

uniqueness of law, suggests that it is possible to isolate legal phenomena and to study their nature. A final aspect of legal fetishism makes a general theory of law not only interesting and possible but also crucial to political theory.

This third feature is the doctrine of the rule of law. The meaning of this idea is complex. For the time being a crude approximation to its meaning will suffice to demonstrate its link to legal fetishism. The core principle of the doctrine is that political power should be exercised according to rules announced in advance ...¹¹⁰

... Marxists have rejected these three aspects of legal fetishism. To begin with, the notion that society rests on law is too simplistic ...¹¹¹

... Equally Marxists deny that there is a special and distinctive phenomenon which we can term law. Because Marxism has approached law tangentially, treating it as one aspect of a variety of political and social arrangements concerned with the manipulation of power and the consolidation of modes of production of wealth, there has been no commitment towards an identification of the unique qualities of legal institutions. What is more important for a Marxist is to notice how laws or law-like institutions serve particular functions within a social formation. The focus is switched from proposing a definition and drawing up of lists of functions of law to devising an explanation of the functions which laws together with other social institutions help to perform in particular historical contexts. Guided by the emphasis upon materialism, Marxists avoid assumptions about the uniqueness of legal phenomena or their essence, and so they rarely offer a general theory of law.

The final aspect of legal fetishism, the doctrine of the rule of law, illustrates one of the functions which laws help to perform, and as such it has been of great interest to Marxists. Since legal rules can inhibit the arbitrary exercise of power, even if their control is precarious, law can contribute an important dimension to political philosophies seeking to explain or justify the existing structures of political domination on the ground that the powerful are constrained by the demands of due process of law. The ideal of the rule of law encapsulates this legitimising function of legal systems. The bulk of Western jurisprudence uses the rule of law doctrine as a standard by which to judge the success of desirability of a general theory of law. It is crucial for these legal philosophers to demonstrate the superiority of their approach towards the problem of the identification of the laws of a particular legal system because they can then argue that they have proved the coherence of the predominant legitimating ideology of power in liberal society. Marxists, however, are obviously uninterested in putting forward a theory of their own, for their purpose is to challenge rather than defend the present organisation of power. Accordingly you will not find here those elaborate analyses of the structures of legal systems which parade as legal theory in the law schools. Nevertheless, the rule of law and the function of law in modern theories of the legitimation of power remain of vital interest to Marxists in their search for a critical understanding of the complexities of modern social system. Therefore a general theory of law in the conventional mode would be an anathema to Marxism, though legal phenomena must constitute a central focus of enquiry ...¹¹²

110 *Ibid*, pp 11–12.

111 *Ibid*, pp 12–13.

112 *Ibid*, pp 13–14.

Engels on Women and the Family

Friedrich Engels subjected the family – and the position of women within the family – to a critical Marxist analysis. Before considering feminist responses to Engel's thought, it is necessary to consider, in outline, the original work. Engels, relying on the empirical research conducted in Lewis Morgan,¹¹³ traces the evolution of the family unit from earliest times.

In *The Origin of the Family, Private Property and the State*,¹¹⁴ Engels stresses that social structures are determined by the stage of development of both labour and the family. Engels – relying on the research of Morgan and others – recounts the changing pattern of the family, demonstrating the changing regulation of the family. From early societies it is clear that rules against sexual intercourse between close family members existed. At the same time, the line of descent – for the purposes of proof of parenthood and inheritance – was in early times through the mother, not the father. In essence, such an approach was necessitated by the simple fact of the proof of parenting was conclusive in relation to the mother through the fact of giving birth, but not necessarily so conclusive in relation to the paternity of the child. However, as societies progressed and private property entered into social relations, this dominance of the mother, and inheritance being determined through the mother's 'gens' (genus: group based on descent through a particular line) the effect was the disinheritance of the father's sons, for – as Engels explains – the chain of inheritance would go 'first to his brothers and sisters and to his sister's children, or to the issue of his mother's sisters. But his own children were disinherited'.¹¹⁵ Thus it was necessary to overthrow the 'mother right'. It was the destruction of mother-right and the establishment of male power which, Engels explains, represented the world historical defeat of the female sex. Not only did the male assume economic power within the family but he also subordinated the woman who, became 'a slave of his lust and a mere instrument for the production of children. Thus was the patriarchal family born.

Shortly after the destruction of mother-right, monogamous marriage became the norm, for the male was determined to assure the fidelity of his wife, and hence the legitimacy of his children. The evolution of family forms passed through three stages: 'for the period of savagery, group marriage; for barbarism, pairing marriage; for civilisation, monogamy supplemented by adultery and prostitution. Only with the overthrow of the capitalist mode of production will the slavery into which monogamy has cast women be overthrown.

Marxist theory has been much criticised by feminist writers. The principal objection is to the equation of women with class, and the argument that the woman is in the same position as her husband in terms of that class. In the following extracts these arguments are considered.

113 *Ancient Society, or Researches in the Lines of Human Progress from Savagery, through Barbarism to Civilisation* (Macmillan and Co, 1877).

114 1884 (Lawrence and Wishart Ltd, 1940).

115 *The Origin of the Family*, pp 57–58.

THE SECOND SEX¹¹⁶

Simone de Beauvoir

Although the chain of thought as outlined by Engels marks an advance upon those we have been examining, we find it disappointing – the most important problems are slurred over. The turning-point of all history is the passage from the regime of community ownership to that of private property, and it is in no wise indicated how this could have come about. Engels himself declares in *The Origin of the Family* that 'at present we know nothing about it'; not only is he ignorant of the historical details: he does not even suggest any interpretation. Similarly, it is not clear that the institution of private property must necessarily have involved the enslavement of women. Historical materialism takes for granted facts that call for explanation: Engels assumes without discussion the bond of interest which ties man to property; but where does this interest, the source of social institutions, have its own source? Thus Engels's account remains superficial, and the truths that he does reveal are seemingly contingent, incidental. The fact is that we cannot plumb their meaning without going beyond the limits of historical materialism. It cannot provide solutions for the problems we have raised, because these concern the whole man and not that abstraction: *Homo oeconomicus*.

It would seem clear, for example, that the very concept of personal possession can be comprehensible only with reference to the original condition of the existent. For it to appear, there must have been at first an inclination in the subject to think of himself as basically individual, to assert the autonomy and separateness of his existence. We can see that this affirmation would have remained subjective, inward, without validity as long as the individual lacked the practical means for carrying it out objectively. Without adequate tools, he did not sense at first any power over the world, he felt lost in nature and in the group, passive, threatened, the plaything of obscure forces; he dared think of himself only as identified with the clan: the totem, *mana*, the earth were group realities. The discovery of bronze enabled man, in the experience of hard and productive labour, to discover himself as creator; dominating nature, he was no longer afraid of it, and in the fact of obstacles overcome he found courage to see himself as an autonomous active force, to achieve self-fulfilment as an individual. But this accomplishment would never have been attained had not man originally willed it so; the lesson of work is not inscribed upon a passive subject: the subject shapes and masters himself in shaping and mastering the land.

On the other hand, the affirmation of the subject's individuality is not enough to explain property: each conscious individual through challenge, struggle, and single combat can endeavour to raise himself to sovereignty. For the challenge to have taken the form of potlatch or ceremonial exchange of gifts – that is, of an economic rivalry – and from this point on for first the chief and then the members of the clan to have laid claim to private property, required that there should be in man another original tendency. As we have seen in the preceding chapter, the existent succeeds in finding himself only in estrangement, in alienation; he seeks through the world to find himself in some shape, other than himself, which he makes his own. The clan encounters its own alienated existence in the totem, the *mana*, the terrain it occupies; and when the individual becomes distinguished from the community, he requires a personal incarnation.

116 (1949) (Everyman's Library, 1993).

The *mana* becomes individualised in the chief, then in each individual; and at the same time each person tries to appropriate a piece of land, implements, crops. Man finds himself in these goods which are his because he has previously lost himself in them; and it is therefore understandable that he places upon them a value no less fundamental than upon his everyday life. Thus it is that man's interest in his property becomes an intelligible relation. But we see that this cannot be explained through the tool alone: we must grasp in its entirety the attitude of man wielding the tool, an attitude that implies an ontological substructure, a foundation in the nature of his being.

On the same grounds it is impossible to deduce the oppression of woman from the institution of private property. Here again the inadequacy of Engels's point of view is obvious. He saw clearly that women's muscular weakness became a real point of inferiority only in its relation to the bronze and iron tool; but he did not see that the limitations of her capacity for labour constituted in themselves a concrete disadvantage only in a certain perspective. It is because man is a being of transcendence and ambition that he projects new urgencies through every new tool: when he had invented bronze implements, he was no longer content with gardens – he wanted to clear and cultivate vast fields. And it was not from the bronze itself that this desire welled up. Woman's incapacity brought about her ruin because man regarded her in the perspective of his project for enrichment and expansion. And this project is still not enough to explain why she was oppressed; for the division of labour between the sexes could have meant a friendly association. If the original relation between a man and his fellows was exclusively a relation of friendship, we could not account for any type of enslavement; but no, this phenomenon is a result of the imperialism of the human consciousness, seeking always to exercise its sovereignty in objective fashion. If the human consciousness had not included the original category of the Other¹¹⁷ and an original aspiration to dominate the Other, the invention of the bronze tool could not have caused the oppression of woman.

Nor does Engels account for the peculiar nature of this oppression. He tried to reduce the antagonism of the sexes to class conflict, but he was halfhearted in the attempt; the thesis is simply untenable. It is true that division of labour according to sex and the consequent oppression bring to mind in some ways the division of society by classes, but it is impossible to confuse the two. For one thing, there is no biological basis for the separation of classes. Again, the slave in his toil is conscious of himself as opposed to his master; and the proletariat has always put its condition to the test in revolt, thereby going back to essentials and constituting a threat to its exploiters. And what it has aimed at is its own disappearance as a class. I have pointed out in the 'Introduction' how different woman's situation is, particularly on account of the community of life and interests which entails her solidarity with man, and also because he finds in her an accomplice; no desire for revolution dwells within her, nor any thought of her own disappearance as a sex – all she asks is that certain sequels of sexual differentiation be abolished.

What is still more serious, woman cannot in good faith be regarded simply as a worker; for her reproductive function is as important as her productive capacity, no less in the social economy than in the individual life. In some periods, indeed, it is more useful to produce offspring than to plough the soil. Engels slighted the problem, simply remarking that the socialist community would abolish the

117 On Simone de Beauvoir's explanation of the Other, see Chapter 6.

family – certainly an abstract solution. We know how often and how radically Soviet Russia has had to change its policy on the family according to the varying relation between the immediate needs of production and those of repopulation. But for that matter, to do away with the family is not necessarily to emancipate woman. Such examples as Sparta and the Nazi regime prove that she can be none the less oppressed by the males, for all her direct attachment to the State.

A truly socialist ethics, concerned to uphold justice without suppressing liberty and to impose duties upon individuals without abolishing individuality, will find most embarrassing the problems posed by the condition of woman. It is impossible simply to equate gestation with a task, a piece of work, or with a service, such as military service. Woman's life is more seriously broken in upon by a demand for children than by regulation of the citizen's employment – no State has ever ventured to establish obligatory copulation. In the sexual act and in maternity not only time and strength but also essential values are involved for woman. Relationalist materialism tries in vain to disregard this dramatic aspect of sexuality; for it is impossible to bring the sexual instinct under a code of regulation. Indeed, as Freud said, it is not sure that it does not bear within itself a denial of its own satisfaction. What is certain is that it does not permit of integration with the social, because there is in eroticism a revolt of the instant against time, of the individual against the universal. In proposing to direct and exploit it, there is risk of killing it, for it is impossible to deal at will with living spontaneity as one deals at will with inert matter; and no more can it be obtained by force, as a privilege may be.¹¹⁸

LOOKING AGAIN AT ENGELS'S ORIGINS OF THE FAMILY, PRIVATE PROPERTY AND THE STATE¹¹⁹

Rosalind Delmar

According to the materialistic conception, the determining factor in history is, in the last resort, the production and reproduction of immediate life. But this itself is of a two-fold character. On the one hand, the production of means of subsistence, of food, clothing and shelter and the tools requisite therefore; on the other, the production of human beings themselves, the propagation of the species. The social institutions under which men of a definite country live are conditioned by both kinds of production: by the stage of development of labour, on the one hand, and of the family on the other. The less the development of labour, and the more limited its volume of production and, therefore, the wealth of society, the more preponderantly does the social order appear to be dominated by ties of sex. However, within this structure of society based on ties of sex, the productivity of labour develops more and more; with it, private property and exchange, differences in wealth, the possibility of utilising the labour power of others and thereby the basis of class antagonisms: new social elements, which strive in the course of generations to adapt the old structure of society to the new conditions until finally the incompatibility of the two leads to a complete revolution. The old society based on sex groups bursts asunder in the collision of the newly developed social classes; in its place a new society appears, constituted in a State, the lower units of which are no longer sex groups but territorial groups, a society in which the family system is entirely dominated by the

118 *Ibid*, pp 56–61.

119 Juliet Mitchell and Ann Oakley (eds), *The Rights and Wrongs of Women* (Penguin, 1976), Chapter 9.

property system and in which the class antagonisms and class struggles, which make up the content of all hitherto written history now freely develop.¹²⁰

It is thus that Engels summarises the main argument of his *Origins of the Family, Private Property and the State*, a text based on Lewis Morgan's *Ancient Society*.¹²¹

...

... Division of labour in the family had regulated the distribution of property between man and wife. This division of labour remained unchanged, and yet it now put the former domestic relationship topsy-turvy, simply because the division of labour outside the family had changed. The very cause that had formerly made the woman supreme in the house, namely, her being confined to domestic work, now assured supremacy in the house for the man: the woman's housework lost its significance compared with the man's work in obtaining a livelihood ...¹²²

... It was this new economic power, according to Engels, which gave men the strength to institute a political revolution against women, and overturn mother-right, replacing it with father-right. 'The reckoning of descent through the female line and the right of inheritance through the mother were hereby overthrown and male lineage and right of inheritance from the father-instituted.'¹²³ What was thereby also instituted was the right to undisputed paternity. He adds that 'as to how and when this revolution was effected among the civilised peoples we know nothing', and depends for proof that such an upheaval did take place on both Morgan's demonstration of the existence of matrilineality and Bachofen's cultural researches into Greek myth and drama.¹²⁴ Bachofen had found, in the *Oresteia*, for example, an acting out of the rights of mother, father and son which culminated in an affirmation of the law of the father, and had interpreted in this the drama of a struggle between the old order and the new. With this political revolution came a new form of family, the patriarchal family, tied to agriculture, which incorporates bondsmen into its structure, as a transitional form before the appearance of the monogamous family. The imposition of the patriarchy meant that women lost any right to separation. Leaving to one side for the moment Engels's characterisation of the monogamous family, it is instructive to compare his hypothesis of the transition with that of the future liberation of women, in order to bring out what they have in common.

The emancipation of women and their equality with men are impossible and must remain so as long as women are excluded from socially productive work and restricted to housework, which is private. The emancipation of women becomes possible only when women are enabled to take part in production on a large, social scale, and when domestic duties require attention only to a minor degree. And this has become possible only as a result of modern large-scale industry, which not only permits the participation of women in production in large numbers, but actually calls for it and, moreover, strives to convert private domestic work also into a more public industry.¹²⁵

120 *Origins of the Family, Private Property and the State* (hereinafter *Origins*), pp 25–26.

121 Lewis Morgan, *Ancient Society* (Macmillan, 1877).

122 *Ibid*, p 521.

123 *Origins*, p 67.

124 Johann Jacob Bachofen, *Myth, Religion and Mother-Right, Selected Writings* (Routledge and Kegan Paul, 1967).

125 *Origins*, p 152.

This is the kernel of Engels's conspectus of the future emancipation of women. Economic emancipation in socially organised production and the liberation of women from restriction to housework are the keys to sexual emancipation. On this all else rests.

Just as the subjugation of women coincided with the subjugation of one section of humanity into slavery, so women's future liberation will coincide with the abolition of wage slavery, for only when that happens will women finally have full freedom in marriage and regain the lost rights of separation: 'full freedom in marriage can become generally operative only when the abolition of capitalist production and of the property relations created by it, has removed all those secondary economic considerations which still exert so powerful an influence on the choice of partner'.¹²⁶

Engels thus locates women's oppression at the level of participation in production, links the conflict between the sexes to the appearance of private ownership of wealth, and posits the reconciliation of the sexes as possible only when private property has been abolished. The fortunes of women and of oppressed classes are intimately connected: neither can be free until economic formations based on private property have been abolished ...

The Division of Labour

Marx and Engels conceived of a spontaneous sexual division of labour arising out of physiological difference and carried over into the social world: 'The first division of labour is that between man and woman for childbreeding.'¹²⁷ And again, writing of the American Indian organisations, Engels remarks that 'the division of labour was a pure and simple outgrowth of nature: it existed only between the sexes'.¹²⁸

In *The Origins of the Family* Engels sees the division of labour as 'women in the home, men outside the home', a separation reflected in the division of property: men control the instruments of labour used outside the home, women those within it. But later anthropological findings have made it clear that there are no grounds for assuming such a clear and spontaneous division of labour, property and tasks of the kind Engels predicted, although a division of labour often of the most intricate kind, always does occur. This division, however, does not appear to be a 'simple outgrowth of nature', but rather, an element of the process of the transformation from nature to culture.

Engels's work does not contain any criticism of the sexual division of labour. Indeed this form of separation of responsibility is for him a question entirely outside of the problems of women's oppression. 'The division of labour is determined by entirely different causes than those which determine the status of women'.¹²⁹ His criticism is focused on the relative economic weighting which these forms of labour acquire, and the privatisation of domestic labour. Whilst he envisages a future society where such labour will be transformed from private service into public industry, and where child will be socialised, there is no hint that in this future state of affairs such collective labour might cease to be performed exclusively by women.

126 *Ibid*, p 88.

127 *Ibid*, p 75.

128 *Ibid*, p 149.

129 *Ibid*, p 61.

This failure to criticise the sexual division of labour marks the break between Engels's analysis (and that of classical socialism) and the feminist perspective. Modern feminism implies a demand for reciprocity. Not only 'anything a man can do a woman can do', but also 'anything a woman can do a man can do'.

The argument that the main focus of women's oppression lies in women's confinement within a privatised domestic economy seems valid. But at the same time it is difficult to believe that work-sharing within the home (the abolition of housework as a category of labour performed by one person or by one sex) can be achieved if, in the social sphere, socialised domestic services and child care continue to be performed exclusively by women.

The feminist critique of the division of labour between the sexes comes from the experience, of women living within monopoly capitalist and imperialist countries. In these societies technology has developed to such an extent that any physiological difference between women and men (such as physical strength) can be rendered irrelevant by labour-saving machinery. At the same time the 'feminine' qualities of the heart, like nurturing and caring, have been recorded as cultural qualities rather than natural phenomena, and are not necessarily restricted to women alone. The recourse to arguments about an immutable female nature is often a defence of the *status quo*. Feminists question not only women's place in the social order, but that of men too.

Socialist feminists have developed a new analysis of the economic importance of women's work in the reproduction of labour power, and in the main have concentrated on the political economy of housework. More attention is now being paid to the implications and development of the sexual division in the world of employment. And various tendencies in the women's movement have encouraged the involvement of men in the care and education of small children. Both the emphasis on the economic and ideological importance of the reproduction of labour power and the demand that this cease to be women's work signal a radical shift from the socialist perspective.

If it is over the issues of the critique of monogamy and the division of labour that modern feminism goes beyond Engels, at the same time Engels did point his finger at some crucial questions which remain to be solved. First, Engels demonstrated that once capitalism is established, the contradiction arises for women between their work in social production and their work in the home. But although the attempted resolutions are different, this contradiction has appeared in socialist countries as well as in capitalist ones. Second, the *Origins of the Family* represents a sustained effort to demonstrate that the existence of sex conflict was bound up with particular historical phases in the development of the family. Such a perspective makes an appraisal of family organisation central to an understanding of women's oppression. This is not to imply that Engels thought that the family was a totally autonomous structure. However, he does imply that the family has a relative autonomy, and that this family does not only inherit 'superstructures' (in the notable case of kinship relations), but also produces its own 'superstructures' – juridical relations (marriage and family law) and social sexual mores. The terms of Engels's analysis are thus: (1) the mode of production, (2) the form of family, (3) the kinship system, (4) juridical relations, and (5) social-sexual mores. What a revolutionary transformation of the form of family thus requires is, in the first place, the revolutionary transformation of the mode of production, a new set of legal guarantees, and the continuous transformation of social-sexual mores and kinship systems. The latter two require as a condition of their success a developed practice of ideological struggle.

Last, we should consider the step forward Engels's work represented. If the *Origins of the Family* constituted an achievement it was this – that it asserted women's oppression as a problem of history, rather than of biology, a problem which it should be the concern of historical materialism to analyse and revolutionary politics to solve.

THE SEXUAL CONTRACT¹³⁰

Carole Pateman

The *locus classicus* for the argument that wives are like workers is, of course, Engels' conjectural history of *The Origin of the Family, Private Property and the State*. Engels argues that 'the first class oppression' was that of male oppression of the female sex, and he states that 'within the family [the husband] is the bourgeois and the wife represents the proletariat'. However, he also claims that in the monogamous family the wife became 'the head servant', and that 'the modern individual family is founded on the open or concealed domestic slavery of the wife'. Engels' famous statement about the oppression of wives thus uses all three feminist terms of comparison; the upper servant, the slave and the worker. Despite his references to the slave and the servant, Engels treats all subordination as class subordination; all 'workers' lack freedom in the same way whether they are located in public workplace or the private workplace of the home, whether they receive protection or the token of free exchange, the wage. Sex is irrelevant to subordination, and the position of wives is best understood as exactly like that of proletarians. Thus, Engels argued that the solution to the subordination of wives in the home was 'to bring the whole female sex back into public industry'. If wives became public workers like their husbands, the married couple would stand together as equals against capitalism, and the husband would have lost the means through which he could control his wife's labour power in the home.

Engels' solution assumes that the original contract was purely a social contract that the terms of the social contract are universal; conjugal relations in the family are like those in the market. That is to say, he assumes that men have no stake as men in their power over women; a husband's interest in his wife's subordination is exactly like that of any capitalist who has another man labour for him. Engels also assumes that sexual difference is irrelevant in the capitalist market. Once women enter into paid employment then, as workers, they become their husbands' equals. The category of 'worker' is universal and applicable to all who enter the capitalist market and sell their labour power.

Contemporary feminists soon ran into difficulties with these assumptions. When the current revival of the organised feminist movement focused attention on housework, many socialists and feminists assumed initially that what became called 'domestic labour' could be brought within the orthodox Marxist critique of capitalism.¹³¹ This approach led to a series of dead-ends; little insight could be gained into the subordination of a wife by seeing her merely as another (unpaid) worker in the interest of capital. The theoretical impasse in the domestic labour debate provoked new interest in the concept of patriarchy. Once it was apparent that the subjection of wives could not be subsumed directly under class subordination, the way was opened for new theoretical categories to be used to

130 Polity Press, 1988.

131 The domestic labour debate can be followed in E Malos (ed), *The Politics of Housework* (London: Alison and Busby, 1980).

understand conjugal power. However, as the 'dual systems' account of the relationship between capitalism and patriarchy illustrates, patriarchy is all too frequently merely joined to existing analyses of class. The model of bourgeois and proletarian is still seen as appropriate for marriage, even though the husband's appropriation of his wife's labour is also seen as patriarchal power. That the wife's subjection derives from the fact that she is a woman has received acknowledgment, but the full political implications of patriarchal right remain obscured.

The dual systems argument assumes that patriarchy is a feudal relic, part of the old world of status, and that feminist criticism of this relic must be added to the existing socialist critique of capitalism. But 'class' and the 'worker' can wear the trousers (to borrow a formulation that philosophers are fond of using) in the 'partnership' between capitalism and patriarchy only because half the original contract is ignored. No hint is given that capitalism and class have been constructed as modern patriarchal categories. The social contract is about the origins of the civil sphere and capitalist relations. Without the sexual contract there is no indication that the 'worker' is a masculine figure or that the 'working class' is the class of men. The civil, public sphere does not come into being on its own, and the 'worker', his 'work' and his 'working class' cannot be understood independently of the private sphere and his conjugal right as a husband. The attributes and activities of the 'worker' are constructed together with, and as the other side of, those of his feminine counterpart, the 'housewife'. A (house)wife, a woman, naturally lacks the capacities required of a participant in civil life, and thus she cannot participate as a worker on the same basis as her husband. Women have now won civil and juridical standing almost equal to men's, but they are not incorporated into workplaces on the same basis as male workers. The story of the original contract shows how sexual difference gives rise to a patriarchal division of labour, not only in the conjugal home between the (house)wife and her husband, but in the workplaces of civil society.

A (house)wife is not a worker who happens to be located outside the workplace and who is subject to her husband; she is not a 'worker' at all. The work of a housewife – housework – is the work of a sexually subject being who lacks jurisdiction over the property in her person, which includes labour power. But sale of labour power, in contrast to sale of labour or the person, is what makes a man a free worker; the ability to contract out a piece of property in exchange for a wage is, it is held, what distinguishes the worker, the wage labourer, from unfree labourers and slaves. A (house)wife does not contract out her labour power to her husband. She is not paid a wage – there is no token of free exchange – because her husband has command over the use of her labour by virtue of the fact that he is a man. The marriage contract is a labour contract in a very different sense from the employment contract. The marriage contract is about women's labour; the employment contract is about men's work.

The connection between the sexual division of labour and the subordination of wives was emphasised in various radical circles in the early 19th century, especially by the Owenite co-operative socialists, including William Thompson. They attacked 'single family arrangements' and, in their model communities established between the 1820s and 1840s, they attempted (not altogether successfully) to combat marital subjection through communal forms of housework.¹³² If Marx and Engels had not dismissed their predecessors so

132 See B Taylor, *Eve and the New Jerusalem* (Virago Press, 1983), esp Chapter VIII.

summarily and scathingly as utopians, they would have found it far harder to forget the sexual contract, and to treat the private sphere as the politically irrelevant, natural basis from which the worker emerges to contract out his labour power and engage in political struggle in the workplace. Socialist criticism of the employment contract might then have continued to be informed by feminist criticisms of the marriage contract and an appreciation of the mutual dependence of conjugal rights and civil equality.¹³³

FEMINISM AND CRITICAL LEGAL STUDIES

The contemporary jurisprudential feminist debate is characterised by diversity. As current social and political theory reflects the uncertainties of the postmodern era, so too feminist jurisprudence questions its orientation and scope. If 'modernity' suggested that social and legal theory could be constructed as some universal truth – some form of certifiable absolute – the postmodern condition implies uncertainty, fragmentation and a distrust of Grand Theory.

Part of this broad movement in social and political theory is reflected in the Critical Legal Studies (CLS) movement. 'Critical Legal Studies' as a broad movement – or a reaction against, traditional jurisprudential thought – which has much affected feminist thought, emerged in the 1980s. CLS has been described by Professor Alan Hunt as the 'enfant terrible of contemporary legal studies'. CLS scholars – while adopting differing approaches – are united in their rejection of traditional legal thought and legal theory. Given the diversity of approach and the rejection of Grand Theory, CLS cannot itself be regarded as 'a theory' or 'a school'. Critical legal scholarship has been applied to feminist jurisprudence, as Professor Deborah Rhode explains in the following passage:¹³⁴

Critical feminism, like other critical approaches, builds on recent currents in social theory that have made theorising increasingly problematic. Postmodern and poststructural traditions that have influenced left legal critics presuppose the social construction of knowledge.¹³⁵ To varying degrees, critics within these traditions deny the possibility of any universal foundations for critique. Taken as a whole, their work underscores the cultural, historical, and linguistic construction of human identity and social experience.¹³⁶

133 *The Sexual Contract*, pp 133–36.

134 In 'Feminist Critical Theories' (see further below).

135 For discussion of postmodernism's denial that categorical, non-contingent, abstract theories derived through reason or human nature can serve as the foundation for knowledge, see JF Lyotard, *The Postmodern Condition* (1984); J Rajchmand and C West (eds), *Psycho-Analytic Philosophy* (1985); Nancy Fraser and Linda Nicholson, 'Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism', in A Ross (ed), *Universal Abandon?: The Politics of Postmodernism* (1988), p 83; Sandra Harding, 'The Instability of the Analytical Categories of Feminist Theory' (1986) 11 *Signs* 645; David Luban, 'Legal Modernism' (1986) 84 *Michigan Law Review* 1656; Robin West, 'Feminism, Critical Social Theory and Law' (1989) *U Chi Legal F* 59.

For a useful overview, see Christopher Norris, *Deconstruction: Theory and Practice* (1982); P Fitzpatrick and A Hunt, 'Critical Legal Studies: Introduction' (1987) 14 *J Law and Society* 1; David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1986) 231 *New England L Rev* 209.

136 See, for example, JF Lyotard above; Jane Flax, 'Postmodernism and Gender Relations in Feminist Theory' (1987) 12 *Signs* 621. Critical legal studies scholars have responded in varying ways, ...