naffine and Owens (1997) p. 6.

<sup>22</sup> D. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (London: Routledge, 1995).

<sup>23</sup> D. Cornell, *At the Heart of Freedom: Feminism, Sex and Equality* (Chichester: Princeton University Press, 1998); D. Cornell, *Just Cause: Freedom, Identity and Rights* (Oxford: Rowman

mplex and original than is implied in the above quotation. She also produces any more practical arguments than are captured by the reference to strategies of irony, satire and mimesis'. Despite the fact that Cornell engages at length with Derrida and Lacan, she avoids being confined by them. On the contrary, Cornell is also in conversation with many of her other contemporaries, including Ronald Dworkin and John Rawls. She takes what she wants from her contemporaries, aware of their conflicting positions, in order to create a unique philosophical framework. In Chapter 3, in which I discuss Cornell's legal proposals drawn from her framework developed from *Imaginary Domain* onwards, I argue that the standard description of Cornell as 'poststructuralist' or 'psychoanalytic' does not capture the clearly acknowledged debt that she has to Hegel.<sup>24</sup> However, this should not be overstated. As I will discuss below, she is anxious not to be viewed as a 'follower of a particular man'.<sup>25</sup> She accounts for her eclectic approach as possibly a way of avoiding such identification whilst recognising that her work has come out of German Idealism.<sup>26</sup>

In their historical sketch, Naffine and Owens then point to the influence of Luce Irigaray. Irigaray's radical reworking of Lacan and her work as an analyst clearly position her within a psychoanalytic tradition. I believe that Irigaray, at least in her earlier work, also overcame this Lacanian influence. I am interested in one aspect of her work, drawn from *Speculum of the Other Woman*:<sup>27</sup> the way in which she radically rethinks the relationship between self and other, such that

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and Littlefield, 2000a).

<sup>24</sup> 'I identified myself as a left Hegelian with strong socialist commitments from the time I was a teenager...' Cornell (2000a) p. 2.

<sup>25</sup> P. Florence, 'Towards the Domain of Freedom: Interview with Drucilla Cornell' *Women's Philosophy Review*, No. 17, 1997, p. 24.

<sup>26</sup> Florence (1997) p. 25.

<sup>27</sup> L. Irigaray, *Speculum of the Other Woman* (New York: Cornell University Press, 1985d).

self is not defined by what is not-self. I will return to explain this point in more detail in Chapter 2.

A history of the literature would not be complete without mentioning the 'ethics of care' that has developed from the influential work of Carol Gilligan.<sup>28</sup> This work has been used to attack perspectives that view social relations in terms of 'contract', both social contract theory and actual contracts, in favour of thinking about the relationship between mother and child as a potential model for social interaction.<sup>29</sup> Gilligan links empathy and caring with the 'feminine'. She tries to invert the priority attributed to traditionally 'female' and 'male' positions, as 'relational' and 'isolated' selves, respectively. The process of separating self and other is viewed as taking place within childhood to produce these 'relational' or 'isolated' selves. This can be contrasted with the theoretical frameworks that I will be looking at in Chapter 2.<sup>30</sup>

One work that is not mentioned by Naffine and Owens is the work of Carol Smart. In the UK, the influential work of Carol Smart,<sup>31</sup> draws upon her reading of Foucault to illustrate how women are 'constructed' by the way in which they are discussed in legal cases. Smart raises two different theoretical issues: whether it is worth feminists trying to engage with law at all and whether there should be such a discipline as feminist jurisprudence. Smart's analysis has some common features with that of Naffine and Owens and I will respond to these points below.

Naffine and Owens' emphasis upon language and upon, what they describe as, the 'open' meaning of what it is to be a 'woman' brings them up to date and is

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<sup>28</sup> C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge Mass: Harvard University Press, 1982).

<sup>29</sup> V. Held 'Non-Contractual Society: A Feminist View' in S.M. Okin and J. Mansbridge, eds, *Feminism: Volume One* (Hants: Edward Elgar Publishing Ltd., 1994).

<sup>30</sup> See also C. Battersby, *The Phenomenal Woman: Feminist Metaphysics and the Patterns of Identity* (Cambridge: Polity, 1998a) pp. 206-208.

<sup>31</sup> C. Smart, *Feminism and the Power of the Law* (London: Routledge, 1989).



ed to situate their own work: they are concerned with ‘the meaning or instruction of law’s subject – the legal person.’<sup>32</sup> Throughout their book there is tension between: (1) what they call ‘sexing the law’, the phrase used to describe their ‘method’ of recognising the way in which sexist assumptions about women permeate the operation of law; and (2) ensuring that, in employing this ‘method’, they do not perpetuate sexism by reinforcing such stereotyping in their analysis.

## **Problem with the dominant approach to Feminist Legal theory**

In her review of the current state of feminist legal theory, Joanne Conaghan expresses concern about the influence of poststructuralism.<sup>33</sup> She argued that,

The political implications of what has become known as ‘the critique of essentialism’ in feminism are potentially far-reaching. Not only does it produce disillusionment within feminism with what has proved to be a valuable political asset, woman-centredness, it also threatens to strip feminism of its political constituency because it appears that no shared identity exists to unify women and justify their political grouping.<sup>34</sup>

This echoes some earlier responses to poststructuralism within feminist theory.<sup>35</sup>

In contrast with the theoretical positions I want to discuss, I do not believe that Lacanian psychoanalysis or Derridean deconstruction, in particular, offers sufficient resources to open up the way in which the self can be thought.<sup>36</sup>

However, it is interesting to note how often feminist legal theorists who employ these perspectives manage to circumvent their constraints. This has been

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<sup>2</sup> Naffine and Owens (1997) p. 6.

<sup>3</sup> This is a broad term that includes a number of different theoretical perspectives. My aim is not to focus upon different positions that come under this umbrella term.

<sup>4</sup> J. Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ in *Journal of Law and Society* Vol. 27, No. 3, 2000, p. 367.

<sup>5</sup> See for example, C. Di Stefano, ‘Dilemmas of Difference: Feminism, Modernity and Postmodernism’ in L.J. Nicolson, ed., *Feminism/Postmodernism* (London: Routledge, 1990); S. Bordo, ‘Feminism, Postmodernism and Gender-Scepticism’ in Nicolson (1990) pp. 133-156. For a useful analysis of these perspectives see A. Phillips, *Democracy and Difference* (Cambridge: Polity, 1993).

<sup>6</sup> See, for example, Jardine who argues that the position of ‘Woman’ is employed as a metaphor in a manner that colonises the position of actual women. A.A. Jardine, *Gynesis: Configurations of Woman and Modernity* (Cornell University Press, 1985). My aim is not to assess poststructuralism but to use a different point of departure to examine other ways of thinking about the self and personhood and to critically examine individualism.

ieved by the adoption of the following strategies: firstly, some writers continue with some very useful work – for example, analyses of legal cases which show injustice to women – whilst simply couching their arguments in the language of poststructuralism, with warnings that the term ‘women’ is used strategically.<sup>37</sup> In particular, there has been some fascinating analysis of the way which the sexed body is treated within law that does not rely upon its broadly stated philosophical position.<sup>38</sup> Secondly, there are theorists who engage with Foucault and Derrida and who radically reuse their work to produce original positions of their own. I would maintain that both Cornell and Irigaray, in different ways, fall within this category and I will be considering Cornell’s response to the equality/difference debate in detail in Chapter 3.

The main theme of many of the chapters in Naffine and Owens’ book take the form of the worry that Conaghan detects in other work: that when they describe women’s interaction with law they will be read as perpetuating a particular view of women as a category or committing the sin of essentialism.

Naffine and Owens express this central theme in the following way:

many of these essays are explicitly concerned about feminism’s apparent limitations, especially its tendency to work with simple oppositions (male and female; masculine and feminine) which feminism often condemns and yet reproduces in the very act of condemnation.<sup>39</sup>

As I will explain in the next section, I do not believe that this is a necessary limitation, neither within feminism nor within philosophy. I think that it is a trap that occurs because of the adoption of a particular theoretical perspective derived from deconstruction. This can be illustrated by looking at O’Donovan’s<sup>40</sup> uneasy distinction between the feminist method of ‘sexing the law’ – i.e. by showing the

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<sup>37</sup> For example, K. O’Donovan, ‘With Sense, Consent or Just Con: Legal Subjects in the Discourse of Autonomy’ in Naffine and Owens (1997) pp. 47-64.

<sup>38</sup> For example, A. Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997).

<sup>39</sup> Naffine and Owens (1997) p. 7.

<sup>40</sup> O’Donovan (1997) pp. 47-64.

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assumptions about men and women that are made within legal cases – and the reinforcement of these categories of male and female as natural and fixed. Donovan produces an interesting analysis of the meaning of ‘consent’ in legal caselaw by examining a paradox: under the doctrine of coverture, women were viewed as able to consent to enter into the marriage contract which then removed their ability to refuse to consent to have sex with their husbands. She links this to consideration of contemporary medical caselaw in which women’s consent was deemed to be unnecessary by the courts.

This consideration of the way in which consent has been viewed as problematic with regard to women has much in common with Carole Pateman’s earlier analysis of women’s position within contemporary liberalism,<sup>41</sup> which I discuss in Chapters 5 and 6. However, O’Donovan frames this useful analysis with the cautious note that,

My substantive position is that a methodology of distinguishing [‘sex’ and ‘gender’] may be useful for certain purposes. I accept, however, the views of theorists who refuse such a distinction and argue that persons, regardless of biology, are cultural products.<sup>42</sup>

O’Donovan cites a paper by Nicola Lacey,<sup>43</sup> who similarly describes herself as wishing to contribute to,

a feminism which recognises the problematic status of the category ‘woman’ without making her disappear; which engages with the feminine as a construct, yet as a construct which has enormous social power.<sup>44</sup>

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<sup>1</sup> Pateman has addressed the issue of consent in much of her work. She addresses O’Donovan’s concerns in an earlier paper, C. Pateman, ‘Women and Consent’ in *Political Theory*, Vol. 8, 1980, pp. 149-168. Reprinted in C. Pateman, *The Disorder of Women* (Stanford: Stanford University Press, 1989a) pp. 71-89.

<sup>2</sup> O’Donovan (1997) p. 49. It is this approach to ‘biology’ and ‘culture’ that Oyama takes issue with, to be discussed in the next chapter.

<sup>3</sup> N. Lacey, ‘Feminist Legal Theory Beyond Neutrality’ in *Current Legal Problems*, Vol. 48, 1995, pp. 1-38.

<sup>4</sup> N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998) p. 14.

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separating ‘feminist method’ from her substantive arguments O’Donovan makes a move that is effectively the same as that of Gayatri Spivak.<sup>45</sup> Spivak argues for the employment of ‘strategic essence’. This is the assumption that it is necessary to talk about women as a category in order to make claims on behalf of men, whilst recognising that there is no fixed identity that can be described as pertaining to ‘woman’. In an interview<sup>46</sup> she describes a conflict between wanting to be a ‘pure deconstructionist’ and to attack sexism. In other words, the only way that she felt that she could attack sexism was to put aside her theoretical rigour. I do not believe that this choice is a necessary one. Philosophy holds more resources than deconstruction in order to address this problem.

## My Response

It is important to separate the different strands of the argument, that there is a danger in discussing women as a group, because the less convincing positions are shielded from criticism by inclusion with more compelling arguments, which carry with them less drastic implications for thinking about women as a category. Firstly, I want to outline the uncontroversial argument. Naffine and Owens point out that feminists, such as Angela Harris<sup>47</sup> and Patricia Williams<sup>48</sup>, argue that this ‘universal’ view of women does not recognise the experience of black women. This is a powerful critique, not least because it employs the same argument – that the universal position marginalises difference – that feminists have used to critique both law and philosophy. From the 1980s, the concern has been that the

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<sup>45</sup> G.C. Spivak ‘Criticism, Feminism and the Institution’ in S. Harasym, ed., *The Post-Colonial Critic* (London: Routledge, 1990) pp. 1-16. Spivak’s position has subsequently changed, see G.C. Spivak, ‘In a Word’ in G.C. Spivak, *Outside in the Teaching Machine* (London: Routledge, 1993) pp. 1-23.

<sup>46</sup> Spivak (1990).

<sup>47</sup> A. Harris, ‘Race and Essentialism in Feminist Legal Theory’ in *Stanford Law Review* Vol. 42, 1990, pp. 581-616.

<sup>48</sup> P. Williams, *The Alchemy of Race and Rights* (Massachusetts: Harvard University Press, 1991).

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periences of white, middle-class, able-bodied, heterosexual women have been viewed as the paradigm case within feminism, just as men have been viewed as universal example of selfhood. It was argued that this has the effect of closing in the space in which women's differences can be expressed. I think that this is a compelling argument but that it tends to be confused with arguments that do not follow from it. For example, Naffine and Owens run a number of arguments together when they comment that 'Such feminists destabilise the category of woman'.<sup>49</sup> I will argue that there are alternative models, from diverse areas of contemporary philosophy, that avoid the current concerns about talking about women as a group. This does not mean that sensitivity to women's differences is not important when discussing women, merely that there are some concerns that women have in common at a particular time.<sup>50</sup>

In Chapter 2, I will expand upon the argument that it is unnecessary to move from a position in which only the universal category of selves/ humans/ persons can be discussed, of which men are the best example, to the view that it is impossible to talk of any category. Again, it is necessary to stress that this does not mean that the marginalisation of differences does not remain potentially problematic. However, the response to this problem must be one of historical sensitivity to the question of which differences are politically relevant in a particular practical situation. This cannot be predicted theoretically before hand.

A similar point can be made with regard to Carol Smart's arguments, derived from her reading of Foucault. She argues that feminist effort to reform the law may be misplaced. This follows from Smart's analysis of the discourse

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<sup>49</sup> Naffine and Owens (1997) p. 5.

<sup>50</sup> For the argument that the insights of second wave feminism, such as the challenge to the public/private distinction and the insistence that housework is real work, are useful despite the concerns about difference that are emphasised by feminists who are worried by talk of women's essence' see, S.M. Okin, 'Families and Feminist Theory: Some Past and Present Issues' in H.L. Nelson, ed., *Feminism and Families* (London: Routledge, 1997) pp. 13-26.

ut, and treatment of, women within legal judgments and within the broader  
l process, for example by lawyers and police. She argues that these are so  
imental to women that caution is needed when seeking a legal solution and  
: it may be more constructive to focus upon direct action.<sup>51</sup> Again, I believe  
: this problem is not one that can be dictated in advance by theory.

This is the position of Bottomley and Conaghan,<sup>52</sup> who also employ the  
rk of Foucault<sup>53</sup> but draw a different conclusion from that of Smart. They  
ue that sometimes it is impossible to theorise further about a political issue  
l that the only way forward is action. Whilst the way in which law operates  
y make it difficult to institute change,<sup>54</sup> this is something that can only be  
derstood ‘on the ground’ and is not static. Similarly, I agree with Ralph  
ndland’s<sup>55</sup> response to Smart when he argues that it is necessary to be strategic  
out the engagement with law.

## **feminists in Philosophy**

eminist philosophers work within a tradition which has been hostile to  
omen, a fact that is equally true in law and in the sciences. Within the discipline  
philosophy today, feminist theory is more marginal and controversial than it is  
ithin other disciplines in the social sciences. The response to this cannot be to  
ave women refuse to take part in philosophy after years of exclusion, nor can

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For example, Women’s Aid supports battered women in practical ways rather than appealing to  
w. This is because of contingent problems with the English law. There are empirical studies to  
dicate how law could be improved, see for example, H. Johnson, ‘Rethinking Survey Research’  
R.E. Dobash and R. Dobash, eds., *Rethinking Violence Against Women* (London: Sage, 1998)  
p. 23-51. This is not the same as precluding the use of law on the basis of a theoretical position.

A. Bottomley and J. Conaghan ‘Feminist Theory and Legal Strategy’ in Bottomley and  
onaghan (1993) pp. 1-5.

M. Foucault and G. Deleuze, ‘Intellectuals and Power: A Conversation between Michel  
oucault and Gilles Deleuze’ in D.F. Bouchard, ed., *Language, Counter-Memory, Practice:  
elected Essays and Interviews by Michel Foucault* (London: Cornell University Press, 1980) pp.  
05-217.

Mossman (1986) pp. 30-52.

R. Sandland, ‘Between “Truth” and “Difference”’: Poststructuralism, Law and the Power of  
eminism’ in *Feminist Legal Studies* Vol. 3, No. 1, 1995, pp. 3-47.

men philosophers once involved in the discipline ignore the way in which women have been positioned within philosophical frameworks. Feminist philosophy has had to work within this tradition whilst undermining, and moving forward, from within. It is impossible to stand outside a culture and to start in. Failure to address philosophical questions would not mean that we could do without theoretical assumptions because practice cannot avoid the use of concepts. To reject philosophy would simply mean that these theoretical beliefs are not being questioned.

One way in which women have been marginalised within philosophy has derived from the way in which they have been positioned as commentators on the masters' work rather than as theorists working within and yet reworking this tradition. Penelope Deutscher<sup>56</sup> has traced the way in which particular women philosophers, such as Clémence Ramnoux and Sara Kofman, were described as commentators upon a man's work. She points to a further twist. Even that the women discussed actually produced their own original work, they were then described as 'bad commentators' rather than recognised as original. As Cornell comments,

I think part of what we are up against is the historical fact of the exclusion of women from philosophy, which has nothing to do in my mind with any natural characteristics of the feminine mind, but simply with imposed, brutally imposed, exclusion. As we get to the point – if we are getting to the point – where women can place themselves in philosophy, then what we would hopefully see is more women engaging enough in disidentification, so that we will no longer have to spend our whole life labelled as a follower of a particular man.<sup>57</sup>

defend the view that both continental and analytic political/ legal philosophy can provide resources for feminism – just as both need feminist theory to show their historical (and contingent) blind spots within their theoretical frameworks. In

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P. Deutscher, "Imperfect Discretion": Interventions into the History of Philosophy by Twentieth-Century French Women Philosophers' in *Hypatia: A Journal of Feminist Philosophy* vol. 15, No. 2, 2000b, pp. 160-180.  
Florence (1997) p. 24.

respect, I agree with the view of Fricker and Hornsby,<sup>58</sup> as expressed in their introduction of an anthology of analytic philosophy,

People sometimes suppose that ‘feminist philosophy’ must either name a subject area – as, say, ‘political philosophy’ does – or else stand for something that is meant to supplant philosophy. But at least as we understand ‘feminist philosophy’, it stands for philosophy informed by feminism; and feminism has different sorts of relevance as it impinges on different philosophical subject areas.<sup>59</sup>

I will illustrate by examining contemporary theory, the fact that the position women produces a blind spot for a number of theoretical frameworks can be viewed constructively. The question: ‘what would it be to think of the self in ways which do not view women as an aberration?’ can open up new ways of thinking. In other words, I believe that feminist philosophers can improve philosophy, not simply by highlighting the way in which women provide a weak point for certain views of ourselves and law, but by producing better concepts and better models. This does not merely involve adding women into already existing frameworks. This is not possible if the framework depends upon either the exclusion or the ambivalent treatment of women. It is also necessary to avoid the opposite error: producing an image of a self or of personhood that renders female bodies as monstrous or unintelligible. This would be to invert the mistake of those perspectives which has viewed women in such a way.

## Chapter Summaries

I start by discussing the concept of self, by bringing together the work of three philosophers from different areas of contemporary philosophy: Oyama, Clark and Fricker and Hornsby. This allows me to draw out common threads which I view as useful to think about the self. I return to these broad themes in later chapters to compare them with other views of self. In addition, I examine the meaning of

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M. Fricker and J. Hornsby, ‘Introduction’ in M. Fricker and J. Hornsby, *The Cambridge Companion to Feminism in Philosophy* (Cambridge: Cambridge University Press, 2000). Fricker and Hornsby (2000) p. 4.



entialism’ to consider potentially more productive frameworks for feminist theory than that of poststructuralism.

In Chapter 3, I turn from ontological views of self to legal personhood, in particular the work of Cornell. This is considered in the context of her arguments regarding tort law, the civil obligations that we are deemed to owe each other. Whilst Cornell has been classified as a poststructuralist, her conceptual framework, which radically reworks Kant and Rawls, incorporates the work of Habermas whilst not relying upon it. Cornell suggests an answer to the problem of equality/difference, arguing that women must be added into law as persons with rights. To avoid the problem that this ‘person’ will be viewed as traditionally male she argues that what it is to be a person should be left open.

The starting point for Cornell’s work is the use of rights, which has been questioned by a number of feminists.<sup>60</sup> I do not focus upon this objection but draw out the implications of her work for a legal test. I agree with Cornell, rather than Garay, that women should not be added into law *as women*, a move which I view as potentially regressive.

In Chapter 4, I continue the discussion of tort law, by employing the work of Ewald. I argue that, despite the fact that his work is focused upon the applications of insurance within France, his broader analysis of the techniques employed in the management of risk and use of the Foucauldian concept of governmentality (the ‘conduct of conduct’)<sup>61</sup> provide important ways to think

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For example, E. Kingdom, *What’s Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh: Edinburgh University Press, 1991); Smart (1989) pp. 138-159. Cornell recognises that, ‘rights are only as good as the people who enforce them’, Florence (1997) p. 14.

M. Foucault, ‘The Subject and Power’ in H.L. Dreyfus and P. Rabinow, eds., *Michel Foucault: Beyond Structuralism and Hermeneutics* (Sussex: The Harvester Press, 1982) pp. 220-221. Perhaps the equivocal nature of the term *conduct* is one of the best aids for coming to terms with the specificity of power relations. For to ‘conduct’ is at the same time to ‘lead’ others (according to mechanisms of coercion which are, to varying degrees, strict) and a way of behaving within a more or less open field of possibilities. The translator notes that ‘Foucault is playing on the double meaning of *conduire* – to lead or to drive and *se conduire* – to behave or conduct oneself, hence *la conduite*, conduct or behaviour. Foucault (1982) p.220.

at the actual operation of English tort law. I adapt Ewald's work to the common law and examine it from a feminist perspective. Again, the paradoxical position of women can be used constructively. I draw a link between 'possessive individualism' – the view of the self as initially separate from others, owner of her abilities and owing nothing to society for these abilities – and the image of the self that Ewald criticises. I then return to consider the extent to which women can avoid assimilation into this view of personhood, such that her 'open' view of personhood is understood merely as the possessive individual.

The historically paradoxical position of women with regard to possessive individualism is then considered in more detail in the rest of the thesis. In Chapter 5, I focus upon Carole Pateman's reading of Hobbes in *The Sexual Contract*,<sup>62</sup> which brings together an analysis of the social contract, the marriage contract and employment contracts. I want to take up Pateman's concerns with the 'traditional' marriage contract, which she characterises as operating between 1840-1970, in order to consider the contemporary position of marriage contracts, employment contracts and welfare. Pateman's critique takes on a contemporary relevance in the context of feminist calls for the extension of contractualism<sup>63</sup> and the development of further medical opportunities for the use of parts of women's bodies.

This discussion is continued in Chapter 6 which looks in more detail at the meaning of possessive individualism (self-ownership or property in the person).

In Chapter 6, I place Pateman's work alongside Marxist concerns about

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C. Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988).

For example, D. Dickenson, *Property, Women and Politics: Subjects or Objects?* (Cambridge: Polity, 1997); D. Dickenson, 'The New Contractualism?' in *Women's Philosophy Review* No. 20, 1998, pp. 108-111; A. Yeatman, 'Contract, Status and Personhood' in G. Davis, B. Sullivan, A. Yeatman, *The New Contractualism?* (Melbourne: MacMillan, 1997) pp. 39-56; A. Yeatman, 'Interpreting Contemporary Contractualism' in M. Dean and B. Hindess, *Governing Australia: Studies in Contemporary Rationalities of Government* (Cambridge: Cambridge University Press, 1998) pp. 227-241.

essive individualism. The historical reason for women's paradoxical position respect to possessive individualism is examined. Again, the aim is to use men's ambivalent position productively at a time when the government is discussing the 'work/life balance'<sup>64</sup> and the traditional models of employment contracts and marriage contracts have broken down.

Finally, I draw upon previous chapters to think about the future development of the 'sexual contract' in the context of the proposed 'new contractualism', the employment of 'contract' as a technique of government, and the relationship between women and the welfare state. I return to the link that is drawn between possessive individualism and the image of what it is to be a person envisaged within Ewald's work on risk. This entails an examination of the ways in which women's traditional position fails to fit, neither within possessive individualism nor within Ewald's analysis of it. I consider the extent to which women are now treated as possessive individuals and whether their traditional position allows for the rejection of this model, for example by being resistant to treatment as a commodity.

## **cutting Across Disciplines**

Much of this work cuts across different subject boundaries, not simply those of philosophy and law, in order to discuss the self, person and individual in the context of the law of obligations. This is a move which I defend on the grounds that it is productive to be able to transplant a problem in order to think about it differently. Whilst this does hold the potential danger of misreading a tradition or drawing together broad terms that have different meanings within those different approaches, I think that it is worth the risk. As Oyama<sup>65</sup> points out, in

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<http://www.dti.gov.uk/er/fairness/fore.htm>  
See for example, Oyama (2000b) p. 2.

analysis of the key terms employed in the nature/culture debate within the philosophy of biology, the ability to talk at cross purposes is not confined to interdisciplinary theory.

Within Chapter 2, the relationship between self/other arises from within the traditions of continental philosophy but is also discussed employing arguments in philosophy of science. This in turn can be subdivided in the philosophy of biology (Oyama) and philosophy of cognition (Clark). In Chapter 3, Cornell's complex analysis of personhood itself engages with both continental philosophy and contemporary Anglo-American political theory. In Chapter 4, Ewald's Foucauldian analysis is employed to think about tort law, Cornell's work and possessive individualism.

Issues of possessive individualism raise concerns that have been widely debated within the Anglo-American tradition. In Chapter 5, Pateman's reading of Hobbes is considered in the rich context of the contemporary feminist theory in Australia<sup>66</sup> and, in Chapter 6, this continues to be discussed in the context of Anglo-American debates between analytic Marxism and libertarianism, in the work of Cohen and that of Nozick.

The legal process involved in the law of obligations sets the context for this examination of the self, person and individual. The focus is initially upon tort law and then upon contract law; upon the practical impact of the operation of contemporary English law. Many of the theorists whose work is used have discussed law from the perspective of other jurisdictions: the US, in the case of Cornell, and France, in the work of Ewald. I discuss their insights and the extent to which they are applicable to English law.

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For a collection of, and discussion on, contemporary Australian feminist philosophy, see *Opatia: A Journal of Feminist Philosophy, Special Issue: Going Australian Reconfiguring Feminism and Philosophy*, Vol. 15, No 2, 2000.

To concentrate upon an area that has been classified as ‘private’ law, the area of tort and contract, I have ignored traditional legal subject demarcations. Where I have found it fruitful to do so. For example, I have highlighted some of the curiosities that emerge when comparing the marriage contract with the employment contract.<sup>67</sup> I am led by my theoretical discussion of selves, persons and individuals, with law merely setting the context. My aim has not been to write a thesis in law and to produce particular recommendations for legislation. Instead, I want to intervene in a theoretical debate. Given that practice is always theory laden, my aim has been to find resources within philosophy that are productive of better ways of thinking about the self and legal subject and to challenge individualism.

I have not discussed in detail the potential overlap between tort law and contract law,<sup>68</sup> nor the law of restitution.<sup>69</sup> Tort law<sup>70</sup> is concerned with those duties that persons are deemed to owe each other, whereas contract law is concerned with obligations to which the parties have agreed, or to which the parties are deemed to have consented. There are often obligations that overlap between tort and contract. So, for example, the parents in so-called ‘wrongful birth’ cases, in which a faulty sterilisation operation leads to the birth of a child, have sued using the tort of negligence. However, when the operation took place at a private hospital, there has been litigation for breach of contract arising out of the same circumstances.

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A special issue of *Feminist Legal Studies* on the law of obligations drew a similarly broad view of what were involved in obligations. *Feminist Legal Studies Special Issue: Law of Obligations*, vol. 8, No. 1, 2000.

See, J. Wightman, *Contract: A Critical Commentary* (London: Pluto Press, 1996) pp. 137-142.

Restitution is concerned with the reversal of undue enrichment, for example if someone is paid more money than they should have received. For arguments regarding the division between tort, contract and restitution see A.S. Burrows, ‘Contract, Tort and Restitution: A Satisfactory Division or Not?’ in *Law Quarterly Review* Vol. 99, pp. 217-267. For a critical discussion of Burrows’ position see Wightman (1996) pp. 25-26.

I have employed the term ‘tort law’ rather than the ‘law of torts’ for ease of reference. I am not discussing the question of which term is more appropriate.

In Chapter, 3, it is clear that Cornell's legal principles, that are derived from her theoretical position, imply more legal changes than those discussed in the area of tort law. However, these can be understood by using the example of tort law without altering her theoretical framework from which they are derived. I am focused upon Cornell's proposals for tort law, to be able to position them within a particular context, in Chapter 4. This opens up a different understanding of the practical operation of the law, in order to consider Cornell's principles, which are intended to have practical effect.

Pateman draws a link between the social/sexual contract and her discussions of marriage contracts and employment contracts. I follow her in this regard, particularly because I think it is useful to juxtapose these contracts. It is necessary to view them as interrelated in order to think about the ways in which they are changing after the breakdown of the breadwinner/wife model.

## Chapter 2: Emergence, Dynamic Systems and Identity

In this chapter I want to illustrate what is at stake in Christine Battersby's view of the self by juxtaposing her contemporary feminist philosophy with work that is taking place within the philosophy of science, in particular the work of Andy Clark and of Susan Oyama. This does not purport to be a definitive account of the current debates but is used simply to draw out some of general approaches to the issues that I think these theorists have in common, despite the fact that they do not always agree with each other's work. I highlight those themes which are potentially useful for feminist legal theory.

To contextualise this aspect of Battersby's work has some parallels with her own discussion of contemporary science within her book, *Phenomenal Woman: Feminist Metaphysics and the Patterns of Identity*. In the chapter 'Her Body/Her Boundaries',<sup>71</sup> she asks why she does not experience herself as being inside a container, with clear boundaries between her body and the outside world.<sup>72</sup> This question arises because this way of looking at oneself as a container with inputs and outputs into the separate external world continues to be taken for granted, as illustrated by those working within the field of 'cognitive linguistics'.<sup>73</sup>

Battersby considers a number of possible explanations. Amongst these, she discusses the idea that her experience reflects a change in attitudes and the experience of the self that took place in the West in the twentieth century. This

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Battersby (1998a) pp. 38-60.

This is a framework evoked by Kant's description of the sublime in which the boundaries of the (male) self are threatened by the might of nature but are then re-established by the use of reason. Kant, *Critique of Judgment*, trans. W.S. Pluhar (Indianapolis: Hackett, 1987) pp. 97-140.

M. Johnson, *The Body in the Mind* (Chicago: University of Chicago Press, 1987); G. Lakoff, *Women, Fire and Dangerous Things* (Chicago: University of Chicago Press, 1987) both cited in Battersby (1998a) pp. 40-43.

risen, she speculates, because our views of ourselves have been influenced move away from reductionism within contemporary science. She points out since the 1914 – 1918 war, there has been a shift away from the privilege of matter to solidity and also from the view of space as a container. The mathematics of topology has become more central to the scientific tradition.<sup>74</sup> In particular, Battersby cites the development of the mathematics of topology as precipitating a rethinking of the distinction between matter and form. This is in keeping with her work on the traditional assumption that can be traced back to Plato, of matter as being inactive, unable to change itself unless imprinted upon by form. Battersby's concern is with the metaphysics that underlies many of these recent topological models, which allows us to think of forms, not as fixed things but as temporarily stable points in a continuous flow. So, she gives the example of a ball falling on the ground as being temporally stable because the ground acts as an 'attractor' within the topographical field. The ball will stay there unless there is another attractor (such as me picking it up) or unless the first attractor goes (for example, the floor collapses).

The topological model allows us to view fixed forms as only temporarily stable and as interrelated. This allows Battersby to rethink the boundaries of her self in a way that is not that of the standard model and more in keeping with her experience:

If we think about boundaries, then, from the point of view of the new sciences, the boundaries of our bodies need not be thought of as 'three dimensional containers into which we put certain things...and out of which other things emerge'. The boundary of my body can be thought of as an event-horizon, in which one form (myself) meets its potentiality for transforming itself into another form or forms (the not-self).<sup>75</sup>

There is a self that emerges with otherness and is not cut off from it. She goes on to attack the image of the self with fixed boundaries, defined against otherness.

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Battersby (1998a) p. 50.

Battersby (1998a) p. 52.



Firstly, I want to compare her work with some of the work of Andy Clark, a philosopher in the area of ‘philosophy/ neuroscience/ psychology’ at Sussex University and then with that of Susan Oyama, researcher in psychology in the Department of Criminal Justice, New York University. The implications of this for the chapter will also be drawn out both during the comparison and in more detail at the end of the chapter.

## ‘Being There’

Andy Clark is concerned with the area of cognition rather than the self.<sup>76</sup> There is an important distinction here, which will be discussed more fully below. To avoid confusion, it is worth underlining at this stage that Battersby’s project is to rethink the self in a way that treats the body and traditional lives of women as the norm rather than as an aberration. It is not some ‘essential’ underlying self that is covered. The way that we view ourselves emerges within different cultures.<sup>77</sup> As discussed in the last chapter, contemporary feminists, including Battersby, have detailed the ways in which Western history has taken male bodies and lifestyles as the norm. However, by reading history ‘against the grain’ it is possible to reveal, revalue and use, other ways of viewing ourselves.

One of the central themes of Clark’s work is resonant with Battersby’s reworking of the subject/object divide. To sum up some subtle arguments very briefly, he argues that cognition is not ‘all in the head’. He describes an emergence of cognitive processes in which it is no longer appropriate to talk

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See, for example, A. Clark, *Being There: Putting Brain, Body and World Together Again* (Massachusetts: MIT, 1997); A. Clark, *Mindware: An Introduction to Philosophy of Cognitive Science* (Oxford: Oxford University Press, 2001).

For discussion of the reworking of the nature/culture debate see ‘Feminism, Essentialism and Work’ later in this chapter.

it a mind/environment split. In an article written with David Chalmers, he es the following argument:

Where does the mind stop and the rest of the world begin? The question invites two standard replies. Some accept the demarcations of skin and skull, and say that what is outside the body is outside the mind. Others are impressed by arguments suggesting that the meaning of our words ‘just ain’t in the head’, and hold that this externalism about meaning carries over into an externalism about mind. We propose to pursue a third position. We advocate a very different sort of externalism: an *active externalism*, based on the active role of the environment in driving cognitive processes.<sup>78</sup> (Italics are in the original.)

illustrates his argument by examining the way in which successful players of computer game (Tetris) manipulate their environment in order to think faster. His approach can be compared to that of Battersby. For Battersby, the importance of the fact that the self is embodied foregrounds sexual difference. For Clark, concerned with cognition, embodiment is important in producing messy real-time solutions to problems. Counting on your fingers, manipulating your environment to play scrabble – rather than having to spend time imagining things in your head – are all important and yet traditionally ignored aspects of our cognition.

First and foremost, we must recognize the brain for what it is. Ours are not the brains of disembodied spirits conveniently glued into ambulant, corporeal shells of flesh and blood. Rather, they are *essentially* the brains of embodied agents capable of creating and exploiting structure in the world.<sup>79</sup> (Italics are in the original.)

The fact that Clark is concerned with an organ that has evolved to produce real-time messy solutions to problems, rather than disembodied rational thought, means that we rely heavily upon what he calls ‘scaffolding’, our ability to use the ‘external’ world so that it is integral to our ability to think. He draws an analogy with dolphins. Dolphins are not physically strong enough to swim at the speeds that they can in fact reach. The trick is that they exploit aquatic eddies, and further, that they actually create pressure gradients in order to do so. This description should not be read as a description of a controlling subject who

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<sup>78</sup> <http://www.nyu.edu/gsas/dept/philo/courses/concepts/clark.html>

<sup>79</sup> Clark (1997) p. 220.

ly manipulates an external object. It is clear that Clark wants to think about a mic system, which does not involve such a straightforward separation of l and environment (or, in other words, subject and object).

By analogy with the dolphin, people who suffer from Alzheimer's disease age to exist in environments in which they should not, in theory, be able to e. They rely upon external prompts to memory such as diaries and otographs. This suggests that they are not merely being reminded about the s of meetings but are also reminded 'who they are' – or their place within an ternal' system that is not straightforwardly separate from themselves – by otographs of friends etc. In this context, when there is a permanent available to memory that is relied upon, Clark supports a remark of Daniel Dennett,<sup>80</sup> t to steal a diary which acts as part of someone's memory has more in nmon with offences against the person than against property.

In a more ambitious move, Clark extends this view of 'scaffolding' to nsider the broader institutions in which we work. This raises questions about e extent to which he can legitimately move from a discussion about the anipulation of the immediate environment (for immediate problem solving) to at appears to be, in Clark's framework, a potentially politically neutral – or at ast undeveloped – approach to institutions. Nevertheless, to be fair, this is not e central focus of his work, which is worth considering in detail because of the xtent to which it resonates with that of Battersby.

I have drawn out the following points to show, very broadly, the areas of verlap between Clark's analysis of cognition and Battersby's radical reworking f the Kantian self:

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A. Clark, 'Where Brain, Body and World Collide' in *Journal of Cognitive Systems Research* ol. 1, 1999, p. 14

both approaches emphasise the embedded,<sup>81</sup> embodied nature of cognition/self;

this results in an image of cognition or behaviour/self that tends to focus upon their emergent properties;<sup>82</sup>

linked with this, both are concerned with thinking of cognition/the self as dynamic rather than fixed. The idea of dynamic, temporary stability is illustrated by Battersby's analogy of the self/other in dynamic equilibrium as being like the water level in a sieve that is dynamically stable because the amount of water that runs out is equal to that running into it;

there is an attack upon the subject/object divide (in Clark's work this is a cognition/ environment split) as traditionally conceived and a move to characterise the emergent process as one which involves rethinking this divide;<sup>83</sup>

within the work of both theorists there is a shift away from the importance of envisaging cognition, or the self, in terms of centralised control. This is illustrated in Battersby's<sup>84</sup> reference to the emergence of self through patterns, through repeated habits, for example. It is explicitly implicated in Clark's view of the messy real-time solutions that we produce in response to

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The term 'embedded' should not be confused with the use of the term by communitarians, in recent Anglo-American political theory, who talk about individuals being 'embedded' in culture and tradition, generally produced by and for white men. Clark, in contrast, is working within the philosophy of science to discuss the relationship between self and environment in problem solving. For a discussion of the 'liberal communitarian debate' from a feminist perspective see E. Frazer and N. Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (London: Harvester Wheatsheaf, 1993). Battersby's work can be understood as thinking about embeddedness that brings in social context but does not lead to communitarian conclusions. This is discussed below in the section on agency.

Clark argues that 'the notion of emergence is itself still ill understood' in Clark (2001) p. 112. I am employing the term as Battersby uses it to evoke the idea of self and other coming into being gradually through patterns of relationality that do not occur simply as a result of a split between self and other.

This move is also central to Oyama's attack upon the nature/culture divide, to be discussed below. See for example Battersby (1998a) p. 184.

problems that involve using the environment to such an extent that it cannot be separated from the thought process itself.

These five points are interconnected within the work of both writers. Clark's emphasis upon the way in which cognition should be viewed as 'real-embodied cognition' leads him to emphasise our use of the environment to solve problems. His analysis undermines the idea of a distinct boundary between thought processes and our environment. He illustrates his argument about the need to consider cognition as 'embedded and embodied' by a scathing attack upon attempts to teach robots to think by simply giving them huge amounts of information. He argues that our (men's?)<sup>85</sup> traditional image of ourselves, as disembodied reason, has been misguided and is to blame for such an approach to robotics. His alternative approach is to try to produce 'thinking'<sup>86</sup> in robots by getting them to try to find real-time solutions to embodied problems. This move prompts a different approach both to the way in which problems are presented and to the way that cognition is understood.

He considers three different ways of thinking about cognition: what he calls the 'componential' approach; the 'catch and toss' approach; and, finally, the one that is prompted by embodied, embedded thinking, that of 'emergence'. The componential approach is the traditional way of thinking about cognition, which attempts to understand the complex whole of cognition by looking at its parts to determine how they work. He does not reject this approach on the pragmatic basis that he would attempt to use any approach to see what results it will yield. The 'catch and toss' approach goes some way to recognising that cognition is embodied and that it takes place within an environment. However, it continues to

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<sup>85</sup>For the argument that reason was traditionally viewed as male, see G. Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (London: Methuen, 1984). I am not concerned with the question of whether robots can actually think.

sider this in a traditional way by focusing upon ‘inner processing, inner computation and representations.’<sup>87</sup> The ‘catch and toss’ approach continues to envisage a firm and fixed boundary between the brain and the world. So, the world throws up problems and we catch and throw them back. Clark argues that this only makes sense when considering very simple feedback situations. As soon as the number of feedback processes increase, as in our messy real world when we need immediate solutions to problems, then this model breaks down.

He then turns to an ‘emergent explanation’ of cognition which he illustrates using an example from robotics from Steels.<sup>88</sup> To consider a sexless robot may seem in some way removed from thinking about Battersby’s reworking of Kant to think of a view of self that considers woman as the norm rather than an aberration. Indeed, the example of the robot is useful in illustrating what is missing. Robots do not share those aspects of embodiment that Battersby seeks to foreground: those that have been historically linked with the female and both degraded and viewed as superfluous. There is nothing fleshy, for example, about a robot. It does not have the ‘flab’ that Battersby wants to mobilise to think about embodiment in our culture and within the history of Western philosophy; to start to view women as typical rather than an aberration.<sup>89</sup>

However, I think that there are some useful comparisons to be made in this area of ‘emergence’. To illustrate this, consider Clark’s use of Steels’ work, cited above. Steels is concerned with the problem of a robot that needs to position itself between two poles in order to recharge itself. The poles are both lit. The non-emergent solution would be to give the robot light sensors that can measure its position relative to the poles and a programme to tell it to stand between them.

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Clark (1997) p. 106.

L. Steels, ‘The Artificial Life Roots of Artificial Intelligence’ in *Artificial Life*, Vol. 1, No. 1-2, 1994, pp. 75-110 cited Clark (1997) p. 108.

Battersby (1998a) p. 14.

emergent solution would be to programme it with the following two 'behaviour systems': 1) a phototaxis system that yields a zigzag approach to any source; 2) an obstacle avoidance system that makes it turn away from anything it hits. With this in place then the required behaviour simply emerges from the program after a few tries.

To characterise 'emergence', Steels suggests that what is required is the use of vocabulary that does not look at components but at the behaviour of aggregates of these components. This is rejected by Clark on the grounds that this should include the feedback of a hi-fi when this system would be better approached by a componential explanation. In his attempt to characterise 'emergence', Clark substitutes a definition that relies upon the distinction between: (1) 'controlled variables' which track behaviours that can be directly manipulated and which represent the componential approach or 'catch and toss' approaches to the system; and (2) 'uncontrolled variables' which track behaviours or propensities that arise from the interaction of multiple parameters and tend to resist direct and simple manipulation and represent the emergent approach.<sup>90</sup>

This move away from the 'catch and toss' model to an image of emergence, which acknowledges the complexity of the dynamic systems, has parallels with the way in which Battersby shifts the Kantian image of the self. A distinction must be drawn between this analysis of cognition and of the self. It is important that, whilst these positions do produce similarities, they are not confused. It is necessary to be careful about the overlap in vocabulary, coming as it does from within different areas of philosophy. In the example drawn from Steels' work in robotics, Clark is talking about the emergence of a particular form of behaviour.

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Clark (1997) p. 110.

rsby employs the term ‘emergence’ to describe a self that emerges out of patterns of relationality. Battersby’s self is described as emerging out of patterns of relations and mutual or interlocking dependencies which, over time, come to blur out the boundary between self and non-self. This involves a rejection of the idea that we define ourselves against others (or otherness). What we are, as a self, emerges out of repetition or habits in which the boundary between self and other (including other selves but also anything that is not-self) is not fixed; yet a distinct self emerges from this process. Clark’s model is also dynamic, to be discussed in more detail below.

Clark does ask the question:

Does the putative spread of mental and cognitive processes out into the world imply some correlative (and surely unsettling) leakage of the self into the local surroundings?<sup>91</sup>

Here, Clark appears to assume the existence of a pre-existent self that then engages with its environment rather than Battersby’s image of a self that emerges through engagement with otherness, by patterns of relationality (rather than by a direct split). To be fair to Clark, he is not focusing upon the concept of self in detail. This can also be read as a humorous choice of phrase.

It is worth considering the difference between Battersby and Clark on this point in more detail. As Battersby is reworking Kant’s analysis of the transcendental self from within the Kantian framework, to explain this point it is necessary to return to Kant’s framework itself. For Kant, the transcendental self is not a psychological description. The transcendental self is that which persists through time from moment to moment. For Kant, the transcendental self must be assumed to exist along with the transcendental object, as the ‘I’ that orders the world in Euclidean space and linear time. So, to suppose that we have a

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Clark (1997) p. 216



endental self is a logical move rather than a psychological description. Strydom attacks the kind of disembodied, persistent 'I' that Kant's philosophy describes by showing that the position of women provides a weak point within this tradition. Kant's assumption that matter is inactive, permanent and no more than an antipole to the transcendental self, makes it impossible to think of matter that can actively reproduce itself. She uses this weakness as the point of departure from which to rethink the opposition between the transcendental self and transcendental object so as to undermine the image of the body as dead, inert matter. She envisages an embodied self that persists through time but is not constructed in a top-down manner by an 'I' that imposes a space-time structure on matter and the world. Linked with this is the image of an emergence of the self with its other, the boundaries of which are not fixed.

Clark seems to ask an analogous kind of question about the relationship between self and not-self:

Does the putative spread of mental and cognitive processes out into the world imply some correlative (and surely unsettling) leakage of the self into the local surroundings?<sup>92</sup>

Clark's answer to his own question is as follows:

... 'Yes and No.' No, because (as has already been conceded) conscious contents supervene on individual brains. But Yes, because such conscious episodes are at best snapshots of the self considered as an evolving psychological profile. Thoughts, considered only as snapshots of our conscious mental activity, are fully explained, I am willing to say, by the current state of the brain. But the flow of reason and thoughts, and the temporal evolution of ideas and attitudes, are determined and explained by the intimate, complex, continued interplay of brain, body and world.<sup>93</sup>

At a superficial level, the reference to the self as a 'psychological profile' would appeal to those, like Nikolas Rose,<sup>94</sup> who draw upon Foucault to historically situate

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Clark (1997) p. 216

Clark (1997) p. 216

For example, N. Rose, 'Assembling the Modern Self' in R. Porter, ed., *Rewriting the Self: Histories from the Renaissance to the Present* (London: Routledge, 1997) pp. 224-248 and the concept of the self in N. Rose *Governing the Soul: The Shaping of the Private Self* (London: Free Press, 1999a) pp. 263-272.

terminology. In keeping with the anti-psychiatry movement, Rose is cynical about the role of psychology in shaping the way that we view ourselves. In using psychological terms and analysis. However, it is important to focus on the point of Clark's argument, which in the last sentence, resonates with Battersby's position in its rethinking of the traditional subject/object boundary. To summarise, Clark argues that in complex real world situations, we use the environment to such an extent that it is part of the thinking process. It becomes 'part of ourselves' as illustrated by his view that its theft should be viewed as not so much an offence against the person. The circumstances involve having to 'use an object' that is 'reliable, present, frequently used and deeply trusted.'<sup>95</sup> This is a psychological description of how we think which then challenges conventional understandings of what it means to be a self. In contrast, Battersby works with a logical argument to show that Kant cashes out his framework in such a way as to make the transcendental self stable but which renders him incapable of thinking an 'I' that is embodied – and selves that are born (to women) in a material (fleshy) way. However, in keeping with Clark's view of cognition, Battersby's reworking of the self also involves rethinking the boundaries between what is to be classed as part of the self and what is other to the self. A distinct self does emerge but through different patterns of relationality rather than in opposition from its other. Battersby

what would happen if we thought identity in terms that did not make it always spatially and temporally oppositional to other entities?<sup>96</sup>

Clark argues that the best way of viewing emergent phenomena is through the lens of Dynamical Systems theory. This is an approach which treats any source of emergence (here, the environment and the organism) together as one system and

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Clark (1997) p. 217.  
Battersby (1998a) p. 2.

at their mutual evolution. It is this approach, that mathematically describes  
ns of actual and potential unfolding, that Battersby discusses in her  
nce to topology.

Clark discusses the best way of thinking about the question of emergent  
tion, in which the subject/object boundary is problematized, in the  
ving way:

In such cases [of emergence]...we ideally require an explanatory framework that  
(1) is well suited to modeling both organismic and environmental parameters and  
(2) models them both in a uniform vocabulary and framework, thus facilitating an  
understanding of the complex interactions between the two. A framework that  
invokes computationally characterized, information-processing homunculi is not,  
on the face of it, an ideal means of satisfying these demands.<sup>97</sup>

emphasis upon the creation of a uniform vocabulary and framework, in  
h to discuss the thinking self and environment, starts with the assumption  
a subject/object split is not useful. It radically undermines the notion of a  
l boundary between subject and object and between self and its other. Whilst  
rsby's image of the self does have boundaries, these emerge, along with the  
and its other, from patterns of relationality. As part of the same move,  
rsby attacks the image of a self with the body as a container providing a  
l boundary against its environment.

Although she is not cited by Battersby, this move can be illustrated by  
idering the work of Polly Matzinger.<sup>98</sup> Matzinger is a biologist whose work  
mmunology has successfully undermined the simple idea that there is a  
other boundary that is policed by the immune system. Such a straightforward  
would have to explain how the body could change, for example, in  
escence, and still recognise what is to be classified as 'self'. Instead,  
zinger has argued for a model in which the immune system responds to

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rk (1997) p. 113.

Matzinger, 'The Real Function of the Immune System: or Tolerance and the Four Ds  
ger, Death, Destruction and Distress)' <http://cmmg.biosci.wayne.edu/asg/polly.html>

atural cell death. This model does not depend upon a rigid self/other dary, whilst recognising that there is such a thing as the self that emerges, with its other. This is analogous to Battersby's move in refusing to view embodied) self as something that has fixed boundaries that are defined by is excluded. From this perspective both Kant and Lacan are attacked for rig up models in which the self can only emerge by setting boundaries against outside world, or by rejection of the mother/other. This approach is also ed in Oyama's work in the context of her radical reworking of the re/culture debate, to be discussed below.

## **Battersby and Oyama**

ore discussing Oyama's work, it is useful to return to the points that Battersby Clark have in common, whilst repeating the health warning that they are sing upon different things: the self and cognition respectively. I argued that, following points represent broadly common themes within Clark's analysis of ution and Battersby's reworking of the Kantian self:

there is an emphasis upon the embedded, embodied nature of cognition/self;  
this results in an image of cognition/self that tends to focus upon their emergent properties;

linked with this, both are concerned with thinking of cognition/the self as dynamic rather than fixed;

there is an attack upon the subject/object divide (in Clark's work this is cognition/ environment split) as traditionally conceived and a move to characterise the emergent process as one which involves rethinking this divide;

there is a shift away from the importance of centralised control.

To discuss the relationship between Battersby's approach to the self and that of Oyama to the radical rethinking of the nature/culture debate, it is useful to bear in mind these general points of overlap in approach. Oyama shares a broadly similar framework, in a different area of concern. This can be characterised as an attack upon the boundaries between subject and object; a move which involves rethinking this relationship in a way that is attentive to the emergence of a self (and a subject)<sup>99</sup> whose boundaries are not defined by what is outside it. This approach attempts to produce a theoretical framework in which due weight is given to the complexity of the emergence of the self.

Further, both Battersby and Oyama share an explicit rejection of dualism and the form/matter distinction. They make the point that the privileging of 'form' as the active ingredient that works upon 'matter' – which has often been viewed as passive and unable to change itself – has been linked with sexual difference and images of women's passivity from the start. Battersby<sup>100</sup> critiques Aristotle's Aristotelian reading of Plato in which the *chora* is (female) passive matter that can only be imprinted by the male form.

Oyama argues that the terms in which the nature/culture debate has been played out have been misconceived. The opponents within the debate have tried to counter genetic determinism with environmental determinism. Oyama argues that the subtlety of development of any organism over time cannot be understood by simply viewing nature as a fixed entity represented by genes that have been built in instructions for development. The novelty of her approach, which

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As outlined in Chapter 1, I want to keep apart the terms self, subject, person and individual cause they are used in different contexts.

Battersby (1998a) pp. 108-109. This is also developed by Butler: Butler (1993) p. 14. For my discussion on the relationship between Butler and Cavarero on this point see, J. Richardson, 'Beyond Equality or Difference: Sexual Difference in the work of Adriana Cavarero' in *Feminist Studies* Vol. VI, No. 1, 1998b, p. 117. For a detailed discussion of the nuances of Aristotle's biology and feminist critiques, see C.A. Freeland, 'Nourishing Speculation: A Feminist Reading of Aristotelian Science' in B.A. Bar On, ed., *Engendering Origins: Critical Feminist Readings in Plato and Aristotle* (New York: State University of New York, 1994) pp. 145-187.

describes as ‘developmental systems theory’, is that she is also critical of those who argue that the environment, and not nature, causes our behaviour. She calls for a more radical understanding of the debate and a different understanding of what is meant by ‘nature’.

Recall that Clark makes the following point with regard to the best way of thinking about the question of emergent cognition in which the subject/object duality is problematized:

In such cases [of emergence]...we ideally require an explanatory framework that (1) is well suited to modeling both organismic and environmental parameters and (2) models them both in a uniform vocabulary and framework, thus facilitating an understanding of the complex interactions between the two. A framework that invokes computationally characterized, information-processing homunculi is not, on the face of it, an ideal means of satisfying these demands.<sup>101</sup>

Although she is not concentrating upon cognition but upon development in general, Oyama also considers the ways in which the reworking of the boundaries between subject and object (self and environment) result in a reconceptualisation of the emergent process. Strikingly, she speaks in similar terms, rejecting the image of a centralised control system – in this context envisaged by the genes (or even, although what is envisaged as a ‘different channel’: memes). She asks,

Why should there be such striking parallels between the problem of the subject in developmental psychology and the problem of conceptualizing biological, especially genetic, processes? In both cases, a single source of organizing (information-processing) power seems necessary, so that the cognitivist subject and the homunculoid gene play similar roles in the dramas of cognitive and ontogenetic formation.<sup>102</sup>

By rejecting both models, she undermines both the notion of centralised control and the hylomorphic approach that envisages the top-down imprinting of selves by genes or by society. This model of genes, as producing a top-down imprint, is the only model of genes available. In her recent edited collection *Cycles of*

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Clark (1997) p. 113.  
Oyama (2000a) pp. 172-173.

ingency,<sup>103</sup> Oyama brings together papers from geneticists and others who broadly within ‘developmental systems theory’ and reject the idea that genes concerns the passing on of ‘master molecules’.<sup>104</sup> Again, she points out there are multiple causes for development, the subtleties of which are not missed by drawing a distinction between genes and everything else, which is included together as ‘environment’. In different ways, Eva Neumann-Held<sup>105</sup> and Mary Moss<sup>106</sup> discuss the change in the way in which the gene is understood in biology and the philosophy of biology. Both, in different ways, provide accounts which move the debate forward by rejecting the image of the gene as a mechanism of top-down imprinting that is necessary to give form to matter, a mechanism that is unnecessary when matter is no longer viewed as inert.

## Agency

Without wishing to neglect the fact that Battersby, Oyama and Clark are addressing different issues in different areas of philosophy, and whilst not trying to collapse the distinctions between them, I think that they share a very broad, generalised approach – as indicated by the list of five central themes in this framework. This suggests a useful perspective on the legal practice of tortious obligations that I want to discuss. The question of agency is relevant here.<sup>107</sup> Battersby and Oyama explicitly deal with this question in similar ways. This arises from their concern to think of the emergence of the self that questions what has previously been designated as ‘inside and outside’, self and non-self or

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Oyama, P.E. Griffiths and R.D. Grey, eds., *Cycles of Contingency: Developmental Systems Evolution* (Massachusetts: The MIT Press, 2001).

Oyama et al (2001) p. 1.

M. Neumann-Held, ‘Let’s Talk about Genes: The Process Molecular Gene Concept and Its Extension’ in Oyama et al (2001) pp. 69-84.

Moss, ‘Deconstructing the Gene and Reconstructing Molecular Developmental Systems’ in Oyama et al (2001) pp. 85-97.

My arguments that agency may become less relevant to the law of tort as a result of potential developments to no fault compensation, see Chapter 4.

on and environment. This challenge to these generally accepted boundaries  
aces a different way of conceptualising the question of agency, amongst  
s. It is linked to the rejection of the form/matter distinction and the image of  
tralised command structure.

One of the central arguments made by critical legal theorists has been to  
rmine the way in which lawyers have employed the technique of abstracting  
ndividual from their social circumstances. Alan Norrie,<sup>108</sup> for example, has  
ted to the way in which the criminal law has operated so as to exclude  
ission of the social context by, for example, separating ‘direct intention to  
orm an act’ from ‘the motivation to perform it’. This means that the court is  
erned only with the question of whether or not the defendant ‘intended’ to  
i.e. that it was not an accident. It rules out any discussion of the social  
ext which motivated the accused, for example stealing bread because of  
ger. This social context is only considered relevant to the question of  
gation of punishment and not of whether or not the offence was committed.  
rie, drawing upon work of E.P. Thompson<sup>109</sup> and Douglas Hay,<sup>110</sup> traces this to  
role of the courts in trying to stifle – or at least avoid inciting – civil unrest in  
eighteenth century. He argues for a reworking of a Kantian framework in  
r to discuss social context without simply dismissing personal agency or  
ne.

My concern is not with crime but with the law of obligations. Nevertheless,  
question of agency is relevant. The refusal to delineate fixed boundaries

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. Norrie, ‘Criminal Law’ in I. Grigg-Spall and P. Ireland, *The Critical Lawyers’ Handbook*  
don: Pluto Press, 1992) pp. 76-83; A. Norrie, *Punishment, Responsibility and Justice: A  
tional Critique* (Oxford: Oxford University Press, 2000).

.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin,  
).

i. Hay, ‘Property, Authority and Criminal Law’ in D. Hay, P. Linebaugh, J.G. Rule, E.P.  
npson and C. Winslow, eds., *Albion’s Fatal Tree* (Harmondsworth: Penguin, 1977).



en the self and its supposed 'outside' offers a new approach to the law of  
tions. It is therefore worth considering how the relationship between the  
n and his/her social circumstances can be reframed using this perspective.  
rsby describes agency in terms of feedback structures. She argues that it is  
ole to think of agency within her model. This is no longer to be considered  
e will of the subject (at least if 'will' is conceived of as autonomous) but  
ves thinking of a 'feedback loop' between the self and environment, such  
hey are considered as open systems. She clearly envisages this as complex  
apable of producing unpredictable changes.

Oyama focuses upon the relationship between nature/culture that addresses  
uestion of agency and of the politics involved in the attribution of behaviour  
nes or to the environment. One point to come out of this work is an attack  
re idea that there is a centralised command structure in the brain that  
aces images and co-ordinates our responses. This attack upon a centralised  
mand structure is central to recent debates within developmental and  
itionary science. As Oyama puts it,

To see the organism-niche complex as both source and product of its own  
development is to acknowledge the role of activity in the life process – not genes  
organising raw materials into beings, and not environments shaping or selecting  
passive bodies and minds, but organisms assimilating, seeking, manipulating their  
worlds, even as they accommodate and respond to them.<sup>111</sup>

is similar to the way in which Battersby talks about feedback loops:

The subject that I will posit is neither completely free nor autonomous, but is also  
not simply passive. It is both marked –'scored' – into specificity by its relationship  
with 'otherness', and yet is itself also capable of agency and of resisting modes of  
domination. This self is not only shaped by 'the other', it is also self-shaping as  
potentiality is transformed into actuality via echo and the feedback-loops of  
memory.<sup>112</sup>

are concerned to think about agency in a manner that takes into account the  
odied nature of the self and the way that agency does not simply involve a

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Oyama (2000a) p. 95.  
Battersby (1998a) p. 12.

ional or abstraction from the particular circumstances in which the self finds  
/himself. This derives from the five general points that these theorists have in  
nmon. In particular, it involves thinking through the implications of matter not  
ng inert. A corollary to this is the rejection of the image of a centralised  
rganising structure, such as that envisaged as the self that decides upon her/his  
ions in a vacuum. As Oyama puts it,

If matter is inert, then organized processes can be explained only by reference to a structuring intelligence. But if it is interactive (think of any chemical reaction) under changing, interdependent constraints, such outside direction is not needed.<sup>113</sup>

gal judgments in the law of obligations depend upon attributions of the causes  
human behaviour. This is familiar territory for feminists who have challenged  
many crass assumptions about the inevitable nature of women that continue  
be used to justify a status quo in which women are subordinate. What is  
novative about Oyama's approach is that, like Battersby in the context of  
etaphysics, she responds by changing the framework in which the debate is  
ried out. Using the example of a type of genetic disorder which can be  
ntrolled by environmental changes, she points out that it is not the case that  
is should be understood only as genetically caused – employing a traditional  
odel of genetics. She is critical of biologists who ignore the environment  
mply because it appears to be constant.

It is possible to illustrate this with an analogy from political, or critical  
gal, theory. Oyama's move is analogous to that of Marx,<sup>114</sup> who argued that the  
oint of departure for political theory should not be to consider the nature of  
lives or individuals but of the society which produces such an emphasis upon  
dividualism. It is impossible to study an individual outside of society. It is the

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Oyama (2000a) p. 173.

K. Marx, 'Thesis on Feuerbach' in K. Marx, *The German Ideology* (New York: Prometheus Books, 1988) p. 573. He states, 'But the essence of man is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations.'

ire of this society that allows the study of individuals, in a vacuum, to appear a natural point of departure. It is precisely this image of a rigid, fixed boundary, between the ‘outside’ environment both physical and social, and the ‘inside’ self that is challenged in the work of both Oyama, Battersby and Clark.

Similarly, Oyama attacks a simplistic view of ‘biology’ as an external force that structures, and permanently fixes, inert matter. Oyama attacks the root of the traditional argument, that women’s subordination, for example, is inevitable if it can be shown to be ‘natural’ or ‘biological’. She argues that, even if a type of behaviour previously had some evolutionary value in certain circumstances then there is no reason why this should continue to be the case.

Battersby’s metaphor, derived from Kierkegaard, is of the wind that is affected by and yet also shapes the landscape,

Self-shaping (or becoming an individual) is like an alien wind that gradually takes on a familiar pattern as it blows across an unfamiliar landscape....

Although in the end, a pattern emerges and the wind plays a melody that remains ‘unaltered day after day’, this sequence only emerges slowly.<sup>115</sup>

Battersby suggests a similar move to Oyama, here. Oyama points to the inadequacies of the metaphors of transmission – in the sense of genetic or cultural transmission which, she argues, do not capture the subtlety of the developmental process. They fail to show the ways in which the embedded organism is able to rework, what is viewed as, both biological and social ‘heritance’. Oyama is also sensitive to the ways in which this use of the term ‘heritance’ is also deeply problematic. There is a link between this view of ‘heritance’ and the way in which property was seen as a thing that could be owned and transmitted.

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Battersby (1998a) p. 184. I will return to discuss this further in Chapter 3 in the context of cultural theory.

The Marxist historian, E.P. Thompson<sup>116</sup> analyses the history of this view of property which dovetails with the image of genetic property that Oyama attacks. Thompson points out that in feudal societies it is difficult to think of land ownership as anything other than involving relations between people. People were born to a certain position, within a hierarchy based upon different rights and obligations around land. Thompson argues that it is only with the *Enclosure Acts*, and the extinguishing of feudal rights below copyhold, as in *Gatewards Case*<sup>117</sup> that a property owner could think of his land as his object, a commodity, rather than as representing rights against other persons. In different ways, a number of contemporary feminist legal theorists<sup>118</sup> have explored the link between gender and sexuality, the image of a bounded self and the ability of property owners to exclude others. This ceases to be simply a metaphor when the term 'heritance' is used to describe the passing on of both genetic and *environmental* material. As discussed above, Oyama attacks this usage (for both types of material) along with its implication that there is a fixed, stable object, a gene or part of the environment, that is passed between generations.<sup>119</sup> Her aim is not to argue that the environment alters how we develop, as much as do genes, but to move away from this approach to development altogether. This is achieved by looking at *interacting systems and processes*, many aspects of which are

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E.P. Thompson, 'Custom, Law and Common Right' in E.P. Thompson, *Customs in Common* (London: Penguin, 1991). See also C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Oxford: Basil Blackwell, 1978b).

*Gateward's Case* (1603) 6 Co. Rep.

Dickenson (1997); J. Nedelsky 'Law, Boundaries and the Bounded Self' in R. Post, ed., *Law and the Order of Culture* (California: California University Press, 1991) pp. 162-189; N. Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' in *Journal of Law and Society*, Vol. 25, No. 2, 1998, pp. 198-212; M. Davies, 'The Proper: Discourses of Purity' in *Law and Critique*, Vol. IX, No. 2, 1998, pp. 141-173; M. Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' in *Social and Legal Studies*, Vol. 8, No. 3, 1999, pp. 317-352.

Oyama (2000a) p. 194.

ored simply because they are stable enough to allow such development to take  
ce.

## **minism, Essentialism and Law**

e question of 'essentialism' has been widely debated within the feminist  
ovement and has been described by Schor<sup>120</sup> as a defining feature of feminism  
the 1980s. Within feminist legal theory it continues to be debated.<sup>121</sup> As  
discussed in Chapter 1, there has been a perceived contradiction between the way  
which the feminist movement has challenged the view that women have a  
rticular nature (which has been used to justify the status quo) and the view that  
ere is some property (or quality) that all women have in common that forms the  
sis of the feminist movement itself. There has also been a strong challenge to  
e distinction, drawn by second wave feminism, between sex – said to represent  
atural and fixed attributes – and gender – which was employed by second wave  
minists to emphasise that many behaviours were learned and not fixed. It is  
ecisely this latter approach that Oyama seeks to undermine by arguing against  
e idea that 'biology' is fixed in the first place. As discussed above, she also  
allenges the idea that either environment or genetics can be analysed as  
crete, centralised, control mechanisms.

A more influential challenge to the sex/gender distinction, within the  
eminist movement, has come from 'postmodern' or 'poststructuralist' feminism.  
However, it is important not to lump together all approaches that draw from  
ontemporary continental philosophy. Poststructuralists, such as Judith Butler,<sup>122</sup>

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<sup>120</sup> N. Schor 'Introduction' in N. Schor and E. Weed, *The Essential Difference* (Indiana University  
ress, 1994) p. vii.

<sup>1</sup> For example, A. Barron, 'Feminism, Aestheticism and the Limits of the Law' in *Feminist  
egal Studies* Vol. 8, 2000, pp. 275-317; M. Drakopoulou, 'The Ethic of Care; Female  
ubjectivity and Feminist Legal Scholarship' in *Feminist Legal Studies* Vol. 8, 2000, 199-226.

<sup>2</sup> Butler (1990); Butler (1993); Butler (1997).

e pointed to the way in which biology is viewed as something that is pre-  
ursive and yet can only be understood in terms of language. At its least  
itically useful, poststructuralist feminism has been characterised as assuming  
t women's political claims cannot be discussed; that they represent merely a  
ition of difference within a psychoanalytic or deconstructive framework. In  
area of feminist legal theory, Barron describes the central theme of  
stmodern legal theory in the following terms:

Postmodernist legal theory, including postmodernist-feminist legal theory, imagines law to be founded on a repression of the desiring, embodied, particular (female) other, thus bringing into view what is excluded or denied in the elevation of this abstract reason as the source of law's authority.<sup>123</sup>

discussed in Chapter 1, a suspicion of 'essentialism' has lead to the argument  
it there can be no voice of the women's movement because the only voice that  
heard tends to be that of white, middle-class, able-bodied, heterosexual  
omen. This is analogous to the feminist criticism of the way in which a  
iversal image of selfhood has subsumed women within an image which has  
ewed men as the norm. In legal terms this can be illustrated using a couple of  
amples taken from the law of obligations. Firstly, the law of tort relies upon  
tablishing negligence by the adoption of the 'reasonable man test', which in  
cent years has been renamed as the 'reasonable person' test. In practice, this  
mains the same because the judges adopt the test of what they view is  
asonable, irrespective of the fiction of the man, or person, on the 'Clapham  
nibus', whose view they are supposedly expressing. The question of whether  
e person's behaviour has fallen below that of the reasonable person does raise  
sues about personal differences. For example, how a 'reasonable person'  
erceives the behaviour of another is relevant in sexual harassment cases.

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Barron (2000) p. 276. Here Barron registers the way in which the question of women's  
bjectivity has been linked with an 'ethic of care' within legal theory.

men tend to perceive a threat – in situations when men do not think such perception is reasonable – because women in our culture are taught to fear rape. Women are concerned that a situation could escalate, whereas men are often insensitive to this interpretation of events. The argument is that male judges would not be able to view the situation through women's eyes and would therefore employ a male standard from which to judge the situation. In *R v A (2001)*<sup>124</sup> the (all male) House of Lords was asked to weigh up the rights of women rape victims not to have evidence of their sex lives introduced within a trial (as stated in *Youth Justice and Criminal Evidence Act 1999 s. 41*) against the rights of the male defendant to a fair trial (under *Human Rights Act 1998 Sch. 1*). They found in favour of the male defendant, leaving the decision of whether or not to admit this evidence to the trial judge in individual cases, thereby doing nothing to undermine concerns of bias.

Another example raises similar issues. The question of who should sit on a jury and whether race or sex should be taken into account has been argued with regard to both race and sex cases. Although the Runciman Royal Commission on Criminal Justice<sup>125</sup> recommended that there should be some representation from ethnic minorities on the jury when race is an issue, the position has not been amended since the Court of Appeal turned down the objection of a black defendant tried by an all white jury.<sup>126</sup>

In both the above examples, the legal system relies upon the assumption that it should be possible for judges to imagine themselves in the position of

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<sup>124</sup> *R. v A (Complainant's Sexual History)*; also known as: *R. v Y (Sexual Offence: Complainant's Sexual History)* HL (2001) 2 W.L.R. 1546; (2001) 3 All ER 1. The Lords found in favour of protection of the male defendant.

<sup>125</sup> Lord Runciman (chair) *Royal Commission on Criminal Justice*, Cmnd 2263 (London: HMSO, 1993)

<sup>126</sup> *R v Ford* (1989) 3 WLR 762.

ers. However, Gatens,<sup>127</sup> drawing upon Spinoza, undermines this assumption arguing that imagination derives from bodily experience. Spinoza uses the example of our perception of the sun as seeming close to us. Even when it is discovered that this is false, the initial bodily experience does not disappear but continues to have an effect. Gatens applies this to her feminist concerns about the judiciary. Given that most male judges are unlikely to have experience of women's roles other than those of a subservient position then, she reasons, they are less likely to be able to even recognise this as an important issue let alone attempt to put themselves within the position of women. I will return to this question in the next chapter.

These examples appear, at first blush, to pose a problem for the feminist movement which has been sensitive to the way in which men purport to represent a universal position which silences women's perspective. Given that this has been extended to the question of differences between women, such as class, race, ability and sexuality, the question is asked, how can feminists ground claims on behalf of women without committing the same mistake? As we have seen, Spivak,<sup>128</sup> although she has moved away from this position, once suggested that feminists should take the desperate measure of adopting a 'strategic essentialism'. This involves both accepting the claim that there is no essential female quality from which to make feminist demands, but that we should act as if there is such a thing in order to ground political claims. I want to argue that Atterbury offers a way out of this problem, which is in keeping with the general approach of Oyama.

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M. Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (London: Routledge, 1996) pp. 5-141.  
Spivak (1990) p. 12.



To introduce this reworking of essentialism, Battersby starts by historically examining the meaning of the term 'essence' which she seeks to reframe. It is worth considering her method, at this stage, before looking at her analysis of essentialism. Her approach to the question of essentialism employs a similar technique to the way in which she considers the work of female artists and poets, such as Karoline von Günderode.<sup>129</sup> She demonstrates that these artists' work can be reactivated within a contemporary feminist context. This can feed back to refine the artistic traditions which had initially excluded these artists. Similarly, Battersby's search for a better way of conceptualising the essentialist critique for feminism involves a recognition that this concept has a history, the underside of which can provide resources for feminism.

This method or approach to history is itself implicated in the way that she thinks about essentialism. It draws from, and alters, Adorno's image of an object, such as an art object, that can shock the subject into a different conceptual framework. Further, for Adorno, objects that do not fit within the frame of reference of the subject do not fall outside any possible view, as in Kant's framework. They might be seen (or be seen differently) at a later date when the object has a different frame of reference. Adorno, as a Marxist, envisaged this shift in terms of a change in the mode of production. In Battersby's work, it is the social change and questions raised by the feminist movement that allow the work of the female artists to be viewed differently. In this way, her work counts for its own position.

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C. Battersby, 'Unblocking the Oedipal: Karoline von Günderode and the Female Sublime' in Ledger, J. McDonagh and J. Spencer *Political Gender: Texts and Contexts* (London: Harvester Wheatsheaf, 1994b) pp. 129-43.

Considered in this way, it has some similarities with the project of another contemporary feminist philosopher, Adriana Cavarero,<sup>130</sup> who aims to rework rhetorical narratives to show how the position of women undermines their theoretical framework from within. Both are concerned with the ways in which men's bodies and traditional lifestyle disrupt different 'modern' and 'postmodern' views of the self. However, whilst their method of attack may have similarities, the important constructive aspects of their work differ. Cavarero's work draws more from Hannah Arendt to describe the importance of the telling of one's story whereas Battersby is more focused upon bodily habit and the daily ambiguities of power relations through which the self emerges.

Battersby makes two important points that are central to her work. Firstly, *Gender and Genius*<sup>131</sup> she distinguishes between the meaning of the 'feminine' and 'female'. It is clear from her historical analysis that men who were classed as being the definition of the romantic genius could be classified as 'feminine', as having feminine attributes. However, they were valued in a way that women, whether viewed as having feminine or masculine attributes, were not. It was therefore possible to call a man 'feminine', but to call him 'female' would be a category mistake – with the possible exception of post-operation transsexuals. Thus, it was the state of being female (and not the possession of 'feminine' attributes) that was degraded.

Secondly, Battersby concentrates upon thinking what it would mean to take the female subject position as norm rather than as an aberration. She develops this to provide a philosophical answer to the feminist problems of essentialism

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A. Cavarero, *In Spite of Plato* (Cambridge: Polity, 1995); A. Cavarero, *Rethinking Oedipus: Rethinking a Patriarchal Text*. Paper at the UK Society of Women in Philosophy Conference 1996; A. Cavarero, *Relating Narratives: Storytelling and Selfhood* (London: Routledge, 2000).  
C. Battersby, *Gender and Genius: Towards a Feminist Aesthetics* (London: The Women's Press, 1989) pp. 10-15.

discussed above. This is done by challenging the assumption that the only way to think about essence is as a fixed, unchanging, underlying characteristic. As Battersby points out, this interpretation of Aristotle is subject to disagreement. What is relevant is the definition of essence that has influenced Western philosophy.<sup>132</sup> The Aristotelian view of essence is such that the essence of x is that property which all examples of x have in common. This involves ignoring the particularity of something and looking for common features which are said to define the essence of the universal category or species. This model therefore blocks any attempt to discuss a female essence because it is only at the level of species that an essence can be discerned.

This can be illustrated in more detail by discussing the way in which Aristotle then instantiates his view of essence in biology, such that both men and women have human essence. However, according to Aristotle's biology, women are viewed as failed males – who would have developed into males had they not been subject to cold and damp conditions in the womb. So, in this strangely influential model, although women have human essence, they are not the perfect example of this essence. In other words, there is a universal species essence, of which the male is the best example. The female is viewed as failing to reach her full potential (to be male).

Given that this makes Aristotelian essentialism an inauspicious place to start to think of the specificity of women, Battersby turns to alternative views of essence within the history of philosophy. In particular, she considers Locke's<sup>133</sup> distinction between 'nominal essence' and 'real essences', the latter of which he associated with Aristotle. Nominalists maintain that names are simply that which

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Battersby (1998a) p. 211

J. Locke, 'Of the Names of Substances' in *An Essay Concerning Human Understanding* (London: Collins, 1969) pp. 283-296.

ple give to things and that these things have nothing else in common. The 'nominal essence' is the abstract idea of things of that sort. The universal therefore attaches to the name of the thing in language rather than to the thing itself.<sup>134</sup> It is the way in which we label the thing, rather than any property within the thing itself, that counts as its 'nominal essence'. These things are linked by the way in which the ideas are built up by a process of abstraction, using simple ideas as to derive complex ideas, rather than by some internal property. Locke objects Aristotle's view of essence by arguing that we cannot categorise things in terms of their real essence because we simply do not know what its 'real essence' is.

Battersby employs a Kantian framework in order to improve Locke's account of essentialism. Rather than rely upon a top-down approach in which language is viewed as labelling things in the world, she uses the Kantian *transcendental* *phenomena* to describe a process in which the data about *x* impinges upon the way in which they are labelled. The empirical image of *x* is then understood within a set of rules in which it is classified. However, this set of rules can alter within different cultures and at different times. This allows the term 'women', to be discussed in terms of its meaning at a particular point in history in a particular culture. This is informed, not only by the way in which the term is used, but also by the way in which the world of which we are a part imposes itself upon us. In other words, Battersby employs a Kantian framework to find an alternative to Lockean nominalism on one side and Aristotelian essentialism on the other.

Battersby's argument can be illustrated further by addressing some criticisms of Battersby made by Linda Alcoff.<sup>136</sup> Alcoff argues that there is a

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Battersby (1998a) p. 29.

Locke (1969) p. 287.

L.M. Alcoff, 'Review Essay: Philosophy Matters, A Review of Recent Work in Feminist Philosophy' in *Signs: Journal of Women in Culture and Society*, Vol. 25, No. 3, 2000 p. 856.

tion in Battersby's work between: 1) the materially real and 2) the image or representation of women as objects. Alcoff ignores the post-Kantian framework which informs Battersby's work, a point that is clear in the way in which she discusses the influences upon Battersby earlier in the paper.<sup>137</sup> Hence, Alcoff describes Battersby in the following terms,

Battersby, like other feminists, looks to Benedict Spinoza...Nietzsche and John Dewey; more originally and surprisingly, she also looks to Søren Kierkegaard, in whose aesthetic works she finds a conception of selves as ambiguous and relational, patterned by habits and 'repetitions' rather than a inner stable core.<sup>138</sup>

As a result of ignoring the central role of Kant in Battersby's work, Alcoff wrongly characterises Battersby as viewing women as 'objects of representation' and as hence emphasising language, putting her into the 'postmodern feminist' camp. As described above, Battersby uses a Kantian move to view essence – not simply as the way in which something is talked about (which she discusses in terms of Lockean nominalism) – but as something that is informed by the way in which the world impinges itself upon our senses, viewed through sets of rules which can alter in response to, for example, different ways of viewing the world produced by the empirical sciences.

As outlined above, this does not collapse into Aristotelian essentialism because essence is not viewed as an immutable underlying characteristic of a thing. It changes with cultural understanding which is itself informed by empirical science but, as I will discuss below, always involves power.

Further, Battersby cannot be viewed as ignoring materiality because it is precisely an attempt to think of matter as active that is pivotal to her reworking of Kant. In Battersby's later discussion of the transcendental self and transcendental subject, she uses the question of what it would be to think of the female body as

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Alcoff (2000) p. 856.  
Alcoff (2000) p. 856.

cal, to show how the Kantian framework makes it impossible to think of  
ve matter – for example, of bodies that can become two.

Battersby uses this reworking of essence, from the ‘underside of  
osophy’ to return to her question of thinking female specificity. It is possible  
hink about the ‘essence’ of woman when it is no longer assumed that essence  
ers to a fixed underlying characteristic that defines the group. Neither is the  
ence of woman simply a name attached to ‘women’, without any bottom-up  
ut from the data, for example, from biological research. In addition, there is no  
utral value-free analysis. It is worth quoting Battersby on this point to show  
w she carves out a definition of essentialism that differs from both Aristotle  
d from Locke:

For the supporter of extreme nominalism, the question is only which characteristics  
in our culture act as linguistic definers. However, for paradigms of human sexual  
difference to evolve there have to be perceived similarities – and discrepancies –  
between the class of entities compared. To maintain this is ‘just’ linguistic and  
social plays down the capacity of data to disturb the definition in a ‘bottom-up’  
way. To allow that empirical ‘evidence’ might play a role in dislocating and  
redrawing current paradigms of sexual difference does not entail that linguistic and  
social practices do not also enter into the current definitions. Nor does it entail that  
there might not also be social reasons why the markers for sexually differentiated  
bodies should change. Opposing extreme nominalism does not entail positing  
underlying, unchanging, ‘real truths’ about female bodies and forms.<sup>139</sup>

ere is also an acknowledged debt to Foucault in Battersby’s work at this point.  
is clear that there is no neutral description of a female essence, in her use of the  
m. What is classed as essential in the definition of the female differs at  
fferent times. This may be influenced by the ‘data’ about sexual difference but  
is never ‘neutral’. Power is always involved in this view of essence, even  
ough it is acknowledged that, not any story will do.

To return to the problem within feminist legal theory of making claims on  
half of women – claims that then silence the voices of racial, sexual and other  
inorities – this does offer an approach that is more pragmatic. There is no fixed

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Battersby (1998a) p. 30.

dition of women at stake because the possibility of such a move is closed by emphasis upon an essence that is subject to change. As Battersby puts it,

Remodelling identity in terms of a metaphysics of becoming allows us to register differences and changes occurring within a single category, and allows us to register power differentials and differences amongst women themselves. As such, an identity politics need not entail homogenizing 'woman' or 'women'....Instead, we will need to ally a metaphysics of becoming with an account of the historical and cultural factors that help configure the female subject-position in its diverse specificities.<sup>140</sup>

Clark and Oyama, with their particular concerns, it is obvious that not any  
y will do and neither will the image of an underlying Aristotelian essence. It  
precisely this Aristotelian approach that Oyama attacks in her rethinking of  
velopment. Battersby's insistence on thinking both sexual difference and 'the  
f' may appear an odd pursuit when compared to the more 'scientific' aims of  
lysis of cognition or development. This rethinking of 'essence' suggests an  
swer to this objection. The meaning of what it is to have, or be, a self – or to be  
erson – in our culture will continue to affect the way in which we live,  
luding the practical operation of law of obligations. It is not that we can  
ply change the stories about ourselves at will. They emerge from complex  
ial histories. However, these histories are not without an underside that can  
ow the meaning of what it is to live as a woman to be discussed. Importantly,  
s does not mean that there is only a top-down imposition of images of  
selves. Oyama's attack upon the reduction of complex interactions into  
parate canals of 'social' and 'biological' is useful here.

As Irigaray<sup>141</sup> has argued, to refuse to discuss sexual difference would be to  
ve it unthought. There is an argument here that is akin to Battersby's<sup>142</sup>

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Battersby (1998a) p. 124.

'Sexual difference is probably the issue in our time which could be our "salvation" if we  
ught it through.' L. Irigaray, *An Ethics of Sexual Difference* (London: Athlone Press, 1993a) p.  
For discussion of this point see J. Richardson, 'Jamming the Machines: "Woman" in the Work  
rigaray and Deleuze' in *Law and Critique*, Vol. IX, No. 1, 1998a, p. 90.

Battersby (1989) p. 225.

ment for the need to rework, rather than simply abandon, the notion of  
ius in her earlier work. In both cases, we will continue to employ the term, or  
re equivalent, because it is actually doing some work in practice. The way to  
llenge it is to reveal the assumptions that go with it and to try to rework its  
aning from within. Similarly, to exchange Aristotle's definition of human  
ence for a position that does no more than reject all images of the self would  
to fail to register the way that the meaning of what it is to be a self works in  
ctice, including in legal practice. It would be to block a discussion of what it  
ans to be a woman, a move that has produced the current problems within  
nivist legal theory.

I will return to the broad framework of the self that I have drawn out of the  
ork of these contemporary theorists, Battersby, Clark and Oyama working  
thin different areas of philosophy. In the next chapter, I want to consider what  
is to be a person, or be or have a self within the law. In particular, I will focus  
on the legal theorist Drucilla Cornell, whose work can more easily be  
aracterised as imposing top-down stories upon the world but in a manner that  
distinct from Alcoff's misreading of Battersby.



## Chapter 3: Cornell's 'Imaginary Domain'

This chapter focuses upon the legal framework proposed by feminist legal theorist Drucilla Cornell, whose practical proposals for changes in law are derived from her theoretical analysis of personhood. Cornell's work has a wide application but I will focus upon her contribution to the law of tort. Whilst Cornell is writing in the US, her legal claim for particular rights based upon personhood is intended to have universal application. In particular, she provides answers to the equality/difference debate and to feminist concerns that in making claims for (or analysing the position of) women as a group they may thereby reinforce stereotypes of women. These were the worries that prompted ideas around strategic essentialism, that were introduced in Chapter 1.

In the last chapter, I looked at different ways of thinking about the self, drawn from diverse areas of contemporary philosophy in order to argue against the need for 'strategic essentialism'. In this chapter I consider personhood, a legal rather than an ontological concept. Whilst Cornell discusses personhood, linked with a claim for legal rights to be explained below, her view of personhood derives from her view of what it means to be a self and from her broader view of 'the project of becoming a person', in which what it means to be a self is linked historically with the law.

Before discussing Cornell's view of personhood it is worth considering the legal context of the term person, in the UK. The meaning of the term 'person' has a legal, as well as a philosophical, history. Women were not classified as persons

until the ‘Persons Case’: *Edwards v Attorney -General of Canada (1930)*<sup>143</sup> in which Lord Sankey said,

*The word [person] is ambiguous and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word ‘person’ could not include females but because at common law a woman was incapable of serving a public office.*<sup>144</sup> (Italics are added.)

This was viewed as a breakthrough, as previously women had not been viewed as persons.<sup>145</sup> In a, now classic, feminist analysis of this case, Sachs and Wilson<sup>146</sup> describe how the newspapers actually congratulated women on the progress they were making in becoming persons! This assumption, that law simply reflects social change, will not really surprise lawyers. It is common for judges to talk as if no case had ever been wrongly decided. Within their inverted world, if the courts had previously thought that women were not classifiable as persons then, by definition, they were not persons. This position resonates with that of Hegel,<sup>147</sup> for whom recognition by the law represented recognition by the community itself. Given that the courts had changed their opinion, then, by definition, women had attained personhood. This approach takes seriously the claims that ‘law’ makes for itself: to be able to dictate reality.

Cornell also takes seriously law’s claim to dictate reality in ways that relate to personhood – but, this time, with a feminist aim. Cornell wants to draw upon the assumption that, at this point in time in the West, we see ourselves as being

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<sup>143</sup> *Edwards v Attorney General of Canada* (1930) A.C. 124 at 128. For a discussion of the case see J. Bridgeman and S. Mills, *Feminist Perspectives on Law: Law’s Engagement with the Female Body* (London: Sweet and Maxwell, 1998) p. 18.

<sup>144</sup> *Edwards v Attorney General of Canada* (1930) A.C. 124 at 128.

<sup>145</sup> See, for example, *Bebb v Law Society* (1914) 1 Ch. 286. Despite the existence of legislation referring to the term ‘person’, a woman was refused permission to sit Law Society preliminary examinations on the grounds that later she would not be allowed to practice as a solicitor. *Jex-Blake v Senatus of Edinburgh University* (1873) 11 M. 784; *Chorlton v Lingus* (1886) 4 C.P 374.

<sup>146</sup> Sachs and Wilson (1978).

<sup>147</sup> G.W. Hegel, *Hegel’s Philosophy of Right*, trans. T.M. Knox, (Oxford: Oxford University Press, 1967).

born with legal rights. In other words, what it means to be a person now includes an ability to go to law to claim rights. There is therefore much at stake in her work. According to this framework, it is possible to create a just society by formulating the correct legal tests. She has even gone so far as to make the difficult claim that capitalism could be undermined by the use of these rights. Her project is therefore aimed at fully extending these rights to women by thinking about ways in which the law can give expression to practical feminist concerns. For example, in tort law she has made proposals for employment rights (a tort of wrongful discharge),<sup>148</sup> protection from sexual harassment<sup>149</sup> and Spanish language rights.<sup>150</sup> She has also applied her framework to the redefinition of the family, adoption,<sup>151</sup> and in support of abortion rights.<sup>152</sup>

In addition, she suggests a legal test to replace the ‘reasonable man test’ that is central in tort law. I will therefore outline the reasonable man test, mentioned in the last chapter, and then turn to Cornell’s proposals to replace it and the way in which she links together a philosophical system with a practical legal principle. These are positions that she has developed since 1995, starting with *The Imaginary Domain*,<sup>153</sup>

## The Reasonable Man

As mentioned in the last chapter, the ‘reasonable man’ is a central concept in tort law. To decide if someone has been negligent judges must decide whether the

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<sup>148</sup> D. Cornell, ‘Worker’s rights and the Defence of Just-Cause Statutes’ in Cornell (2000a) pp. 83-117.

<sup>149</sup> D. Cornell, ‘Sexual Freedom and the Unleashing of Women’s Desire’ in Cornell (1995) pp. 167-227.

<sup>150</sup> D. Cornell, ‘Spanish Language Rights: Identification, Freedom and the Imaginary Domain’ in Cornell (2000a) pp. 129-153.

<sup>151</sup> D. Cornell, ‘Adoption and its Progeny: Rethinking Family, Gender and Sexual Difference’ in (1998) pp. 96-130; D. Cornell ‘What and How Maketh a Father: Equality Versus Conscriptioin’ in Cornell (1998) pp. 131-149.

<sup>152</sup> D. Cornell, ‘Dismembered Selves and Wandering Wombs’ in Cornell (1995) pp. 31-91.

<sup>153</sup> Cornell (1995); Cornell (1998); Cornell (2000a).

defendant's actions fall below the standard of the hypothetical 'reasonable man'.

As Conaghan and Mansell point out,

Traditionally, the reasonable man has been invoked to represent an objective standard of care against which all are measured. He is thus devoid of all characteristics which make him human. By so denuding him of those 'idiosyncrasies of the particular person whose conduct is in question' (*Glasgow Corporation v Muir* (1943), *per* Lord MacMillan at 457) the reasonable man poses as the average man, thereby providing a single and universal standard purporting to correspond with reasonable behaviour.<sup>154</sup>

There have been a number of feminist arguments<sup>155</sup> that the reasonable man test relies upon a male perspective which differs from women's attitudes, particularly in areas such as sexual harassment and provocation. The feminist debate about the reasonable man test is therefore a version of the equality/difference debate – that women either have to appear to be like men in order to gain the same rights (thereby problematising pregnancy, for example) or they have to appear different from men and risk affirming traditional oppression. This is a topic introduced in the first chapter and discussed further in the next section. In the area of sexual harassment, for example, it has been argued that sensitivity between the sexes differs and therefore a universal test as to how the 'reasonable man' would behave is inappropriate.<sup>156</sup> Cornell's critique of the reasonable man test leads her

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<sup>154</sup> J. Conaghan and W. Mansell, *The Wrongs of Tort*, 2<sup>nd</sup> edition, (London: Pluto Press, 1999) pp. 52-53.

<sup>155</sup> For example, R. Martin, 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' in *Anglo-American Law Review* Vol. 23, 1994, pp. 334-374. For a summary of the arguments regarding tort law, see Conaghan and Mansell (1999) pp. 52-53. There is also work on the way in which the reasonable man is raced. For an historical analysis of the way that the rise of the 'reasonable man' coincided with the heyday of British Imperialism (and how the meaning of 'reasonable man' test was adapted so the 'primitive reasonable man' was not viewed as having the same sense of restraint as British men) see the Sindh Criminal appeal case of *Ghulam Mustafa Gahno* (1939) AIR Sind 182, cited and discussed in K. Laster and P. Raman, 'Law for One and One for All: An Intersectional Legal Subject' in Naffine and Owens (1997) pp. 193-212.

<sup>156</sup> The EU Code of Practice includes reference to 'conduct that is unwanted, **unreasonable** and offence to the recipient': Recommendation 92/C 27/04. For a discussion see M. Rubenstein, 'Sexual Harassment: European Commission Recommendation and Code of Practice' in *Industrial Law Journal* Vol. 21, 1992, p. 70; J. Dine and B. Watt 'Sexual Harassment: Moving Away From Discrimination' in *Modern Law Review* Vol. 58, 1995, pp. 355-362. The possibility of the development of tort law to provide a remedy for sexual harassment more generally has been traced by Joanne Conaghan. See, J. Conaghan, 'Enhancing Civil Remedies for (Sexual) Harassment: s3 of the Protection from Harassment Act 1997' in *Feminist Legal Studies* Vol. 7, 1999a, pp. 203-214; J. Conaghan, 'Equity Rushes in Where Tort Fears to Tread: The Court of Appeal Decision in *Burris v Asadani*' in *Feminist Legal Studies* Vol. IV, No. 2, 1996, pp. 221-

to argue that it should be replaced by her own test,<sup>157</sup> and that, more broadly, her approach to personhood resolves the paradox of the equality/difference debate in its many guises.

## **Cornell's Approach to Tort: Free and Equal Persons**

Cornell's analyses of different torts – as well as her broader arguments about law – all work by concentrating on the idea of freedom. She wants to keep in play the question, 'would free and equal persons agree to this decision?' and this question is to act as a legal principle. She proposes that this question should be asked whenever legislation is passed or a judicial decision made. She argues that,

We judge public law by the 'as if' of a postulated original contract. The rightfulness of a law is one that all citizens, regarded as free and equal, *could* have agreed to if they were in a position to consent within the general will. The contract is an idea of reason with practical effect in that it can guide legislators with a test for rightfulness....Like both Rawls and Kant, I also defend the idea of reasonableness and public reason. Reasonableness and public reason depend upon the demand of the 'as if' itself. Judges and legislators are called upon to proceed through the 'as if' because this is the test for the rightfulness of the law consistent with the evaluation of each one of us as a free and equal person.<sup>158</sup>

In a footnote, Cornell<sup>159</sup> points out that she is using as a device the hypothetical position of persons sitting round a table deciding what laws to agree upon. I will discuss in more detail below the way in which her position differs from that of Rawls. The image of what it means (or could mean) to be a person is therefore central to her work.

So far, it appears that Cornell's legal test merely replaces the 'reasonable man test' with the 'free and equal persons test'. However, these operate very differently, as can be illustrated by the problem of sexual harassment, mentioned above. The equality/difference problem, when transposed into sexual harassment

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228; J. Conaghan, 'Harassment and the Law of Torts: *Khorasandjian v Bush*' in *Feminist Legal Studies* Vol. I, No. 2, 1993, pp. 189-197.

<sup>157</sup> See, Cornell (1995) pp. 14-16 for her discussion of the reasonable man test.

<sup>158</sup> Cornell (1995) pp. 12-13.

<sup>159</sup> Cornell (1995) p. 242, fn.16.

law, is concerned with the question of what the 'reasonable man' would view as acceptable behaviour. Cornell offers a different approach in which women are not viewed as seeking protection but as claiming their worthiness as persons.<sup>160</sup> She therefore derives this position from her original philosophical analysis to argue that it is important to recognise,

the way in which the devaluation of one's sex curtails *freedom* by imposing standards of behaviour which fails to accord with equal personhood.... Thus, to protect the space for free play of one's sexual imaginary demands the recognition of the primary good of self-respect for each one of us as sexuate beings. Again, when women demand the space to be sexual in their own way and still be accorded respect for their worthiness as persons, they are demanding the equal chance to seek sexual happiness, not protection.<sup>161</sup> (Italics are in the original.)

She argues that the replacement of the 'reasonable man' test with a 'reasonable woman' standard is inadequate because it continues to divide women into those who take sexual harassment cases and those who 'keep a stiff upper lip' about male behaviour. Cornell's aim is to shift the court's attention from whether or not the woman was reasonable in claiming sexual harassment to an examination of the workplace by focusing upon 'whether or not the workplace itself enforced sexual shame so as to effectively undermine the social basis of self-respect'.<sup>162</sup>

I have much sympathy with the aims of Cornell's project and think that there is merit in any pragmatic use of law.<sup>163</sup> However, Cornell's work moves beyond a pragmatic position to embrace the view that we really are constituted as subjects with rights. She argues,

Perhaps in the end I am Hegelian enough to think that we are actually constituted in modernity as subjects of right and so, in a sense, we cannot step outside this sphere of law.<sup>164</sup>

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<sup>160</sup> Cornell (1995) p. 172.

<sup>161</sup> Cornell (1995) p. 172.

<sup>162</sup> Cornell (1995) p. 206.

<sup>163</sup> I have argued that there are pragmatic problems with this approach to a legal test. Not only can it subtly be easily misinterpreted by judges but it ignores the practical considerations, such as the length of proceedings, the endless documentation and cross examination, that make applicants feel like victims, even whilst they simply claim 'personhood'. J. Richardson, 'A Burglar in the House of Philosophy: Theodor Adorno, Drucilla Cornell and Hate Speech' in *Feminist Legal Studies* Vol. 1, No. 1, 1999, pp. 3-31. I want to leave this objection aside to exploring the broader implications of Cornell's view of personhood.

<sup>164</sup> Florence (1997) p. 15.

Similarly, in *Just Cause: Freedom, Identity and Rights*, she acknowledges her debt to Hegel,

Of course, the idea that the concept of right is constitutive of the person takes us back to Hegel.<sup>165</sup>

She assumes that human sociability, and the recognition that we give each other, must now be attributed to (or, at least, channelled through) the law. This is far more important to Cornell's analysis of contemporary legal debates than is her employment of Lacan – a fact that the common description of Cornell as producing 'psychoanalytic feminism'<sup>166</sup> fails to register. In particular, Cornell views herself as having produced a solution to the equality/difference debate.<sup>167</sup> I will concentrate upon this debate and the way in which Cornell's approach provides an interesting response to the Person's Case.

As discussed above, women were initially deemed not to be classifiable as 'persons'. This was changed as a result of the Person's Case, thereby paving the way for allowing women to have some of the same rights as men. This scenario raises the well-worn equality/difference debate discussed above, as to whether women should be classified, in law, as 'just like men' in order to obtain the same rights as men or whether particular rights should pertain to women, *as women*.

This debate can be illustrated further by considering an area of law that has historically suffered from an assumption that men are the norm, against which women should be judged. The *Sex Discrimination Act 1975 s1* states that it is unlawful to treat a woman 'less favourably than a man' (and vice versa). It was therefore argued in the English Employment Appeal Tribunal<sup>168</sup> that the Act could not be used to prevent discrimination against a pregnant woman because she

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<sup>165</sup> Cornell (2000a) p. 19.

<sup>166</sup> This common description is understandable given her reference to Lacan and Irigaray in her work. see, for example, N. Naffine and R.J. Owens, 'Sexing Law' in Naffine and Owens (1997) p. 6.

<sup>167</sup> D. Cornell (2000a) p. 17.

<sup>168</sup> *Haynes v Malleable Working Men's Club* (1985) ICR, 705, EAT.

could not show that a comparable pregnant man would not have been dismissed. As the Act could only operate by comparing women with men, the courts then decided to compare the employer's treatment of pregnant women with their treatment of sick men. The European Court of Justice<sup>169</sup> later effectively overruled this approach to argue that dismissal on the grounds of pregnancy constituted direct sex discrimination. The earlier approach makes perfect sense if you are focused upon the question of how an employee who is not at work is to be treated. The problem is that, within this frame of reference, women's ability to give birth is seen as an aberration rather than a norm.

An important move within feminist philosophy – as well as within the law – is to show how, within certain belief structures, the position of women cannot simply be added into models without disrupting the whole framework. It therefore becomes difficult to argue that the position of women in the framework is a marginal issue. It can become a fault line that undermines the legal or theoretical structure from within. So, in this practical legal example, a focus on sexual difference raises the following question: what falls out of our analysis when workers are viewed purely in terms of their ability to work? This example opens up broader questions of social organisation, including our attitudes to birth and to work.

Cornell's conception of what it means to be a person responds to the debate as to whether women should be viewed as having particular rights *as women*.<sup>170</sup>

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<sup>169</sup> *Dekker v Stichting Vormingscentrum Voor Jonge Volwassen (VJV-Centrum) Plus* C-177/88 (1991) IRLR, 27, ECJ.

<sup>170</sup> This is Irigaray's position in L. Irigaray, *I love to You: Sketch of a Possible Felicity in History* (London: Routledge, 1996); L. Irigaray, 'Why Define Sexuate Rights' in Irigaray (1993b) pp. 81-92. For Cornell's concerns about Irigaray's later work see, P. Cheah and E. Grosz, 'The Future of Sexual Difference: An Interview with Judith Butler and Drucilla Cornell' in *Diacritics*, Vol. 28, No. 1, 1998, p. 21. Cornell describes her development of the 'imaginary domain' as a reaction to Butler's argument that to symbolise the imaginary as feminine entails a conservative move. See Butler (1997). Butler does not engage with Irigaray in Butler (1997) but Cornell refers to Butler's general arguments and a personal discussion with Butler in 1995 which 'pushed her quite hard on the ontologization inherent in Irigaray', P. Cheah and E. Grosz (1998) p. 21. I will trace the



She argues that women should be ‘added in’ (viewed as subject to legal rights) *as persons* (not as women). So, rights are to be viewed as attaching to the idea of being a person. However, she aims to avoid the problem of women simply being subsumed under the neutral term, ‘person’ – and as such being viewed as having a male body and traditional lifestyle – by her unusual definition of the term ‘person’. This can be illustrated by the way she talks about ‘the project of becoming a person’:

What we think of as ‘individuality’ and ‘the person’ are not assumed as a given but respected as part of a project, one that must be open to each one of us on an equivalent basis.<sup>171</sup>

There is an image of overcoming what you have been – or rejecting stereotypes – in an act of personal transformation, which is protected by law, described as ‘going beyond the limit’.<sup>172</sup> She does not envisage that we change individually, through an act of will, but that there is a collective transformation, an ‘acting out’ of different ways of living, facilitated by the law. In order that we should have any hope of being successful in this ‘project of becoming a person’, Cornell cites three conditions that should be protected by law:

1) bodily integrity; 2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others and; 3) the protection of the imaginary domain.<sup>173</sup>

In this context, it is important to note that Cornell’s concern that we should be able to ‘differentiate ourselves from others’ is intimately linked with Cornell’s ‘project of becoming a person’. Differentiation from others is to be safeguarded by allowing access to symbolic forms and linguistic skills. Presumably, she has in mind an ability to define oneself – rather than to view oneself as, for example,

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position Cornell develops in response more slowly, below.

<sup>171</sup> Cornell (1995) p 4.

<sup>172</sup> For a discussion of the personal transformation involved in personhood, see Cornell (1995) pp. 4-5. For a discussion of the difference between ‘parameters and limits’ see Cornell (2000a) pp. 140-141. Inheritance of culture, language and country sets parameters but cannot impose limits ‘that so rigidly define us that we cannot develop a personal response to the particularity of the situation’. Cornell (2000a) p. 140.

<sup>173</sup> Cornell (1995) p 4.

only a wife/partner/mother etc. with respect to others. This could be contrasted with a position in which ‘differentiation from others’ involves being able to throw them out of your house. Her emphasis upon symbolic form and imagination is in keeping with Cornell’s whole system. Her model prioritises the imagination. It is this, collective imaginary (both conscious and unconscious) that she refers to by the term ‘imaginary domain’. Again, this is to be protected by law. She proposes that the protection of the ‘imaginary domain’ should operate as a very broad legal principle. As discussed above, a woman who is subject to sexual harassment is to make a legal claim that the harassment interferes with her self-image and hence her project of becoming a person.

Cornell is rightly concerned about the way in which those claiming sexual harassment are viewed as victims, appealing to law for protection. She argues that the claim to be able to protect one’s imaginary domain means that one is not set up as a victim but as claiming personhood. This ties in with her argument that whenever a legal decision is made then the question addressed by the judges should be ‘would free and equal persons agree to this?’ Given the choice, persons would not agree to a legal decision that would undermine their imaginary domain which would include an image of themselves.

For Cornell, the project of becoming a person involves being able to act out our sexual identity in ways that derive from ‘how we imagine ourselves to be’. The stress on the imagination means that her model appears to conceive of social change as occurring as a result of our ability to *think* about ourselves differently. It is possible to reverse her model, so that it is the collective acting out of identity that becomes the impetus for changes in self-image. Generally, however, her stress is upon a ‘top-down’ change. This is emphasised by her plea that we try to

‘create psychic maps from outer space’,<sup>174</sup> to encourage the rejection of stereotypes. This is also illustrated by her description of the imaginary domain in *Heart of Freedom*,

The imaginary domain is the space of the ‘as if’ in which we imagine who we might be if we made ourselves our own end and claimed ourselves as our own person.<sup>175</sup>

I sympathise with Cornell’s aims but am worried by this abstraction. We cannot remove ourselves from the way in which we are treated in our everyday lives but that does not prevent social change. For example, it may be that a legal secretary can have an interesting social life in which she acts out her identity in any number of different ways. However, if at work she is treated as an emotional punch ball and as having low status on a repeated daily basis, it would be difficult to sustain this self-image. It is the daily *ambiguities*, for example as to what is a reasonable request at work, and how these are negotiated (without necessarily being thought through), that are an important part of common experience. Cornell’s emphasis upon the imaginary, as the domain of ideas that effect our lives, shifts attention away from the importance of mundane, repeated tasks and habits; the negotiation of power differences; and ambiguity as to what constitutes abuse.

To draw out this point, it is possible to compare Cornell’s view of the imaginary with an alternative view of imagination proposed by Gatens.<sup>176</sup> As mentioned in Chapter 2, Gatens argues that it is difficult for the mainly male, white, upper middle-class judiciary simply to imagine themselves in the position of women. Her view of imagination, derived from her reading of Spinoza, is that it emerges from bodily experience. This makes Gatens much more pessimistic about the ability of the judiciary to make the ‘mental leap’ outside their own

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<sup>174</sup> Florence (1997) p. 20.

<sup>175</sup> Cornell (1998) p. 8.

<sup>176</sup> M. Gatens, ‘Power, Ethics and Sexual Imaginaries’ in Gatens (1996) pp. 125-145.

bodily experience that is required of them by Cornell. She does not engage with Cornell but warns against reliance upon racism and sexism training-days for a judiciary who see women, for example, only in subservient roles. In other words, she denies that they are able to make the public use of reason required of them by Cornell.<sup>177</sup>

Cornell would argue that defeatism is unnecessary, that Gatens simply produces an argument for a change in the selection of judiciary rather than an abandonment of Cornell's legal test. However, I use the example merely to illustrate a conceptual point about Cornell's vision of the imagination, which appears 'top-down' – removed from bodily experience. Cornell makes an analogous 'top-down' move in relation to the role of law. Law is positioned as acting down upon the person, facilitating his/her 'project of becoming a person' – just as social change is understood to occur as a result of changes in the imagination. For Cornell, there is a realm that works from above to alter something else. However, there is also a closer link between these 'realms' of the 'imaginary domain' and of law, than this analogy would suggest. The law is called upon to protect our collective imagination ('the imaginary domain') and yet the law is actually a creation of the imaginary domain itself. In other words, Cornell's argument that we are subjects with rights relies upon the argument that, in modernity, we *imagine* ourselves to be subjects with rights. She is an astute political campaigner, and not naïve about the conservatism of actual court decisions, but understandably wants to make women's rights permanent. She wants us to think of a time when the fight for women's rights has been won and,

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<sup>177</sup> This is akin to Foucault's 'anxiety about judging' that it always involves the idea that the judge is removed from the circumstances. M. Foucault, 'On Popular Justice: A Conversation with Maoists' in M. Foucault, *Selected interviews and Other Writings 1972-1977*, C. Gordon, ed. (Sussex: Harvester Press, 1980) p. 30; M. Foucault, 'The Anxiety of Judging' in M. Foucault, *Foucault Live: Collected Interviews 1961-1984* (New York: Semiotext(e), 1996b) pp. 241-254.

for example, women in every country have gained the right to abortion. This determined optimism does, I think, lead her to take too seriously law's claim to dictate reality. She wants to give us scope to define ourselves anew rather than offering a definition of what it is to be a person, so that her model emphasises transcendence of our current position and the possibility of collective change. However, the one thing that is already defined is that being a person means being subject to law. This not only undercuts her emphasis upon our ability to define ourselves; it makes law integral to our self-definition from the start.

Cornell's position is complex with regard to the relationship between theory and practice. There appear to be two Cornells. One operates within a liberal framework and proposes the imaginary domain; the other is the radical socialist feminist activist. I suspect that what lies behind this apparent schizophrenia is a commitment to radical politics that views her theoretical position as a practical engagement with liberals. To put it into the language preferred by liberals, she is saying to them, 'if you buy the arguments of Dworkin and Rawls then you must accept this feminist analysis'. On the other hand, she is clearly convinced by her arguments – they are not adopted just for pragmatic purposes. It is thus tempting to try to account for her more radical activism by viewing her theoretical work as strategic. This paradox can be accounted for by considering her Hegelian position. Just as Adorno was concerned to analyse the work of his contemporaries as an indication of 'where we are now' so Cornell deals practically with US liberals. It is not merely a strategy, but neither is it the last word that can be said about her theoretical position. This would account for her eclectic use of contemporary theorists.

The problem then becomes: if her stress is upon practical reason, does her suggestion work? Below, I want to argue that her engagement with the US

liberals, in particular Rawls and Dworkin, could undermine the more radical aims of her project. Central to this problem is her innovative use of Rawls to produce the legal test: would free and equal persons agree to this legislation/judgment? I will briefly outline the way in which she reworks Rawls and then discuss the extent to which Cornell's test leaves her open to an unwanted libertarian response. This is used to illustrate how Cornell's reworking of Rawls leads her into a dilemma regarding the extent to which she can leave open the meaning of what it is to be a person, within her legal test itself.

## Rawls and the Imaginary Domain

Cornell points out,

Although I am relying on Kant's postulation of an original contract as an idea of reason, my formulation is not strictly 'contractarian', if one means, by contractarian, the use of a contract theory in a liberal way as a 'moral or justice proof procedure'. I am explicitly using the idea of the original contract as a heuristic device.<sup>178</sup>

This can be illustrated by considering Kant's comments about the original contract, which he also employs as a heuristic device:

The act by which a people forms itself into a state is the *original contract*. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state.<sup>179</sup> (Italics are in the original.)

Cornell's work also derives from Kant's position that to be a person is linked with the moral imperative: to treat oneself and others *as if* one were free.

In *A Theory of Justice*,<sup>180</sup> Rawls also draws from Kant to set up a thought experiment. He asks the question that Cornell wants to keep in play: 'what would free and equal persons agree to?' Rawls uses this thought experiment to derive fixed answers as to how society should be organised based upon what 'heads of

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<sup>178</sup> Cornell (1995) p. 242.

<sup>179</sup> I. Kant, *The Metaphysics of Morals*, trans. M.J. Gregor. (Cambridge: Cambridge University Press, 1996) pp. 92-93.

<sup>180</sup> J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972); J. Rawls, *Justice as Fairness: A Restatement* (Mass.: Harvard University Press, 2001).

household' would agree to if they did not know what position they would hold in society, i.e. they are under a 'veil of ignorance'. This is to avoid, for example, those who knew they would be rich arguing against redistribution of wealth. He argues that persons under the veil of ignorance would produce a 'general conception of justice' with the central idea that,

all social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.<sup>181</sup>

These are ordered in terms of priority, such that the protection of civil liberties cannot be undermined for other reasons, such as redistribution of wealth. In this way Rawls gives content to what 'free and equal persons' would decide under the veil of ignorance.

Political philosopher, Susan Moller Okin points out that Rawls initially envisaged the (male) 'heads of household' as meeting under the veil of ignorance,<sup>182</sup> a move which unwittingly undercuts his aim to exclude bias in his thought experiment. Okin<sup>183</sup> argues that if 'free and equal persons' risked entering into society positioned as women then a more radical reinterpretation is required than is given in Rawls' analysis. Nobody who risked being treated as a woman would leave unchallenged the unequal division of labour within the family, for example. Further, Okin<sup>184</sup> illustrates that Rawls ignores injustice within the family and even relies upon the assumption that the family is a just institution when he discusses the development of a sense of justice in Part Three of *A Theory of Justice*.<sup>185</sup>

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<sup>181</sup> Rawls (1972) p. 303.

<sup>182</sup> Rawls (1972) p. 128 and p. 146 cited S.M. Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989) p. 196. See also Okin (1989) pp. 89-109; Rawls' response to Okin is in Rawls (2001) pp. 162-168.

<sup>183</sup> Okin (1989) pp. 89-109.

<sup>184</sup> Okin (1989) pp. 97-101.

<sup>185</sup> In drawing up principles of moral psychology he states 'First Law: given that family institutions are just...' Rawls (1972) p. 490.

In contrast, Cornell, with her different conception of personhood from Rawls and from Okin, wants to avoid deriving fixed arguments as to what would be agreed by free and equal persons. She wants to keep this question in play as a legal test, to be considered whenever a legal decision is to be reached.

## **Thought Experiment: Nozick's Application of Cornell's Legal Test**

At this point, I will refer to Nozick's libertarian work to draw out one of my concerns with Cornell's legal test and to further examine her conception of personhood. I will defer detailed discussion of 'self-ownership' to Chapter 6. Cornell argues that whenever a piece of legislation is to be passed, and whenever judges have to make a legal decision, as a guide they should ask themselves: would free and equal persons agree to this? This does not assume that persons start from a position of equality and freedom and Cornell is clear that they do not. However, it is intended to be a radical reworking of Rawls' work because it keeps in play and repeats the question of freedom and equality. The test 'would free and equal persons agree to this legislation or this legal judgment?' does not dictate what would be decided, neither does it produce one answer that is to be fixed for all time. This is because Cornell wants the person, and not the state, to define what it means to be a person. She is concerned that everyone is given an equivalent chance to develop their 'project of becoming a person.'<sup>186</sup>

This can be compared with Nozick's conception of what it is to be a person in what is for him an ideal, the 'minimal state':

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<sup>186</sup> Cornell (2000a) p. 18.



The minimal state treats us as inviolate individuals, who may not be used in certain ways by others as means or tools or instruments or resources; it treats us as persons having individual rights with the dignity this constitutes. Treating us with respect by representing our rights, it allows us, individually or with whom we choose, to choose our life and to realize our ends and *our conception of ourselves*, insofar as we can, aided by the voluntary co-operation of other individuals possessing the same dignity.<sup>187</sup> (Italics are added.)

Although Cornell's conclusions are very different from those of Nozick, and he is not a writer with whom she has engaged, there is a similarity between his reference to our 'conception of ourselves' and Cornell's emphasis upon the imaginary domain. Both are linked with personhood which is to be protected, with rights against competing claims. In Cornell's work, it must be remembered that the idea of the imaginary domain is intimately linked with her legal test: free and equal persons would not agree to any decision that would harm their image of themselves. For example, employing Cornell's test, she argues that the right not to be sexually harassed, or the right to have an abortion, are fundamental legal rights necessary to treat women as free and equal persons.<sup>188</sup> To fail to allow these rights would damage the woman's imaginary domain, her self-image, and therefore it would damage her project of becoming a person. As her test is actually intended to be used by judges and legislators, this is an assumption that must be made when deciding what free and equal persons would agree to.

I want to think about the possible response of Nozick to Cornell's work in order to draw out Cornell's view of personhood. As he has not engaged with her I will base my arguments upon his clearly stated position in *Anarchy, State and Utopia*.<sup>189</sup> Imagine Nozick as a legislator faced with a decision to increase taxation to pay for the justice system to enforce the legal rights that Cornell proposes, such as the tort of sexual harassment, employee rights, Spanish language rights. These are torts, i.e. they give persons rights against others, but

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<sup>187</sup> Nozick (1974) pp. 333-334.

<sup>188</sup> This is restated in Cornell (2000a) p. 3; Cornell (1995) pp. 31-91 .

<sup>189</sup> Nozick (1974).

they are to be enforced by the state, which must be paid for from taxation. Nozick, as legislator, is asked to employ Cornell's test: 'would free and equal persons agree to this?'. For Nozick, to be treated as if you were free is to be treated as if you own all rights over yourself that would be owned by a chattel-slave owner in a slave society. As owners of their labour, free persons have the right to keep anything they earn by the use of their labour. To be taxed above the level required to produce a minimal state<sup>190</sup> is therefore the equivalent of coerced labour, for Nozick. Nozick would argue that free persons should not be forced to pay taxes. Nozick can easily respond to Cornell's test because his position is based upon his own very different understanding of how 'free persons' would want to be treated by the state.

The 'equality' clause in the question is only slightly less straightforward because Nozick views free persons as 'equal'. Nozick's arguments for self-ownership do not result in a society in which there is equality of income and this is not part of his 'ideal'. However, Cornell's test does not address this point. It simply asks the judges and the legislature to speculate upon what free and equal persons would do and to legislate or judge accordingly. Nozick could argue that just as free persons would not be forced to pay taxes above those required for a minimal state, so equal persons – not subject to command by a superior body, neither the state nor a feudal master – would also have the right to keep the product of their labour. It is consistent with Nozick's position to assume that he would construe 'equality' in the context of Cornell's test, as entailing the rights of workers in a capitalist society as contrasted with those of a feudal serf, for example. By appealing to the idea of self-ownership and freedom, Nozick could argue that he was viewing persons as both free and as equal and that this fulfilled

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<sup>190</sup> For a summary of his position see, Nozick (1974) pp. 52-53.

Cornell's test. Therefore as legislator he could argue that, applying Cornell's test, 'free and equal persons' would not agree to an increase in taxation to finance anything beyond a minimal state.

This argument could be viewed as unfair to Cornell because it tears away this legal test from her explanation of the development of personhood. I have artificially broken down Cornell's arguments in order to examine them. At this stage it is clear that Cornell cannot answer Nozick's hypothetical argument by limiting herself to the question of 'would free and equal persons agree to this?' because both have in play different views of freedom and equality. I will deal with a number of her potential responses, below.

Cornell's test is set up to compare different competing claims of persons in court and arguments to the legislature. Arguments about the framework of taxation laws, as opposed to their application, would have to take place in front of the legislature. As I have argued, there is nothing in Cornell's test that would prevent Nozick from arguing that free and equal persons would not agree to the taxation required to finance her proposed changes in tort law. To oppose this argument, Cornell could resort to the 'Rawlsian' move of expanding her definition of what free and equal persons would want. As outlined above, Rawls expands upon this to produce arguments that are not perfectionist, i.e. they do not dictate what it to live a good life. However, he provides an answer to the question of what free and equal persons would agree to in a manner that Cornell expressly avoids. I will return to this point in the next section. Alternatively, Cornell could say that it would be Nozick's right to make this argument to his fellow legislators, but that others, with opposing views of what is necessary for their project of being a person, could offer alternative arguments. She could support

those arguments on other grounds, but my point is that these could not be derived from her test alone.

The move of speculating what ‘free and equal persons’ would agree to – which Cornell wants to keep open – is very similar to speculations about life in the state of nature, to be discussed in Chapters 5 and 6.<sup>191</sup> In both cases, there is a thought experiment, an appeal to a different sphere, that supposedly empties the empirical world of some of its content. Later, I will discuss how Macpherson<sup>192</sup> and Pateman<sup>193</sup> both show how Hobbes imports an image of how persons behaved in his own culture into his state of nature. Similarly, Cornell<sup>194</sup> and Okin<sup>195</sup> have demonstrated how Rawls imports stereotyped images of the relationship between the sexes into his discussion of the ‘heads of household’ making decisions under his veil of ignorance. I want to extend this argument and think about this problem in the context of Cornell’s own work.

Whenever theorists produce rules discovered under a veil of ignorance – by speculating, or asking what ‘free and equal persons would agree to’, or ‘how persons would behave in a state of nature’ – they have to import some existing views of persons. Failure to do so simply deprives their thought experiment of content. Cornell is conscious of this criticism, especially as she applies the point so effectively against Rawls. She argues that her test keeps open the question of what it is to be a person (and the possibility of change), because the answer is not to be settled for all time but the test is to be repeated as a legal test. In other words, she is not dictating what image of a person would be produced – by

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<sup>191</sup> Cornell describes herself as using the idea of an original contract as a ‘heuristic device’. See above p. 74 and Cornell (1995) p. 242.

<sup>192</sup> C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962).

<sup>193</sup> Pateman (1988).

<sup>194</sup> Cornell (1995) pp. 12-20.

<sup>195</sup> Okin (1989) pp. 89-109.

deciding what would be said under the veil of ignorance (or, by analogy, in the state of nature). However, her test is set up to be applied by the judges and legislature, who would import their own version of what free and equal persons would want, using her test. Whilst Cornell does refuse to imply, in a Rawlsian fashion, a fixed answer to the question of what free and equal persons would agree to, it may be that Cornell does this by the back door.

I want to argue that Cornell does import her image of what it is to be a person. She does this in two ways: firstly, she chooses examples to cash out how the test should be used; and secondly, and more broadly, to make her test work she needs to argue for a particular view of the process of 'individuation' (or how one becomes a person). Cornell has a choice: either she can resist filling in the gaps and importing her views of what free and equal persons would agree to; or she can provide examples of how it should work. If she chooses the former then she must put up with the fact that others such as Nozick can cash out her test to produce results that, as a socialist feminist, she could not endorse. This is inevitable because left without examples the test is so broad. Elsewhere,<sup>196</sup> I have argued that the judges, who have proved themselves as extremely accomplished at interpreting existing case law in ways that give expression to their own views,<sup>197</sup> would not have their discretion limited by such a broad test. The other alternative (of importing her view of free and equal persons into the test) would involve Cornell making the move that she criticises in Rawls.

Before looking at this in more detail, I want to examine why she may be concerned to avoid this second move by recalling the feminist concerns that are addressed by Cornell's arguments. Cornell's approach – of arguing that women should demand to be treated as free and equal persons by the operation of law –

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<sup>196</sup> Richardson (1999) pp. 3-31.

<sup>197</sup> J.A.G. Griffiths, *The Politics of the Judiciary*, 5th edition (London: Fontana, 1997).

avoids the constraint imposed upon feminist thinking in the face of poststructuralist concerns about the category ‘women’, as discussed in Chapter 1. Cornell faces the problem that simply viewing women as persons has resulted in the treatment of women as if they were men, viewing male bodies and lifestyles as the norm against which women are compared. This is the case, for example, in the operation of the English *Sex Discrimination Act 1975*, which makes it unlawful to treat a woman ‘less favourably than a man’. Cornell’s answer to this problem is that the definition of what it is to be a person is not to be viewed as paradigmatically male in her test because the definition of person is to be kept open by the repeated use of her test. It is therefore central to Cornell’s argument that she does not fill in the meaning of what it is to be a person. It should also be noted that the way in which her test is proposed, as a practical legal principle, means that it is not to be filled in by persons themselves but by the legislature and by the judiciary, acting on their behalf. Hence my practical concerns about such a broad test.

## **Cornell, Autonomy and Self-Ownership**

In this section, I will expand upon Cornell’s image of persons, compared to that of Nozick. Recall that, in order that we should have any hope of being successful in this ‘project of becoming a person’, Cornell cites three conditions that should be protected by law:

1) bodily integrity; 2) access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others and; 3) the protection of the imaginary domain.<sup>198</sup>

The differentiation of oneself from others indicates Cornell’s vision of ‘autonomy’. She does not like the term, preferring to talk of ‘individuation’

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<sup>198</sup> Cornell (1995) p. 4.

rather than 'autonomy' and 'individual'. She wants the law to protect the process of individuation, by protecting persons' rights by the use of her test. Nozick, in contrast, starts with rights-bearing individuals, not a process of individuation; an entirely different move. Nozick is mentioned in a footnote, in which Cornell is critical of libertarian theories which,

rest on an atomistic view of the self that is incompatible with an adequate account of how selves come to be persons with their individual identities.<sup>199</sup>

Nozick argues that self-ownership is necessary if persons are to be treated as autonomous. Nozick's persons are already 'individuals' from birth and the question is therefore addressed as to what duties they owe each other. In contrast, Cornell argues for greater legal safeguards than a minimal state could offer so that the law can protect the process of individuation (by which she means the attainment of personhood).<sup>200</sup> She describes this in terms of the law allowing persons space in which to develop. She does not want the law to encourage a particular conception of the good but to defend a person's project of individuation.

Cornell's position is closer to that of the analytic Marxist Gerald Cohen than Nozick. As part of a number of arguments aimed at undermining the attractiveness of Nozick's argument based upon the assumption of self-ownership, Cohen<sup>201</sup> attacks Nozick's link between self-ownership and autonomy. Cohen defines self-ownership as the premise that we should be treated as if we had the rights of chattel-slave owners over ourselves.<sup>202</sup> Cohen's argument is that

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<sup>199</sup> D. Cornell (2000a) p. 167 fn.11. For an analysis of the meaning of 'atomistic' Cornell cites with approval C. Taylor, 'Atomism' in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) pp. 187-210. Taylor attributes 'atomism' to both Hobbes, in Taylor (1985) p. 187 and Nozick, in Taylor (1985) p. 188, amongst others, describing them as sharing 'a vision of society as in some sense constituted by individuals for the fulfilment of ends which were primarily individual' Taylor (1985) p. 187.

<sup>200</sup> See Cornell (1995) pp. 4-5.

<sup>201</sup> Cohen (1995).

<sup>202</sup> Cohen (1995) p. 68.

Nozick's principles of self-ownership produce a society in which fewer persons have actual autonomy than in other potential societies. For example, the losers in such a society – based upon the unrestrained capitalism that Nozick derives from self-ownership – would have to work for others in unregulated conditions, which Cohen argues, undercuts common ideas of what autonomy involves.<sup>203</sup>

Cornell could adopt a similar argument to that of Cohen, in a manner that is generally consistent with her position, by arguing that her test must be understood to contain her conception of individuation. This works because the society produced according to Nozick's rights of self-ownership would be a society in which Cornell's process of individuation ('the project of becoming a person') would be compromised.

Cohen, like Nozick, is fundamentally concerned with class and with the question of distribution of resources, whereas Cornell is concerned with broader questions of personhood and 'individuation', and focuses upon race and 'sexuate rights' – a term she employs to indicate that she is unwilling to sacrifice issues of sexuality and queer politics to issues of sex/gender. However, Cornell would agree that it is a prerequisite to the process of individuation that persons have access to the minimum material conditions of life for everyone to get off the ground their 'project of becoming a person'. These are not the conditions pertaining in the society that Nozick defends. So, Cornell could argue that her test does not stand alone; that when she states that the law must protect the imaginary domain she implies into her legal test her own understanding of personhood.

To summarise, Cornell could argue that her test 'would free and equal persons agree to this legislation/judgment?' must be read as giving expression to

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<sup>203</sup> Cohen (1995) pp. 236-238. I return to Cohen's arguments against self-ownership in Chapter 6.



these conditions. This would mean that Nozick (as legislator in my thought experiment) could not read her test ‘would free and equal persons agree to this?’ by employing his view of what is meant by a ‘free and equal person’. Cornell could then maintain that when her test is read so as to give effect to her view of personhood the legislature could assume that ‘free and equal persons’ would approve taxation statutes to enact and enforce the torts she proposes.

Further, Cornell’s test is proposed with the intention that it can be used to consider competing rights between individuals. She could envisage that the ‘free and equal persons’ whom the legislature should consider would be those in poverty, rather than persons generally. It could be argued that these persons would not agree to living in a capitalist society (or, at the very least would not agree to a society without a welfare state) because such a society would jeopardise their project of becoming a person. The fact that there is no clear answer illustrates the problem of having to fill in Cornell’s test, discussed above. Cornell could also argue that any free and equal persons, including those not in poverty, would agree to taxation for welfare. Living in a society that would be produced by Nozick’s libertarian capitalism could be viewed as a situation which would jeopardise anyone’s project of becoming a person, irrespective of poverty, because of the selfish values that are inculcated, for example.<sup>204</sup>

Can Cornell make this move and still claim that she is not defining the content of what it is to be a person, thereby getting round the dilemma I proposed above? In other words, could she argue that her process of individuation is distinct from giving content to personhood? It is my view that the same dilemma does apply. This can be seen by considering which version of a society she would

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<sup>204</sup> For a discussion of the relationship between such ‘personal’ values and political theory, see G.A. Cohen, *If You’re an Egalitarian, How Come You’re So Rich?* (Harvard: Harvard University Press, 2001).

want the legislature to consider. This has to be filled in at some point. Either it is filled in by Cornell, which she explicitly wants to avoid, or it is filled in by the legislature/judge who may be open to a number of arguments as to what free and equal persons would agree to.

## **Comparison with Themes from Chapter 2**

Both Nozick and Cornell are concerned with 'our conception of ourselves'. For Cornell our 'imaginary domain' should be protected by law. I want to give a more detailed account of Cornell's image of what it is to be a person, and the process of individuation, by comparing this with the general points about the self discussed in Chapter 2. In Chapter 2, I drew out the following common properties from contemporary views of the self, as an ontological concept (as contrasted with a person as a legal concept, as a self that is subject to law) by Oyama, Clark and Battersby:

1. there is an emphasis upon the embedded, embodied nature of cognition/self;
2. this results in an image of cognition/self that tends to focus upon their emergent properties;
3. linked with this, they are concerned with thinking of cognition/the self as dynamic rather than fixed;
4. there is an attack upon the subject/object divide (in Clark's work this is cognition/ environment split) as traditionally conceived and a move to characterise the emergent process as one which involves rethinking this divide;
5. there is a shift away from the importance of centralised control.

How does Cornell's image of personhood and 'individuation' differ from this broad approach? Considering point 1, she has an image of personhood that is

embodied and sexed. Sexuality is central to the project of becoming a person.

She argues that,

Since, psychoanalytically, the imaginary is inseparable from one's sexual imago, it demands that no one be forced to have another's imaginary imposed upon him or herself in such a way as to rob him or her of respect for his or her sexual being. Thus, what John Rawls has argued is a primary good, namely self-respect, is integrated into the very idea of the imaginary domain itself.<sup>205</sup>

This allows her to talk about the need for 'sexual rights' as necessary for the laws' protection of this project, an argument that she supports without the need to depend upon psychoanalysis. It can be derived from the view that sexual identity is important to our image of who we are in our culture.

There are potential arguments about the extent to which her image of a person is embedded. It is not 'embedded' in the same way as discussed in Chapter 2 because Cornell emphasises the imaginary domain and attempts to think 'as if from outer space'<sup>206</sup> in order to produce social change, and this methodology differs from the stress placed upon the emergence of change by changes in bodily habit, discussed in Chapter 2.

However, Cornell's view of personhood is culturally embedded. This can be illustrated by the way in which she compares her work, derived from Hegel, to that of libertarians, discussed above. In her chapter 'Worker's Rights and the Defense of Just-Cause Statutes'<sup>207</sup> Cornell distinguishes her position from those influenced by Hobbes, and from theorists who start with the individual rather than a process of individuation of oneself from others. I will return to the work of Hobbes and self-ownership in chapters 5 and 6.

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<sup>205</sup> Cornell (1995) p. 8.

<sup>206</sup> Florence (1997) p. 15.

<sup>207</sup> Cornell (2000a) pp. 83-117. A just-cause statute demands that employers apply justice to their reasons for a worker's dismissal and can be called upon to explain them. In England the common law of employment at will, which Cornell attacks, has been superseded by legislation granting workers rights against 'unfair dismissal'. This applies a reasonableness test. Similarly, Cornell advocates a 'rational cause' rather than a 'just cause' to avoid speculations about justice, Cornell (2000a) p. 84.

Turning to point 2, Cornell's view of personhood as a project certainly implies the idea of the emergence of a person. Further,

A person is not something 'there' on this understanding, but a possibility, an aspiration which, because it is that, can never be fulfilled once and for all. The person is, in other words, implicated in an endless process of working through personae. On this definition, the person is neither identical with the self or the traditional philosophical subject.<sup>208</sup>

Point 3 is linked with this. The person in Cornell is not fixed. She envisages a process of transformation that is never complete.

Turning to point 4, Cornell starts with an image of individuals who are not separate from each other but then have to work at this separation between self and other. This split from the other is viewed in Lacanian terms, with an emphasis upon the symbolic. The law is called upon to protect,

access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others.<sup>209</sup>

The question about the relationship between subject and object in Cornell's work is derived from Hegel. In her later work, her emphasis is upon intersubjectivity which is to include women – rather than the relationship between subject and object.<sup>210</sup> This point can be illustrated by considering her analysis of the labour contract. She contrasts her theory, derived from Hegel, with accounts derived from Hobbes which she views as a deep influence upon the 'libertarian perspective adopted by the law and economics literature'.<sup>211</sup> What is at stake is not the question of regulation of the employment relationship but,

what view of regulation truly promotes individual freedom...for Hegel state regulation is done in the name of the ideal reciprocal symmetry.<sup>212</sup>

This ties in with her discussion of the subject,

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<sup>208</sup> Cornell (1995) p. 5.

<sup>209</sup> Cornell (1995) p. 4.

<sup>210</sup> Cornell (2000a) p. 85.

<sup>211</sup> Cornell (2000a) p. 97.

<sup>212</sup> Cornell (2000a) p. 97.

For Hegel, reconciliation with the community in modernity is always mediated by the subject who comes to understand her community as a response to her own demand.<sup>213</sup>

Turning to point 5, recall that the law is called upon to protect access to symbolic forms in order to achieve linguistic skills which permit the differentiation of oneself from others.<sup>214</sup> From this it can be seen that Cornell does have an emphasis upon ‘centralised control’ of a person’s actions, rather than the focus upon bodily habits or problem solving that characterised the approach of Clark, Battersby and Oyama outlined in Chapter 2. What is most important for Cornell is the ideal; she defends the notion that we can change our lives as a result of imagination. Adopting the approach from Chapter 2, I would argue that this is too ‘top-down’ and that it is also necessary to start from an analysis of what we do in our daily lives rather than what we imagine ourselves to be. However, I do not want to overstate the distinction between these approaches. For example, none of the approaches in Chapter 2 deny the importance of ideas and their material effects and Cornell would not deny the importance of daily activity. The difference lies in their emphasis.

This point is linked with the argument, discussed in Chapter 1, about the relationship between theory and political practice. Foucault<sup>215</sup> argues that it is possible to envisage a situation in which it is necessary to act, such that practice forms a link between different theoretical positions, and conversely that theory can provide a move between different practices. Similarly, it is possible to think about the relationship between feminist theory and practice in terms that can be both ‘top-down’ – in that ideas promote different practices (as emphasised by

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<sup>213</sup> Cornell (2000a) p. 96.

<sup>214</sup> Cornell (1995) p. 4.

<sup>215</sup> Foucault and Deleuze (1980) pp. 205-217.

Cornell) – and ‘bottom-up’, so that different bodily practices open up different theoretical positions.

## Chapter 4: Tort and the Technology of Risk

The political imaginary is of a contractual form of justice established no longer of a natural order of rights but by the conventions of society, and of an ideal of a society in which each member's burdens and shares are fixed by social contract which is no longer a political myth but something made real by technical means....The socialisation of risk does not seek to undermine capitalist inequality. Precisely the opposite: it is a means of treating the effects of that inequality.<sup>216</sup>

I want to turn from Cornell's arguments for the reform of tort law, based upon her original reworking of personhood, to consider the way that English tort law now operates. This involves examining a different relationship between the person and law. To do so I will employ François Ewald's work on insurance and risk analysis. Insurance plays a central part in the practical operation of the law of tort. This is an aspect of legal practice that is lost if the focus is upon perfecting legal tests for liability derived from political philosophy, such as that proposed by Cornell. Insurance is now compulsory in all areas in which there is a risk of being sued in tort, for example when persons act as employers, producers of products, professionals, road-traffic users or home owners. It is the insurance system that allows the operation of tort as a system of loss distribution.

Ewald<sup>217</sup> expressly draws upon Foucault's analysis of 'governmentality' from his late lectures, to be discussed below. Analysing techniques of government that employ a 'scientific approach' to risk analysis, Ewald considers the way in which insurance companies have altered the operation of this area of law in France. His work is helpful for thinking about the English law of obligations but I want to amend it in two different respects: one empirical and the other theoretical. Firstly, he concentrates upon the codified tradition in France

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<sup>216</sup> M. Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999). p. 186.

<sup>217</sup> F. Ewald, 'Norms, Discipline and the Law' in R. Post, ed, *Law and the Order of Culture* (California: University of California Press, 1991b) p. 138.

which differs in a number of respects from the English common law tradition. I will trace the way that the common law has accommodated the operations of insurance companies.

Secondly, I will argue that a feminist critique opens up points that are ignored by Ewald. In particular, the insurance industry has assumed a simple public/private divide that is complicated by such a perspective. I will start by detailing Ewald's arguments in the context of the English common law, rather than the French codified tradition of law, then move to a consideration of feminist issues that arise from this model. Finally, I will return to Cornell's work to consider it in the context of Ewald's historical analysis. I continue to be interested in the way in which women occupy an ambiguous position with regard to the images of the self. This applies not only to the image of the prudent man who insures, but also to the process of becoming such an individual that is examined in Ewald's analysis of him. The idea of these actual insurance contracts replacing a hypothetical 'social contract' in providing a social means of safeguarding a 'commodious life'<sup>218</sup> by technical means will be explored. If insurance provides the dream of a 'contractual form of justice',<sup>219</sup> based upon the hope that risks could be shared on the basis of need and not ability to insure, it has obviously not been implemented. It has not been an ambition that has been extended to women's traditional risks, which occupy an ambivalent position with respect to social insurance.

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<sup>218</sup> T. Hobbes, *Leviathan*, E. Curley, ed. (Cambridge: Hackett Publishing Ltd. 1994b) Ch. XIII, s. 14, p. 78.

<sup>219</sup> Dean (1999) p. 186.



## Ewald's Historical Understanding of 'Risk Analysis' and English Law

In his analysis of insurance, Ewald is not discussing a marginal area of concern that could interest only personal injury lawyers. On the contrary, in his historical analysis he concludes that,

At the end of the nineteenth century, insurance is thus not only one of the ways the provident person can guard against risk. The technology of risk, in its different epistemological, economic, moral, juridical and political dimensions becomes the principle of a new political and social economy. Insurance becomes *social*, not just in the sense that new types of risk become insurable, but because European societies come to analyze themselves and their problems in terms of the generalized technology of risk....Societies envisage themselves as a vast system of insurance, and by overtly adopting insurance's forms they suppose that they are conforming to their own nature.<sup>220</sup>

This emphasis upon the control of risk becomes central to the construction of subjecthood, in Ewald's analysis. He is not describing the employment of insurance and risk analysis as a tool used by the state in a 'top-down' manner to manage persons. On the contrary, what it means to become a self is informed by the regimes of daily life that are dictated by risk assessment, for example attention to diet, to exercise, taking preventative medicine at regular intervals. Part of being this sort of subject involves looking to the state as protector of our health and welfare.

I will start by outlining the ways in which the technology of risk operates within the context of English law of obligations, but first I will set out Ewald's analysis of the technology of risk in terms of his explicit adoption of Foucault's understanding of 'governmentality', Foucault's neologism for government rationality.<sup>221</sup> In his late lecture series Foucault focused upon government as the 'conduct of conduct'. This covers both daily relationships involving guidance and

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<sup>220</sup> F. Ewald 'Insurance and Risk' in G. Burchell, C. Gordon, and P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991a) p. 210.

<sup>221</sup> M. Foucault, M. 'Governmentality' in G. Burchell, C. Gordon and P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991a) pp. 87-104.

control and relations concerned with the exercise of political sovereignty. In a well known argument, Foucault calls for a move away from analysis of governmental institutions to an examination of the processes and techniques of power that are used. This entails the view, also argued by feminists, that a theory as to what would make sovereignty legitimate does not describe the ways in which power actually operates.

Ewald describes insurance as a technology of risk, which represents a way of ordering the world. The insurer ‘produces risks’ where previously it was thought that an event simply had to be suffered. Risk analysis represents a technique by which the government is able to both ‘individualise and totalise’.<sup>222</sup> In other words, the technique of risk analysis affects everyone in society in a manner that focuses upon each and every individual. Foucault<sup>223</sup> traces the ways in which the health of the subject is integral to the functioning of power within society. He describes the way in which the power of the policing and control developed from the ability to kill his subjects through to the governance of life, to the health of subjects.<sup>224</sup> Ewald’s work takes up this history by illustrating the way in which the governance of life has developed by employing the technique of risk analysis.

I want to reinforce a point made by Foucault – that ‘it is not that everything is bad, but that everything is dangerous’<sup>225</sup> – by employing an argument used by

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<sup>222</sup> M. Foucault, ‘Omnes et Singulatim: Towards a Criticism of Political Reason’ in S. McMurrin, ed., *The Tanner Lectures on Human Values, Vol. II* (Salt Lake City: University of Utah Press, 1991b) pp. 225-254.

<sup>223</sup> See, for example, M. Foucault, ‘The Politics of Health in the Eighteenth Century’ in M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, C. Gorton, ed., (New York: Random House Inc., 1980a) pp. 166-182.

<sup>224</sup> For example the final chapter of M. Foucault, *History of Sexuality Volume One: An Introduction* (London: Penguin, 1976) pp. 135-159.

<sup>225</sup> M. Foucault, ‘Technologies of the Self’ in *The Essential Works: 1954-1984 Vol. 1, Ethics, Subjectivity and Truth*, P. Rabinow, ed., (New York: The New Press, 1997a) p. 256.

Donna Haraway<sup>226</sup> in a broader context. She argues that it is not really possible to opt out of engagement with the advance of techno-science, living in a technological society. It is not possible just to say ‘no’ to ‘power’; to the concern with health or science; or, in this context, to the techniques of risk analysis. I will return to the argument below, in the context of insurance of South African women, to discuss questions raised by the insurance industry’s policies against the risk of rape.

A recognition of the way that English law has changed, considered by thinking through these techniques of governmentality, allows critique to operate at a level that does not simply accept law’s claims to dictate reality. Daniel Defort<sup>227</sup> outlines the history of the French state as it begins to act as an insurer and to provide no fault compensation for employment injuries. In England, with the exception of certain industrial injuries, such as pneumoconiosis which have a specific system of compensation, anyone who has been injured or suffered loss as a result of another’s negligence must sue in the courts for compensation. The state is involved in all major areas of civil litigation to the extent that it makes insurance compulsory and will ultimately enforce civil court decisions.

In England, after the scandal over the case of thalidomide (in which those suffering deformities as a result of defects in the morning sickness pill were still without compensation ten years later), the Pearson Committee<sup>228</sup> was set up in 1972 to consider the arguments for no-fault compensation, as in the French

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<sup>226</sup> D.J. Haraway, *Modest\_Witness@Second\_Millennium.FemaleMan@\_Meets\_OncoMouse™* : *Feminism and Technoscience*, (London: Routledge, 1997).

<sup>227</sup> D. Defort, “‘Popular Life’ and Insurance Technology’ in Burchell et al. (1991) pp. 211-233.

<sup>228</sup> Lord Pearson (Chair) *Royal Commission on Civil Liability and Compensation for Personal Injury* Cmnd 7054 (London: HMSO, 1978). The Commission recommended a mixed system of fault and no fault compensation which was ignored by the incoming Conservative administration in 1979.

system. Conaghan and Mansell<sup>229</sup> have traced the way in which the opportunity to view tort law in terms of social insurance rather than individual harm was lost.

The English common law has been very resourceful in incorporating changes and making any transition appear seamless. The common law has been absorbed into a broader structure of the system of insurance without altering the way in which liability is attributed to individuals. So, this change could not be understood by confining the analysis to a consideration of only cases and statutes. Whereas employment law is governed by legislation and dealt with in the Employment Tribunals, any common law claim of negligence, including workplace accidents, will be heard in the courts. Both will look at the circumstances of the case in detail. Although the cases express the obligations that we owe each other in terms of the individual, it is clear that working behind this is a system of insurance.<sup>230</sup> In other words, this method of loss distribution is not really about getting someone to apologise and compensate for actions that have caused harm. The judiciary may talk in such terms, but the framework of the law means that the matter is passed to the defendant's insurers who make a commercial decision about settlement. Ewald points out that,

Insurance is not initially a practice of compensation or reparation. It is the practice of a certain type of rationality: one formalized by the calculus of probabilities.<sup>231</sup>

The philosopher Ian Hacking<sup>232</sup> traces the history of the emergence and impact of statistics upon daily life and illustrates the way in which this use of the technology of risk is almost invisible by being ever-present. It would be impossible to consider litigation in the area of tort law without statistics. This operates at different levels: there is insurance for litigation which is calculated by

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<sup>229</sup> J. Conaghan and W. Mansell, *The Wrongs of Tort*, 2<sup>nd</sup> edition (London: Pluto Press, 1999) pp. 105-123.

<sup>230</sup> H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Claims* (Oxford: Oxford University Press, 1987).

<sup>231</sup> Ewald (1991a) p. 199.

<sup>232</sup> I. Hacking, *The Taming of Chance* (Cambridge: Cambridge University Press, 1986).

considering the risk of accidents within a particular industry or area of life; but there is also the use of the techniques of assessing risk within the process of litigation itself. This can be divided into the problems of assessing liability for harm and for assessing the amount of compensation for the harm done. With regard to the question of liability, the job of the litigation lawyer in England is to estimate the chances of success, an endeavour which does not employ the most sophisticated techniques of risk analysis.

Similarly, the assessment of risk is built into the legal principles themselves. Judges still talk about the defendant's actions and whether these fall below the standard expected of the reasonable man, discussed in earlier chapters. The reasonable man, in the guise of the reasonable employer, is expected to weigh up a number of factors: the likelihood of an accident, the severity of harm, if it does occur, and the sensitivity of any employee. These are to be calculated and balanced against a fourth factor: the cost of avoiding the risk.<sup>233</sup>

In addition, the most convoluted statistical analysis is reserved for the area of assessment of 'quantum of damage', the expression used to describe the strange quasi-science of putting a price on an injury. Damages are broken down into different areas: general damages, which are defined as 'not quantifiable', such as, 'pain and suffering', 'loss of amenity'; and special damages, which can be quantified, such as loss of earnings, or the replacement of blood-stained clothing. In the not-too-distant future people may wonder at the macabre precision of these calculations, which may be viewed as the remnants of an old notion of compensation, and these may be replaced by a more efficient method of

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<sup>233</sup> A comparable approach to risk occurs within contract law in which the question of who bears the burden of the risk of any particular harm is negotiated as part of the contract. For this reason, O'Malley, a legal theorist interested in risk analysis, has argued that the development of contract law provides a 'blueprint for government through uncertainty' P. O'Malley, 'Uncertain Subjects: Risks, Liberalism and Contract' in *Economy and Society* Vol. 29, No. 4, 2000.

loss distribution. At present, the minutiae of the arguments may surprise non-lawyers. For example, if someone is in a coma she/he cannot claim under the head of 'pain and suffering' because this is not applicable (as she/he is not in pain) and so must claim under another head of damage, such as 'loss of amenity'. The calculation of damages to be paid are ascertained by reading Kemp and Mantle<sup>234</sup> which details all the cases involving particular awards for injuries. The particular injury is compared with the case law, amended to take into account inflation between the date of trial and date of calculation. Approximately 98% of cases are settled before reaching court<sup>235</sup> because of the risk of trial. There is also concern that in serious cases the claimant<sup>236</sup> should enjoy the money before dying, a factor which allows insurance companies to settle such cases more cheaply.

It is in the area of 'loss of future earnings' where the techniques of risk come into their own. This involves the insurer's favourite: the mortality tables. These are amended annually and give an up-to-date assessments of the risk of death for any age and sex. With the advance of techno-science, especially genetic research, these techniques have improved and will be developed further. In the *Birth of the Clinic*,<sup>237</sup> Foucault details the emergence of contemporary medicine through the techniques of statistics, amongst other things. As Hacking<sup>238</sup> points out, the use of these statistics can have positive consequences, such as the

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<sup>234</sup> D. Kemp and P. Mantle, *Damages for Personal Injury and Death*, 7<sup>th</sup> edition (London: Sweet and Maxwell, 1999) This text is subject to updating. Alternatively, lawyers now subscribe to [www.westlaw.co.uk](http://www.westlaw.co.uk) which updates twice daily.

<sup>235</sup> This is the estimated figure in F. Furedi, *Courting Mistrust: the Hidden Growth of a Culture of Litigation in Britain* (London: Centre for Policy Studies, 1999) p. 5. He points out that this is an estimate because settlements can involve a confidentiality clause which disguises the figure. See also, H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Claims* (Oxford: Oxford University Press, 1987).

<sup>236</sup> For ease of reference, I have employed the nomenclature of the Civil Procedure Rules whether or not the case in question was subject to these rules at the time. I have therefore consistently referred to 'claimant' rather than 'plaintiff'.

<sup>237</sup> M. Foucault, *Birth of the Clinic: An Archaeology of Medical Perception* (New York: Vintage/Random House, 1975).

<sup>238</sup> I. Hacking, 'How should we do the History of Statistics?' in Burchell, et al. (1991) pp. 181-195.

increase in sanitation. It is not a matter of saying ‘no’ to this technique but of understanding how this operates; the forms that it takes. This involves, not only considering the particular use of mortality tables within this peculiar method of loss distribution – whose inefficiency probably makes it a dated historical compromise<sup>239</sup> – but also consideration of the broader implications of the way in which this technique is used.

It is by focusing upon cultural objects such as mortality tables that Foucauldian analyses, such as that of Ewald, can be shown to owe some debt to the earlier work of Adorno. Although they differ in overall framework, both Foucault<sup>240</sup> and Adorno<sup>241</sup> share a concern with the way that instrumental rationality develops within the West. However, there are clear differences. Adorno, as a Marxist, would object to the way in which the mortality tables are used to calculate the appropriate compensation for an early death, as a way of commodifying life, i.e. treating life, and ourselves, as objects that can be exchanged in the market place.<sup>242</sup> In contrast, Foucault’s aim is to trace more detailed, specific modes of the operation of instrumental rationality, by which the subject is individuated vis-a-vis the totality and makes himself subject to the

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<sup>239</sup> There were comments by the Master of the Rolls, in 2001, regarding a move to no fault compensation scheme thereby completing the transition to a more efficient system of loss distribution akin to the French system analysed by Ewald. It is my argument that the current English system fits within this model but in a way that is inefficient within the parameters of the system itself. For discussion of these comments: B. Mahendra, ‘Revisiting No Fault Compensation’ in *New Law Journal*, Vol. 151, No. 6987, 2001, p. 837; for the argument for no-fault compensation: U. Essen, ‘Tort compensation for victims of Medical Accidents’ in *New Law Journal*, June 2001, pp. 846-854.

<sup>240</sup> ‘I think that the Frankfurt School set problems that are still being worked on. Among others, the effects of power that are connected to a rationality that has been historically and geographically defined in the West...’, M. Foucault, *Remarks on Marx: Conversations with Duccio Trombadori*, trans., R.J. Goldstein and J. Cascaito (New York: Semiotext(e), 1981) p. 117.

<sup>241</sup> T.W. Adorno, and M. Horkheimer, *Dialectic of Enlightenment* (London: Verso, 1995).

<sup>242</sup> For a discussion of the ways in which personal injury compensation may be viewed in terms of commodification of the injury see M.J. Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Harvard: Harvard University Press, 2001) pp. 184-205.

state.<sup>243</sup> Drawing upon Foucault's work, Ewald describes a process in which selves become individuated by the way in which their avoidance, and calculation, of risk becomes a way of life.

The courts' image of the 'reasonable man' is that he is the owner of his abilities and of his body. These are treated as if they were his property and had a price. He requires compensation if those parts of him are negligently damaged. It is important to hold onto Adorno's concern with commodification. In this context, personal injury litigation is accompanied by the commodification of the body, seen as an object that can be given a price. This occurs when, for example, one is awarded £10,000 for a broken leg – more if it shows signs of osteoarthritis as a result of the injury. Given that judges feel comfortable setting a price upon personal injuries, it could be assumed that anything could be given a price. This is not the case. As I will discuss in more detail below, judges are squeamish about viewing women's traditional work of child care in such terms. In this way, women's traditional work falls outside the framework in which abilities are given a price. Whilst this could be viewed positively in that it provides an area that is potentially resistant to commodification, it does mean that women are not compensated in these cases. I will return to this point in later chapters to discuss its historical context and future development.

Aspects of Foucault's work can be viewed as adding to the Marxist critique of the way in which human qualities and abilities are given a price. The 'self-owning' individual is now one who must insure himself against risk; who must regulate himself and be prudent in his daily activities. Neither the Marxist nor Foucauldian analysis assume that this 'self-owning' individual is anything other than a fiction and both are critical of this position for different reasons, as

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<sup>243</sup> 'What we have to do is analyze specific rationalities rather than always invoking the progress of rationalization in general' Foucault (1982) p. 210.



discussed above. However, neither focus upon the historically ambivalent position of women as part of their critique. It is women's position that I want to consider in the context of the use of the technology of risk, below.

In keeping with Ewald's analysis, the contemporary theorist Robert Castel captures the way in which individuation occurs within a society based upon the calculation and minimisation of risk in the following terms,

Thus, a vast hygienist utopia plays on the alternative registers of fear and security, inducing a delirium of rationality, *an absolute reign of calculative reason* and a no less absolute prerogative of its agents, planners and technocrats, administrators of happiness for a life to which nothing happens.<sup>244</sup> (Italics are added.)

I want to stress this description of what I am arguing is a contemporary aspect of 'possessive individualism', because I intend to trace the relationship between women and the notion of the possessive individual in the next two chapters. The position of women troubles both: (1) the model of possessive individuals; and (2) Ewald's Foucauldian model that traces, and is critical of, the emergence of such subjects.

With its employment of calculative reason to deal with the risks that we pose to each other, the law of tort in England fits within a broadly Foucauldian analysis of governmentality. When seen in these terms it is possible to predict its future development, in ways that are not available to those who simply analyse the legal tests themselves. As a method of loss distribution, the current English system of tort is painstakingly inefficient in ways that are reminiscent of old child support settlements. To demonstrate this point, it is useful to compare employees with women labouring under traditional marriage contracts. Prior to the creation of the Child Support Agency in 1993 which oversees distribution of funds for the upkeep of children upon divorce, the courts went into similar excruciating detail.

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<sup>244</sup> R. Castel, 'From Dangerousness to Risk' in Burchell, et al. (1991) p. 289.

The aim of proposed amendments<sup>245</sup> to improve the Child Support Agency, has been to simplify the calculation. This detailed calculation by the courts still occurs with regard to the maintenance of housewives, to be discussed below. Similar concerns about the size of the legal aid bill has prompted more recent amendments to the civil system with the *Access to Justice Act 1999*, and the removal of legal aid for personal injury litigation.

To say that the French system of no fault compensation is more efficient because it targets the money at those who need it (rather than to the insurance companies and solicitors) – whilst true – simply states an argument that would improve the English system only in so far as it would bring it into line with the French system which is the subject of Ewald's broader critique. To assume that this reform would answer criticisms of the system fails to examine how the insurance of everything fits neatly within an analysis of governmentality. It also ignores the way in which the traditional risks incurred by women are marginalised. Despite the judges' discussions about liability, it is clear that the basis of the English system of tort law is insurance and risk analysis. This comes as a shock to litigants in, for example, medical negligence cases who are interested in receiving an apology and discovering information about negligent treatment. Instead, the litigant finds that his or her dispute is dealt with via insurance companies who are repeat players in the litigation lottery – and who always make commercial decisions about settlement.<sup>246</sup>

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<sup>245</sup> Child Support, Pensions and Social Security Act 2000.

<sup>246</sup> Genn (1987).

## Feminist Concerns

Although Ewald discusses the way that insurance was viewed as a method of producing security for all social classes, it is clear that such security was not necessarily going to be achieved in practice. He quotes Proudhon,

The savings bank, mutuality and life assurance are excellent things for those who enjoy a certain comfort and wish to safeguard it, but they remain quite fruitless, not to say inaccessible, for the poorer classes. Security is a commodity bought like any other: and as its rate of tariff falls in proportion not with the misery of the buyer but with the magnitude of the amount he insures, insurance proves itself a new privilege for the rich and a cruel irony for the poor.<sup>247</sup>

A feminist analysis can point to the ways in which women fail to fit within the current system; but must go beyond any such move. Feminists can (rightly) complain that insurance is aimed at compensating loss incurred within the ‘public’ sphere (i.e. outside the home), and that women in general as poorer paid workers cannot always be in a position to benefit. However, whilst this criticism – which is basically that of Proudhon – is right, it does not engage at the level of Ewald’s analysis, since Ewald’s more radical point is that the system of insurance is part of the way in which individuation occurs. My concern is to explore women’s ambiguous position with regard to this process of individuation.

It is worth considering another basic feminist argument as a point of departure. Feminists have been (rightly) critical of the way in which the public/private divide has been assumed in law. In his historical analysis, Ewald ignores the position of housewives. It is clear that women are only parties to workers’ insurance contracts as employees. Women’s position within the home can be safeguarded with life insurance (against death of her husband or partner) and mortgage indemnity insurance, but there is no insurance against a housewife’s loss of income upon divorce. In 1942 Beveridge proposed that the

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<sup>247</sup> Cited Ewald (1991a) p. 206.

benefits associated with unemployment should be extended to cover women who had been separated from their (male) breadwinner. His anxiety was that housewives who were not 'at fault' may lose their livelihood and be ineligible for maintenance. He recognised the different positions of husband and wife in the following way:

If [the needs caused by divorce, legal separation, desertion and voluntary separation] are regarded from the point of view of the husband, they may not appear to be insurable risks; a man cannot insure against events which occur only through his fault or with his consent, and if they occur through the fault or with the consent of the wife she should not have a claim to benefit. But from the point of view of the woman, loss of her maintenance as housewife without her consent and not through her fault is one of the risks of marriage against which she should be insured; she should not depend upon assistance.<sup>248</sup>

Beveridge's proposal to extend benefits into this new area of risk and to view housewives as a new category of persons who could be insured were rejected. In 1974 the Finer Committee<sup>249</sup> proposed a 'guaranteed maintenance allowance' as a means of ensuring a regular source of income for women and children upon divorce or separation. Again, this was rejected by the government of the day, leaving traditional housewives to claim maintenance through the courts with welfare benefits as an interim measure.

It does not require a sophisticated analysis of the emergence of self and other though relationality, as discussed in Chapter 2, to recognise the difficulty of trying to establish fault in marriage. The writers of one of the main contemporary textbooks<sup>250</sup> (rightly) note the practical difficulty of attributing blame and also the difficulty in reconciling ideals of collective security and individual fault. Curiously, they then make the following comment about wives:

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<sup>248</sup> W. Beveridge, *Social Insurance and Allied Services* (Cmnd. 6404) (London: HMSO, 1942) para. 347.

<sup>249</sup> M. Finer, *Report of the Committee on One Parent Families* (Cmnd. 5629) (London: HMSO, 1974)

<sup>250</sup> B. Hoggett, D. Pearl, E. Cooke, P. Bates, *The Family, Law and Society: Cases and Materials*, 4<sup>th</sup> edition, (London: Butterworths, 1996) p. 104.

In a welfare state, the moral virtue of contributing to a scheme which will provide relief against, for example, sickness and unemployment – both your own and your neighbours’ – is, one hopes, self-evident. Contributing to a scheme which provides relief for the wives in other people’s broken marriages, however, is not so easy to justify.<sup>251</sup>

If a woman has given up work to bring up a family and is without means because of separation or divorce then why is her loss of livelihood not viewed as akin to unemployment? The appeal to public sentiment, in the above quotation, is an appeal to the public/private divide in which women’s work within the home is unacknowledged and viewed as natural. Despite the increase in women engaged in paid work, the feminisation of poverty upon divorce still makes this an important contemporary issue. The question of insurance for the risk of child birth, to be discussed in the next section, further illustrates the continuing view of women’s traditional work of child care as ‘natural’.

### **Wrongful Birth Cases**

With regard to insurance against child birth, in the nineteenth century this would have been viewed as unethical. Now it is simply a bad risk for insurers, such that the premiums would be too high. In the last twenty years the so-called ‘wrongful birth’ cases have developed in tort law. In these cases, parents have taken negligence claims usually against a health authority or trust, on the basis that a faulty sterilisation operation, or incorrect advice, had lead to the birth of an unwanted child. The defendant health authority would be covered by insurance policies for negligence in these cases.

I am interested in the ‘wrongful birth’ cases because of the way in which the House of Lords has moved away from standard principles of tort law, as I will outline in a moment. The way in which these cases are discussed does raise theoretical issues about the way in which tort law applies to issues involving

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<sup>251</sup> Hoggett et al. (1996) p. 104.

pregnancy and childcare. The cases also open up some broader questions about the image of what it is to be a person that is evoked. This is in keeping with the tension between the historical position of women and the image of the possessive individual, who owns her abilities and must be compensated for work performed.

The main case in the area is the House of Lords decision in *McFarlane v Tayside Health Board* (1999),<sup>252</sup> the only case of this type to come before the Lords. They decided that, provided a child is born healthy, awarding compensation for the costs of bringing up a child would not be 'fair, just and reasonable'.<sup>253</sup> However, the pain and suffering and inconvenience associated with the pregnancy and birth plus loss of earnings and any medical expenses associated with the pregnancy were awarded (with Lord Millett dissenting). This overturned a Court of Appeal decision<sup>254</sup> from 1985 in which damages had been granted based upon the upkeep of the child. It also overturned the lower court's judgment, illustrating the ambiguity felt about the issue by the judges.

In *McFarlane v Tayside Health Board*, it was the husband who had suffered the negligent procedure relating to sterilisation. He was erroneously told that his sperm tests were negative so that no other contraception was required. This had the foreseeable result that his wife become pregnant. The facts that the couple had sex, did not abort or put up the child for adoption were not viewed, by the courts, as breaking the causal chain of events.

The first point to clarify is the question of who is the claimant? When it is the woman who has the failed sterilisation then it is clear that the losses are consequential upon that operation. Legal problems have arisen, in cases such as *McFarlane v Tayside Health Board*, when it is the man who has been

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<sup>252</sup> *McFarlane v Tayside Health Authority* H.L (1999) 3 WLR 1301; (2000) 2 AC 59.

<sup>253</sup> *McFarlane v Tayside Health Board* (2000) 2 AC 59 per Lord Steyn p. 82.

<sup>254</sup> *Emeh v Kensington and Chelsea and Westminster Area Health Authority* (1985) QB 1012 CA

unsuccessfully sterilised. For example, vasectomies have reversed themselves and the claimant is a future partner. In *Goodwill v British Advisory Services*,<sup>255</sup> a woman who had a sexual relationship with Mr. Goodwill three years after his faulty sterilisation and had an unwanted pregnancy had her claim dismissed because it was held that the doctor could not have had the claimant in mind at the time of the operation. Mrs. McFarlane did not have this problem because she was married to Mr. McFarlane at the time of the operation and so was held to have been in the reasonable contemplation of the doctors, a necessary hurdle in making the claim. As outlined above, Mrs. McFarlane successfully claimed damages in relation to the pregnancy and birth but both parents, as claimants, were unsuccessful in their claim for damages for the cost of child rearing.

The two main reasons for the decision are as follows: firstly, that the birth of a healthy baby was a ‘blessing, not a detriment.’<sup>256</sup> There is something very curious about the idea that a defendant can claim that a fault on their part was actually a blessing upon the claimant. Prior to the appeal to the Lords, Lord McCluskey in the Second Division of the Inner House of Court of Sessions pointed out that such an argument is not part of the usual procedure in tort. He argued that:

I know of no principle of Scots law that entitles the wrongdoer to say to the victim of his wrongdoing that they must look to their prospective and impalpable gains in the roundabouts to balance what they actually lose on the swings.<sup>257</sup>

Emily Jackson<sup>258</sup> has pointed out that marriage is usually viewed by the courts as a good thing and yet a solicitor who negligently failed to obtain a divorce for a client would be liable in negligence. However, the damages in such a case would

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<sup>255</sup> *Goodwill v British Pregnancy Advisory Service* (1996) 1 WLR 1397.

<sup>256</sup> *McFarlane v Tayside Health Board* (2000) 2 AC 59 per Lord Millett at p. 114.

<sup>257</sup> *McFarlane v Tayside Health Board* (1998) SLT 307 2 Div. pp. 316-317. The same law applies in both England and Scotland on this point of law.

<sup>258</sup> E. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) p. 36.

not be as great as the award of the cost of child care, a concern that also motivated the Lords, to be discussed below.

Secondly, there was an appeal to ‘distributive justice’.<sup>259</sup> Lord Steyn expressed a concern with the distribution of resources in a community. He contrasted this with ‘corrective justice’, which aims to compensate for harm to the individual by restoring her, as much as is possible, to the position she would have been in had the negligence not occurred. In other words, he employed the term ‘distributive justice’ to mean that the money would be better left with the Heath Board rather than awarded to the claimants. Lord Steyn admitted that on the basis of corrective justice the claim should succeed but he argued that this should not be the case because of,

an inarticulate premise as to what is morally acceptable and what is not...Instinctively the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.<sup>260</sup>

The Lords were clear that the arguments regarding birth being a blessing and the question of ‘distributive justice’ were applicable only to the birth of healthy child. Compensation for the extra costs of raising a child with a disability was recently awarded in *Parkinson v St. James and Seacroft Hospital*.<sup>261</sup> Similarly, such compensation was awarded in the case of a visually impaired mother and healthy child in *Rees v Darlington Memorial Hospital NHS Trust*.<sup>262</sup> The view was that the extra costs associated with the disability of either child or mother should be awarded because this would be viewed as just, fair and reasonable.

At the root of this decision is a view of women, and women’s traditional role, which has changed in recent years; linked with the broader question about

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<sup>259</sup> *McFarlane v Tayside Health Board* (2000) 2 AC 59 per Lord Steyn at p. 82.

<sup>260</sup> *McFarlane v Tayside Health Board* (2000) 2 AC 59 per Lord Steyn at p. 82. The ‘reasonable man’ has been updated from the ‘man on the Clapham omnibus’ to the gender neutral ‘traveller on the Underground.’

<sup>261</sup> *Parkinson v St. James and Seacroft Hospital* (2002) QB 266 CA

<sup>262</sup> *Rees v Darlington Memorial Hospital NHS Trust* (2002) 2 All ER 177 CA



what tort law aims to do. As stated above, one of the basic assumptions in tort law is that we are envisaged as individuals who are owners of our own abilities, such as our ability to work and our bodies. If anyone negligently injures us or prevents us from being able to earn a living we can claim damages because we own parts of our bodies and life chances in a way that is analogous to the way in which we own property.

As I will discuss in more detail in the next chapter, this has not always been the position of women. With the increase of paid labour outside the home from around 1840s, men were viewed as owners of their abilities that are sold in the labour market. Wage labour became the usual way for men to make a living. However, women's work within the home became seen in more sentimental terms, as a natural expression of femininity, a private pleasure, rather than as work. This lies at the root of the Lords reluctance to compensate for the upbringing of a child. Lord Millett, in particular, dissented from the judgment in that he would only award limited damages for the loss of the ability to decide the size of their family. He argued against awarding compensation for the pain and suffering and other costs associated with the pregnancy by rejecting a comparison between pregnancy and sickness on the grounds that pregnancy is a 'natural' event. In doing so, he accepted one of the arguments of the Defendant: that there could be no cause of action because pregnancy and child care were 'natural'.<sup>263</sup>

Whilst unwanted pregnancy and rape are not comparable experiences, it is worth noting that sex is viewed (and constructed) as 'natural' but that women's consent, if not desire, is now viewed as important. However, the issue of women's consent and the way in which women were viewed as able to enter into

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<sup>263</sup> The other judges were able to view pregnancy as involving pain and suffering in a way that is reminiscent of the comparison between pregnancy and sickness in early sex discrimination cases, which are no longer good law. See *Haynes v Malleable Working Men's Club* (1985) ICR, 705, EAT.

marriage contracts, which then prevented them from refusing to have sex with their husbands, has been subject to feminist critique, discussed earlier. The act of categorising pregnancy as ‘natural’ must be understood in this context. It has the effect of allowing the Lords to argue that child birth should be viewed as ‘a blessing and a joy’, something the woman may not have initially wanted (a point that is difficult to dispute in these cases of failed sterilisation) but that would bring her pleasure. This allows the Lords to refuse to compensate for the expenses and work involved in childcare. It is simply not viewed as work but as ‘natural’.<sup>264</sup>

One of the Lords’ worries was the problem of putting a value on human life and hence commodifying it. In this context, it is interesting to note that the traditional work of women in the home including: the provision of housework, companionship and sex has been given a price by the courts. Prior to 1982,<sup>265</sup> there was a head of damages in negligence that allowed men to be compensated for the ‘loss of consortium of a wife’. In 1952, the Lords refused to extend this common law claim to a wife whose husband had become impotent as a result of the defendant’s negligence. Lord Goddard made his view of the historical position of wives clear when, in turning down the wife’s claim, he stated that,

The action which the law gives to the husband for loss of consortium is founded on the proprietary right which from ancient times it was considered the husband had in his wife. It was in fact based on the same grounds as gave a master a right to sue for an injury to his servant if the latter was thereby unable to perform his duties. It was an action of trespass for an invasion of the property right which, arising from the status of villeinage or serfdom, the master had over his servant.<sup>266</sup>

However women were not viewed as the owners of these abilities – which historically, under the doctrine of coverture, belonged to her husband.

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<sup>264</sup> For a discussion of the way in which the ‘natural’ and ‘biological’ is being rethought by Oyama see Chapter 2.

<sup>265</sup> The right to damages for loss of consortium was abolished by the *Administration of Justice Act 1982*.

<sup>266</sup> *Best v Samuel Fox and Co. Ltd.* (1952) AC 716, *per* Lord Goddard at pp. 731-732.

When a sterilisation operation has taken place privately it can give rise of a claim in contract as well as tort law and so it is useful to consider this position briefly. Contract law always raises the issue of consent because it is predicated upon the idea that individuals should be bound by what they agree to do. Whereas the aim of tort law is to try to put the claimant in the position she would have been in had the tort not occurred, the aim of contract law is to put the parties in the position they would have been in had the contract been performed properly. It would therefore be expected that, if a doctor agrees to perform a sterilisation operation that s/her will be bound by this agreement. However, in *Eyre v Measday*<sup>267</sup> the claimant sued in contract when a faulty sterilisation operation resulted in her pregnancy. The Court of Appeal decided that the doctor was not liable. They were not willing to hold that there was a warranty that the operation would be successful, despite the fact that the doctor told the claimant that the operation was permanent and that she would not be able to have children. There was no warning of any risk that the operation might not have been successful.

The wrongful birth cases can be viewed within the terms of the equality/difference debate. On the equality side of the debate it appears strange that the usual rules of tort should be ignored when women's traditional role of child rearing is discussed. As Lord Steyn<sup>268</sup> admitted, full compensation of the costs of child rearing is the result that arises by employing the usual rules of tort law. If women, and women's traditional work of child rearing, are to be 'added into' tort law on the same basis as men then their claim should not be denied. There is a case for arguing that the resources would be better spent on the sick but why should there be reference to 'distributive justice' to defeat this claim but

<sup>267</sup> *Eyre v Measday* (1986) 1 All ER 488 CA.

<sup>268</sup> *McFarlane v Tayside Health Board* (2000) 2 AC 59 per Lord Steyn at p. 82.

not other cases? The claimants were told that a failure on the defendant's part was actually a blessing and that its results were 'natural' and therefore good whether or not the woman wanted a child. In this respect judges appear to have difficulty in viewing women as owners of their capacities, with a right to bodily integrity and to payment in full of the damages that arise from this breach of duty, providing they are not too remote.

However, I think that there is more to be said on this issue and it is useful to think about what I have described as the 'difference' argument. From this perspective, birth should not simply be subsumed within personal injury, although it obviously involves pain and suffering. This is the argument that was used by feminists when employer's treatment of pregnant women was compared with their treatment of sick men in the early operation of the *Sex Discrimination Act 1975*.<sup>269</sup> A difference approach would be sympathetic to the difficulty that the Lords had in viewing women as atomistic individuals, who are owners of their capacities, rather than part of society. Such a view of humanity derives from Thomas Hobbes' description in *Leviathan*, to be discussed below. This approach would entail the abandonment of 'corrective justice' (with its focus upon individual harm) in favour of an emphasis upon 'distributive justice'. However, I would argue that, if this logic is to be pursued then the Lords concern with 'distributive justice' cannot be limited to areas that are traditionally linked with women's unpaid work in the home. It would be unnecessary to assume that, by acknowledging the uniqueness of pregnancy, it should follow that a different system of tort, or ideals of justice, should apply to women or areas of work traditionally linked with women.

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<sup>269</sup> *Haynes v Malleable Working Men's Club* (1985) ICR, 705, EAT.

For the Lords' emphasis upon 'distributive justice' to be consistent would require legislation to radically alter the civil justice system in accordance with need. In the narrower confines of the case itself this would involve thinking about the actual parents' needs. The Lords have been willing to consider the particular circumstances of the case when either the child or the mother has a disability. To be consistent with Lord Steyn's reference to 'distributive justice' this would have to be extended to a consideration of the parents' income and the resources necessary to bring up a child. A more equitable way of doing this, which would take into account the claims upon the health service, would be through social insurance rather than the tort system.<sup>270</sup> This is preferable because, under the usual principles of tort law, the courts calculate compensation based upon the amount the parents would be likely to spend on the child. So, for example, there would be arguments that if they would normally send a child to a private school this should be included in the award. This would mean that the amount of compensation would increase with the wealth of the parents and not with their needs.

My aim here is not to detail the many good arguments against current tort law as a system of loss distribution but to illustrate the ambivalent position of women with regard to risk and to individualism. In specific areas of law it may be that women's traditional position, which resists commodification, could potentially be used constructively to argue for a more equitable distribution of resources. However, given the ease with which the public/private divide is employed in this area this may be over optimistic.

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<sup>270</sup> For more detailed arguments on this point see P.S. Atiyah, *Accidents, Compensation and the Law* (London: Weidenfeld and Nicolson, 1970); J. Conaghan and W. Mansell, 'From the Permissive to the Dismissive Society: Patrick Atiyah's Accidents, Compensation and the Market' in *Journal of Law and Society* Vol. 25, 1998, pp. 284-293; J P. Cane, *Atiyah's Accidents, Compensation and the Law* (London: Butterworths, 1999); D. Harris, D. Campbell and R. Halson, *Remedies in Tort and Contract* (London: Butterworths, 2002) pp. 405-461.

## Rape

The insurance industry has recently moved into other areas, as illustrated by the offer of insurance to women in South Africa against the real possibility of being raped and contracting HIV. The insurance offers them tests and treatment that are not available within their impoverished health service. Although I am concerned with the operation of the law of obligations in England, this example is relevant because it illustrates a similar technique for the management of risk. From the view of technologies of risk, we represent different risks to each other. The criminal represents a risk as does a doctor or any person who may negligently cause injury. The same techniques of risk analysis can quantify them. It may be that I would be more upset by the same injury knowing that the person who inflicted it did so on purpose, because this could undermine, for example, my view of the world. However, for the calculation of risk, this can be viewed as ‘trauma’, as an additional part of the injury. This does nothing to undermine the possibility of the calculation of risk itself. As Foucault points out, we construct ourselves as subjects with the state as protector against sources of risk, including each other.<sup>271</sup> Whilst he discusses the construction of the criminal as a source of risk, the same reasoning applies to the law of obligations, with the assessment of systems – such as safety in factories, the operation of NHS, education – through audits that can alter the nature of the activity.<sup>272</sup>

From a feminist perspective the horror evoked by the example of South African women is important. It brings home the daily fear of these women for whom a more long term solution is obviously vital, but it also disrupts the usual image of insurance. This disruptive quality becomes available when women’s

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<sup>271</sup> Foucault (1976).

<sup>272</sup> For a discussion of the ‘audit explosion’ see, for example, N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999b) pp. 153-155; M. Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997).

position – outside the ‘norm’ – is examined. In England, rape is a crime and also a tort so that it is possible to sue for an injunction and damages. The ability to recompense the victim with money evokes a sense of unease because of its link with (involuntary) prostitution. The Criminal Injuries Compensation Board Scheme allows the victim of any violent crime to obtain automatic compensation from the state. This is based upon a tariff system.<sup>273</sup> Victims can have awards rejected or reduced because their ‘lifestyle’ is deemed to put them at risk.<sup>274</sup> So, for example, the fact that a woman was a prostitute would be an objection to a rape claim. In this instance, the woman is outside the protection of insurance.

### **Developments in the Deployment of Risk Analysis**

There are potential developments within the deployment of risk analysis that are also relevant to feminist concerns. Castel, like Ewald, discusses contemporary developments in France but his general theoretical approach is relevant to the English law of obligations. In ‘From Dangerousness to Risk’<sup>275</sup> Castel argues that there has been a change in *techniques* of social administration such that,

The new strategies [of social administration] dissolve the notion of the *subject* or a concrete individual, and put in its place a combinatorial of *factors*, the factors of risk....The essential component of intervention no longer takes the form of the direct face-to-face relationship between the carer and the cared, the helper and the helped, the professional and the client. It comes instead to reside in the establishing of *flows of population* based upon the collation of a range of abstract factors deemed liable to produce risk in general.<sup>276</sup> (Italics are in the original.)

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<sup>273</sup> A earlier controversial case was that involving Meah in which he was awarded £45,000 compensation in a civil court for a road traffic accident which caused brain damage and allegedly caused him to engage in sexually aggressive behaviour. (*Meah v Creamer* (1985) 1 All ER 367). This award can be compared with the compensation of two of Meah’s victims who sued him for sexual assault (award: £6,750) and rape (award: £10,250) *W v Meah, D v Meah* (1986) 1 All ER 935. These cases held that rape was to be classified as a personal injury. They were distinguished in *Griffiths v Williams CA* (1995) (unreported) *The Times*, 24 November. It was held that views of rape had changed and that £50,000 award was not too high. Under the current tariff system of the CICA in which ‘repeated non-consensual vaginal and/or anal intercourse over a period exceeding 3 years’ has a tariff of £17,500.

<sup>274</sup> *Criminal Injuries Compensation Scheme 1996 para. 13-16*; enabling Act: *Criminal Injuries Compensation Act 1995*.

<sup>275</sup> Castel (1991) pp. 281-298.

<sup>276</sup> Castel (1991) p. 281.

He details how these new strategies have produced a change in the balance of power between administrators and professionals. An example of the way in which this operates is relevant to the feminist analysis given by Brown<sup>277</sup> and by Fraser,<sup>278</sup> of the way in which the state acts as the ‘man in the life’ of the women raising children as a single parent. Castel<sup>279</sup> points to the French approach for detecting childhood anomalies, which involves collecting data on all children. This is an administrative task rather than one which involves face-to-face contact with ‘experts’. It is only when there are sufficient ‘risk factors’ in a particular case that there is an expert dispatched to assess the situation ‘on the ground’. Among the statistics gathered are questions about the mother, such as whether she is married, a minor, of foreign nationality – along with illnesses, psychological problems etc.

This technique means that the probability of risk is deduced by statistical analysis, by administrators, before expert intervention. Referring to Foucault, Castel argues that this is a new type of surveillance in which the presence of the expert is not required. It is made on the basis of an abstract and probabilistic existence of risk.<sup>280</sup> He is concerned about its effects: “‘Prevention’ in effect promotes suspicion to the dignified scientific rank of a calculus of probabilities.”<sup>281</sup>

It is useful to look at crime, momentarily, in order to think about civil law. As illustrated in his lecture summary, ‘The Punitive Society’,<sup>282</sup> Foucault traces the way that this discipline was linked with the industrial revolution; how the

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<sup>277</sup> Brown (1995).

<sup>278</sup> N. Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Cambridge: Polity, 1989).

<sup>279</sup> Castel (1991) p. 287.

<sup>280</sup> Castel (1991) p. 289.

<sup>281</sup> Castel (1991) p. 288.

<sup>282</sup> M. Foucault, ‘The Punitive Society’ in M. Foucault, *The Essential Works: 1954-1984 Vol. 1, Ethics, Subjectivity and Truth*, P. Rabinow, ed., (New York: The New Press, 1997b) pp. 23-37.



development of manufacturing produced changes which meant that workers disciplined themselves throughout the working day: to arrive on time and to perform certain acts at certain times. The 'soul' is produced through the mechanisms of control. Castel is detailing the development of new techniques of such governmentality.<sup>283</sup>

## **Cornell and Ewald**

Whereas Cornell is concerned with the process of 'individuation' in which each person takes his/herself as a project – along with his/her equivalent rights to this project that are to be protected by law – Ewald discusses the way in which the operation of law and social administration produce 'individuation'. This is achieved by such techniques as statistical and risk analysis which is understood as an example of governmentality, the conduct of conduct, as described by Foucault.<sup>284</sup>

I have used Ewald's analysis to show how contemporary English tort law employs the techniques of risk analysis and also fits within the broader concept of governmentality. By employing this framework, it can be shown that the English law could fulfil the same function and develop in ways that are more efficient, by moving to the use of no fault compensation. This operation of law would undercut the use of Cornell's legal test in such cases because it would no longer be necessary to go to court to prove fault, where no fault compensation applies. It may be necessary to argue over the amount of damages but it is unlikely that Cornell's test was meant merely to ask: would free and equal persons agree to this amount of compensation? Tariffs are likely to be set to

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<sup>283</sup> For a discussion of these techniques and their development see G. Deleuze, 'A Postscript on Control Societies' in G. Deleuze, *Negotiations* (New York: Columbia University Press, 1995) pp. 176-182.

<sup>284</sup> See, for example, Foucault (1991a) pp. 87-104.

avoid litigation. Presumably, Cornell would be happy with this method of loss distribution, given her position on welfare generally. She could argue that her test would apply in other areas.

Can Ewald account for Cornell's description of a project of becoming a person? There is an initial similarity. It could be argued that Cornell's image of 'the project of becoming a person' sits too comfortably with the image of oneself as an enterprise which Ewald discusses within his work on 'insurance as a moral technology':

To calculate a risk is to master time, to discipline the future. To conduct one's life in the manner of an enterprise indeed begins in the eighteenth century to be a definition of a morality whose cardinal virtue is providence.<sup>285</sup>

Similarly, Rose discusses the contemporary development of risk technology in the following terms that again resonate with Cornell's 'project of becoming a person':

One is always in continuous training, lifelong learning, perpetual assessment, continuous incitement to buy, to improve oneself, constant monitoring of health and never-ending risk management. Control is not centralized but dispersed; it flows through a network of open circuits that are rhizomatic and not hierarchical.<sup>286</sup>

In earlier work, Rose<sup>287</sup> links this to a shift in the regulation of risk from the 'social' arena – by social security, mutual societies – to the domain of individual choice in the market place. This is an image which also pervades state provision in which the recipient is viewed as a client,

The enhancement of the powers of the client as consumer – consumer of health services, of education, of training, of transport – specifies the subjects of rule in a new way: as active individuals seeking to 'enterprise themselves', to maximize their quality of life through acts of choice, according their life a meaning and value to the extent that it can be rationalized as the outcome of choices made, or choices to be made....*Political reason must now justify and organize itself by arguing over the arrangements that are adequate to the existence of persons as, in their essence, creatures of freedom, liberty and autonomy.*<sup>288</sup> (Italics are added.)

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<sup>285</sup> Ewald (1991a) p. 207.

<sup>286</sup> Rose (1999b) p. 234.

<sup>287</sup> N. Rose, 'Governing Advanced Liberal Democracies' in A. Barry, T. Osbourne and N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (London: UCL Press, 1996a) p. 57.

<sup>288</sup> Rose (1996a) p. 57.

Cornell can argue that her view of individuation does not define personhood but leaves it open for each person to say what it is for her or him to be a person. However, her view of the emergence of personhood itself – that it is worked upon as a project – represents a way of life that those writing in the area of ‘governmentality’, such as Rose and Ewald, aim to explain and historically situate. The practical question becomes whether Cornell’s work is cleverly pitched to extract concessions for women within this contemporary neo-liberal framework or whether it fits too comfortably within it. How radical is Cornell’s image of ‘the project of becoming a person’, that will be understood by the courts as a project between competing ‘possessive individuals’, owners of their bodies and abilities – save possibly in the area of women’s traditional work?

Cornell’s view of personhood does not simply include ‘the emergence of individuals’ but of different ways of living. She can argue that, just because many will today view their project of becoming a person in terms of possessive individualism (which, I am arguing, is now intimately linked to the deployment of the techniques of risk) does not mean that this is all that persons can become. This is something that she keeps open – not simply for individuals – but in terms of cultural change in the meaning of ‘persons’ in future generations, hence the utopian theme in her work. This is why her view of personhood cannot be subsumed into the view of the person as enterprise.

I do not believe that Cornell’s entire framework can be aligned with this approach, although this is one way in which potential legislatures/judges are likely to view Cornell’s legal test. Ewald links the employment of the technique of risk to instrumental reasoning. Above, I have said that this evokes the figure of the ‘possessive individual’. Cornell expressly distinguishes her position on what it is to be a person, from that of libertarians, whose image of what it is to be a

person, she argues, derives from Hobbes, and which she describes as ‘atomistic individualism’.<sup>289</sup>

To recap my argument, the contemporary view of the ‘reasonable man’ of tort law is one who employs risk analysis as a tool in the operation of instrumental reason; who owns his body and its abilities and is traditionally male. Until relatively recently, women have not been viewed in this way. The traditional housewife has not been viewed as owning her labour power, which is characterised by being sold for a wage, because she received housekeeping money from her husband. The risks of the traditional housewife have not been viewed as insurable. In keeping with this approach, the courts have been unwilling to compensate women if they have given birth to a healthy child because of negligent sterilisation, for example. There is some evidence that the courts are also changing their approach in this area, to the limited extent that compensation is awarded for the pain and suffering of pregnancy<sup>290</sup> and of the upkeep of children with disabilities in the ‘wrongful birth’ cases.<sup>291</sup> To extend this technique of calculative reason to women would be in keeping with the move to include women as possessive individuals, as owners of their bodies and abilities, linked to their increasing participation in paid work and the breakdown of the traditional housewife/breadwinner model. In the next two chapters I want to consider further the relationship between women and ‘possessive individualism’.

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<sup>289</sup> Cornell (2000) p. 167 fn.11.

<sup>290</sup> *McFarlane v Tayside Health Authority H.L.* (1999) 3 WLR 1301.

<sup>291</sup> *Greenfield v Irwin (A firm) C.A.* (2001) WLR 1279; *Rand v East Dorset HA* (2000) 56 BMLJ 39.

## Chapter 5: The Sexual Contract

I will now turn from tort law to the area of contract law in order to further explore the anomalous position of women with regard to selfhood, personhood and individualism. Contract law focuses attention upon the question of consent and, historically, upon an image of persons with an autonomous will.<sup>292</sup> The basis of contract law is that it regulates obligations that are entered into by ‘agreement’, in contrast with tort law in which the obligations, for example, the duty to behave with reasonable care so as not to harm anyone foreseeable affected by our actions, are imposed by the courts. There has been much feminist analysis of the way in which women’s consent has been treated in the operation of law, for example, in the areas of rape<sup>293</sup> and consent to medical consent.<sup>294</sup> Just as Marx<sup>295</sup> points out that workers were not really free to choose whether or not to work, so women could be viewed as historically pressured into the traditional marriage contract. The relationship between the employment contract and the marriage contract and their relationship with personhood is the focus of this chapter. I will then use this analysis to look at ‘possessive individualism’ in more detail in the next chapter.

In this chapter, I move from a discussion of Ewald’s analysis of insurance, and its application to tort law, to Carole Pateman’s reading of Hobbes’ version of social contract theory and its relationship to other contracts. This involves moving from an analysis of actual insurance contracts, and the way in which they

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<sup>292</sup> See P.S. Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford: Oxford University Press, 2000). For an alternative view of the self see Chapter 2.

<sup>293</sup> See for example Smart (1989) pp. 26-49.

<sup>294</sup> See for example, O’ Donovan (1997) pp. 47-64.

<sup>295</sup> K. Marx, *Capital: A Critique of Political Economy, Volume One* (London: Penguin, 1976) Ch. 6, p. 280.

can be viewed as ‘social’, in that these contracts hold out the possibility of redistributing risk. Even if this hope of a ‘contractual justice’ has not been fulfilled, these insurance contracts are just as concerned with the questions of safeguarding the means to live a ‘commodious life’<sup>296</sup> as Hobbes’ social contract to be discussed below.

One central argument made by both socialists and feminists has been that employment contracts and marriage contracts have little in common with the paradigm of a contract as an exchange between two equal ‘individuals’, that is so dominant within political and legal theory. As I will discuss below, Carole Pateman explores the way that an exchange between two persons – in which one must exchange something, such as his/her ability to work, which cannot be separated from his/her body – is characterised by his/her subordination. She draws out the relationship between subordination (and hence the possibility of exploitation) under the marriage contract and compares it to subordination under the employment contract, discussing the ways in which they differed but were interrelated. I will argue that aspects of her rethinking of this relationship between marriage contracts and employment contracts are still useful even though, as she acknowledges in an article written in 1996,

The patriarchal structures with which I was concerned have been considerably weakened, and the heyday of the worker/breadwinner was from 1840-1970.<sup>297</sup>

Nevertheless, I agree with her later comments that,

Women and men alike are now being drawn into a global division of labour, and assessments of which women may gain or lose, and whether new forms of subordination are developing, are, necessarily, enormously complex and difficult when the restructuring is gathering pace. I believe my arguments in *The Sexual Contract* can throw light on the course of some recent developments, but to examine the issues would require another, very different, book.<sup>298</sup>

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<sup>296</sup> Hobbes (1994b) Ch. XIII, s. 14, p. 78.

<sup>297</sup> C. Pateman, ‘A Comment on Johnson’s Does Capitalism Really Need Patriarchy?’ in *Women’s International Forum* Vol. 19, No 3, 1996a, p. 204.

<sup>298</sup> Pateman (1996a) p. 205.

At a time when the UK government has stated that it aims to try to facilitate a ‘new relationship’ between work and family life’,<sup>299</sup> thereby taking the radical step of recognising the unspoken relationship between work both within the home and outside the home,<sup>300</sup> it is worth returning to Pateman’s historical analysis to understand the paradoxical position of women with regard to personhood and individualism. Pateman argues that it was contract – the legal device – that played an important role in women’s subordination because it was the existence of contract that produced both married women and workers, as parties to the marriage and employment contracts. As she puts it,

Contract does not merely ‘legitimise’ or ‘facilitate’ certain relationships. Relations that constitute central institutions in modern civil society, notably marriage and employment, are *created* through contract. ‘Husband’ and ‘wife’ or ‘employer’ and ‘worker’ come into being through the mechanism of contract.<sup>301</sup> (Italics are in the original.)

I want to examine her theoretical arguments in detail and to look at their implications for the contemporary English law of obligations and for the paradoxical position of women. Hutchings<sup>302</sup> has argued that Pateman’s position has strength despite holding onto the concept of the ‘sovereign individual’. Here, the ‘sovereign individual’ is used as a ‘composite term’ which includes the ‘possessive individual’:<sup>303</sup>

I am using the term to cover what is variously referred to in the literature as the possessive, the autonomous, the abstract, the disembodied or the unitary subject of traditional/ liberal/ modernist political and moral theory, or sometimes as the Cartesian, the Hobbesian or the Kantian subject/ agent/ individual.<sup>304</sup>

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<sup>299</sup> <http://www.dti.gov.uk/er/fairness/fore.htm>

<sup>300</sup> For a discussion of this point and assessment of the legislation and initiatives see, J. Conaghan, ‘Women, Work and Family: A British Revolution?’ in J. Conaghan, R.M. Fischel and K. Klare, *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002).

<sup>301</sup> C. Pateman, ‘Contract and Ideology: A Reply to Coole’ in *Politics* Vol. 10, No. 1, 1990, p. 30.

<sup>302</sup> K. Hutchings, ‘The Death of the Sovereign Individual’ in M. Griffiths and M. Whitford, *Women Review Philosophy* (Nottingham: Nottingham University Press, 1996) pp. 1-25.

<sup>303</sup> Hutchings (1996) p. 2.

<sup>304</sup> Hutchings (1996) p. 2.

I will discuss some feminist responses to Pateman's *The Sexual Contract* in this chapter but will defer a more thorough analysis of the 'possessive individual' until the next chapter.

## Hobbes' Story

Pateman describes Hobbes as 'the most brilliant and bold of the contract theorists.'<sup>305</sup> I want to concentrate upon Hobbes because, for Pateman, he is instrumental in replacing 'classical patriarchy' with 'modern patriarchy', a shift which is at the core of Pateman's thesis to be discussed in detail below. In addition, Hobbes is one of the few Western philosophers to identify the subordination of women as a political matter: as a matter of convention, rather than as a natural condition. Hobbes' analysis was soon superseded by that of Locke who reverted to the view of women's position as naturally subordinate. As Pateman puts it,

Hobbes was too revealing about civil society. The political character of conjugal right was expertly concealed in Locke's separation of what he called 'paternal' power from political power and, ever since, most political theorists, whatever their views about other forms of subordination, have accepted that the powers of husbands derive from nature and, hence, are not political.'<sup>306</sup>

Feminist scholars have undertaken some very revealing and exciting work on the classic texts of political theory, but little attention has been paid to Hobbes, whose writings are of fundamental importance for an understanding of patriarchy as masculine right.<sup>307</sup>

The narrative of the social contract initially told by Hobbes warned of the potential dangers which could occur if the English civil war resulted in a breakdown of law. It was based upon some supposed 'facts' about human nature, which was conceived of as selfish, competitive, acquisitive and rational. Individuals' selfishness makes life in the state of nature, in which there are no laws, 'solitary, poor, nasty, brutish

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<sup>305</sup> C. Pateman, "'God Hath Ordained to Man a Helper": Hobbes, Patriarchy and Conjugal Rights' in M.L. Shanley and C. Pateman *Feminist Interpretations and Political Theory* (Cambridge: Polity, 1991) p. 59.

<sup>306</sup> Pateman (1991) p. 69.

<sup>307</sup> Pateman (1991) p. 54.



and short'.<sup>308</sup> However, individuals' ability to reason allows them to recognise that it is in their long-term interests to escape the state of nature by means of the social contract. Their agreement to give up their freedom to the sovereign then allows the sovereign to enforce the law, which includes the enforcement of contracts. Importantly for Pateman's rereading of the social contract, this includes the sovereign's enforcement of marriage contracts.

In Hobbes' state of nature, there could be no marriage contract and hence it would only be the mother who could (possibly) say who had fathered her child.<sup>309</sup> In the state of nature, Hobbes argues, it would be up to the mother to either let the child die or look after it. If she protected it then she would be the head of the family. As the following quotation makes clear, her child's obedience would be obtained by consent and in exchange for protection, not owed to parents *per se*.

In *Leviathan*, Hobbes states that dominion can be acquired in two ways:

[4] Dominion is acquired two ways: by generation or conquest. The right of dominion by generation is that which the parent hath over his children, and is called PATERNAL. And is not so derived from generation as if therefore the parent had dominion over the child because he begat him, but from the child's consent, either express or by other sufficient arguments declared. For as to generation, God hath ordained to man a helper, and there be always two that are equally parents; the dominion therefore over the child should belong equally to both, and he be equally subject to both, which is impossible; for no man can obey two masters. And whereas some have attributed the dominion to the man only, as being of the more excellent sex, they misreckon in it. For there is not always that difference in strength or prudence between the man and the woman as that the right can be determined without war. In commonwealths this controversy is decided by the civil law, and for the most part (but not always) the sentence is in favour of the father, because for the most part the commonwealths have been erected by the fathers and not by the mothers of families...

[5] If there be no contract, the dominion is with the mother. For in the condition of mere nature, where there are no matrimonial laws, it cannot be known who is the father unless it be declared by the mother...<sup>310</sup>

Hobbes is therefore unique amongst the social contract theorists, in starting with an image of the state of nature in which women are viewed as being equal with men. This is because each individual is equally able to kill the other:

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<sup>308</sup> T. Hobbes, *Leviathan*, ed. C.B. Macpherson, (London: Penguin books, 1968) Ch. XIII. p. 186.

<sup>309</sup> Hobbes (1994b) Ch. XX, p. 129. 'It cannot be known who is the father unless it be declared by the mother'.

<sup>310</sup> Hobbes (1994b) Ch. XX, pp. 128-129.

For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others that are in the same danger with himself.<sup>311</sup>

There is often an ambiguity as to when the use of the term ‘men’ is actually meant to include women within political theory. This is not easily resolved by ‘adding in’ women, because this ambiguity itself performs a role in that it allows women to appear as individuals who can take part in the social contract at certain times and not at others. Pateman describes the way in which women are held to be ‘individuals’ as part of the social contract and yet are outside it – as objects of the sexual contract. As outlined above, Hobbes is less guilty than the later social contract theorists because his rigorous application of individualism to both men and women leads him to view women as equal to men in the state of nature. However, this leads Pateman to ask why they would give up this state to enter into a civil society in which they were subordinate to men.

By a careful reading of the social contract theorists, Pateman argues that within these texts is hidden a ‘sexual contract’. This claim involves a complex analysis of the way in which she views change in, but also a continuation of, patriarchy. Pateman describes this in terms of the overthrow of ‘classical patriarchy’ – which was based upon a model of sovereign power as analogous to the ‘natural’ power of the father within the household<sup>312</sup> – with modern patriarchal power which is based upon the sexual contract.

Pateman<sup>313</sup> points to inconsistencies in Hobbes’ story that result from his view that everyone is equal in the state of nature. Why should they agree to give up their freedom and equality to enter into a society governed by laws which did

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<sup>311</sup> Hobbes (1994b) Ch. XIII. p. 74.

<sup>312</sup> For a detailed historical analysis of different theories of classical patriarchalism see, G.J. Schochet, *Patriarchalism in Political Thought* (Bristol: Basil Blackwell, 1975). Also, J.P. Sommerville, ed., *Filmer: Patriarchia and Other Writings* (Cambridge: Cambridge University Press, 1991).

<sup>313</sup> Pateman (1991) pp. 53-73.

not treat them as equal? At the level of story-telling, this question raises the paradoxical issue of women's consent.<sup>314</sup> Under the doctrine of coverture, women were viewed as being persons who could consent to the marriage contract, which then took away their legal personhood and their ability to make further contracts.

Pateman<sup>315</sup> traces through possible amendments to the social contract narrative to try to remove this inconsistency within Hobbes' story. So, she discusses the likelihood that women could all have been 'captured' within the state of nature because they are weakened by bringing up children.<sup>316</sup> She does raise the question of how this could apply to all women, not all of whom would choose to have children, especially if this increased their risk of capture. She also discusses the possibility that women would agree to enter into civil society on lesser terms than men in order to gain the benefits of civil society. However, without assuming that women are unequal within the state of nature it is difficult to see why such an agreement should take place.

In Hobbes' state of nature there could be no contract – as none can be enforced – and therefore no marriage contract. Within Hobbes' story, one of the reasons for entering into civil society by means of the social contract, is to empower the sovereign to enforce contracts between his or her subjects. The social contract in Pateman's retelling of the story involves a deal that is struck between males to have a sovereign who will guarantee the marriage contract. Hence, their access to women's bodies and labour will be enforced.

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<sup>314</sup> See, for example, Pateman (1980) pp. 71-89.

<sup>315</sup> Pateman (1988) pp. 43-50.

<sup>316</sup> Hobbes does say that a woman can decide whether or not to raise a child and if she does then the child is deemed to contract with her to obey her as its head of household. Hobbes assumes that once a contract is made it should not be breached, even if it was made under duress. However, he introduced limitations upon sovereign power such that the point of moving from the state of nature was to preserve life. If the sovereign threatens your life, you have the right to disobey.

Her rereading of the transition from the state of nature to civil society borrows from Freud as well as from Hobbes. In Freud's<sup>317</sup> myth of the primal horde the patriarchal father is able to have sex with all women in the group and the overthrow of the father involves a shift from the rule of the father to the rule of the brothers, who then have sexual access to women. In Pateman's reworking of the move from classical patriarchy to the 'fraternal contract' the state guarantees husbands' conjugal rights. The marriage contract, enforced by the state, is therefore central to her story:

[the sexual contract] both establishes orderly access to women and a division of labour in which women are subordinate to men.<sup>318</sup>

The first question to be considered is the actual status (and meaning) of the social/sexual contract itself. Pateman makes clear that, like Hobbes, she does not really believe that there was such a contract. Pateman is examining the stories that were, and are, told to explain and justify the existence of law. It is important to consider the way in which such stories are understood by Pateman to avoid being absorbed into a discussion that takes the social contract too seriously as a historical fact. Pateman says that,

The political fiction of the original contract tells not only of a beginning, an act of political generation, but also of an end, the defeat of (the classical form of) patriarchy. Moreover, the story is not merely about ends and beginnings, but is used by political theorists and, in more popular versions, by politicians, to represent social and political institutions to contemporary citizens and to represent citizens to themselves. *Through the mirror of the social contract, citizens can see themselves as members of a society constituted by free relations.*<sup>319</sup> (Italics are added.)

This is evocative of the image of the mirror that Irigaray uses, in *Speculum*,<sup>320</sup> to draw attention to women's ambivalent position within male-centred political theory. Both argue that it is the failure of women to fit within the political system that allows it to operate. Both explore symbolic systems or narratives in which

<sup>317</sup> S. Freud, *Totem and Taboo: Some Points of Agreement between the Mental Lives of Savages and Neurotics* (London: Routledge and Kegan Paul Ltd., 1950) pp. 141-146.

<sup>318</sup> Pateman (1988) p. 119.

<sup>319</sup> Pateman (1988) p. 221.

<sup>320</sup> Irigaray (1985).

women are not themselves subjects but are necessary to reflect men, to allow men to attain subjecthood. Irigaray's<sup>321</sup> miming of Marx, for example, evokes the way in which women can be viewed as objects of exchange and has the effect of positioning men as subjects amongst each other. Pateman, in a different register, produces a similar analysis.<sup>322</sup> Pateman is at pains to stress that she is simply discussing the stories that have been told to explain or justify the origins of the state.

In certain respects, Pateman's stated aim is similar to that of Adriana Cavarero<sup>323</sup> (whose work owes an explicit debt to Irigaray): to appropriate male stories and to unravel them by illustrating how weak they are when the anomalous position of women is considered. Cavarero's is also a constructive project in that there is a move to rework the patterns themselves; to produce different images of women. Although Pateman is dealing with stories, *The Sexual Contract* is different, not only in its refusal of the narrative style, but also in the centrality that is given to this particular story.<sup>324</sup> It involves a close reading of the texts of, amongst others, Hobbes, Locke, Rousseau and Hegel to argue that the 'sexual contract' operates as an unstated assumption within these texts themselves. This story is said to be important because of its use within contemporary political rhetoric.<sup>325</sup> By drawing this analogy between Pateman and both Irigaray and Cavarero, I am interested in what is opened up by this analysis in terms of the image of the female subject.

Pateman uses the social contract theorists' own words and method against them, to disrupt their work by focusing upon the anomalous position of women

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<sup>321</sup> L. Irigaray, 'Commodities among Themselves', in *This Sex which is not One* (New York: Cornell University Press, 1985c) pp. 192-197; L. Irigaray, 'Women on the Market' in *This Sex which is not One* (New York: Cornell University Press, 1985a) pp. 170-191.

<sup>322</sup> See also Wittig's reading of the social contract which focuses upon enforced heterosexuality, M. Wittig 'On the Social Contract' in *The Straight Mind and Other Essays* (London: Harvester Wheatsheaf, 1992) pp. 33-45.

<sup>323</sup> See, for example, Cavarero (1995) p. 8.

<sup>324</sup> Cavarero has also written about Hobbes in 'Pace e libert nel pensiero politico di Thomas Hobbes', in *Per la filosofia* Vol. 9, pp. 73-79, 1987; and Locke in *La teoria politica di John Locke* (Padova: Ed. Universitarie, 1984).

<sup>325</sup> Pateman (1988) p. 221.

within it. This method has been subject to criticism, in that she appears to take the narrative of the social contract too seriously. In a generally sympathetic review, Hutchings argues that,

It is in her readings of the actual omissions, ambivalence and sometimes explicit misogyny in these texts that Pateman at her most convincing. However, her use of hypothesis to fill the gaps in the social contract story, her claims about links between that story and historical realities and the inconsistencies in her arguments are more difficult to defend.<sup>326</sup>

I think that Pateman's work is important and has contemporary relevance as a critique of contract. As Hutchings<sup>327</sup> acknowledges, the way in which Pateman employs the technique of 'retelling stories' should not detract from her demonstration that women have an ambivalent status with regard to individualism. Whilst I agree, I think that the importance of Pateman's work, linked with this analysis of possessive individualism, is her attack upon the daily *subordination* that takes place in different, but historically complimentary ways, within marriage and employment. This background is useful in order to think about the ways in which contract continues to be employed today.

## Defending Pateman

There have been a number of criticisms<sup>328</sup> of Pateman that focus upon her reworking of Hobbes' story to argue that Hobbes did not envisage women's capture and subordination in the state of nature. In his recent translation of *Leviathan*, Curly,<sup>329</sup> for example, argues that women's subordination in the state of nature does not fit with Hobbes' acceptance of women as sovereigns. He cites Hobbes' discussion of ecclesiastical powers<sup>330</sup> in which Hobbes states that a

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<sup>326</sup> Hutchings (1996) p. 18.

<sup>327</sup> Hutchings (1996) p. 18.

<sup>328</sup> For example, Hobbes (1994b) Ch. XIII, p. 78; D. Van Mill, *Liberty, Rationality and Agency in Hobbes' Leviathan* (New York: State University of New York, 2001) pp. 198-200.

<sup>329</sup> Hobbes (1994b) p. 78.

<sup>330</sup> Hobbes (1994b) Ch. XLII, p. 372.

female sovereign can appoint someone to speak on her behalf as head of the Church, because – even though women are forbidden to speak in church – she can appoint someone by her authority: ‘For authority does not take account of masculine and feminine’.<sup>331</sup> Similarly, Van Mill<sup>332</sup> argues that men would not risk putting themselves in danger in order to subjugate anyone in the state of nature.

I have two responses to this line of criticism of Pateman’s reading of *Leviathan*. Firstly, I think that the abstract discussion of the state of nature needs to be inverted to explain what is at stake in this story, to be discussed below. More importantly, as mentioned above, criticisms aimed at Pateman’s rewriting of the sexual contract miss their mark because Pateman’s work does not rely upon the credibility of this particular aspect of her reworking of a fictional narrative. Her speculation about the implied capture of women within Hobbes’ state of nature can be viewed simply as a device to illustrate her attacks upon contractarian belief.<sup>333</sup>

My first point involves inverting the temporality of Hobbes’ story. Hobbes’ description of the social contract was a cautionary tale to show what would happen if the English Civil War resulted in a breakdown of the rule of law. It was not an historical analysis, not something that had already happened, but a state of affairs that could pertain at some future point. From this perspective, the cautionary tale can be applied to women. When the temporality of this is reversed, it could be argued that this is a warning to women that rebellion could produce a breakdown in law and that they would fair worse in the state of nature

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<sup>331</sup> Hobbes (1994b) Ch. XLII, p. 372.

<sup>332</sup> Van Mill (2001) pp. 198-200.

<sup>333</sup> This is supported by the focus of Pateman’s most recent work in which she drops the discussion of the ‘sexual contract’ but continues to analyse the subordination that occurs through thinking of ‘property in the person’ or ‘self-ownership’ as implying that one’s labour power can be alienated. C. Pateman, ‘Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts’ in *The Journal of Political Philosophy* Vol. 10, No. 1, 2002, pp. 20-53.

than in civil society. However, this assumption is based upon Hobbes' image of the universality of possessive individualism, that can itself be challenged by considering the historical position of women, a point to which I will return in the next chapter.

The second point is related to the first. As I will discuss in detail in the next chapter, Pateman's work is an exposition of the way in which any contract for the 'exchange' of a human ability that is not separable from the worker's body, produces daily subordination through the use of a fiction that there is a free exchange. This derives from, but also amends, Marx's<sup>334</sup> analysis of the exchange of labour power for a wage and the exploitation that results when both are treated as commodities. Pateman draws together an analysis of marriage contracts as well as employment contracts, prostitution contracts<sup>335</sup> and surrogacy contracts to show how these operate in practice. Her stress is upon daily subordination. This does not rely upon a rereading of Hobbes such that women are to be viewed as prisoners within a hypothetical state of nature. Pateman's move allows her to emphasise the political nature of the marriage contract itself and to trace its development alongside the employment contract. As she recognises, the marriage contract is no longer central to the lives of women. Later in this chapter I will go on to develop her analysis of the marriage contract and employment contract, discussing the use of implied terms in contemporary English law. This raises the question of how to reconceptualise the position of women who are now constructed as 'dependant'<sup>336</sup> not upon men but upon the state. Pateman also

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<sup>334</sup> K. Marx, *Capital: A Critique of Political Economy, Volume One* (London: Lawrence and Wishart, 1954).

<sup>335</sup> For Pateman's analysis of prostitution contracts see also C. Pateman, 'Defending Prostitution: Charges Against Ericsson' in *Ethics* Vol. 93, 1983, pp. 561-565.

<sup>336</sup> For an analysis of the politics of the term 'dependency' that is also applicable to English law, see, N. Fraser and L. Gordon, 'A Genealogy of 'Dependency': Tracing a Keyword of the U.S. Welfare State' in N. Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (London: Routledge, 1997).



raises questions about the meaning of self-ownership, and the rights of dominion over others, that will be the subject of next chapter.

A further possible objection to Pateman's work should also be considered at this point. Foucault attacked the idea that 'political power obeys the model of a legal transaction involving a contractual type of exchange.'<sup>337</sup> Foucault's work serves as a warning against discussions of family, civil society and state as monolithic entities. He describes his analysis of power as the opposite of Hobbes' *Leviathan*:

In other words, rather than ask ourselves how the sovereign appears to us in his lofty isolation, we should try to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts, etc. We should try to grasp subjection in its material instance as a constitution of subjects. This would be the exact opposite to Hobbes' project in *Leviathan*, and of that, I believe of all jurists for whom the problem is the distillation of a single will – or rather, the constitution of a unitary, singular body animated by the spirit of sovereignty – from the particular wills of multiplicity of individuals.<sup>338</sup>

Whilst it may appear that this criticism must apply to Pateman: that she has failed to 'cut the head off the sovereign' and views sovereignty, or the law, as that which instantiates the sexual contract, I want to defend the usefulness of her analysis of contract law. This includes the way in which she links her critique of the marriage contract with that of the employment contract and of the story of the social/sexual contract. It is possible to highlight central themes in Pateman's work on the marriage contract and employment contract in a manner that goes beyond an analysis of sovereignty. Although these contracts are enforced by law, her work can be viewed as focusing upon the daily lives of women who are subject to the marriage contract (and of workers subject to employment contracts). Whilst it is possible to agree with Foucault that the intricacies of such relationships cannot be caught by a simple analysis of the contract, a point which

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<sup>337</sup> M. Foucault, 'Two Lectures' in Foucault (1980a) p. 88.

<sup>338</sup> Foucault (1980a) p. 97.

Pateman would acknowledge, Pateman is right to point out the role that contract plays in creating wives and employees.<sup>339</sup>

It is useful to consider what Pateman wants to achieve by telling the story of the sexual contract. She concludes by indicating that its retrieval does not provide a political programme but opens up a new perspective from which to assess political possibilities.<sup>340</sup> In this respect her aim is constructive. Just as Irigaray reworks masculinist stories to allow something different to emerge, so Pateman wishes to problematize,

[N]ature, sex, masculinity and femininity, the private, marriage, and prostitution...work and citizenship.<sup>341</sup>

This link between the operation of marriage contracts, employment contracts and citizenship is also illustrated in her recent article 'Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts'.<sup>342</sup> Pateman is consistent with her earlier work when she argues that subordination within the workplace and the home prevents both men and women from developing the personal attributes necessary for 'active citizenship'.<sup>343</sup>

A further criticism is levelled at Pateman by Moira Gatens. Gatens<sup>344</sup> points out that, despite the useful detailed readings of the social contract theorists, Pateman's model is underpinned by a view of women as sexually vulnerable to men. For Pateman, the social contract is set up as allowing men 'sexual access to women'. Pateman works with an image of men's mastery over women. Similarly,

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<sup>339</sup> Hindness argues that, within contemporary society, contract can be viewed as itself providing a technique of power, for example as a process that produces the 'job seeker' who views him/herself as an individual who is contracting with the state. This is a change from the role of contract within liberal theory and will be discussed in Chapter 6. B. Hindness, 'A Society Governed by Contract?' Davis et al. (1997) pp. 14-26.

<sup>340</sup> Pateman (1988) p. 233.

<sup>341</sup> Pateman (1988) p. 233.

<sup>342</sup> Pateman (2002) pp. 20-27.

<sup>343</sup> Pateman (2002) p. 34.

<sup>344</sup> M. Gatens, 'Contracting Sex: Essence, Genealogy and Desire' in Gatens (1996) pp. 76-91.

Fraser<sup>345</sup> argues that this does not adequately describe the relationship between men and women. However, Pateman's image does include the possibility of change.

Pateman concludes positively arguing that,

Men have a vested interest in maintaining the silence about the law of male sex-right, but the opportunity exists for political argument and action to move outside the dichotomies of patriarchal civil society, and for the creation of free relations in which manhood is reflected back from autonomous femininity.<sup>346</sup>

Pateman does not flesh out her view of 'autonomous femininity' and does not rely upon her image of what it is to be a self to support her important political critique of contract or her attack upon possessive individualism. This critical aspect of her work is therefore consistent with the image of selfhood that was discussed in Chapter 2, even if this is not a view of self that she employs.

Whilst Pateman does acknowledge the changing nature of the family,<sup>347</sup> it is Brown<sup>348</sup> who tries to further this analysis by shifting her focus to the dichotomies within liberalism itself, rather than the contract, *per se*. Although she criticises Pateman, Brown's analysis is similar to Pateman's in a number of respects. To examine these, it is useful to move away from the social contract itself and to detail Pateman's analysis of two particular contracts: the marriage contract and the employment contract.

## **The Relationship between the Social Contract, Marriage Contracts and Employment Contracts**

Before considering these contracts separately it is worth briefly discussing their relationship with the social contract. Gatens<sup>349</sup> argues that Pateman's analysis of the

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<sup>345</sup> N. Fraser, 'Beyond the Master/Subject Model: On Carole Pateman's *The Sexual Contract*' in Fraser (1997) pp. 225-235.

<sup>346</sup> Pateman (1988) p. 233.

<sup>347</sup> C. Pateman, 'Beyond the Sexual Contract?' in G. Dench, *Rewriting the Sexual Contract: Collected Views on Changing Relationships and Sexual Divisions of Labour* (London: Institute of Community Studies, 1997) pp. 1-9.

<sup>348</sup> W. Brown, 'Liberalism's Family Values' in Brown (1995) pp. 135-165.

<sup>349</sup> M. Gatens, 'Contracting Sex: Essence, Genealogy and Desire' in Gatens (1996) pp. 76-91.

social contract sits uneasily with her consideration of the marriage and employment contracts. Again, I want to defend Pateman on this point. Whilst the social contract is employed by theorists as a heuristic device, this theoretical move does stem from and, to some extent, perpetuates the same cultural beliefs as other uses of contract, i.e. it employs a contractual framework through which to consider social relations.

In the story of the social contract as told by Hobbes,<sup>350</sup> it is the social contract that allows other contracts to exist, by producing the conditions under which their enforcement can be guaranteed. However, it is possible to reverse this argument. What we understand by 'contract' is not fixed. It is being created by the way in which the term 'contract' is used, for example the way in which the law of contract is understood in the courts when dealing with specific types of contract, such as marriage contracts and employment contracts. This meaning of contract can then be read back into the story of the social contract.

Similarly, images of the story of the social contract can colour the meaning of 'contract'. The question of when (and whether) the weaker party can end a contract continues to be subject to argument in both the social contract theory and in the courts' analyses of employment contracts and marriage contracts. Hobbes argued that the sovereign should enforce contracts, including the social contract, even if those subject to it had been forced into agreement by the use or threat of violence. The only time a subject could reject the social contract would be if her/his life were to be threatened. This is a necessary exception for Hobbes, in order to be consistent with his argument that the subject's motivation for giving up his freedom is to survive. This is central to Hobbes' image of 'human nature'. If the sovereign could kill one of his subjects then the subject would have been better off taking his or her chances in the state of nature. As I will discuss below,

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<sup>350</sup> As discussed above, Hobbes is important for Pateman because he is not typical of the social contract theorists who viewed women's subordination within the family as natural.

if an employer threatens an employee's life then this would certainly be viewed as a fundamental breach of contract. The employee would be able to treat the contract as already ended. Importantly, the same is not true within a marriage because court action is required before either party can end the contract.

Workers who suffer poor working conditions know that they have to endure them because the other options are worse and they are not persuaded that the use of contract spells equality. Similarly, married women may well not consider the contractual nature of marriage unless attempting to escape a violent man or divorcing. Nevertheless, this does not mean that to criticise contract is to criticise a fetish, as Brown argues against Pateman.<sup>351</sup> Further, the courts are willing to read an employment contract into a relationship which complies with the courts' tests as to whether the person working is an employee rather than an independent contractor.<sup>352</sup> Contractual terms are implied into the contract irrespective of the parties' intentions or whether they had complied with the law by signing a written contract of terms and conditions. The mechanism used within employment law is therefore to decide that there is a contract and then to imply terms into this contract.

Compare this legal mechanism to the law relating to women who are mothers and cohabiting, but are not subject to a marriage contract. In a traditional relationship, in which women work in the home and have not contributed money or monies worth to the purchase of the house, the unmarried woman is in a less secure position with regard to financial claims if the relationship ends. However, the law will imply obligations upon men with regard to the upkeep of children.

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<sup>351</sup> W. Brown, 'Liberalism's Family Values' in Brown (1995) pp. 135-165.

<sup>352</sup> This distinction stems from the Beveridge Report which replaced the nineteenth century terms of independent contractor, casual worker, servant, labourer and workmen. See S. Deakin, 'The Many Futures of the Contract of Employment' in Conaghan et al. (2002) p. 179.

This now operates through the Child Support Agency,<sup>353</sup> which imposes an obligation upon the father to support the child that operates in an analogous manner as the imposed obligations upon employers, discussed above. Whether the father's obligations to the child are viewed as an implied contract, entered into upon the birth, or through another mechanism, does not necessarily make much difference to the outcome. The position of gay couples has also moved from a position of not being recognised by the law, with those ensuing advantages and disadvantages, to one of increased regulation.<sup>354</sup>

Once the courts were willing to extend the use of implied terms in contracts, in order to protect the weaker party, the nineteenth century laissez faire image of two persons making an agreement was lost.<sup>355</sup> The mechanism by which contract operates is therefore little different between mothers who are unmarried women, whose partners the courts treat as having assumed to have agreed to pay for the child by virtue of being its father, and employees, whose employer tries to claim that he is simply hiring an independent contractor to avoid employment legislation. Through the use of protective statutes, the law will impose obligations upon the stronger party in each case. This also impacts upon the weaker party in unpredictable ways 'on the ground', for example, fathers may view payments as an exchange that allows him to maintain contact with both the child and the mother. The discussion of contract is important because it still occurs, even though the relationship between status and contract is ambiguous.

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<sup>353</sup> This is not an endorsement of the Child Support Agency. See for example, M. Freeman, 'Divorce: Contemporary Problems and Future Prospects' in M. Freeman, *Divorce: Where Next?* (Aldershot: Dartmouth, 1996) pp. 1-8. Freeman argues that 'It is as unsurprising as it is unfortunate that the moral panic engendered around the CSA should concern its impact upon men...rather than on the plight of one-parent female-headed households or the feminisation of poverty'. Freeman (1996) p. 2. The rejection of the Beveridge proposal to include housewives as a class to be insured against marital breakdown was discussed in the last chapter.

<sup>354</sup> See D. Bell and J. Binnie, 'Sexual Citizenship: Law, Theory and Politics' in J. Richardson and R. Sandland, *Feminist Perspectives on Law and Theory* (London: Cavendish, 2000) pp. 167-186.

<sup>355</sup> For an extended discussion of this point see Atiyah (2000).

Pateman's strength is in drawing these two together. For the last two sections of this chapter I will consider Pateman's work in the context of contemporary English marriage contracts and employment contracts.

## The Marriage Contract

Pateman gives an historical account of the legal ambiguity of women's position within the marriage contract, brought out by comparing it with the slave contract and the employment contract. She raises a number of legal issues that are not of contemporary relevance and yet provide an important background to cultural understandings, and contemporary legal deliberations, about marriage. She avoids the trap of treating law as an ideal form that needs to be consistent. It is often inconsistent because 'legal reasoning' tends to provide a post hoc justification for the decision reached.<sup>356</sup>

Both Nancy Fraser<sup>357</sup> and Wendy Brown<sup>358</sup> provide useful responses to Pateman's position, with regard to a contemporary understanding of the marriage contract, at a time when the nuclear family is breaking down. Fraser focuses upon one aspect of Pateman's work: her reading of the relationship between the parties to the contract. As mentioned above, she argues that Pateman views this relationship in terms of 'master/subject'<sup>359</sup> which does not adequately describe the marriage relationship. Fraser holds onto the importance of considering women's position within society as a whole – in order to make the simple point that marriage involves more than male sex-right within the marriage itself. She draws upon the work of

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<sup>356</sup> For support see, for example, Mossman (1991); Griffiths (1997).

<sup>357</sup> N. Fraser, 'Beyond the Master/Subject Model: On Carole Pateman's *The Sexual Contract*' in Fraser (1997) pp. 225-235.

<sup>358</sup> W. Brown, 'Liberalism's Family Values' in Brown (1995) pp. 135-165.

<sup>359</sup> This is a difficult phrase for Fraser to use. Although this is not discussed, the reason that the common terms 'master/slave' or 'master/servant' – which is still a feature of employment law texts – is avoided is clearly because Pateman draws out the difference between these situations. One of the strengths of Pateman's work is her historical analysis of the employment contract that derives from consideration of the position of wives – rather than vice versa.

Okin<sup>360</sup> to produce an argument that appears relevant to the position of women in the UK as well as the US,

If marriage still too often resembles a master/subject relation, this is due in large measure to its social embeddedness in relation to sex-segmented labor markets, gender-structured social-welfare policy regimes, and the gender division of unpaid labour....In general, then, although the legal reform of marriage remains significantly incomplete, the institution in the United States today is probably better understood as an unequal partnership in which 'voice' correlates inversely with opportunities for 'exit' than as a master/subject relation.<sup>361</sup>

She also argues that the relationship of 'master/subject' may provide an interpretative framework for some couples but not for others. I think this is right, but also that this does not generally undermine Pateman's analysis of the social contract theorists nor upon the different types of subordination historically attached to the marriage contract and employment contract.

In contrast, Brown's concerns do focus upon Pateman's project as a whole and attempt to supersede it. Brown<sup>362</sup> draws an analogy with the work of Weber to illustrate her argument that Pateman's position is historically correct but is *no longer* relevant. Weber, she argues, illustrated the way in which capitalism relied upon a Protestant work ethic and then pointed to the fact that a work ethic is no longer needed for the maintenance of capitalism. This Protestant work ethic is now only reproduced in certain aspects of the culture. Similarly, she argues that Pateman correctly outlines the historical role of contract in women's subordination, but that Pateman fails to see that contract is no longer necessary for its continuation. To continue to fight against contract, Brown argues, would be like attacking Protestantism in the hope of undermining capitalist exploitation.

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<sup>360</sup> Okin (1989) cited N. Fraser, 'Beyond the Master/Subject Model: On Carole Pateman's *The Sexual Contract*' in Fraser (1997) p. 228.

<sup>361</sup> N. Fraser, 'Beyond the Master/Subject Model: On Carole Pateman's *The Sexual Contract*' in Fraser (1997) p. 228. Whilst her reference is to the US, these arguments are relevant to the current discussion of marriage in England.

<sup>362</sup> W. Brown, 'Liberalism's Family Values' in Brown (1995) pp. 135-165, p. 135.



This argument is more applicable to marriage contracts than to employment contracts. As discussed at the beginning of this chapter, Pateman has admitted that,

The patriarchal structures with which I was concerned have been considerably weakened, and the heyday of the worker/breadwinner was from 1840-1970.<sup>363</sup>

Nevertheless, Pateman argues that the sexual contract still provides a useful tool for contemporary analysis. Brown goes on to develop her own position which draws upon Pateman. At a basic level, she argues that Pateman's attack on the marriage contract cannot account for the position of single women, with or without children. Women are no longer forced into the marriage contract for survival or even for social recognition. Brown ignores legal change in the nature of marriage itself and seems to regard these as largely irrelevant. Here, it must be emphasised that Brown is writing in the context of US law and not English law. It is arguable that, in England, there has been a shift away from the last vestiges of the doctrine of coverture. The House of Lords decision in *R v R* (1991)<sup>364</sup> (that women could no longer be legally forced to have sex with their husbands) is a move towards the courts seeing marriage in terms of contract and away from status – although this is as yet not fully realised in England. For example, the bar on gay marriages means that the parties to the contract must be male and female, i.e. based upon status in this regard.

There is a split between the ways in which the English courts deal with marriage – and, where possible, incorporate the position of cohabitantes within their remit – and popular views of marriage. A stark example of the way in which the courts reason when viewing marriage through the framework of contract is provided by the case of *R v R* (1991). In the High Court, at first instance, the

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<sup>363</sup> Pateman (1996) p. 204.

<sup>364</sup> *R v R* (1991) 4 All. ER 481.

discussion of rape within marriage in this case centred upon a consideration of implied terms within the marriage contract. This will be examined below but the contractual framework employed must be borne in mind whilst considering Brown's argument that contract is no longer important in women's subordination.

As I will discuss below, there is an argument within employment law that the increase in the use of implied terms (in part through an increase in protective legislation in such areas as health and safety) has resulted in a shift away from the traditional image of contract.<sup>365</sup> As Pateman rightly points out, the problem with the marriage contract (and employment contracts) is that the contracting parties enter into relationships of subordination because the weaker party purports to contract something which cannot be separated from her/his body. Whether or not this body is female may well be relevant to the service that is to be provided and cannot be abstracted away from any analysis.

Brown's central argument is that,

the legacy of gender subordination Pateman identifies as historically installed in the sexual-social contract is to be found not in contemporary contract relations but in the *terms* of liberal discourse that configure and organize liberal jurisprudence, public policy and popular consciousness.<sup>366</sup> (Emphasis is in the original.)

So, Brown, advocates a move away from the sexual contract and towards an analysis of the liberal discourse that is premised upon it. Given that Pateman's sexual contract takes the form of a reworking of a story, it is initially difficult to understand how Brown's move can be useful. Some of Brown's analysis in illustrating how 'liberal ontology is fundamentally and not continentally gendered'<sup>367</sup> covers very similar ground to that of Pateman, particularly Pateman's earlier work on the problematic nature of women's consent.<sup>368</sup> However, Brown's work is helpful

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<sup>365</sup> A. Thompson, 'The Law of Contract' in I. Grigg-Spall and P. Ireland, eds., *The Critical Lawyers' Handbook* (London: Pluto, 1992) pp. 69-76.

<sup>366</sup> W. Brown (1995) p. 138.

<sup>367</sup> W. Brown (1995) p. 150.

<sup>368</sup> This links with criminal law and the many debates around the problem of the role of consent in rape law and its relationship to citizenship. See Pateman (1980) pp. 71-89. This point is also

in broadening Pateman's analysis – in a manner similar to that of Fraser – to consider the breakdown of the family. This involves recognising that the marriage contract as such is not required for women's subordination. This does not undermine Pateman's argument so much as move forward to consider the position of women for whom the state is increasingly 'the man in their lives'.<sup>369</sup> As discussed above, the law in this area could be conceived as contractual because the courts are willing to impose some obligations upon unmarried fathers – just as they impose obligations upon employees without a written employment contract. This involves blurring a distinction between status and contract that is already present in both employment and marriage contracts, to be considered in more detail below.

In Brown's discussion of the way in which women's bodies are viewed as vulnerable to rape, she considers a link between the image of women as being unable to defend the boundaries of the state and as being unable to defend their own body boundaries. The role of the female body – and its supposed vulnerability to rape – is then considered within myths of origin of the state, including the story of the social/sexual contract. These myths of origin justify law as necessary to protect women from their so-called 'natural' vulnerability to rape. It is this unquestioned assumption that women are naturally susceptible to rape that Gatens<sup>370</sup> accuses Pateman of maintaining. By considering the social contract within the context of other myths of origin, Brown avoids emphasising 'contract' *per se*.<sup>371</sup> Women are

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taken up by Ngaire Naffine in Naffine (1998); with regard to medical consent and subjectivity by Katherine O'Donovan in O'Donovan (1997) pp. 47-64. For Brown's discussion on consent see Brown (1995) pp. 162-4.

<sup>369</sup> This is also the concern of Fraser who has analysed the political meaning of need and dependency. See, for example, N. Fraser, 'Women, Welfare and the Politics of Need Interpretation' and 'Struggle over needs: Outline of a Socialist-Feminist Critical Theory of Late Capitalist Political Culture' in Fraser (1989) pp. 144-187; 'A Genealogy of 'Dependency': Tracing a Keyword of the U.S. Welfare State' in Fraser (1997). This is the area that is missing from historical (1840-1970) discussions of the marriage and employment contracts in *The Sexual Contract* but which is addressed in Pateman's later work. See C. Pateman, 'The Patriarchal Welfare State' in J.B. Landes, ed., *Feminism: the Public and Private* (Oxford: Oxford University Press, 1998) pp. 241-274.

<sup>370</sup> M. Gatens, 'Contracting Sex: Essence, Genealogy and Desire' in Gatens (1996) pp. 76-91.

<sup>371</sup> Brown's discussion, which also includes a discussion of Freud, resonates with the move that Whitford makes in linking the social contract with the 'symbolic contract'. See also M. Whitford,

positioned as being vulnerable to rape and the law is viewed as being their protector, a set-up which Brown describes as a ‘protection racket’.<sup>372</sup> This can be viewed as an *inversion* of what has actually happened. As Pateman illustrates, law did not protect women. It created a realm, the ‘state’ of marriage, in which women could be forced to have sex legitimately. To draw on Marcus,<sup>373</sup> these stories about law (and the legal proceeding themselves) perpetuate an image of woman’s body as already raped and men as naturally potential rapists. This is to view these stories, not as perpetuating a false consciousness, but as an inverted description of the way in which social relations operated in a society at a particular time. To make this move does not entail an assumption that these social relations are fixed.

To illustrate this, it is useful to consider the case of *R v R* (1991). The precedent that a husband can legally force his wife to have sex dates from Sir Matthew Hale’s *History of the Pleas of the Crown* (1736),<sup>374</sup>

But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.

This was applied in the ecclesiastical courts in *Popkin v Popkin* (1794) in which Lord Stowell said that,

The husband has a right to the person of his wife but not if her health is endangered.<sup>375</sup>

This is a noteworthy use of the term ‘person’ given that women were not viewed as ‘persons’ until the courts declared that they had achieved personhood in the *Persons Case*.<sup>376</sup>

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‘Irigaray, Utopia and the Death Drive’ in C. Burke, N. Schor and M. Whitford, eds., *Engaging with Irigaray* (New York: Columbia University Press, 1994) pp. 379-400.

<sup>372</sup> Brown (1995) p. 188.

<sup>373</sup> S. Marcus, ‘Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention’ in J. Butler and J.W. Scott, eds., *Feminists Theorize the Political* (London: Routledge, 1992) pp. 385-403.

<sup>374</sup> M. Hale, *Hale’s History of the Pleas of the Crown* (1736) Vol. 1 Ch. 58 p. 629 cited in H.L. *R v R* (1991) 4 All ER 481 at p. 604.

<sup>375</sup> Cited *R v R* (1991) 4 All ER 481, at p. 604.

<sup>376</sup> *Edwards v Attorney General of Canada* (1930) A.C. 124. This is discussed in Chapter 3.

The discussion in *R v R* (1991) centres upon the legal framework of contractual implied terms. This is the same framework in which employment contracts are discussed and the use of the implied term within these contracts is strikingly similar. This mechanism has allowed the courts to alter contracts according to their own – usually conservative – beliefs.<sup>377</sup> A quotation from Owen J., the trial judge at first instance, illustrates how the framework of contract is used. In this case, Owen J. is saddled with the contractual legal framework through which the law views marriage, but, in a climate influenced by feminism, he also seeks to mitigate against the misogyny of earlier decisions:

What, in law, will suffice to revoke that consent which the wife gives to sexual intercourse upon marriage and which the law implies from the facts of the marriage?...It must be sufficient for there to be agreement between the parties. Of course, an agreement of the parties means what it says. It does not mean something which is done unilaterally....As it seems to me, from his action in telephoning her and saying that he intended to see about a divorce and thereby to accede to what she was doing, there is sufficient here to indicate that there was an implied agreement to a separation and to a withdrawal of that consent to sexual intercourse, which the law, I will assume and accept, implies.<sup>378</sup>

Whilst, for the majority of the population, contract may not provide a conceptual framework through which to consider rape, it does provide such a frame of reference for judges – even if it is only evoked to justify a decision that is made on the grounds of public policy. Here, the trial judge is discussing the implications of the husband's act of telephoning his wife to say that he intended to seek a divorce. Owen J., the trial judge, can be understood to be posing the following question: *was this telephone call sufficient to indicate an implied agreement to divorce which would be sufficient to revoke the wife's implied consent to sex within the marriage contract?*

Owen J. refers to the principle in contract that an agreement is not something that can be made unilaterally. This point can be examined using an example from

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<sup>377</sup> For a detailed analysis see, for example, Griffiths (1997).

<sup>378</sup> *R v R* (1991) 1 All ER 747, at p. 754 discussed by the Lords in *R v R* (1991) 4 All ER 481, at p. 606.

employment law. If there is a fundamental breach of contract by one of the parties, the other party can assume that, because of this action in itself, s/he is no longer bound by the contract. So for example, if my employer hit me I could walk out and claim unfair dismissal. The violent action alone would be taken to mean that the employer no longer intended to maintain the employment contract and, therefore, that I was released immediately from my obligations under the contract. If I ignored this behaviour then I would be deemed to have *accepted* the employer's breach of contract and the contract would be deemed to continue. Married women are in a worse position than employees in this respect because there is no violent act, short of murder, that can automatically release them from the marriage contract. Ironically, in this sense, employment contracts are more 'private', as they can be ended without the intervention of the courts.

Further, the position of women within marriage can be compared to that of women who were sexually harassed at work, prior to the landmark case of *Porcelli v Strathclyde R.C.* (1984).<sup>379</sup> Before this decision, women had to show that an act of sexual harassment was linked to some other contractual disadvantage, for example, being demoted or dismissed, in order to claim damages for a breach of *Sex Discrimination Act 1975*. In *Porcelli*, the Court of Sessions decided that sexual harassment was to be treated as a detriment in its own right and so it was no longer necessary to show any further detriment. This can be compared with the situation pertaining under the marriage contract. In the case of *R v R* (1991), Owen J. did not assume that the rape alone, as an act in its own right, could demonstrate even a willingness to end the marriage contract. This had to be demonstrated by the telephone call in which divorce was discussed.

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<sup>379</sup> *Porcelli v Strathclyde R.C.* (1984) ICR 177. This Scottish case is now part of English law. For a summary of current law on sexual harassment, see S. Johnson and M. Rubenstein, 'Sexual Harassment and the Law' in *Equal Opportunities Review* No. 102, February, 2002, pp. 16-17.

Implied terms have become important within the employment and matrimonial contracts because they regulate relationships of subordination. The demands of these relationships cannot be dictated in sufficient detail by the contract itself, and therefore the courts are willing to imply extra terms into the contract. Within the twentieth century this has also been a mechanism by which protective legislation has been implemented. The temporal sequence of these contracts needs to be thought through, to understand their effects, in order to consider whether Brown is right in her argument that contract is no longer important in women's subordination. Whereas an employment contract may be the subject of negotiation between employer and employee (or his/her trade union)<sup>380</sup> during the course of the relationship, the same framework of negotiation may not occur within marriage – although informal daily negotiation may well occur.<sup>381</sup> The courts are normally involved only after the relationship has broken down. Therefore, the implied term arises later. However, this provides a framework through which the relationship can be viewed by the parties and which can provide leverage when a relationship is breaking down. This is particularly the case when legal advice is sought within the duration of the relationship.<sup>382</sup>

Linked with this point, Elizabeth Kingdom<sup>383</sup> has argued in favour of the adoption of cohabitation contracts, for both married couples and cohabitants, detailing clauses such as the question of who will care for the children if they fall ill.

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<sup>380</sup> There has been a shift in the role of trade unions away from that of collective negotiation to that of monitoring and enforcing individual members' legal claims. See Deakin (2002) pp. 193-194; H. Collins, K.D. Ewing and A. McColgan, *Labour Law: Tests and Materials* (Oxford: Hart Publishing, 2001) pp. 56-58.

<sup>381</sup> See, for example, R. Lister and C. Callender, 'Income Distribution within Families and the Reform of Social Security' in *Journal of Social Welfare and Family Law* Vol. 21, No. 3, 1999 pp. 203-220.

<sup>382</sup> In a Kafkaesque manner, myths abound as to what is law, especially amongst people who are afraid to seek legal advice. I had a client who thought that her children would be taken away if she instigated divorce. In these circumstances, the myths can be even more conservative than the law.

<sup>383</sup> E. Kingdom, 'Cohabitation Contracts and the Democratization of Personal Relations' in *Feminist Legal Studies* Vol. 8, 2000, pp. 5-27.

Whilst it is useful to focus upon such issues at the start of the relationship, Okin's arguments are relevant, here. Okin<sup>384</sup> points out that the family systematically produces vulnerability through women's disproportionate contribution to child care. Here, the comparison between marriage (or cohabitation) contracts and employment contracts is helpful. Whilst negotiation in both situations may be useful, more radical change is required in order for this to be democratic, a point that Kingdom acknowledges.<sup>385</sup>

Returning to the case of *R v R* (1991), the case proceeded to the Court of Appeal and the House of Lords, both of which decided to take what the Court of Appeal called 'the radical solution'<sup>386</sup>: that there was no longer to be a marital immunity to rape. This was described as the 'removal of a common law fiction which has become anachronistic and offensive.'<sup>387</sup> The Lords did not attack the use of a contractual framework through which to think about marriage. On the contrary, they employed a contractual framework but held that a particular contractual term (that a woman could be assumed to consent to sex with her husband) could no longer be implied into the marriage contract. This leaves open the possibility that further regulation of marriage contracts could occur through the courts' use of implied contractual terms.

Pateman's analysis of the marriage, civil slave and employment contracts draws out the complexities of trying to view long term relationships within this contractual frame.<sup>388</sup> Brown discusses this in terms of an ideological moment in which the exploitative nature of the relationship is obscured when contract is

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<sup>384</sup> Okin (1989) pp. 167-169.

<sup>385</sup> Kingdom (2000) p. 23.

<sup>386</sup> C.A. *R v R* (1991) 2 WLR 1065 and H.L. *R v R* (1991) 4 All ER 481.

<sup>387</sup> C.A. *R v R* (1991) 2 WLR 1065 and H.L. *R v R* (1991) 4 All ER 481.

<sup>388</sup> This has been recognised by contract lawyers as well as by employment lawyers (who are unable to avoid noticing this point). See I. MacNeil, *The New Social Contract* (Yale: Yale University Press, 1980).



portrayed as a free exchange between equals – in keeping with Pateman’s analysis and that of Marx. For Brown, there is also a discursive moment in which identities are created. My rereading of Pateman makes Brown’s move unnecessary. Pateman herself argues that the contract produces wives and employees. It is possible to rework Pateman’s analysis in a manner that plays down the moments when she assumes that women’s vulnerability is fixed. I will deal with this further in the next chapter.

Brown attempts to supersede Pateman by focusing upon the way in which liberalism produces dichotomies: equality/ difference, liberty/ necessity, autonomy/ dependence, rights/ needs, individual/ family, self-interest/ selflessness, public/ private, contract/ consent.<sup>389</sup> This is a useful analysis, which draws out dichotomies which are already implicit in Pateman’s own work. Brown is right to argue that there is a move away from the predominance of the marriage contract itself – if by this she means that marriage is no longer central within the subordination and exploitation of women compared with the time when marriage served as a legal disability. However, the case of *R v R* (1991) illustrates the way in which contract is still applied within the courts. In addition, there is still an appeal to contract, particularly in terms of the growing areas of surrogacy, reproductive technology and debates around cohabitation contracts as well as employment contracts.

## **The Employment Contract**

Against Brown, I will argue that contract is still prevalent within the way in which employees think about their position. Whereas Pateman’s earlier work<sup>390</sup> considered the problem of ‘political obligation’ in terms of questions of

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<sup>389</sup> W. Brown, ‘Liberalism’s Family Values’ in Brown (1995) p. 152.

<sup>390</sup> For example, C. Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* (Cambridge: Polity, 1985).

obligations to obey the state, in *The Sexual Contract*<sup>391</sup> she is concerned with *civil* contractual obligations. In other words, Pateman is concerned with obligations between individuals and between individuals and companies.<sup>392</sup> Her Marxist argument regarding the employment contract resolves a problem that is still discussed within contemporary employment law text books and employment case law. It is worth considering this because it is relevant to the way in which a worker is viewed as having property in his person, to be discussed in more detail in the next chapter.

The problem for the courts is that it is difficult to draw up a distinction between employees and independent contractors if it is assumed that the employment contract is a contract for a particular piece of work. There are a number of tests employed in this area.<sup>393</sup> One way in which this problem is avoided is by dividing the employment contract into two stages: firstly, the exchange of work for wages; and, secondly, the creation of an expectation that the same exchange will occur again in future. This can be illustrated by the following quotation from Freeland, an employment lawyer:

[T]he contract has a two-tiered structure. At the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance. The second level – the promise to employ and be employed – provides the arrangement with its stability and with its continuity as a contract.<sup>394</sup>

This glories in the title of ‘mutuality of obligations test’ and has been used in cases<sup>395</sup> to consider the question of whether to classify a worker as an employee (with employment rights) or an independent contractor (with even fewer rights).

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<sup>391</sup> Pateman (1988).

<sup>392</sup> Companies have legal personality. In other words they are treated as if they were men – even when women were not viewed as ‘persons’.

<sup>393</sup> S. Deakin and G.S. Morris, *Labour Law* (London: Butterworths, 2001) p. 148.

<sup>394</sup> M. Freeland, *The Contract of Employment* (Oxford : Clarendon Press, 1976) p. 20.

<sup>395</sup> *Hewlett Packard Ltd. v O’Murphy* No. EAT/612/01; (2001) WL 1135163; the argument has been used to exclude non-traditional workers (disproportionately affecting women) from employment rights, see *O’Kelly v Trust House Forte* (1984) QB 90.

This problem only arises for liberal employment lawyers because they view the employment contract as being an exchange of labour – rather than labour power (i.e. the capacity to labour) – for money. The difference is important because the exchange of labour for money would imply that all labour was paid for, i.e. that employees received the value of the goods they produced. As Marx<sup>396</sup> argued, if this were true then there would be no valorisation of capital as a result of the extraction of surplus value. In other words, the worker would be paid for all of the working day and not simply a part of it.

Pateman also details the way in which the employment contract differs from the marriage contract. As Whitford<sup>397</sup> points out, Pateman covers similar ground to Irigaray, whilst concentrating upon an historical perspective. This part of *The Sexual Contract* does not fit exactly with Irigaray's rereading of Marx and yet raises similar issues relating to the relationship between women's subordination and capitalism. Both want to keep hold of important aspects of Marx's analysis whilst refusing to privilege the employment contract. Pateman points to four main ways in which the 'free' labour of employees differs from 'unfree' labour of married women (and slaves): workers are paid a wage rather than provided with 'protection'; the employment contract is limited in time whereas married women have an open-ended obligation with regard to housework; the worker is not deemed to contract out *himself* (or 'person' as Lord Stowell put it in *Popkin v Popkin* (1794), discussed above) but his labour power – part of the property in the person; the worker stands on an equal footing with the employer as a 'juridically free and equal citizen'. With regard to this last point alone, regarding formal equality, married women have achieved the same status as men. The fact that married women were not viewed as having property in their person is another way of saying that only men were

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<sup>396</sup> Marx (1954) p. 172.

<sup>397</sup> M. Whitford, *Luce Irigaray: Philosophy in the Feminine* (London: Routledge, 1991) pp. 169-191.

traditionally viewed as possessive individuals, or as having self-ownership, to be discussed in the next chapter.

The peculiarity of the employment contract can be brought out by Pateman's<sup>398</sup> comparison between three different versions of the relationship between workers and 'property in the person'. If it is assumed that one's ability to work can be treated as a commodity and can be alienated completely, this results in a slave contract. There are no limitations upon the work and this is associated with a difference in status between master and slave. The current situation is that the worker's labour power is sold in accordance with a contract on a more piecemeal basis and both employer and employee are viewed as juridically equal. This represents a middle path for Pateman. The third alternative is to deny that human abilities can be removed from the person. The employment contract really requires a worker to turn up and be told what to do. Pateman's third alternative is therefore to question why 'the renting of persons' is viewed as compatible with political equality. Her focus is therefore upon subordination and the interrelationship between marriage and employment contracts and the welfare state. As she puts it,

But if democratisation is to take place, property in the person must be left behind with civil subordination. Two of the most important questions are whether the right of self-government should continue to be (partially) alienable, and whether the renting of persons should be deemed compatible with democratic citizenship.<sup>399</sup>

It is useful to illustrate the difference between the employment and marriage contracts by returning to the question of the termination of the contract. To recap, whereas the domestic sphere – as compared to civil society and the state – was viewed as 'private', as soon as the question of termination of the contract arises the marriage contract can be viewed as more 'public' than the employment contract. It is necessary to be careful about the use of the terms: public/private. In

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<sup>398</sup> Pateman (2002) p. 31.

<sup>399</sup> Pateman (2002) p. 52.

law, to describe a case as involving ‘public’ law means that the state is involved. ‘Private’ law therefore covers any litigation between individuals and/or companies that, by definition, have legal personality. However, here I simply mean that employment contracts can be severed without court involvement whereas the termination of a marriage must be read out in open court, i.e. made public in the broader sense of the term. It is impossible to repudiate a marriage contract without the involvement of the courts. So, in the example mentioned above, if an employer hits an employee then this constitutes constructive dismissal and the employee can accept the breach of contract, and can leave and claim damages for unfair dismissal. However, wife beating will not be taken as repudiation of the marriage contract.

Further, it is useful to consider why only damages are available in these circumstances within the employment scenario. Reinstatement is not awarded when the employment relationship is judged by the employment tribunal to have broken down. In this way, the courts discuss the employment relationship in the same terms as a divorce, in which irretrievable breakdown of the relationship<sup>400</sup> must be demonstrated. The personal nature of the employment contract is also viewed as important within other legal tests. For example, there is deemed (by the courts) to be an implied term of ‘mutual trust and confidence’ in all employment contracts. In considering this, the courts have, on occasions, applied a psychological test. It has been argued that the implied existence of the ‘mutual trust and confidence’ term means that not only must the employee have trust and confidence in her/his employer, s/he must also be able to believe reasonably that the employer has trust and confidence in her/him. For example, an employer requesting that an employee take a psychiatric examination was deemed to have breached this term because this

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<sup>400</sup> *Matrimonial Causes Act 1973 s1(1)*

behaviour ‘objectively’<sup>401</sup> implies that the employer does not have trust and confidence in the employee.<sup>402</sup>

Brown’s critique of Pateman must be considered in the context of the courts’ wide ability to imply terms into employment contracts. In this case, the relationship is still viewed in terms of ‘contract’ but this contract is far from the paradigm image of an exchange between two equal individuals. The marriage contract has changed, dropping some of its ‘brutal origins’,<sup>403</sup> and at the same time is becoming less relevant, as it shifts, to some degree, away from status. Pateman’s critique of contract illustrates why this is not a solution for feminists, however. Women would not be better off if they could ‘freely’ negotiate the marriage contract, as I will discuss below. The employment contract is becoming more akin to a device for dealing with a status relationship, through the use of implied terms and protective legislation.

Brown should not be so confident that ‘contract’ has lost its pulling power. In a book review of *The New Contractualism?*<sup>404</sup> To be discussed in the next chapter, Dickenson has argued that,

What is wrong with the sexual contract, and its expression in marriage, is not that it is a contract but the fact it is sexual. Critics like Pateman ... tend to confuse the historical circumstances which prevailed at the time liberalism got under way – specifically the massively inegalitarian doctrine of coverture in marriage – with the essence of contract itself.<sup>405</sup>

Dickenson<sup>406</sup> argues that contractual relations can ensure mutual recognition and respect between equals. But where are these (non-sexual) egalitarian contracts that she takes as the standard of comparison here? In *The New Contractualism?* Marcia

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<sup>401</sup> In law, the term ‘objective’ is used to describe the courts’ decisions.

<sup>402</sup> *Bliss v South East Thames Regional Health Authority* (1985) IRLR 308.

<sup>403</sup> J.S. Mill, ‘The Subjection of Women’ in *Essays on Sex Equality*, ed. A.S. Rossi (Chicago: University of Chicago Press, 1970) p. 130 cited Pateman (1988) p. 119.

<sup>404</sup> Davis et al (1997) cited in Dickenson (1998) pp. 108-111.

<sup>405</sup> Dickenson (1998) p. 110.

<sup>406</sup> Dickenson (1997).

Neave<sup>407</sup> expresses her doubts that a move to allow couples to negotiate the marriage contract by way of pre-nuptial agreements would increase women's freedom and autonomy, detailing the factors – derived from women's customary unequal role with regard to child care – that make women less able to negotiate on equal terms with men.

When Dickenson argues for 'egalitarian' contracts, is she really thinking of employment contracts? I have illustrated the way in which courts have used the device of implied terms to construct (in different ways) both marriage contracts and employment contracts after the relationships have ended. These result in contracts that have little in common with the idea of simple exchange or even the voluntary assumption of responsibilities.<sup>408</sup> Perhaps consumer contracts – in which we should be free to buy genetically modified foods from international companies – provide Dickenson with her ideal of equal exchange? If the (non-sexual) egalitarian contract is not to be found in practice then perhaps it is an ideal. Another question arises: is the model of equal persons that these egalitarian contracts employ a useful feminist ideal? It may be that the best example that can be found of such an idealised form of exchange contract is the trading that occurs between equal sized companies. But does such an account take the position of women as typical or as aberration? I will continue to consider these questions in the next chapter on 'possessive individualism'.

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<sup>407</sup> M. Neave, 'The Hands that Sign the Paper: Women and Domestic Contracts' in Davis et al, *The New Contractualism?* (Melbourne: MacMillan, 1997) pp. 71-86. She cites Pateman approvingly at pp. 77-78.

<sup>408</sup> For a discussion of contract law which highlights this point, see A. Thompson, 'The Law of Contract' in I. Grigg-Spall, and P. Ireland, eds, *The Critical Lawyers' Handbook* (London: Pluto, 1992) pp. 69-76.

## Chapter 6: Possessive Individualism

Possessive individualism encompasses both a view of the self and normative political claims, some of which were touched upon in the last chapter. It also represents a point of tension and an area of political struggle at this point in time. The tension and political opportunities for change occur as a result of the breakdown of the traditional breadwinner/ housewife model. At issue is the question of the extent to which women are treated as having self-ownership or property in their person or whether other (better) models can be adopted.

The position of women is a blind spot in the concept of possessive individualism. As an ontological concept it can be shown that we do not 'spring up like mushrooms'.<sup>409</sup> We are not individuals from the start. In Chapter 2 I discussed contemporary theories from different areas of philosophy which detail the emergence of selves; processes that are not envisaged as complete after childhood. Whilst these start from a position in which women are the norm, they also give a much better account of what it is to be a self for men, as well as for women, than does possessive individualism.

However, the concept of possessive individualism is also normative. It is possible for proponents of this view to argue that we should be treated as if we were owners of our own abilities in order to have autonomy or to be treated justly. This is Nozick's<sup>410</sup> argument when he evokes Kant to argue that self-ownership is necessary if that we are to be treated as ends and not means.<sup>411</sup> In

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<sup>409</sup> T. Hobbes, *Man and Citizen* (De Homine and De Cive), ed. B. Gert (Indiapolis: Hackett Publishing Company, 1998) Ch. VIII, p. 205.

<sup>410</sup> Nozick (1974) p. 32-33.

<sup>411</sup> The form of this argument has some parallels in Cornell's radical rereading of Kant: that any legislator/judge should address the question of whether we would agree to the legislation/judgment if we were to be treated as free and equal persons. This cashes out with very different political consequences. For a discussion of the relationship between Cornell and Nozick see Chapter 3.



this chapter I want to deal with these arguments. Again, I believe that this framework depends upon a failure to consider the position of women. Both Pateman and Okin illustrate the incoherence that arises when women are treated as possessive individuals. This theoretical analysis is important at a time when, as illustrated by the wrongful birth cases in Chapter 4, there is some ambiguity amongst judges over whether the courts should view women as owners of their abilities. It is also a view of the self that is assumed by proponents of 'law and economics',<sup>412</sup> which is influential within legal theory.

In order to look at the meaning possessive individualism in more detail I will consider the work of Crawford Brough Macpherson, which Tully describes in the following terms:

Initially a challenge to the perceived wisdom, it soon became the reigning orthodoxy and then it was subjected to intense and sustained criticism.<sup>413</sup>

I will then discuss self-ownership by looking at some of the arguments of analytical Marxist Gerald Cohen and consider the ways in which both Pateman and Okin demonstrate that any view based upon possessive individualism depends upon its exclusion of women for its coherence.

As discussed above, by ignoring the position of women, proponents of possessive individualism also ignore the development of selves. At the end of the chapter I look at Anna Yeatman's<sup>414</sup> reaction to Pateman and her arguments that men were trained to view themselves as possessive individuals. The current training of persons to view themselves as possessive individuals is then considered, along with the gendered implication of Hindness'<sup>415</sup> argument that contract is now employed as a technique of control within the welfare state.

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<sup>412</sup> For example, R.A Posner, *Economic Analysis of Law* (Boston: Little Brown, 1992) cited and discussed in Radin (2001) p. 3-8.

<sup>413</sup> J. Tully, 'After the Macpherson Thesis' in J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993) p. 71.

<sup>414</sup> Yeatman (1997).

<sup>415</sup> Hindness (1997).

## Possessive Individualism/ Self-Ownership/ Property in the Person

The term ‘possessive individualism’ is associated with the work of Macpherson. Macpherson<sup>416</sup> draws upon Marx to argue that men were treated as possessive individuals in the work Hobbes, amongst other philosophers,<sup>417</sup> because this describes the behaviour of men within the emerging market economy and liberal tradition. The paradox of women’s position is ignored by Macpherson.

Pateman argues that Macpherson’s phrase ‘possessive individualism’,

brilliantly encapsulates the character of the attributes that are presented as belonging ‘naturally’ to individuals. When the attempt is made to see individuals in complete abstraction and isolation from each other, to see them as ‘ineluctably *separate* units’, they necessarily appear as ‘naturally’ free and equal with each other. They also appear to be possessors of property, including the property they own in their personal attributes and capacities.<sup>418</sup> (Emphasis is in the original.)

In *The Political Theory of Possessive Individualism: Hobbes to Locke*,<sup>419</sup>

Macpherson attacks the roots of the liberal democratic state, which he finds in English seventeenth-century political thought. Whilst recognising that Hobbes’ arguments in support of a monarchy – whose power is restricted only by his subjects’ need to resist anyone who threatens their survival – is hardly liberal,

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<sup>416</sup> Macpherson (1962).

<sup>417</sup> He includes in his analysis the following: Hobbes, The Levellers, Harrington, Locke, Hume, Burke, Bentham and James Mill. The first four are analysed in Macpherson (1962), Hume is discussed in C.B. Macpherson, ‘The Economic Penetration of Political Theory: Some Hypotheses’ in *Journal of History of Ideas* Vol. 39, 1978, pp. 101-118; Burke is dealt with in C.B. Macpherson, *Burke* (Oxford: Oxford University Press, 1980) and the utilitarians are discussed briefly in C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977). For critical summaries of this work see D. Miller, ‘The Macpherson Version’ in *Political Studies* Vol. XXX, No. 1, 1982, pp. 120-127; Tully (1993) pp. 71-95. The many criticisms of Macpherson’s thesis centre around the historical analysis as to when possessive individualism occurred. As I am interested in contemporary analysis of women’s ambivalent position with regard to possessive individualism, and since it is not denied that persons are treated as having property in the person, i.e. as possessive individuals, I am not detailing this historical debate.

<sup>418</sup> Pateman (1985b) p. 25. This is a discussion about Hobbes and I extend Pateman’s analysis to include Nozick, below. As discussed in Chapter 3, both Rawls and Cornell make a move that involves thinking about ‘free and equal persons’. However, neither Cornell nor Rawls adhere to a view of possessive individualism or self-ownership as I will define it in this section, i.e. the view that one’s labour (and the fruits of ones labour) should be viewed as one’s own property. Both want a greater distribution of resources than can be derived from this position. For further discussion of this point see Chapter 3.

<sup>419</sup> Macpherson (1962).

Macpherson argues that the individualism that influenced subsequent theory starts with Hobbes.<sup>420</sup> The difficulty with the original seventeenth-century individualism lay in its ‘possessive quality’:

Its possessive quality is found in its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them.... The relation of ownership, having become for more and more men the critically important relation determining their actual freedom and actual prospect of realizing their full potentialities, was read back into the nature of the individual. The individual, it was thought, is free in as much as he is proprietor of his person and its capacities. The human essence is freedom from dependence on the will of others, and freedom is a function of possession. Society becomes a lot of free equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise.<sup>421</sup>

Macpherson’s definition of ‘possessive individualism’ as the image of individuals who own their person or capacities, is very similar to that succinct definition of ‘self-ownership’ proffered by the contemporary analytic Marxist, Gerald Cohen:<sup>422</sup>

to own oneself is to enjoy with respect to oneself all those rights which a slave owner has over a complete chattel slave.<sup>423</sup>

‘Possessive individualism’ or ‘self-ownership’ both provide an image of individuals as free to sell their labour power as a commodity, a defining feature of a capitalist mode of production. Marx<sup>424</sup> points out that workers are ‘free’ in both senses of the term. They are ‘free of’ the means of production. In other words, they do not own the means of production, and so have to work for those who do own these. They are also ‘free’ because they are treated as owners of their own labour power and are therefore not compelled to work for one particular ‘master’. A society in which workers are treated as possessive individuals is therefore defined not only against a slave society, but against a feudal society.

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<sup>420</sup> Macpherson (1962) pp. 1-2. This point is also made by Cornell, discussed in Chapter 3.

<sup>421</sup> Macpherson (1962) p. 3

<sup>422</sup> Cohen (1995).

<sup>423</sup> Cohen (1995) p. 214.

<sup>424</sup> Marx (1976) Ch. 6, p. 280.

Possessive individualism – or self-ownership – appears to describe a relationship between a subject and an object that it owns. To clarify this point, it is worth considering the way in which this view of ownership has arisen. Macpherson<sup>425</sup> has traced the way that this view of property arose historically – illustrating the point that property ownership entails a regulation of relations between persons, not the relationship between a person and a thing. Cohen adds the following to his discussion of self-ownership:

Note that what is owned, according to the thesis of self-ownership, is not a self, where ‘self’ is used to denote some particularly intimate, or essential, part of the person. The slaveowner’s ownership is not restricted to the self, so construed, of the slave, and the moral self-owner is, similarly, possessed of himself entire, and not of his self alone. The term ‘self’ in the name of the thesis of self-ownership has a purely reflexive significance. It signifies that what owns and what is owned are one and the same, namely, the whole person. There is, consequently, no need to establish that my arm or my power to play basketball well is a proper part of my self, in order for me to claim sovereignty over it under the thesis of self-ownership.<sup>426</sup>

Although Macpherson discusses the possessive individual as ‘owing nothing to society’ this does not contradict Cohen’s definition of ‘self-ownership’, which I am arguing is synonymous with it. Cohen’s<sup>427</sup> analysis takes the form of an attack upon the concept of self-ownership generally and the implications of it that are drawn by Nozick, in particular. As discussed in Chapters 3 and 4 (with respect to Cornell’s legal test), Nozick argues that we should be treated as if we have those rights over ourselves that would belong to a chattel-slave owner in a slave society. Therefore, we should not have our labour appropriated by taxation, above that necessary to sustain a minimal state.

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<sup>425</sup> C.B. Macpherson, ‘Liberal Democracy and Property’ in Macpherson (1978b).

<sup>426</sup> Cohen (1995) pp. 68-69. The definition becomes relevant to his arguments against Nozick – as illustrated by the reference to the basketball play, discussed as a thought experiment about Wilt Chamberlain by Nozick in Nozick (1974) pp. 161-163. It should be noted that my discussions of ‘self’ in earlier chapters do not refer to an intimate part of the person but to the whole of the ‘person’ as Cohen uses the term, here. I have reserved the term ‘person’ in relation to legal issues whereas self is used as an ontological concept.

<sup>427</sup> Cohen (1995).

In attacking Nozick, Cohen claims that self-ownership (or possessive individualism, as I have discussed it) cannot be easily dismissed by Marxists because they make a similar move. When Marx claimed that the extraction of surplus value involved ‘theft’ from workers, the claim is based on the assumption that workers should own the fruits of their own labour, i.e. be treated as possessive individuals (or as having self-ownership). Nozick makes exactly the same move in attacking taxation on the grounds that possessive individuals should have the right to the fruits of their labour. Cohen illustrates that the premise of self-ownership can be dropped and that without it Marxism has the resources to argue against Nozick, by arguing that the laissez-faire liberalism, that would result from Nozick’s possessive individualism, would reduce the autonomy<sup>428</sup> of the working class.

To illustrate his use of the term further, Cohen goes on to criticise James Tully<sup>429</sup> for Tully’s argument that in order to talk about self-ownership it would be necessary to separate selves from their abilities. Cohen adds,

For the existence of ‘selves’ is not required by the thesis of self-ownership, and if ownership requires separability of what owns from what is owned, then self-ownership is impossible.<sup>430</sup>

It is this point and its implications that bring out what is central to Pateman’s work. For Pateman, contracts in which one party agrees to use part of his/her body or an ability that cannot be separated from the body will necessarily involve *subordination*:

The employer obtains right of command over the use of the bodies of workers in order, unilaterally, to have power over the process through which his commodities are produced.<sup>431</sup>

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<sup>428</sup> Cohen defines ‘autonomy’ as having a range of choice. G.A. Cohen, ‘Once more into the Breach of Self-Ownership: Reply Narveson and Brenkert’ in *The Journal of Ethics* Vol. 2, 1998, pp. 86. Whether or not Nozick defines autonomy in this way does not affect Cohen’s argument that self-ownership would reduce the range of choice of the working class in such a society. This is discussed in Cohen (1998) pp. 86-87.

<sup>429</sup> J. Tully, ‘Review of Grunebaum’ in *Ethics*, Vol. 98, 1987, pp. 851-854.

<sup>430</sup> Cohen (1995) p. 69.

<sup>431</sup> Pateman (1988) p. 215.

Pateman recognises, or course, that an ideal situation for both employer and husband is that the subordinate party regulates his or her self. Part of the work of both wives and employees is to try to predict the ‘needs’ of the husband or demands of the employer. Pateman<sup>432</sup> prefers to use the term ‘property in the person’ derived from Locke<sup>433</sup> because she is concerned that recent debates in political theory around the more popular term ‘self-ownership’ tend to play down the ‘ownership’ aspect of the term. Like Cohen, she objects to the way in which ‘self-ownership’ is often employed as synonymous with ‘autonomy’.

In order to think about Pateman’s emphasis upon subordination it is useful to return to my discussion of agency in Chapter 2, which brings together the work of the philosopher of science, Oyama with Battersby’s feminist metaphysics and Andy Clark on cognition. The relationship between employer and employee and husband and wife is negotiated. This process of negotiation can be envisaged in terms of the emergence of relationships in which the self is not passive but neither is she completely free. The image of a self that is most consistent with this is of one which emerges through relations with others, which is shaped and shapes her daily circumstances.<sup>434</sup>

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<sup>432</sup> Pateman (2002) p. 22.

<sup>433</sup> ‘Every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.’ J. Locke, *Two Treatises of Government*, ed. P. Laslett, (Cambridge: Cambridge University Press, 1999) Book II, Ch. V, p. 287.

<sup>434</sup> For details of the experience of this negotiation, which is obviously aided by those in a similar situation, see, for example, S.L. Bartky ‘Feeding Egos and Tending Wounds: Deference and Disaffection in Women’s Emotional Labour’ in *Femininity and Domination: Studies in the Phenomenology of Oppression* (London: Routledge, 1990) pp. 99-119; R. Pringle, *Secretaries Talk: Sexuality, Power and Work* (London: Verso Books, 1989). These make clear the extent to which isolated women are in a much weaker bargaining position.

## 'Kettle Logic'

In her critique of Pateman, Diana Coole<sup>435</sup> describes Pateman's arguments in *The Sexual Contract* as analogous to 'kettle logic'. According to Freud, 'kettle logic' involves the following arguments:

I never borrowed your kettle.  
And it was in perfect condition when I returned it.  
Anyway, it was damaged when I got it.

She argues that it presents women with the same inconsistencies:

Women have never been treated as possessive individuals.  
When they are it is a patriarchal trap.  
Anyway, the whole concept is a fiction.<sup>436</sup>

Coole's accusation that Pateman is guilty of 'kettle logic' can only be addressed by considering women's ambiguous position with regard to both contracts and to possessive individualism. The logic of her objection raises the question of whether possessive individualism is necessarily assumed when a contractual framework is employed. To clarify this involves considering Pateman's analysis of contract in more detail. Pateman distinguishes between different types of contract. Firstly, it is possible to enter into contracts in which two things are swapped or in which parts of the human body which can be detached (such as sperm or kidneys) are exchanged. There may be concerns about the way in which parts of the body are treated as commodities sold by desperate persons in a black market<sup>437</sup> but this is not at issue in Pateman's analysis of the marriage and employment contracts. She is interested in contracts in which one's abilities are viewed as a commodity. To view oneself as owning one's abilities is central to the definition of a possessive individual, or 'self-ownership' or 'property in the person'.

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<sup>435</sup> D. Coole, 'Patriarchy and Contract' in *Politics* Vol. 10, No. 1, 1990, pp. 25-29.

<sup>436</sup> D. Coole (1990) p. 25.

<sup>437</sup> See, for example, Radin (2001); N. Scheper-Hughes, N. 'The Global Traffic in Human Organs' in *Current Anthropology* Vol. 41, No. 2, 2000, pp. 191-224.

The logic of Coole's criticism can be unpacked in the following way. If Pateman is arguing that all contracts for the use of a person's abilities are necessarily envisaged as occurring between possessive individuals then she must claim that either: the marriage contract is not really contractual or that women are 'added in' to this contract as possessive individuals. Pateman points to the way in which the marriage contract is an odd sort of contract because of the inconsistency of women's position. Historically, women could 'consent' to the marriage contract but then lost their right to enter into further contracts. Unlike workers, they were not viewed as owning their ability to work, hence the struggle between husbands and employers over women's labour, to be discussed below. Wives were viewed as agreeing to provide consortium, i.e. sex, companionship and housework, which was exchanged upon marriage. So, to the extent to which wives were said to own and exchange their ability to give consortium it could be argued that they should be viewed as possessive individuals and marriage can be viewed as a contract. However, this is not a satisfactory way of looking at the marriage contract because the definition of possessive individualism is that you are the owner of your abilities, such that you can sell them in a market place. The paradigm case of this is the employment contract in a capitalist society. Labour power is commodified in a manner that housework and sex within marriage were not. So, women fall outside 'possessive individualism' in the traditional marriage contract.

This then opens Pateman to the argument that the traditional marriage contract is more akin to a relationship based upon status, a throwback to feudalism. She resists this move because it fails to capture the historical uniqueness of the marriage contract and its intimate relationship with the employment contract between 1840-1970. The traditional marriage contract is



more akin to a civil slave contract because upon entry rights were lost, including the ability to be viewed as the owner of one's labour power. At stake in this historical analysis is the possible response of Pateman to contemporary arguments by feminists such as Dickenson<sup>438</sup> that women's position will be improved by the further use of contract.

Another way of thinking about this ambiguity produced by the position of women is to question whether it is possible to envisage a contract that does not assume that the parties are possessive individuals. The possessive individual is only a product of a capitalist society, by definition. Prior to the repeal of the Master and Servant Legislation in 1875, workers were not viewed as owners of their abilities which they could freely trade on the market.<sup>439</sup>

Coole's accusation of kettle logic also refers to the idea of possessive individualism as a legal fiction. Again, I think that Pateman's analysis, derived in part from Marx, is correct. We cannot separate our abilities from our bodies and exchange them for money. What this fiction amounts to is the subordination of one party. Pateman's critique of the fiction of possessive individualism therefore directs her to a radical attack, not only upon traditional marriage but upon contemporary employment practices. Both produce persons who are told by others what to do on a daily basis, which undermines the possibility of democracy.<sup>440</sup>

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<sup>438</sup> Dickenson (1997).

<sup>439</sup> For a discussion of this see A. Edie, I. Grigg-Spall and P. Ireland, 'Labour Law: From Master and Servant to the Contract of Employment' in I. Grigg-Spall and P. Ireland, *The Critical Lawyers' Handbook* (London: Pluto, 1992) pp. 106-113. The *Employers and Workmen Act 1875* removed the magistrates' criminal jurisdiction for breach of employment contract.

<sup>440</sup> Deakin points out that the employment contract set limits upon the power of employers but that their prerogative, derived from the master and servant relationship, remained in the form of an implied duty to obey. The limits upon the employment contract have been imposed through protective legislation. Deakin (2002) p.180.

This provides Pateman with a potential response to Miller's<sup>441</sup> argument that Macpherson's emphasis upon the 'possessive individual' in readings of the social contract theorists emphasised the 'economic' at the expense of the 'political'. Miller argues that Macpherson's analysis of the social contract theorists was incorrect because the social contract theorists were concerned with questions of legitimation of the law rather than the alienation of labour power. This is a false distinction because the treatment of labour power as a commodity is not simply a matter of exploitation but of daily subordination. This is clearer in Pateman's writing than it is in that of Cohen, for example, because she is focused upon the relationship between employment contracts, marriage contracts and the arguments around the social contract. By considering the position of women the question of subordination rather than economic exploitation is foregrounded.

Against Miller, the question of 'alienation of labour power', with its image of possessive individualism is a political question because it produces selves who are told what to do on a daily basis. At this point, it is possible to move beyond Pateman's conception of what Hutchings terms 'the sovereign individual'. Pateman's attention to daily relationships makes this aspect of her analysis compatible with an approach to the self that is more akin to those discussed in Chapter 2. It does not rely upon a view of women as natural victims. On the contrary, the aim of her political analysis is to attack and change women's position. The fact that she holds together the marriage contract, the employment contract and the social contract to raise questions about democracy strengthens her analysis.

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<sup>441</sup> Miller (1982).

## Pateman/Marx: 'Old Issues Reconsidered'

In 'Does Capitalism Really Need Patriarchy?: Some Old Issues Reconsidered'. Carol Johnson argues that Pateman's analysis of *The Sexual Contract* is an attempt to subsume an analysis of capitalism within patriarchy, which she defines as,

a system of male domination that involves the subordination of women. Patriarchy takes different forms in different societies and different historical periods. It interacts with other forms of oppression, such as class, race and sexuality, in very complex ways.<sup>442</sup>

Johnson returns to a debate that took place in the 1970s and 1980s in which feminists discussed how to employ Marx's analysis of capitalism whilst rejecting crude reductions of women's oppression to issues of class.<sup>443</sup> This was superseded by the influence of poststructuralism and concerns about the sweeping use of term 'patriarchy' which is viewed as universalising the position of women, thereby ignoring differences between them such as race, sexuality, disability and class. In Chapter 1, I emphasised the need for historical and cultural sensitivity to such issues.

By drawing upon Barbara Taylor's<sup>444</sup> detailed analysis of the historical treatment of women, Johnson illustrates the conflicts over women's labour that took place between capitalists and husbands. For capitalists, women were a source of cheap labour that could potentially be used to undercut men's wages. This conflicted with husbands' concern to control both women's unpaid labour within the home and labour outside the home. Johnson rightly argues that these

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<sup>442</sup> C. Johnson, 'Does Capitalism really need Patriarchy?: Some Old Issues Reconsidered' in *Women's Studies International Forum* Vol. 19, No. 3, 1996, p. 201.

<sup>443</sup> See, for example, H. Hartmann, 'The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union' in L. Sargeant, ed., *Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (London: Pluto Press, 1981).

<sup>444</sup> B. Taylor, *Eve and the New Jerusalem: Socialism and Feminism in the Nineteenth Century* ((London: Virago, 1983). See also L. Davidoff, M. Doolittle, J. Fink and K. Holden, *The Family Story: Blood Contract and Intimacy 1830-1960* (Harlow: Addison Wesley Longman Ltd, 1999).

conflicts drop out of any analysis that views patriarchy and capitalism as intertwined.

In her response, Pateman<sup>445</sup> agrees with the historical analysis provided by Johnson, that there have been conflicts between employers and husbands over women's labour. Pateman disagrees with Johnson's assertion that, in *The Sexual Contract*, she views capitalism as a type of patriarchy. Instead, she argues that her analysis of contract is compatible with Johnson's position. Her concentration on contract was intended to show the way in which patriarchy, from the seventeenth century, was contractual in form. It developed along with capitalism and helped to shape it:

I emphasised that there were significant differences between the employment contract (capitalism) and the marriage contract (patriarchy). Husbands were not like capitalists, nor were wives like workers. The marriage and employment contracts both gave rise to different types of civil subordination, but the respective subordination of workers and wives took different forms. When I argued that the employment contract presupposed the marriage contract, or stressed the mutual interdependence of two contracts, I was not 'collapsing' one into the other. I was drawing out the logic of the relationship.<sup>446</sup>

As discussed above, I agree with Pateman's argument that the historical subordination of workers and of wives took a different form and grew up together. This history needs to be understood in order to comment upon the contemporary paradoxical position of women. For example, the debate about the granting of 'special rights' for women in order to promote equal opportunity constructs women as those in need of extra help whilst playing down the way in which men continue to have 'special rights' by virtue of women's disproportionate work within the home.<sup>447</sup> Here, the term 'special rights of men' is doing the same work as 'the sexual contract' in Pateman's earlier work in referring to the extent of women's unpaid work within the home.

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<sup>445</sup> Pateman (1996a) pp. 203-205.

<sup>446</sup> Pateman (1996a) p. 203.

<sup>447</sup> See for example, C. Pateman, *Democracy, Freedom and Special Rights* (Swansea: The University of Wales Swansea, 1985a).

## Okin's Attack upon Possessive Individualism/ Self-Ownership/ Property in the Person

In a compelling argument, Susan Moller Okin<sup>448</sup> pushes a theoretical framework derived from possessive individualism to an absurd conclusion by considering the position of women. If Cohen can be viewed as akin to Macpherson, in that he engages with possessive individualism from a (useful) Marxist perspective but tends to ignore the position of women, then Okin's approach can be aligned with that of Pateman. Whereas in *The Sexual Contract* Pateman gives a detailed reading of Hobbes, Locke, Rousseau and Hegel, Okin focuses upon the work of Nozick. Okin argues that if the position of women is considered then Nozick's image of society, derived from possessive individualism, would actually become a slave society with mothers as owners of their children! This is not a conclusion that he would endorse. Indeed, this conclusion renders his position incoherent because it is impossible to be both a slave and a possessive individual at the same time. Whilst Nozick<sup>449</sup> does not argue against possessive individuals being able to enter into slave contracts, this transaction would assume that the slave started out as a possessive individual and sold the rights in his/her self. Okin shows that, if the position of women is taken into account, nobody would acquire such rights over themselves in the first place, unless given them by their mothers.

Okin's argument is based upon the breadth of Nozick's<sup>450</sup> definition of 'production', from which he derives his arguments for a minimal state. This is therefore central to his theoretical position. He argues that, if the means to produce goods are justly acquired, the producer should be entitled to the product,

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<sup>448</sup> Okin (1989) pp. 74-88.

<sup>449</sup> Nozick (1974) p. 331. He explains that the idea of selling off rights in oneself could produce slavery, although the aim of the discussion is to consider a non-minimal state, Nozick (1974) p. 283.

<sup>450</sup> Nozick (1974) p. 160.

irrespective of the needs of others. Whilst altruism would be a good thing it could not be compelled by the state because this would be tantamount to theft of the 'holdings' (goods) from the individual producer. As Nozick puts it,

Whoever makes something, having bought or contracted for all other held resources used in the process (transferring some of his holdings for these co-operating factors) is entitled to it. The situation is *not* one of something's getting made, and there being an open question of who is to get it. Things come into the world already attached to people having entitlements over them.<sup>451</sup>

Okin shows how reproduction, the labour involved in pregnancy and in the traditional childcare performed by women, fits the criteria of *production* within Nozick's analysis. In Nozick's terms, women can be viewed as the producers of children. They acquire and use sperm as part of the production process. This sperm can usually be viewed as 'justly acquired' as a gift and hence the legal title of both the sperm and the product (the child) passes to the woman. Alternatively, sperm could now be purchased over the Internet. Nozick is happy with the idea that whatever a person is given or buys belongs to him/her, as does the product of that individual's labour upon these materials. He explicitly dismisses the idea that someone would need to have complete control over (and understand) the process of production of something in order to become its owner because this would preclude the ownership of other 'products', such as trees.<sup>452</sup> Okin concludes that when the position of women is considered within Nozick's framework then women can be viewed as *owning* their children.

In a thought experiment, about the possibility of everyone holding shares in each others lives, Nozick briefly deals with the question of children being owned by their parents but does not reach a conclusion.<sup>453</sup> As Okin illustrates, Nozick's gender neutral language at this point allows him to ignore the position of

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<sup>451</sup> Nozick (1974) p. 160; cited and discussed Okin (1989) p. 78.

<sup>452</sup> Nozick (1974) p.288.

<sup>453</sup> Nozick (1974) p. 287.

women.<sup>454</sup> There is a contradiction between the fact that Nozick's framework leads to ownership of the child by the mother but depends upon the idea that individuals can be viewed as owning their capacities and the fruits of their labour. He also ignores the more consistent position of Hobbes on the question of whether possessive individualism necessarily leads to the conclusion that individuals should be viewed as owning their children. As discussed in the last chapter, for Hobbes, it is not the generation of children, but their protection, which allows one of the parents to have dominion over the child by virtue of an implied contract.<sup>455</sup> Hobbes, being more thorough in thinking through the implications of his individualism, argues that children are to be called 'free men' 'by the natural indulgence of the parents'.<sup>456</sup>

Although Okin does not mention Marx it is useful to think about her position as the corollary of Marx's analysis of reproduction. Her argument reverses the priority that Marx gives to *production* when he analyses the reproduction of children in terms of its work for capital, i.e. as reproducing the labour force as a commodity. He considers this by arguing that the cost of labour as a commodity *includes* the cost of its reproduction – a point taken up by Marxist feminists.<sup>457</sup> As Marx puts it,

The labour-power withdrawn from the market by wear and tear and death, must be continually replaced by, at the very least a fresh supply of labour-power. Hence the sum of the means of subsistence necessary for the production of labour-power must include the means necessary for the labourer's substitutes, i.e. his children, in order that this race of peculiar commodity-owners may perpetuate its appearance on the market.<sup>458</sup>

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<sup>454</sup> Okin (1989) p. 80.

<sup>455</sup> Hobbes (1994b) Ch. XX, pp. 128-129.

<sup>456</sup> T. Hobbes, 'De Corpore Politico' in *The Elements of Law* (Oxford: Oxford University Press, 1994a) Ch. XXIII, p. 133.

<sup>457</sup> For discussions of the domestic labour debate and Marxist feminist debates in the 1970s and early 1980s see, for example, J. Brenner and M. Ramas, 'Rethinking Women's Oppression' in J. Brenner, *Women and the Politics of Class* (New York: Monthly Review Press, 2000) pp. 11-58; L. Sergeant, ed., *Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism* (London: Pluto Press, 1981).

<sup>458</sup> Marx (1954) Ch. 6, p. 168.

In contrast, Okin<sup>459</sup> prioritises an analysis of *reproduction* to show that possessive individualism is incoherent once women's labour in reproducing children is included as production. Both are attacking a view of selves as 'peculiar commodity-owners' or possessive individualism.

Okin's illustration of the blindness of Nozick's theory to women leads to a discussion of the relationship between self and other. Whether the proponent is Hobbes or Nozick, the idea that the possessive individual owns himself and his labour and owes nothing to society for them becomes an acute source of tension when reproduction and education is considered, a point that I will discuss in detail in the next section.

## The Education of 'Possessive Individuals'

One of the peculiarities of Hobbes' and Nozick's vision of selves as possessive individuals is the way in which they are not envisaged as children who gradually develop. Neither is there any sense that individualism, with its split between self and other, is a diminished view of selves at any age – as discussed in Chapter 2. Whilst Hobbes does discuss the role of the family as inculcating political values,<sup>460</sup> what is central in Hobbes' image of selves is that they are individuals from the start.

In Yeatman's<sup>461</sup> reading of Pateman's *The Sexual Contract*,<sup>462</sup> Yeatman points out that the sons of property-owning households, within the seventeenth century, were *trained* to view themselves as possessive individuals. One aspect

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<sup>459</sup> Okin (1989) p. 80.

<sup>460</sup> In teaching obedience to the family, the parent is teaching obedience to the state. Hobbes (1994b) Ch. XXX, p. 223. For a discussion of the education of children in both the state of nature and civil society see R.A. Chapman, 'Leviathan Writ Small: Thomas Hobbes on the Family' in *American Political Science Review*, Vol. 69, 1975, pp. 76-90. Reprinted in P. King, *Thomas Hobbes: Critical Assessments III* (London: Routledge, 1993) pp. 629-656. Chapman reads Hobbes as claiming that parents teach children to 'consent' to obey them.

<sup>461</sup> Yeatman (1997) pp. 39-56.

<sup>462</sup> Pateman (1988).



of the sons' education involved training them to think of themselves as owners of their own abilities and as having been born with them. Part of the son's training would therefore involve teaching them to act as if they had not been received such lessons on how to behave.

Yeatman links her point that sons were educated to view themselves as possessive individuals with a discussion of Maine's<sup>463</sup> famous statement that modernity is characterised by a transition from status to contract. She points to the status element that takes place within a society governed by contract to emphasise that these sons had a *status* (linked with being positioned as a possessive individual) that allowed them to enter into contracts – a position denied to married women. In this way, she shifts Hobbes' and Pateman's philosophical stories into a historical description of a way of life:

Contract is the device which enables sons, once they are old and educated enough to assume the capacities of a rationally orientated individual will,...to set up their own households. It is clear from this that the education of the son is conceived precisely in terms of the cultivation of this individualised, rational will....By being constituted as wills of their own, the sons assume their own dominium. The individualisation of dominium is expressed in their status as wills of their own with independent householder status....Classical liberal contractualism, then, is predicated on the individualisation of patrimonial dominium. The structure of classical liberal thought follows from this.<sup>464</sup>

In a footnote,<sup>465</sup> she says that this approach 'jibes' (clashes) with Pateman's discussion of a fraternal contract. Yeatman is considering individual families in the seventeenth century rather than the story of the sexual contract, to emphasise that the sons had to be trained to view themselves as a possessive individuals. She reads this back into Pateman's story to argue that Pateman ignores the fact that the sons in her tale of the fraternal contract and the overthrow the patriarch would also have to be trained to view themselves as possessive individuals. She

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<sup>463</sup> H. Maine, *Ancient Law* (London: J.M. Dent and Sons) p. 100.

<sup>464</sup> Yeatman (1997) p. 44.

<sup>465</sup> Yeatman (1997) p. 56.

attributes this in part to the role of the father – curiously not to the mother or servant.<sup>466</sup>

Yeatman's move of thinking about the historical ways in which sons were educated to view themselves as possessive individuals, and as propertied heads of household, is useful. It informs her consideration of the way in which training to view oneself as an individual takes place today. In particular, she is concerned with the way in which women are encouraged to take part in 'empowerment' training and their treatment in the context of the welfare state, a point to which I will return below. The relationship between being a possessive individual and being a head of household is also important. It is not mentioned in the definition of possessive individualism given by Macpherson, nor by Cohen's definition of self-ownership, because both ignore the position of women and deal only with employment. The reference to 'heads of household' as one of the features of possessive individualism fits within Pateman's discussion of the relationship between marriage contracts and employment contracts.

As discussed in the last chapter, I do not think that readings of Pateman which dwell upon her rhetorical rewriting of Hobbes in terms of the sexual contract hit their mark. This is because I downplay the extent to which Pateman relies upon Freud and also take Pateman at her word that she is merely retelling a story.<sup>467</sup> This reading is consistent with the way in which her work has developed since *The Sexual Contract*.<sup>468</sup> Yeatman's criticism leaves undisturbed what I value in Pateman's work: her analysis of the problems of possessive individualism and of contract. It is a little harsh to accuse Pateman of failing to question the way in which the sons in her story are trained to become possessive

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<sup>466</sup> Yeatman (1997) p. 44.

<sup>467</sup> Pateman (1988) p. 219.

<sup>468</sup> See, for example, Pateman (2002).

individuals when her analysis of contract is aimed at undermining this image of the self as a possessive individual – by showing the subordination that results from it. Nevertheless, Yeatman's switch to historically situating an aspect of the story provides what Hobbes fails to give: an analysis of the emergence of the self that views itself as a possessive individual as a result of emerging with and through his relations with others. Yeatman is able to do this by historically situating possessive individualism rather than viewing it as a universal statement about human nature. In making this move she has more in common with Pateman (and with Macpherson) than she acknowledges.

## **New Contractualism; Old Problems?**

The image of a social contract, in different guises, has been a thread that has run through this thesis: Cornell's question of what free and equal persons would agree to, detailed in Chapter 3; Hobbes' social contract and the way in which this is rewritten by Pateman, discussed in Chapters 5 and 6. Ewald's analysis of loss distribution through the techniques of risk analysis and insurance contracts, discussed in Chapter 4, could even be viewed as 'social contracts', albeit of a different type. Whilst, like Hobbes' social contract they are concerned with security, they differ in that they are actual contracts employing a technique that potentially could be used for social distribution of loss. I will now look at another closely related 'social contract': the 'new contractualism' that has been discussed by a number of Australian theorists including Yeatman.<sup>469</sup>

Many women now rely upon the state rather than a man to provide income when they are performing the unpaid labour of child care and are hence constructed as 'naturally dependent'. Therefore, analyses of the operation of the

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<sup>469</sup> Yeatman (1997).

welfare state represent a contemporary extension of Pateman's concerns in *The Sexual Contract*. Many Australian theorists, in particular, have analysed the way in which the relationship between the welfare recipient and the state has been construed as a 'social contract'. This needs to be considered in detail because it is unlike the standard story of the social contract and extends the meaning of the terms 'social contract' and 'possessive individual'.

The question of what it is to be a self, person or individual is deeply implicated in this 'social contract' between welfare recipients and the state. To predicate this upon an image of the 'possessive individual' appears to be a strange move as the possessive individual on welfare can only be described as *potentially* owning his or her ability to work. I want to return to contemporary analyses in the area of governmentality, first discussed in Chapter 4, to trace the way in which the 'unemployed' are encouraged to view themselves as owners of their abilities. Given women's history of being excluded from possessive individualism – as not being owners of the abilities that could be sold in the market place – this can include strategies of 'empowerment' for those, predominantly women, who are recipients of welfare.

O'Malley,<sup>470</sup> draws upon governmentality analysis to argue that,

'Empowerment' thus appears as a strategy of neo-liberal governance, creating 'techniques of the self' which fold into the new subject such central characteristics of political rationality as the changed relations of expertise and the revised autonomy of the individual. Such enterprising individuals, in their turn, are enjoined to enter into – a form of new contractualism – in which the 'social contract' is displaced by a myriad of 'partnerships', 'charters', relationships of 'customer and provider' and 'involvements of stakeholders'. They are formed into imaginary voluntaristic and mutually beneficial agreements between whole new classes of equals: in which empowered subjects contract with each other and with a state that now presents itself as fragmented into a myriad of 'market actors'.<sup>471</sup>

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<sup>470</sup> <http://law-crime.rutgers.edu/omalley1.html>

<sup>471</sup> <http://law-crime.rutgers.edu/omalley6.html>

There are a number of points within this quotation that I want to unpack below. O'Malley references the work of Rose<sup>472</sup> to explain which aspects of contemporary society he is referring to by the rubric of 'neo-liberal governance' and 'advanced liberalism'. O'Malley distinguishes contemporary liberalism from nineteenth-century liberalism by arguing that in the nineteenth century the 'market' and 'state' were viewed as separate realms. Contemporary 'neo-liberalism' is characterised by the way in which techniques employed in the market are adopted by the state, for example: the use of outsourcing, competitive tendering by state and non-state agencies, cost-benefit analysis, 'reinventing' bureaucrats in the image of entrepreneurs. These techniques are applied, not only in the market, but also within state government itself and in other contexts, such as within universities and the daily lives of individuals.

Similarly, Rose<sup>473</sup> details developments in the twentieth century in which the privacy of the employment contract was weakened as governments accepted that pay and conditions should be regulated for social peace. He details the ways in which the family wage was viewed as a way in which males were to be linked into the social order.<sup>474</sup> In these circumstances, the state took on the management of risk for (male) workers through social insurance, for example: unemployment benefit, accident insurance, health and safety legislation. As discussed in Chapter 4, Rose describes a shift in the treatment of risk, away from the use of mutual or friendly societies and the state towards individual market choice, for those who can afford to purchase security. Whilst the state envisaged risk and welfare in terms of families, to women's detriment, now risk has been taken into the market and has been aimed at both women and men – if they can pay for it. Given the

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<sup>472</sup> N. Rose, 'The Death of the Social? Re-figuring the Territory of Government' in *Economy and Society* Vol. 25, No. 3, 1996b, pp. 327-356.

<sup>473</sup> Rose (1996b)

<sup>474</sup> Rose (1996b) p. 338; See also Deakin (2002).

pay differential between men and women, of course, fewer women are in a position to pay for such private insurance.

Employing the same broadly Foucauldian analysis, Hindness<sup>475</sup> produces an up to date supplement to Foucault's 'The Punitive Society',<sup>476</sup> by tracing the techniques by which the unemployed are encouraged to constitute themselves as self-governing individuals who can fit within society, by being viewed as 'customers/consumers' of welfare who must optimise their ability to join the marketplace. Whereas the social contract, in its different forms, has been used as an argument in support of the law, Hindness argues that contract is now a *technique* linked with self-government.

To explain this, it is useful to show Hindness' (unattributed) link with Pateman. Like Pateman, Hindness links the social contract of liberal theory with marriage contracts and employment contracts. He argues that in all cases there is an agreement on behalf of those entering into the contract to regulate their own behaviour. In liberal theory, this has meant that the governed should behave *as if* there were a social contract. In marriage and employment this self-regulation extends beyond what could be written down. The extension of the use of 'contract' to the 'unemployed', which includes increasing numbers of women-headed families, is viewed by Hindness as a way in which both men and women come to view themselves as self-governing individuals.

The theme of contract and welfare is taken up by O'Malley,<sup>477</sup> He outlines the 'new contractualism' as characterised by the way in which government services in Australia, and in Britain and the US, are allocated in terms of a 'contract' between the welfare claimant and the state. Often this means that the services are

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<sup>475</sup> Hindness (1997) pp. 14-26.

<sup>476</sup> Foucault (1997b) pp. 23-37.

<sup>477</sup> <http://law-crime.rutgers.edu/omalley6.html>

supplied by private tender. He argues that this is merely a way of controlling the limited resources given, whilst appearing to empower individuals. This argument fits comfortably with Pateman's analysis of the marriage contracts that it often replaces. Again, the woman is a party to the contract and yet is in a weaker position with regard to the actual operation of the contract because she is construed as dependent if she performs unpaid childcare.

In addition, the way in which women are encouraged to see themselves is of interest in the development of the meaning of 'possessive individualism'. In the above quotation, O'Malley refers to the way in which the techniques of governmentality use the idea of empowered individuals. I want to expand upon this, focusing upon the position of women, to argue that this fits within a possible shift towards the treatment of women as possessive individuals and within the increased commodification of the domestic sphere. This is in keeping with my case analysis relating to marriage that show some move towards contract rather than status.<sup>478</sup>

There has been analysis of the techniques of 'empowerment' which I also want to link with the development of possessive individualism. Cruikshank,<sup>479</sup> describes the 'self esteem movement' which was spear-headed by the 'California Task Force to Promote Self-Esteem and Personal and Social Responsibility' in 1983. This views the idea of working on oneself (Cornell's project of becoming a person?) as a social obligation rather than a matter of private satisfaction. By taking courses in self-esteem the unemployed are trained to view themselves as

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<sup>478</sup> In Australia, this has also been linked with a move to change legislation so that couples can negotiate potential divorce settlements prior to the marriage. For a discussion of how women are potentially in a more vulnerable position if this further shift to contract occurs see Neave (1997) pp. 71-86, discussed in Chapter 5.

<sup>479</sup> B. Cruikshank, 'Revolutions Within: Self-Government and Self-Esteem' in Barry et al. (1996) pp. 231-251.

individuals as ‘jobseekers’,<sup>480</sup> who can take up the offers that are open to them by the market. Hindness points out that the idea of the social contract was ‘individualistic’ but not ‘individualising’, i.e. the emphasis was upon the ‘free and equal individual’ but no account was taken of the individual circumstances. In contrast, ‘new contractualism’ is tailored to individual circumstances and is therefore also individualising.

Similar points are made by both Mitchell Dean<sup>481</sup> in ‘Governing the Unemployed Self in an Active Society’ and by Yeatman<sup>482</sup> in ‘Status, Contract and Personhood’, drawing upon their experiences in Australia to make points that are more generally applicable. Yeatman argues that contract does not free the individual from society but ‘reshapes the status of the person in society so as to become an individualised one.’<sup>483</sup> As discussed above, she compares the way in which propertied sons who were to be male heads of household were educated to view themselves as possessive individuals. This training has now been broadened to include women, but, importantly, without the assumption that these ‘heads of household’ will have access to traditional wives.

In Chapter 4, I claimed that the work on risk analysis shows that the ‘self-owning’ possessive individual is now encouraged to employ cost-benefit analysis to calculate risk and act in order to minimise harm. The worker who owns the rights over himself, his abilities and the fruits of his labour characterises Hobbes’ ‘possessive individual’. In neo-liberalism, the instrumental reason that he (and, more recently, she) now employs includes an analysis of risk, with investment in pensions and insurance provided on the market.

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<sup>480</sup> The term is employed in the UK in the *Jobseekers Act 1995* in which welfare benefits may be tied to the claimant’s willingness to retrain. See also *A New Contract for Welfare: Principles into Practice* (Cmnd. 4101) (London: HMSO, 1998).

<sup>481</sup> Dean (1995) pp. 559-583.

<sup>482</sup> Yeatman (1997) pp. 39-56.

<sup>483</sup> Yeatman (1997) p. 43.



Pateman's analysis of women's position in terms of contract, rather than as a feudal relic, can be brought to bear to think about 'new contractualism'. There has been a shift in liberal theory from the Hobbesian image of that we 'spring up like mushrooms'<sup>484</sup> as possessive individuals to an assumption that possessive individualism represents an ideal image of free and equal persons that we (men and women) can be encouraged to be, as consumers. This includes the consumption of the means of securing against risk, which has moved from mutual societies and the state to individual market choices at a time when women are potentially being 'added in' as possessive individuals. Whereas Yeatman (and other feminists such as Dickenson) view this as an important step because there are advantages to women in being treated as possessive individuals, the work of Pateman warns against such a sanguine approach to contractualism.

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<sup>484</sup> Hobbes (1998) p. 205.

## Chapter 7: Conclusion

The question addressed by this thesis is: what is meant by the terms ‘self’, ‘person’ and ‘individual’? The operation of the law of obligations has provided the context in which this question has been considered. I have argued that it is unnecessary to move from a ‘modern’ to a ‘postmodern’ view of the self, both of which are based upon the image of males as the paradigm case. It is possible to think about universals, the category of women, without such universals being ‘global’, i.e. relating to the species as a whole. Deconstruction is inadequate to this task, as is illustrated by Spivak’s<sup>485</sup> concern that she could not be a pure deconstructionist and attack sexism. This is not a problem inherent to all philosophy, but with a type of philosophy that is currently popular within feminist legal theory. One of my aims has been to illustrate that there are better theoretical approaches that do not produce such dissonance.

In the introduction, I expressed my sympathy with the argument made by, for example, black women, lesbians, women with disabilities and working-class women that feminism considers women as a universal category in such a way that their voice and situation is marginalised.<sup>486</sup> This is a strong argument, particularly as the same move has been applied by feminists to mainstream political theories to show the effect of *women’s* exclusion by the discussion of selves, individuals and persons in a manner that takes male bodies and lifestyles as the norm. However, the argument that calls for sensitivity to difference has become mixed up with the claim that it is impossible to consider what women have in common in our culture at this point in time. Conaghan<sup>487</sup> has warned

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<sup>485</sup> Spivak (1990) p. 12.

<sup>486</sup> See p. 17.

<sup>487</sup> Conaghan (2000) p. 367.

against this fear of talking about women as a group, which has the potential to constrain feminist legal theory.

Rather than focusing upon poststructuralism, I have drawn from broader resources in philosophy to address this question of feminists' ability to talk about, and make claims on behalf of, women as a group. Linked with this question is what Scott<sup>488</sup> has described as the paradoxical position of women, which arises when men have positioned themselves as the finest example of the universal category of persons. In order to intervene politically, women have had to argue that they are like men, for example equally rational, and yet this neglects the fact that both theoretical frameworks as well as institutions have been constructed to fit with the traditional male lifestyles and bodies. In feminist legal theory this has been termed the equality/difference debate.

In Chapter 2, I addressed this problem by bringing together diverse areas of contemporary philosophy that offer a different way of thinking about the self, that does not assume the position of males as the norm against which women are measured. Oyama, writing within the philosophy of science, rethinks the complexity of the relationship between nature and culture, such that it is not 'construction' all the way down. This does not involve a denial of the fact that we need language in order to discuss what it is to be a self, or a woman, nor that the question of power is implicated in these claims. Oyama, with other contemporary philosophers of biology,<sup>489</sup> are thinking about the relationship between nature and culture in a manner that avoids viewing these as separate streams. This involves, for example, changing the image of what is self and not-self; challenging the idea that there is a strict, fixed boundary between them; and undermining the idea that they are manipulated by a central controlling mechanism.

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<sup>488</sup> Scott (1996).

<sup>489</sup> Oyama et al (2001).

Battersby and Oyama write from within completely different areas of philosophy and do not discuss each others work. However, they share common ground regarding their treatment of the question of agency; an area that is relevant to the law of obligations. Both describe the way that the self develops in a manner that is active but not dependent upon a supposed autonomous will of the subject. So, Oyama<sup>490</sup> stresses that development should not be viewed in terms of genes that can organise ‘raw materials’ into human beings nor by describing an environment that shapes and selects, but by thinking about organisms that manipulate and seek out particular environments, just as they are shaped by them.

Similarly, Battersby<sup>491</sup> talks in terms of ‘feedback loops’ between the environment and the self. In common with the work of Andy Clark, Battersby’s model should not be viewed as a simple feedback between an individual and environment. As Battersby argues, both self and not-self are carved out gradually through their modes of relationality. For Clark, this is demonstrated by the way in which it becomes impossible to separate the self from the environment which is part of its cognitive process, just as a dolphin *creates* eddies in order to swim faster than it would otherwise be able to do.

This image of what it is to be a self, or to develop as an organism, illustrates the paucity of the image of the possessive individual, discussed in the last chapter. Of course, it would be open to those adopting a political theory based upon possessive individualism, such as that of Hobbes and Nozick, to make a normative claim that we should be treated as if we were possessive individuals. It is then necessary to look at the contradictions produced by such a

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<sup>490</sup> Oyama (2000a) p. 95.

<sup>491</sup> Battersby (1998a) p. 12.

claim when the position of women is highlighted by political theorists such as Pateman<sup>492</sup> and Okin.<sup>493</sup> I will return to Pateman and Okin below.

Oyama and Battersby, in very different ways, pay attention to the development and emergence of the self to challenge the way it is viewed as constituted by being split from what it 'outside' it, either other selves or its environment. Battersby poses the question of what it would be to think of women's bodies and lifestyles as the norm rather than as an aberration. From her radical rereading of Kant, she also suggests a different understanding of 'essence'. To rethink essence in this way allows feminists to talk about women as a group without committing themselves to the assumption that they are discussing a fixed underlying entity. In doing so, Battersby challenges the Aristotelian view of 'essence' as something fixed in the world that all of a universal group have in common. It is Aristotle's view of essence that is assumed by those feminists, such as Spivak,<sup>494</sup> who then need to employ 'strategic essentialism' to justify discussions about women as a category. Battersby avoids this move by arguing that the way in which we view this grouping alters with shifts in the schemata through which we understand the world. This assumes that there is more than simply discourse that constructs the world and our understanding of it – in a top-down manner – but recognises that the world is not divided into pieces that we simply perceive. Our schemata or frameworks – through which we understand the world – change the way in which we view it but can also be changed in a bottom-up manner by the world of which we are a part. This is relevant to law because it opens up the possibility of making claims on behalf of women which avoids the pitfalls of either employing a fixed idea of

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<sup>492</sup> Pateman (1988).

<sup>493</sup> Okin (1989).

<sup>494</sup> Spivak (1990) p. 12.

what it is to be a woman (as presupposed by Aristotelian essentialism) or of appealing to ‘strategic essentialism’.

In Chapter 3, I discussed the way in which Cornell provides a different answer to the problem of making legal claims for women as a group. This time the focus was upon legal personhood rather than the self. For Cornell, what it is to be, or have, a self in this culture, is to have legal rights. Her answer to the equality/difference problem, that women have had to show that they are ‘like men’ in order to claim the same rights but that this approach neglects areas of difference, is to move beyond it. Cornell argues that women should be viewed as joining the legal community as *persons* but that the definition of what it means to be a person is to be kept open. She thereby aims to avoid the trap of seeing ‘the person’ as paradigmatically male. This is a more compelling argument than proposals that women should be treated in law as *women* with specific rights pertaining to being female, such as those suggested by Irigaray.<sup>495</sup> Cornell’s aim is to keep open space in order to transgress ‘who we are’ rather than to appeal to what we have been.<sup>496</sup>

Cornell’s version of personhood allows her to attack liberals for their ‘atomism’, quoting Charles Taylor.<sup>497</sup> She adopts the liberal idea that the law should not define what it is to be a person – or adopt a perfectionist image of the good – which has tended to look back wistfully to earlier times when women were not even viewed as persons. Instead, Cornell’s definition of personhood looks forward to the possibility of women being treated as free and equal

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<sup>495</sup> For example Irigaray (1993b).

<sup>496</sup> She explains that she was attracted to Irigaray’s earlier work because of its utopian move, which Irigaray labels as ‘the feminine’. Cornell views this as doing the same work as the imaginary domain. Cornell is critical of Irigaray’s later work on feminine rights which appeal to a historical feminine, which Cornell views as conservative. Cornell describes her attitude on this position as arising out of discussions with Butler in 1995. See Cornell (1998) p. 21.

<sup>497</sup> Taylor (1985).

persons. Cornell radicalises contractarian justifications of the state when she argues that, for the state to be legitimate, it must address the question of whether it acts in ways we *would* agree to if we *were* free and equal persons.

Whilst I am sympathetic to Cornell's stated socialist, feminist aims, one of my concerns with her work is with the efficacy of the legal test that has been derived from her philosophical framework. As her hypothetical legislator/judge I would find her arguments compelling. However, I would vote with her anyway. This is the problem; the test of what 'free and equal persons would agree to' is empty. Nozick, with his view of what it is to be free and equal would certainly evoke her test to vote against us.<sup>498</sup> Cornell is driven to add more content to her test, as she does when addressing particular torts. My main concern is that the openness of the image of the 'free and equal person' will mean that, in a capitalist society, such a person will be understood to be a possessive individual – a term the meaning of which I explored in Chapters 5 and 6.

Whereas Cornell argues that in our culture we view ourselves as persons with rights, Ewald has argued that one aspect of our lives that is now central to 'who we are' is shaped, in part, by our daily employment of the techniques of risk analysis. This is related to 'government' in the broadest sense of the term, not only a technique employed by the state but a way of conducting one's life. In Chapter 4, I adapted Ewald's analysis of insurance and governmentality to English law to continue to address the question of the anomalous historical position of women. Rather than proposing a different way of thinking about the equality/difference debate, as in the previous two chapters, this chapter considers contemporary developments: the extent to which women are actually now treated

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<sup>498</sup> I am assuming that Cornell and I would have a vote. Given that Cornell's test is to be applied by either the legislature or the judiciary this is too optimistic.

as possessive individuals, owners of their abilities and owing nothing to society for them.

I have argued that the image of the possessive individual, owner of his abilities, can now be viewed as someone who can safeguard his 'property in the person' through insurance and the technology of risk, upon which the operation of tort law is based. The owner of his abilities is to be compensated if these abilities are damaged and is to act in a prudent manner in order to safeguard such 'property', such as his ability to earn a living, through private insurance. By virtue of their increasing participation in paid work, increasing numbers of women are being treated as such possessive individuals (as workers) at a time when such insurance is viewed more as a market decision than as social security provided by the state. For those without paid work or in low paid employment, the breakdown of the family has resulted in the feminisation of poverty.

Insuring against risk has traditionally been subject to a public/private split, with the risks associated with women's traditional lives, such as income upon divorce and the costs associated with childbirth generally being excluded. However, with the increase in women workers and the influence of feminism, it may be that there is a move to view women in terms of possessive individualism. This is not clear cut and remains an area of tension and struggle. The feminist attack upon the public/private divide is important at a time when the marriage and employment contracts are altering with the breakdown of the breadwinner/wife model (amongst other factors, such as the ability of global capital to move and the gendered workplace model of distinguishing between core workers and peripheral workers, who are on temporary and short term contracts).<sup>499</sup>

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<sup>499</sup> Deakin (2002).



The anomalous position of women can be seen in the varied approaches of the different courts on the question of the award of damages for the cost of child care. I looked at the example of the ‘wrongful birth’ cases to illustrate this. The House of Lords<sup>500</sup> refused to view childbirth as anything other than ‘a blessing’ and hence refused to award damages for the care of children that are born as a result of negligent sterilisation. However, they were willing to quantify the pain and suffering associated with pregnancy and to award damages for this.

What these cases also highlight is the double bind that women find themselves in. If women claim property in their person then areas of their lives are open to commodification. Alternatively, they are not paid at all. In the wrongful birth cases, for women to be treated as possessive individuals has the advantage that they would receive compensation. Child care would be treated as an extra job that had been imposed by another’s negligence. To be treated as the owner of one’s abilities appears to offer respect but, as Pateman points out, has historically entailed within it a different type of *subordination*, that of the worker who is viewed as exchanging labour power for a wage.

For women to be treated as possessive individuals also opens up the possibility of commodifying areas of life that were previously resistant to such commodification. A stark example of this is Dickenson’s argument that payment for surrogacy entails the recognition of the woman’s ability to birth in that she is being paid for it. She claims that:

The ‘good news’ about contract motherhood is that it implies a recognition that the mother has *something* to transfer or sell.<sup>501</sup>

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<sup>500</sup> *McFarlane v Tayside Health Authority* H.L (1999) 3 WLR 1301; (2000) 2 AC 59.

<sup>501</sup> Dickenson (1997) p. 162. However, she gives a more nuanced discussion on this point to illustrate the limitation of contract whilst advocating that surrogacy is viewed in terms of payment for the woman’s pain and suffering in pregnancy and labour. I am pointing out women’s ambivalent position with regard to possessive individualism rather than giving a full analysis of the arguments for and against payment for surrogacy contracts. For pragmatic arguments see, for example, M. Freeman, ‘Does Surrogacy Have a Future After Brazier?’ *Medical Law Review* Vol. 7, Spring, 1999, pp.1-20.

In comparison with Dickenson, Radin<sup>502</sup> has pointed out that in the case of child surrogacy the possibility of payment for a child does raise the question of what a child is worth.<sup>503</sup> She asks an empirical question: at what point does the introduction of an area of commodification start a slippery slope effect whereby members of the population then view human abilities or bodies in terms of money, and hence view themselves as having a common measure?<sup>504</sup> She raises the spectre of a society in which children could grade themselves in accordance with the price they would have achieved on the open market. This is particularly relevant in law, given the influence of the school of law and economics which views all abilities in terms of commodities in a market place.

To distribute wealth does not necessarily involve the treatment of human attributes as objects. So, for example, the award of money to help with child care in the ‘wrongful birth cases’ could be viewed in terms other than those of commodifying human life. It could be viewed as questioning the way in which the burden of child care falls upon women. This would be better administered through the welfare state rather than through the litigation lottery, not merely because of efficiency but because the tort system would calculate an award in inverse proportion to need, by basing their calculations upon what the parents would be expected to spend on their child.

In terms of commodification, there is a huge difference between distribution of resources through welfare and a surrogacy contract. The ‘wrongful birth cases’ could be viewed ambiguously in this context. They were only seen in

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<sup>502</sup> Radin (2001).

<sup>503</sup> Note that it is not the ability to work that is exchanged and hence the surrogate mother is not told what to do on a daily basis – save with regard to issues relating to risk to the foetus, such as smoking. On this point see D. Lupton, ‘Risk and the Ontology of Pregnant Embodiment’ in Lupton, D. *Risk and Sociocultural Theory: New Directions and Perspectives* (Cambridge: Cambridge University Press, 1999) pp. 59-85.

<sup>504</sup> For the seminal discussion of how different items come to be viewed as having a common measure see Marx (1954) pp. 43-96.

terms of commodification within the analysis of individual cases rather than as part of welfare scheme based upon loss distribution.

In Chapters 5 and 6, I then drew out the ambivalent historical position of women with regard to possessive individualism by returning to the work of Hobbes. Hobbes is unusual as a social contract theorist in his consistent application of possessive individualism to women as well as men. He is therefore a useful theorist to consider when discussing the developments and tensions in the current relationship between women and possessive individualism. So, for example, in Hobbes' hypothetical state of nature women can decide what to do with their children, who are then assumed to consent to obey them if they have been allowed to survive.

Hobbes' attempt to think about the behaviour of 'free and equal persons' in the state of nature must import his views about how individuals *actually* behave to avoid simply being an empty abstraction. In this respect there are similarities to Cornell's analysis, save that she aims to avoid evoking individualism by her conception of personhood. Macpherson argues that Hobbes actually describes the behaviour of men within Hobbes' own emerging capitalist society. This is the image of the possessive individual that I am concerned will be read into Cornell's image of personhood. Whilst Macpherson's work has been subject to sustained attack for his historical analysis,<sup>505</sup> and whilst he ignores the position of women, his work is useful for focusing criticism upon possessive individualism, self-ownership or property in the person.

Pateman's work can be viewed as taking up Macpherson's analysis to consider the way in which the possessive individual, the owner of his labour and the fruits of his labour, has been understood as paradigmatically male. Pateman's

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<sup>505</sup> See, for example, Miller (1982); Tully (1993).

analysis serves as a warning against a legal fiction, that an ability to work can be separated from a person. Hence, she attacks workplace subordination, as well as a different type of subordination within the traditional marriage contract. Importantly, her work stresses the historical relationship between these contracts in a manner that is now discussed by a few labour lawyers<sup>506</sup> but does not feature within much contemporary analyses of ‘self-ownership’ within political theory.<sup>507</sup>

The sexed body of the person concerned may be relevant to the contract, as is clear in the examples that Pateman uses, such as marriage, the prostitution contract, etc. The caselaw on sexual harassment in the workplace and the position of gendered work such as the role of the secretary<sup>508</sup> also strengthens her point. Pateman’s analysis of contract, the central theme of her work, does not rely upon an assumption of the natural vulnerability of women, which appears occasionally in *The Sexual Contract*. Pateman provides a critique of possessive individualism (and of contract) based upon the subordination it produces. As she does not rely upon an alternative view of the self, I believe that Pateman’s critique of individualism is consistent with the analysis of the self discussed in Chapter 2.

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<sup>506</sup> For example, L.A. Williams, ‘Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution’ in Conaghan et al. (2002) pp. 93-114. However, this is exceptional. For the argument that issues that traditionally affect women workers are still viewed as ‘specialised topics which do not touch the “essence” of labour law’ see J. Conaghan, ‘Feminism and Labour Law: Contesting the Terrain’ in A. Morris and T. O’Donnell *Feminist Perspectives on Employment Law* (London: Cavendish Publishing, 1999b) p. 14.

<sup>507</sup> For example, Cohen (1995). Whilst Cohen does not bring together the marriage contract with the employment contract, he does provide a useful sustained attack on self-ownership. Many commentators simply accept self-ownership as meaning something akin to autonomy, rather than possessive individualism or property in the person. See Pateman (2002) p. 20. For example, Pateman cites Will Kymlicka in W. Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 1990) p.112 cited Pateman (2002) p. 23. This is kept in the updated edition: W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2<sup>nd</sup> edition (Oxford: Oxford University Press, 2002) p. 116. To be fair, in his later edition he does outline Okin’s arguments against Nozick, commenting favourably upon them, Kymlicka (2002) p.126. This is an interesting example because, between 1990 and 2002, Kymlicka integrates feminist theory into arguments on self-ownership, rather than dealing with it mainly in the chapter dedicated to feminist political philosophy. He does not discuss Pateman (1988) but will have to discuss Pateman (2002) in any next edition.

<sup>508</sup> Pringle (1989).

The criticism of a 'male sex right' with respect to women's labour is also of relevance where there is no marriage contract but cohabitation takes place on the same terms. As Conaghan<sup>509</sup> points out, there has been recent recognition of the extent to which the marriage contract (or now cohabitation) and employment contracts interrelate in government concerns regarding the 'work/life balance'. There is still a struggle over whether women's unpaid labour in the home is to be acknowledged or to be viewed in terms women's 'special needs' and 'dependency'. With middle-class women 'outsourcing' housework, this also raises questions of differences between women.

In the workplace, part of this struggle is played out in the discourse of 'human resource management' in which there has been a shift in language from 'equal opportunities' to 'managing diversity'. Although the conceptual positions differ, this resonates with the broad call to 'respect the other' within aspects of poststructuralism. I am not suggesting a simple causal relationship but am detecting approaches which conflate the term 'otherness' or 'diversity', meaning anyone who is not white, male, middle-class, able-bodied and heterosexual.<sup>510</sup> There have been arguments that 'managing diversity' tends to individualise issues of gender and race which were previously viewed as social issues.<sup>511</sup>

In Chapters 5 and 6, I discussed the ways in which consideration of women's position undermines the philosophical frameworks premised upon an image of possessive individualism. Pateman's rereading of Hobbes and the social contract theorists and Okin's rereading of Nozick both show the difficulties that arise for claims based upon possessive individualism when women's position is considered. The concept of the possessive individual, self-ownership or 'property

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<sup>509</sup> Conaghan (2002).

<sup>510</sup> See Brown (1995) p. 65-66.

<sup>511</sup> For a critical appraisal of 'managing diversity' see, for example, J. Webb 'The Politics of Equal Opportunity' in *Gender, Work and Organisation* Vol. 4, No. 3, 1997, pp. 159-169.

in the person` has as its paradigm case the position of the employee in a capitalist society. The (male) worker was the owner of his ability to work that is viewed as a commodity for which he is paid a wage. Women under traditional marriage contract were not paid, did not alienate their abilities by the hour and were not always juridically equal with men hence they could not be described as possessive individuals. They were viewed as exchanging their persons upon marriage rather than as exchanging their ability to work. In keeping with this analysis, Deakin<sup>512</sup> outlines the way in which the employment contract had two aspects: to limit the extent of the employer's right of command and to regulate a relationship that worked as a vehicle for channelling risk, by the welfare the state for (male) employees.

The attacks upon possessive individualism by Pateman and Okin greatly strengthen the arguments of Cohen,<sup>513</sup> who points to the impact of an unrestrained capitalism on the working class, and of Charles Taylor,<sup>514</sup> who argues that Nozick's position is based upon an acceptance of freedom as an ideal and yet would undermine the social possibility of any such shared ideals flourishing in any future society. Indeed, the position of women produces such additional ammunition for these arguments that its omission now appears curious in recent debates about self-ownership.<sup>515</sup>

With the breakdown of the breadwinner/housewife model, any successor to Pateman's analysis of *The Sexual Contract* would be concerned with the developments within state provision of welfare. Here, the arguments of Yeatman and Hindness provide a sequel to the discussions about women's ambiguous position with regard to possessive individualism. In particular, Hindness

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<sup>512</sup> Deakin (2002) p. 181.

<sup>513</sup> Cohen (1995).

<sup>514</sup> Taylor (1985).

<sup>515</sup> See Pateman (2002).

describes the use of 'contract' as a technique of governance, operating such that the so-called consumer or customer of welfare is assumed to enter into a contract with state agencies. This new 'sexual contract' is then viewed as a contract between the state and the woman who is then trained to view herself as the owner of her ability to work and to 'take advantage' of training to be a 'job seeker'. This is a training in viewing oneself as a possessive individual, the owner of one's abilities.

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