

# On the ‘Sexual Contract’: Interpreting Carole Pateman’s Critique of Contract Theory in the Era of #MeToo

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## **Abstract**

Thirty years ago, during a “major revival of interest in contract theory,”<sup>1</sup> Carole Pateman published *The Sexual Contract* (1988). Her feminist critique of contract theory followed from her writings on participation and democracy. Through her writings on the sexual contract, Pateman argues that the sexual contract is a crucial component of the classic original contract that binds society. Pateman holds that, like other classic political ideas, the sexual contract has shaped our major institutions. In view of the 2018 #MeToo movement, it is clear that the consequences of the sexual contract continue to plague the structures of modern society. The movement has shed light on how Nondisclosure Agreements are employed as a modern form of the sexual contract. Pateman’s proposals for more participative institutional structures and a universal basic income remain viable methods for attempting to correct some of the remaining inequalities women encounter throughout civil society.

## **Introduction**

Carole Pateman has made enormous contributions to political theory. In her first major book, *Participation and Democratic Theory* (1970) “Pateman was among the first to show how the rejection of old, homogenizing assumptions about the history of democratic thought can be illuminating.” She considers the importance of a feeling of ‘efficacy’— which makes citizens more likely to participate in politics (2010, 814). Crucially, she holds that this applies to industry, as well. “Industry, with its relationship of superiority and subordination, is the most ‘political’ of all areas in which ordinary individuals interact” (1970, 83). In “Justifying Political Obligation” she says “it is within a participatory form of democracy that individuals retain their political decision-making power as citizens” (1989, 62). Nonetheless, Pateman finds that there are problems with presuming the political obligation of citizens under the modern ‘liberal-democratic’ form of government. Pateman advocated for democratization throughout her writing. She contends that in the 21<sup>st</sup> century “an alternative discourse of freedom is badly needed” and “we hear a great deal about

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<sup>1</sup> “Preface” of *The Sexual Contract* (1988)

freedom from proponents of the official view of democracy but for too long the market has been cornered by a contractual conception” (2008, 233).

Informed by her ideas about participation and democracy, Pateman takes on her first of three explorations into the multiple parts of the classic conjecture of the original contract. *The Problem of Political Obligation* explores the social contract, ultimately critiquing the premise that political obligation must be ‘self-assumed’ or ‘self-imposed’. “Voting, it is claimed, protects the interest of all citizens, no matter how substantively unequal they are; and so all can be said to consent” (1989, 64-65). However, Pateman doubts that this assumption is true. She disputes Alan Gerwirth’s notion that because ‘one can participate if one chooses to do so’, “the individual is obligated...whether he personally utilizes his opportunity or not,” arguing instead “it hardly makes sense to insist that individuals are consenting when they refrain from an activity which helps reinforce their disadvantaged position” (1989, 65). This theory carries into her critique of *The Sexual Contract* and later, *The Settler Contract*<sup>2</sup>.

Pateman’s theories on participation and democracy informed her argument in *The Sexual Contract*. Her story provides the central framework for understanding her feminist interpretation of classic contract theory. Her argument emphasizes the consequences of the ‘sexual-social’ pact of the original contract (1988, 1). Pateman maintains that by assuming woman’s ‘tacit’ consent, classic contract theorists were able to establish the ‘law of male sex-right,’<sup>3</sup> ensuring that “women are subordinated to men as men and men as a fraternity” (3). Through her ‘resurrection’ of the story of the sexual contract, Pateman sheds light on the structure of modern contracts involving ‘property in the person’ which create relations of civil subordination. Ultimately, she contends that we must move “beyond contract if there is ever to be a free social order” (2007, 2).

In a 2017 conversation about *The Sexual Contract*, Carole Pateman said, “I would hope that [The Sexual Contract] might give [readers] some insight...into the way that societies are structured. Even the best societies are still structured so that somehow men monopolise all the top positions, they get all the power” (2018). The story of the sexual contract can help us navigate the seemingly endless paradoxes that are involved with woman’s inclusion in a civil society ordered by man. Moreover, Pateman’s interpretation enables us to recognize the ‘illusory nature of consent’ in modern social relationships and begin to “rethink the relationship between contract and freedom.”<sup>4</sup>

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<sup>2</sup> Although the focus of this paper explores the application of *The Sexual Contract*, the analysis could also be used to consider Pateman’s *Settler Contract* and Charles Mills’ *Slave Contract* in the context of present-day politics. “Pateman defines a settlers contract as an agreement among colonizers themselves to simultaneously end a terra nullius, a state of nature, and create a civil or political society and sovereignty for the first time. Native peoples do not take part in the contract, but ‘they are henceforth subject to it, and their lives, lands, and nations are reordered by it.’” (2010, 818)

<sup>3</sup> Pateman (1988, 2) citing Adrienne Rich (1980, 645)

<sup>4</sup> “Introduction” of *Contract & Domination* (2007)

## ***Part I: The Theoretical Framework of the Sexual Contract***

Classic contract theorist conjecture that the original social contract established “a society in which individuals can make contracts secure in the knowledge that their actions are regulated by civil law and that, if necessary, the state will enforce their agreements” (1989, 7). Carole Pateman contends that this interpretation of contract theory, which is often promoted by political theorists, only considers one of many dimensions of the original contract that binds society.<sup>5</sup> ‘Sexual contract theory’ offers a frame for understanding how the so-called ‘sexual-socio pact’ is mimicked by “contracts all the way down” in the classic conception of society (1989, 15). Pateman “investigated the logic of contract theory” and thusly “analyzed the logic of the structural connections between the institutions of marriage, employment, and citizenship” (2008, 202). Through her story of the sexual contract, Pateman reinigorates the notion that woman is a subject of the original contract, not a party to it (2010, 816); so, there is an ‘illusion’ of her consent. Pateman argues that woman’s exclusion from the original agreement constituted her subordination under the ‘law of male sex-right’, which henceforth ensured her civil subordination was “generated through contracts about property in the person within a context of juridical and civil freedom and equality” (2007, 209).

### **‘Illusion of Consent’**

Pateman contends that contracts do not constitute consent. “Unlike consent, the practice of contract brings something new into being. The original agreement is a contract of creation; it is not consent” (2007, 205). Therefore, “*Illusion of Consent*, evokes an argument that runs through much of Pateman’s work.”<sup>6</sup> As a result, “the justification of all structures of authority is thrown open to questions and (logically) only one basis for legitimate government remains; the governed have to agree to be governed” (2007, 207). Pateman casts doubt on the assumption that “the liberal-democratic state rests on a voluntarist basis of genuine commitments” (1989, 68). Locke argues that this consent can be implied from the “peaceful everyday interactions” of the community “under the protection of government” (1989, 63). Pateman disputes the sufficiency of this Lockean theory of ‘tacit consent.’ The false presumption of consent threatens the legitimacy of political authority because, as Pateman claims, “individuals must themselves consent, contract, agree, choose, or promise to enter into a relationship [involving political obligation and political authority]” (1989, 60). In so far as there is a lack of consent, political ‘obligation’ does not seem to be the appropriate characterization of the relation between all citizens and the state (1989, 61).

‘Tacit consent’ is particularly concerning when contracts establish terms for domination. Pateman is critical of the notion that individuals could possibly voluntarily consent to contracts resulting in their subordination. She takes issue with the influence that coercion has in the making of contracts and argues that the existence of coercion during the formation of a contract casts doubt on the validity of its terms (1988, 133). However, Pateman stresses that the absence of coercion does not ensure the legitimacy of a contract. She says, “concentration on coerced contracts, important

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<sup>5</sup> “The social contract was only one dimension of the original contract...there was another dimension, the sexual contract” (1989 203).

<sup>6</sup> “Introduction” of *Illusion of Consent* (2008)

though this is, can obscure an important question: does contract immediately become attractive to feminists or socialists if entry is truly voluntary, without coercion?" "Even when nothing is awry in the conditions under which people made their decision, the agreement might still be problematic if it involves submission to another person's power" (2008, 102).

According to contractarians, "If the individual owns his capacities, he stands in the same external relation to his intimate property as to any other" (1988, 56). Thus, "both parties to the contract enter on the same basis, as property owners who have the common purpose, or common will, to use each other's property to mutual advantage" (1988, 56). Nevertheless, "Social critics of the employment contract and feminist critics of the marriage contract have attacked the claim that, if two individuals make a contract, the fact that the contract has been made is sufficient to show that the exchange must be equal" (1988, 57). Socialist and feminist critics point out that if one party to a contract is in an inferior position (the worker or the woman respectively), then he or she has no choice but to agree to submit themselves to disadvantageous terms. As such,

Well-known problems about consent are hard to avoid. For instance, how is consent refused; where is consent when workers are unilaterally downsized. It might be argued that, rather than giving consent, the individual assents or acquiesces to the power structure, but this raises other equally familiar difficulties about tacit consent (2008, 239).

Pateman believes that the party who 'tacitly' consented to an arrangement for her subordination could not have freely elected to enter into its terms. This is exemplified by the prostitution contract. Pateman cites Alison Jagar who says, "it is the economic coercion underlying prostitution...that provides the basic feminist objection" (1988, 201). Thus, she rejected the classic contrarian notion that consent can be presumed through the agreement of both parties.

In *The Sexual Contract*, Pateman is particularly concerned with theorists' disregard for the consent of women, whom are assumed to 'voluntarily consent' to relationships of domination. She identifies a paradox in the logic of contract theory in that: "Women exemplify the individuals whom consent theorists have declared to be incapable of consenting. Yet, simultaneously, women have been presented as always consenting, and their explicit non-consent has been treated as irrelevant or has been reinterpreted as consent" (1989, 72). This paradox extends into the conditions of the marriage contract. Pateman questions how beings who "lack the capacities to make contracts" are nevertheless supposed to 'voluntarily' enter into the marriage contract (1988, 6). In this regard, the theory of 'voluntarism', which many accounts of the original contract rest upon, is diminished by an inherent contradiction in the attempt to apply the contract to woman. The supposed 'voluntary' nature of contractual relationships masks how contract serves to structure society based on conditions of inequality.

Pateman believes women have been wrongly subjected to the original contract despite having been denied, categorically, their capacity to consent to its terms. Classic contract theorists view the capacity to consent as a masculine attribute. Pateman highlights that according to contract theorists, the "individual" who enters into the contracts in a free and equal society can only be male. While "the fact that 'individuals' are all of the same sex is never mentioned; attention is focused instead on different conceptions of the masculine 'individual'" (1989, 41). Pateman cites Locke, who claims that the individual is the "guardian of his own consent." She argues, "the latter formulation

should be read literally; the consent is his consent. Neither the classic contract theorists nor their successors incorporated women into their arguments on the same footing as men” (1989, 71).

### *Consent and Participative Democracy*

Pateman’s concern with a so-called ‘illusion of consent’ carries into her argument for more participative and democratic institutions; she argues, “consent is central to democratic legitimacy, and deliberation could be seen as a way of obtaining consent.” Nonetheless, Pateman does not see deliberative and participatory as synonymous given a widespread “tacit acceptance of existing power structures” (2008, 237). However, even “contemporary contract theory neglects democratization, the creation of a more democratic social and political order, and fails to question the meaning of democracy.” She maintains that “contract and markets cannot be the model for an entire social order” (2008, 234).

Pateman connects sexual contract theory to her ideas on democracy by arguing that the implications of the sexual contract are destructive to the establishment of a liberal democracy. In her writings on participation and democracy, Pateman brings to light “a participatory tradition that has long been neglected” (2010, 814). She cites Michael Goodhart, who argues, there is “a democratic emancipatory tradition that has not been given its due. It has been obscured until very recently in standard histories of political theory that were...all too willing to transmute the premise of individual freedom into subordination or to exclude sections of the population from freedom all together” (2008, 233).

### **“The Law of Male Sex-Right”**

In *The Sexual Contract*, Pateman demonstrates that “contract is the means through which modern [fraternal] patriarchy is constituted” (1988, 2); thus, contract is employed to establish sexual difference as political difference.

### *Modern Fraternal Patriarchy*

According to Pateman, the original contract that classic theorists imagined was an institution of the new “patriarchal” order for civil society. She considers a conjectural tale of how freedom was won in society by sons who “cast off their natural subjection to their fathers and replace paternal rule by civil government.” However, patriarchy is not one dimensional, and patriarchy should not be strictly understood as paternal right. Pateman says, “paternal right is only one, and not the original, dimension of patriarchal power.” While Pateman argues that patriarchy ceased to be paternal after the political defeat of the father, the structures of modern civil society are still affected by the subordination of women to “men as men, or to men as a fraternity” (1988, 3).

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<sup>7</sup> Pateman contends that we cannot suppress the concepts of ‘patriarchy’ and ‘fraternity’-the only terminology that specifically describes the subjection of women to ‘men as men’ and ‘men as brothers’ respectively. Pateman argues that if “the problem has no name, patriarchy can all too easily slide into obscurity beneath the conventional categories of political analysis.” Additionally, “almost no one – except some feminists – is willing to admit that fraternity means what it says: the brotherhood of

Pateman emphasizes that the original contract erects a common bond that unites men around their collective interests as men. “The men who defeat the father, claim their natural liberty and, victorious, make the original contract, are acting as brothers; that is to say, as fraternal kin or the sons of a father, and by contracting together they constitute themselves as a civil fraternity” (1988, 78). Therefore, the social contract raises the authority of the so-called “male principle” above the authority father.<sup>8</sup> This raises ‘the law of male sex-right’ in order to legitimize the power of men as a collective. Pateman contends that there is an ‘ancient connection’ between fraternities (the small associations in which fellowship is close and brother can know and assist his brother) and the ‘civil fraternity of citizenship.’ The concept of ‘fraternities’ apparently immediately “conjure[s] up pictures of explicitly masculine and often secret associations.” She mentions the picture of the public world depicted by Virginia Woolf as “a mosaic of men’s clubs, each with its appropriate costumes and ceremonial activities” (Sexual 1988, 81).

Pateman says the original contract constituted the establishment of ‘modern fraternal patriarchy’. It is often forgotten that the “revolutionary trilogy” includes fraternity: ‘liberté, égalité, and fraternité.’ Civil freedom was historically enshrined as a masculine attribute. Pateman claims, “modern patriarchy is fraternal in form and the original contract is a fraternal pact” (1989 77). As a concept, fraternity has been subject to many ‘confusions.’ However, Pateman argues that the misuses and misunderstandings of fraternity (along with patriarchy) should not be accepted or espoused by political theorists. Moreover, these ‘confusions’ do not warrant the abolition of their use. She argues that to ignore the masculine character of fraternity is to forget the ascriptive history of the concept. In the “Fraternal Social Contract” (1988) Pateman says:

The contract constitutes patriarchal civil society and the modern, ascriptive rule of men over women. Ascription and contract are usually seen as standing at opposite poles, but the social contract is sexually ascriptive in both form (it is made by brothers) and content (the patriarchal right of a fraternity is established). (1989, 43).

There is no better concept than fraternity to conjure a reminder of the fraternity that exercises the ‘law of male sex-right’ under the form of the revolutionary trilogy.

Social contract theory relies on the assumption of the exclusion of women. Pateman points to Freud who found that “the motive for the brothers’ collective act is not merely to claim their natural liberty and right of self-government, but to gain access to women...In historically specific terms, the brothers create the modern system of marriage law and family and establish the modern order of conjugal or sexual right” (1989, 43). She reminds us that “civil individuals have a fraternal bond because, as men, they share a common interest in upholding the contract which legitimizes their masculine patriarchal right and allows them to gain material and psychological benefit from women’s subjection” (1989, 43). Therefore, as a result of the sexual contract, patriarchy takes a fraternal form in modern society, further entrenching the division of man and woman into the public and private spheres respectively.

### *Public/Private Dichotomy*

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men.” These concepts are crucial to the construction of Pateman’s argument, which serves to end the repression of the sexual contract—“one of the most important challenges to assumptions made in political theory” (1988, 78).

<sup>8</sup> She notes “civil fraternity has not always been universal; that is its distinctively modern feature. Unlike modern civil society, citizenship in the polis was defined ascriptively and was particular to a given city-state” (1988, 80).

“Liberal-feminism has radical implications, not least in challenging the separation and opposition between the private and public spheres that is fundamental to liberal theory and practice” (1989, 119). Pateman argues that the ‘sexual division of labor’ demonstrates how the subjection of woman to the ‘law of male sex-right’ affects the whole structure of society. The original contract is considered a means of establishing men’s orderly access to women. As such, woman is treated as man’s property and thus, cannot be in full possession of the property in her person. Therefore, the sexual contract requires that women are incorporated into civil society on a different basis from men. So, “women are incorporated into a sphere that both is and is not in civil society. The private sphere is part of civil society but is separated from the ‘civil’ sphere. This has ensured that “the antinomy private/public is another expression of natural/civil and women/men” (1988, 11). The private/ womanly/natural sphere exists in opposition to the public/masculine/sphere. Pateman explains “in the story of the creation of civil society through an original agreement, women are brought into the new social order as inhabitants of a private sphere that is part of civil society, and yet is separated from the public world of freedom and equality, rights, contract, interests and citizenship” (1989, 4). She says, “the private sphere is typically presupposed as a necessary, natural foundation for civil i.e., public life, but treated as irrelevant to the concerns of political theorists and political activists” (1988, 11).

According to Pateman, “feminists have emphasized how personal circumstances are structured by public factors, by laws about rape and abortion, by the status of ‘wife,’ by policies on child-care and the allocation of welfare benefits and the sexual division of labour in the home and workplace” (1989, 131). This has ensured that the ‘personal’ remains the ‘political’ for women. In her essay on “The Patriarchal Welfare State,” Pateman refers to ‘Wollstonecraft’s Dilemma’. The dilemma speaks to the complexities of how women have sought inclusion in the public sphere. Pateman explains,

“on the one hand, they have demanded that the ideal of citizenship be extended to them, and the liberal-feminist agenda for a ‘gender-neutral’ social world is the logical conclusion of one form of this demand. On the other hand, women have also insisted, often simultaneously, as did Mary Wollstonecraft, that as women they have specific capacities, talents, needs and concerns, so that the expression of their citizenship will be differentiated from that of men” (1989, 197).

Under a patriarchal conception of citizenship, women are thus allowed only two alternatives: “either women become like men, and so full citizens; or they continue at women’s work, which is of no value for citizenship” (1989, 197).

Feminists often struggle with Wollstonecraft’s Dilemma in some fashion when discussing the framework for achieving equality. To resolve Wollstonecraft’s Dilemma necessitates a complete re-conception of citizenship, because the public sphere has been structured according to the interests of men. Some feel that the dilemma can be solved by the negation of sex difference (in other words, gender neutrality), however, Pateman is critical of this notion. She holds that “humankind has two bodies—and the bodies of women and men have very different social and political significance. “In an exploration of contract and patriarchal right, the fact that women are women is more relevant than the differences between them” (1988, 18). Pateman rejects ‘mainstream’ political theory’s assumption that the public sphere is independent from the private sphere, for it is her contention that as demonstrated by the classic texts, “the meanings of ‘private’

and 'public' are mutually interdependent; the 'public' cannot be comprehended in isolation" (1989, 3). The ignorance of the interdependence of the two spheres leads to the assumption that the public world and the categories that theoretically comprise it are 'sexually neutral' and 'universal.'

Although, according to contractarians, the political sphere was theoretically distinct from the private sphere, the former was charged with the arbitration and protection of the latter. "The answer...was to divide social life into two spheres and to substitute for shared principles a 'political method' or procedure for arbitrating between conflicting individual interests and deciding on the 'public interest.' Under the structures of the original contract, the public sphere was considered to be the sole agent of the political. The distinction of political right as a uniquely masculine trait has been employed as a justification for ignoring the patriarchal right of fathers and husbands that has been enshrined in the public law.

Pateman maintains that notion of the 'spheres' should not confuse the fact that man's assertion of his patriarchal right extends into all of civil society. She argues:

"To state that the social contract and the sexual contract - the original contract - creates the two spheres, can be seriously misleading in so far as such a formulation suggests that patriarchal right governs only marriage or the private sphere. In the classic tales the sexual contract is displaced into the marriage contract, but this does not mean that the law of male sex-right is confined to marital relations. Marriage is extremely important, not least because the private sphere is constituted through marriage, but the natural power of men as 'individuals' extends to all aspects of civil life. Civil society (as a whole) is patriarchal. Women are subject to men in both the private and public spheres; indeed, men's patriarchal right is the major structural support binding the two spheres into a social whole. Men's right of access to women's bodies is exercised in the public market as well as in private marriage, and patriarchal right is exercised over women and their bodies in ways other than direct sexual access" (1988, 113).

This reflects her central argument rejecting the conjectural history espoused by the classic contract theorists. These historical tales, which establish the division of the spheres, must be challenged, because the ideas behind them are thought to shape the whole structure of society.<sup>9</sup>

### **Civil Subordination and 'Property in the Person'**

Pateman says "civil subordination depends upon the capacity of human beings to act as if they could contract out labour power or services rather than, as they must, contract out themselves and their labour to be used by another." Thus, "a brilliant piece of political inventiveness has given the name of freedom to civil subordination and repressed the interdependence of civil freedom and patriarchal right" (1988, 231). As a result, Pateman argues "it is too often taken for granted that contract exhausts the ways of entering into free agreements or constituting free relations" and advocates for a conception of freedom that "abandon[s] the political fiction of property in the person" (2007, 213).<sup>10</sup>

"Civil subordination is generated through contracts about property in the person within the context of juridical and civil freedom and equality." This is because the "new form requires the agreement of the governed and free acts of individuals" so "it has to be constituted through contract

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<sup>10</sup> Pateman stops short of outlining a new conception of how we might form free relationships.

within institutions (held to be) constituted by free relations” (2007, 209). Thus, Pateman contends that a ‘permanent exchange’ of obedience for protection has structured social relationships. “The peculiarity of this exchange is that one party to the contract, who provides protection, has the right to determine how the other party will act to fulfill their side of the exchange” (1988, 59). She contends that these exchanges are supported by the notion that ‘property in the person’ is a political fiction that was imagined by contract theorists.

Moira Gatens interprets Pateman’s critique to imply that “political, economic, social, or conjugal” subordination are “historically, conceptually, and substantially interconnected.” She continues, “the common thread that connects them all is the political fiction of ‘property in person’ that allows certain kinds of contracts to appear legitimate. As such, societies’ ‘key institutions’ of ‘employment, marriage, and citizenship,’ “developed together, are mutually reinforcing, and are constitutively contractual” (2008, 32). Not to mention, “each institution crucially depends on the political fiction of property in person.” Modern contractual societies, far from freeing us from hierarchy, have merely transformed the ways in which social relationships are constructed as relations of domination and subordination.” Gatens explains how Pateman challenged Locke’s theory of property and “its role in underwriting the equality of individuals in civil society.” Hence, if women do participate in civil life, it is never as full rights-bearing individuals, it is always as women. (2008, 32). Contracting out fictional property in persons is the modern means of creating relationships of subordination (1989, 118), and it is important to consider the extent to which these supposedly free relationships resemble the relationship of master and slave.

### *The Fiction of ‘Property in the Person’*

Pateman’s argument is concerned with the ‘alienability’ of property in the person, for...if property in the person is ‘alienable’, then it can be subject to contract (2002, 21). In sexual contract theory, Pateman is primarily concerned with the ‘inalienable’ property that has been treated as if it were ‘alienable,’ due to a fiction that certain property in the person (i.e. the commodification of labor power) can be separated from the rest of the person. Contracts involving property in the person are those that create relationships (i.e. between worker and employer, or wife and husband) of subordination (2002). She maintains that this conception of property in the person is a political fiction, because in practice, ‘agency,’ ‘services,’ or ‘labor power,’ are not separable from the body (2007, 211). Understanding the fiction of the ‘alienability’ of property in the person is central to understanding how contracts that alienate property in the person undermine the freedom and equality of those who submit to them. As Mill says, “it is not freedom to be allowed to alienate his freedom” (1988, 103).

Contract rests upon the exclusionary principle that “every man has property in his own person.” As a result, Pateman argues, the original contract established a political system that was shaped by the refusal to acknowledge that woman owns the same property in her person as man. This can be seen through “an exploration of contracts about property in the person to which women must be party – the marriage contract, the prostitution contract and the surrogacy contract” which “show that the body of a woman is precisely what is at issue in the contract” (1988, 224). In these contracts, “the owner, exercising freedom or agency, rents out property (in the person) for use by

another...but if the property is to be used as required, the body of the owner has to be available too” (2007, 210).

The fiction of property in the person has been used to justify the permanent structure of social relationships characterized by the ‘exchange of obedience for protection.’ To exemplify the nature of how the property in the person of a subordinate is used by superior, Pateman points to employment contracts. “The fiction that what is available as a commodity for sale or rent in the market is merely a piece of property, just like any other, is necessary if such contracts are to be said to constitute free relations” (2007, 210). She cites the analysis of Coase and argues that “in the employment contract, the worker ‘for a certain remuneration (which may be fixed or fluctuating) agrees to obey the direction of an entrepreneur within certain limits” (1988, 59). The essence of the employment contract is that it is the employer’s prerogative to direct the worker in his work. “But if the property is to be used as required, the body of the owner has to be available too” (2007, 210). The employer buys the right to control the worker, so the employer becomes the master and the worker becomes the servant in a relationship of civil subordination.

“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” (1988, 135). Similarly, “A wife who is in paid employment never ceases to be a housewife; instead she becomes a working wife, and increases the length of her working day” (1988, 130).

#### *‘Contracting Out’ Property in the Person*

The employment contract relies on the fiction of the alienability of labor power. Pateman says, “The contract in which the worker allegedly sells his labour power is a contract in which, since he cannot be separated from his capacities, he sells command over the use of his body and himself” (1988, 151). She furthers,

The answer to the question of how property in the person can be contracted out is that no such procedure is possible. Labour power, capacities or services, cannot be separated from the person of the worker like pieces of property. The worker’s capacities are developed over time and they form an integral part of his self-identity (1988, 150).

Additionally, she says, the employment contract is “open-ended, not a contract of specific performance, and the employer alone gains the ultimate right to decide what the content of the contract will be” (1988, 148). Pateman argues that the employment contract exists to reinforce the power of the capitalist over the worker. She argues, “If unrestricted bargaining took place, the employer’s possession of the political right that makes him an ‘employer’ would have disappeared; hence, instead of ‘pure contract’ there is the employment contract, which is enforced by the employer” (1988, 148). Consistent with her defense of the use of the concepts ‘patriarchy’ and ‘fraternity,’ Pateman also defends the indispensability of the term ‘wage slave.’ She argues, “‘wage slave’ is as indispensable as ‘patriarchy.’ Both terms concentrate the mind on subordination” (1988, 152). It is clear that employment contracts are a form of contracts about property in the person. Thus, according to Pateman, these contracts “inevitably create subordination.”

Pateman also argues that “the workplace is structured by patriarchal discipline.” She explains,

The content of the labour of the worker is determined by the capitalist, but since capitalism is patriarchal, the labour of women workers is different from that of male workers. Because the subjection of wives derives from their womanhood and because the sexual division of labour extends into the workplace, it is tempting for feminists to conclude that the idea of the individual as owner is anti-patriarchal. If women could be acknowledged as sexually neuter ‘individuals’, owners of the property in their persons, the emancipatory promise of contract would seem to be realized (1988, 153).

Nonetheless, she maintains that in reality individuals “are sexually indifferent only to the extent that they are disembodied” (1989, 3). Pateman furthers, “the capitalist market is patriarchal, structured by the sexual division of labour” (1989, 132). She thusly challenges Engels’ notion that “sexual difference is irrelevant in the capitalist market” (1989, 134).

Marx argues that in the context of employment and the capital market, contract is a “process which is qualitatively different from exchange, and only by misuse could it have been called any sort of exchange at all” (1988, 148). Pateman emphasizes that “contracts about property in the person were peculiar in that they do not involve an exchange, or at least do so only in a very special sense...these contracts create relationships (of subordination) within institutions. The specific form of contract that [she] analyzed is not an abstract mechanism but inseparable from its relational and institutional context” (2007, 206). Pateman’s argument is based on the dialectic between contracts and structures. She maintains that, “the domestic relations of master-slave and master-servant, relations between unequals,” [gave way] to the relation between capitalist or employer and wage labourer or worker.” She explains that “production moved from the family to capitalist enterprises, and male domestic labourers became workers” (1988, 117). Nonetheless, “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” (1988, 135). Similarly, “A wife who is in paid employment never ceases to be a housewife; instead she becomes a working wife, and increases the length of her working day” (1988, 130).

“Only women became (house)wives and provided ‘domestic service’” (1989, 125). Pateman argues that the ‘exchange’ between the parties of the marriage contract is especially curious, because only one party to the contract (the man) is an owner of property in the person. According to Levi-Strauss, the marriage contract is an exchange of a form of property: ‘the most precious category of goods, women’. The result is that “as a ‘natural subordinate’ the wife receives protection from her husband in exchange for obedience, much like a slave contract” (2010, 35). Thus, social contract theory relies on the paradox that “women are property, but also persons; women are held both to possess and to lack the capacities required for contract – and contract demands that their womanhood be both denied and affirmed” (1988, 60). This fundamental paradox demonstrates how property in the person can only be seen as multidimensional in that women are seen as possessing a wholly different mix of property in the person. Pateman contends that despite the paradox surrounding property in the person of women, the ‘fiction’ of property in the person has served to legitimize relationships of subordination which “place right of command in the hands of one party

to the contract.” She says, “feminism looks toward a differentiated social order within which the various dimensions are distinct but not separate or opposed, and which rests on a social conception of individuality, which includes both women and men as biologically differentiated but not unequal creatures” (1989, 136).

Pateman thinks the marriage contract is the best place to begin to illustrate how patriarchal political right is continuously renewed and re-affirmed through actual contracts in everyday life. John Stuart Mill writes that marriage is “the primitive state of slavery lasting on” (1989, 215). She argues that the original contract can only be upheld if women’s subjection is secured in civil society through the institution of marriage. Pateman says that the “marriage contract is the only remaining example of a domestic labour contract, and so the conjugal relation can easily be seen as a remnant of the pre-modern domestic order” (1988, 118). She reasons that historically, “To become a wife entails becoming a housewife; that is, a wife is someone who works for her husband in the marital home” (1988, 118). The bondage of women to men has been structured and upheld by the law.

Consider, for example, the common law doctrine of coverture, which ensured that until late into the nineteenth century, the legal and civil position of a wife was analogous to that of a slave. Pateman says, “the denial that wives (women) owned the property in their persons was central to coverture” (2007, 210). “Blackstone explains the singular situation of married women as follows; under coverture, for a man to contract with his wife, ‘would be only covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voiding by the intermarriage’” (1988, 156). A slave had no independent existence apart from his master, and husband and wife became ‘one person,’ the person of the husband. “Under coverture, married women were held to be absorbed into the person of their husbands, and women were barred from professions and the franchise on the grounds that they were not persons” (2007, 210). Additionally, “a wife was required to live where her husband demanded, her earnings belonged to her husband and her children were the property of her husband, just as the children of the female slave belonged to her master” (1988, 121) According to William Thompson, “men would have turned women into mere labourers except that they depend on women to satisfy their sexual desires.” She also points to John Stuart Mill who offered that at the origin, every woman was “found in a state of bondage to some man.”

Pateman argues that marriage is “only one of the socially acceptable ways for men to have access to women’s bodies.” Alas, “in modern patriarchy a variety of means are available through which men can uphold the terms of the sexual contract” (1988, 189). She explains that “the sexual subjection of wives<sup>11</sup> has never lacked defenders, but until very recently an unqualified defence of prostitution has been hard to find” (1988, 190). Pateman holds that “marriage and prostitution contracts...have always been tainted by the odour of slavery, and provide an embarrassing reminder of ‘brutal origins’” (1988, 230). She also maintains that the “prostitution contract is exactly like the employment contract...The prostitute like other ‘individuals’, stands in an external relation to the property in her person” (1988, 191). “Similarly, the services of the prostitute cannot be provided unless she is present; property in the person, unlike material property, cannot be separated from its owner...In prostitution, the body of the woman, and sexual access to that body, is the subject of

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<sup>11</sup> Pateman herself says, “Possibilities for changing marriage are much greater than for prostitution” (2007, 226).

the contract” (1988, 203). Likewise, Pateman is critical of the ‘surrogate’ mother. She says, “The ‘surrogate’ mother contracts out right over the unique, physiological, emotional, and creative capacity of her body, that is to say, of herself as a woman” (1988, 215). So, the prostitution contract and the surrogacy contract also represent contracts that follow from the terms of the sexual contract.

## ***Part II: Interpreting the Story of the Sexual Contract in the Era of #MeToo***

Although society has progressed markedly in the last 30 years, the relevance of sexual contract theory has stood the test of time. Carole Pateman’s theory certainly does not rely on a denial of the progress that women have made in achieving political equality. She says, “after a century or more of legal reform women are near juridical equality with men,” but, she qualifies, “men still enjoy extensive power as a sex” (1988, 227). Even after the onset of the 2017 #MeToo movement, Pateman has maintained that “although you have to take into account that society is not quite the same as it used to be,” she still thinks, “*The Sexual Contract* has application now.”<sup>12</sup> According to Pateman, there hasn’t been a big enough cultural revolution yet, and a lot of the ideas of the feminist movement exist in popular culture in a “watered-down form.”<sup>13</sup> As a result, the increasing political influence of women has failed to meaningfully effect the power of the modern fraternal order.

Sexual contract theory provides a framework for understanding that the structure of modern institutions is effected by the ‘division of the sexes’ in civil society. In contemporary society, institutions have attempted to eliminate sex-based discrimination by forcing women to conform to structures that were devised by and for men. “When contract and the individual hold full sway under the flag of civil freedom, women are left with no alternative but to (try to) become replicas of men” (1988 187). Pateman holds that, “to argue that everyone should be treated in the public world as if the facts of sex, class, colour, age, and religion do not count, is to insist that we should deny the most basic human facts about ourselves and thus accentuate the inhumanity and alienation of the present” (1989, 134). Whether or not there is a natural difference between the sexes is irrelevant insofar as classic contract theorists establish sexual difference as a political construct. “The story of the sexual contract tells how contract is the medium through which patriarchal right is created and upheld” (1988, 187). Thus, Pateman’s theory enables us to move past the ‘wrong question’ of whether sexual difference is politically significant and instead explore the question of how the difference is to be expressed in our modern institutions (1988, 226).

Across the institutions of civil society, woman continues to face unique structural challenges as a result of her historical subjugation under the ‘law of male sex-right.’ Pateman’s proposals for more participatory institutional governance and a system for universal basic income remain relevant and viable methods for leveling the playing field for women. Nonetheless, we must

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<sup>12</sup> Thompson, S., Hayes, L., Newman, D. et al. *Fem Leg Stud* (2018). <https://doi.org/10.1007/s10691-018-9368-1>.

<sup>13</sup> *Ibid.*, 12.

continue to rethink the structures that form our social relationships in order to promote a more free and equal society.

## **Modern-day Consequences of the Sexual Contract**

### *The Employment Contract and the Effects of the 'Sexual Division of Labor'*

“It has to be recognized that the workplace is structured by a sexual division of labour which poses still further complex problems for equality and participation”— Carole Pateman, “Feminism and Democracy”

The story of the sexual contract reveals that the terms of the employment contract presuppose the ‘sexual division of labor’. The sexual division of labor constituted by the original contract has had a significant effect on the modern condition of institutions in Western economies. It cannot be disputed that “the subordination of wives was presupposed by the institution of employment” (1988, 135). The division of labor had a significant effect on the condition of public and private institutions today. The patriarchal structure of the workplace is clearly seen through the ‘gender segregation’ of top management levels which persists across corporations. For example, according to a 2013 study<sup>14</sup>, among Fortune 500 companies, only 14.6% of corporate executive officer positions are occupied by women. Clearly, the lasting impact of the sexual division of labor is plainly revealed by the concentration of men at the top of most corporations.

Moreover, the “division of labor” has ensured that “when husbands became ‘breadwinners’ and their wives became economic ‘dependents’, the wage became a family wage.” She contends that the “family wage has always been as much an ideal as a reality,” so, “women’s earnings have been regarded as a ‘supplement’ to a husband’s wage.” Therefore, “wages have been sexually differentiated...and so an economic incentive for women to become wives is maintained” Still today, “many married women work part time, often because no other jobs are available” (1989, 137). From 1980 until 2012, there was little change in both the proportion of men and the proportion of women working part-time in the U.S. economy.<sup>15</sup>

### *Workplace Sexual Harassment: Understanding the 'Fiction of Property in the Person'*

“Sexual domination is part of the structure of subordination in the workplace”—Carole Pateman, *The Sexual Contract*

Pateman challenges the notion that workers can truly alienate their labor power in the employment contract. The ‘fiction of property in the person’ espoused by contractarians masks the reality of the structural inequality that women encounter in ‘workplace’ institutions, for the narrative of it involves the assumption that it is feasible for women to separate the ‘labor power’ in their persons from the sex of their persons. In 1989, Pateman mentioned that ‘sexual harassment’ had been

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<sup>14</sup> Warner, Judith. “Fact Sheet: Women’s Leadership Gap,” Center for American Progress. 7 Mar 2014. Web.

<https://www.americanprogress.org/issues/women/reports/2014/03/07/85457/fact-sheet-the-womens-leadership-gap/>

<sup>15</sup> “On Pay Gap, Millennial Women Near Parity – For Now,” Pew Research Center, Washington, D.C. Dec. 11, 2013. Web.

discovered in the workplace, and it “helps maintain patriarchal right in the public world. Women workers are frequently subject to persistent, unwelcome sexual advances, or their promotion or continuing employment is made conditional upon sexual access” (1988, 142). In 2017, issues of workplace ‘sexual harassment’ resurfaced with the #MeToo movement<sup>16</sup>. Following the onset of the movement, 35% of women said they have personally experienced sexual harassment or abuse from someone in the workplace.<sup>17</sup> The widespread astonishment in society over the number of women who have been affected by sexual harassment in the workplace is misplaced; Given the lasting effects of the sexual contract, the large number of women harmed by sexual harassment should come as no surprise.

Because men still hold a disproportionate share of the power in the workplace, bad men are still able to leverage contracts to enforce the ‘law of male sex-right.’ The #MeToo movement shed light on the uniquely challenging condition of the ‘female wage laborer.’ “Thirty years after the United States Supreme Court held in *Meritor Savings Bank v. Vinson* that sexual harassment creates a hostile or abusive work environment and is a violation of title VII of the Civil Rights Act of 1964, sexual harassment remains a widespread problem, affecting victims in every industry, at every level of employment.”<sup>18</sup> Contracts provide the mechanism for parties to arbitrate claims of sexual harassment out of the public’s view. Female victims of sexual harassment in the workplace are often silenced by the terms of their employment contract and other forms of the sexual contract, so the oppressive structures of the workplace are upheld.

### *College Fraternities: Defending the Modern Fraternal Patriarchy*

“The motive for the brothers’ collective act is not merely to claim their natural liberty and right of self-government, but to gain access to women”—Carole Pateman, “The Fraternal Social Contract”

The climate is ripe for an evaluation of the culture of society’s institutions, and how some institutions serve to protect the law of male sex-right and the modern fraternal patriarchy. College social fraternities have taken heat in the political arena as a result of numerous drinking-related deaths of members and an apparent widespread sexual assault of female students.<sup>19</sup> The original contract permits the free association of male individuals in civil society. The modern patriarchy continues to wield influence through fraternal organizations. College fraternities, which are possibly older than the American Republic, have been under growing public scrutiny. The scrutiny of college fraternities is not new. Fraternities, like male-dominant workplaces, are able to utilize legal tactics to protect their influence.

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<sup>16</sup> Farrow, Ronan. “Harvey Weinstein’s Secret Settlements,” *The New Yorker*. 21 Nov. 2017. Web. <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>

<sup>17</sup> “Gender discrimination comes in many forms for today’s working women,” Pew Research Center, Washington, D.C. Dec. 14, 2017. Web.

<sup>18</sup> Ending Secrecy About Workplace Sexual Harassment Act, 115 H.R. 4729, 2017 H.R. 4729, 115 H.R. 4729

<sup>19</sup> Flanagan, Caitlin. “The Dark Power of Fraternities,” *The Atlantic*. Web. March 2014; “First and foremost of these is the binge-drinking epidemic, which anyone outside the problem has a hard time grasping as serious (everyone drinks in college!) and which anyone with knowledge of the current situation understands as a lurid and complicated disaster. The second is the issue of sexual assault of female undergraduates by their male peers, a subject of urgent importance but one that remains stubbornly difficult even to quantify”

Social fraternities on college campuses represent how the “fraternal” social pact provides a unique mechanism for men to enforce the ‘law of male sex-right.’ “When colleges tried to shut them down, fraternities asserted that any threat to men’s membership in the clubs constituted an infringement of their right to freedom of association.” As a result, “the powerful and well-funded political-action committee that represents fraternities in Washington has fought successfully to ensure that freedom-of-association language is included in all higher-education reauthorization legislation, thus “disallowing public Universities the ability to ban fraternities.”<sup>20</sup>

### *Sexual Assault: The ‘Ambiguity’ of Consent*

“If the practice of consent is to be meaningful it must be possible for individuals both to give and refuse consent. Therefore, when an individual says ‘yes’ or ‘no,’ no matter who utters the words, the presumption must always be that the individual means what he or she says”— Carole Pateman, *Illusion of Consent*

The #MeToo movement resurfaced a political conversation about consent in cases of sexual assault. “States are expected to grapple with legislation to establish affirmative consent — known as “yes means yes” — and rewrite rape and sexual assault laws. Legislatures already are considering more than two dozen bills that would strengthen laws against rape, teach students that both participants must consent to sexual activity, and extend the time to prosecute or sue those accused of sexual assault.”<sup>21</sup>

“The legal failure to distinguish between ‘acts of sexual assault and consenting sexual relations among adults,’ or between enforced submission and consent, is grounded in a complex of beliefs about the ‘natural’ characters of the sexes. Eminent lawyers as well as the public are convinced that the ‘naturally’ sexually aggressive male must disregard a woman's refusal as merely a token gesture that hides her true desires” (1989, 71). The theory that accusations that female survivors are ‘not credible,’ or that survivors ‘wanted’ the sexual assault, is informed by the notion that women lack the ubiquitous capacity to consent. Pateman points to Rousseau, for example, who painted a picture of men as natural aggressors and women as being destined to resist. In essence, he argues that woman must always say ‘no’ even when she wants to say ‘yes.’

Why do you consult their words when it is not their mouths that speak? . . . The lips always say “No,” and rightly so; but the tone is not always the same, and that cannot lie. . . Must her modesty condemn her to misery? Does she not require a means of indicating her ‘inclinations without open expression?’ (1989, 76).

It follows that, “In certain areas of the law where ‘consent’ is central...social reluctance to recognize women as ‘free and equal individuals’ denies in practice what the law proclaims in principle” (1989, 77) creating a situation that requires women to use force in order for their refusal of consent to be recognized during sexual encounters. “If you require that there be force, then someone has to fight off someone to say no. That’s not a reasonable standard.”<sup>22</sup>

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<sup>20</sup> Ibid, 18.

<sup>21</sup> “#MeToo Movement Has Lawmakers Talking About Consent,” Pew Research Center, Washington, D.C. 23 Jan 2018. Web. <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/23/metoo-movement-has-lawmakers-talking-about-consent>

<sup>22</sup> Ibid, 20.

Society has largely ascribed to a ‘Hobbesian’ theory of consent through the perception that submission to a sexual act is enough to guarantee that both individuals freely participated in it. The ‘Hobbesian’ theory on consent is problematic, because it does not acknowledge that victims of sexual assault are often coerced or forced into engaging in the act. The burden then falls onto the survivor to demonstrate that she physically resisted otherwise she is believed to have ‘submitted’ to the act. “When people are mugged or robbed, they are not asked why they did not resist. But in sexual assault cases, failure to resist can be one of the biggest sticking points for jurors. Often both sides acknowledge that a sex act occurred, and the question is whether it was consensual. Fighting back is viewed as an easy litmus test.”<sup>23</sup> Not to mention, this burden for women to prove that they resisted is enough to keep many women from holding their oppressors accountable under the law, particularly when she believes she may have ‘tacitly’ consented to the abuse.

The confusion of the law leads to situations where women are made to think they consented to sex even though they didn’t want to. For example, although Stormy Daniels maintained that her ‘affair’ with President Donald Trump was consensual, in describing the terms of their sexual encounter she said, “I just felt like maybe – [laugh] it was sort of – I had it coming for making a bad decision for going to someone’s room alone and I just heard the voice in my head, ‘well, you put yourself in a bad situation and bad things happen, so you deserve this.’”<sup>24</sup> Issues with how to conceptualize ‘consent’ are deeply rooted in society.

These issues with understanding the meaning of ‘consent’ have also been at the front and center of contemporary debates surrounding the adjudication of sexual harassment and sexual assault proceedings on college campuses. At public universities, the United States Department of Education has begun rolling back adjudication procedures that gave credence to sexual assault allegations which often lack physical evidence. The Department released universities from a 2011 regulation that “demanded colleges use the lowest standard of proof, ‘preponderance of the evidence,’ in deciding whether a student is responsible for sexual assault.”<sup>25</sup> However, allowing the ‘preponderance of the evidence’ standard enabled victims of sexual assault to seek justice even when they could not meet the difficult standards of proof required of the criminal justice system.

## Understanding Nondisclosure Agreements as a Sexual Contract

“Unless entry into the contract is a voluntary act there can be no engagement with the assumption, which runs through much political philosophy as well as much current public policy, that contract can be identified with freedom”— Carole Pateman, *Illusion of Consent* (2008)

In *The Sexual Contract*, Pateman demonstrates how marriage, employment, prostitution, and surrogacy contracts represent some of the ‘contracts all the way down’ which take on the form of

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<sup>23</sup> Dewan, Shaila. “She Didn’t Fight Back: 5 (Misguided) Reasons People Doubt Sexual Misconduct Victims,” *New York Times*. 30 Nov 2017. Web. <https://www.nytimes.com/2017/11/30/us/sexual-harassment-weinstein-women.html>

<sup>24</sup> Filipovic, Jill. “Stormy Daniels has Spoken. It doesn’t look good for Trump – or us,” *The Guardian*. 26 March 2018. Web. <https://www.theguardian.com/commentisfree/2018/mar/26/stormy-daniels-trump-affair-claims-doesnt-look-good-president-america>

<sup>25</sup> Saul, Stephanie, et al. “Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations,” *New York Times*. 22 Sept 2017. <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>

the original sexual contract. Nondisclosure Agreements (NDAs) are a quintessential form of the modern sexual contract which has been challenged through the #MeToo movement. NDAs are used to uphold the 'law of male sex-right' in cases of sexual misconduct. As one employment lawyer said, "settlement agreements for harassment claims containing nondisclosure provisions are the rule and not the exception."<sup>26</sup> Pateman's framework provides a clear method for understanding the issues with NDAs. According to sexual contract theory, all NDAs would be considered problematic because they attempt to alienate the parties' speech for exchange in an agreement.

NDAs are particularly problematic in cases of sexual misconduct, because they employ the victim's speech as a means of achieving an end of protecting her oppressor's reputation. Even when victims want to seek justice, they often face perverse incentives to remain silent. "In the vast majority of cases, settlement agreements resolving sexual harassment claims in exchange for monetary payments require that victims not speak publicly about the settlement's terms or any details of the circumstances giving rise to the litigation."<sup>27</sup> Many times, victims do not freely enter into these agreements. Victims are coerced into entering into NDAs through the power of money. Otherwise, victims are made to feel as though they have no option but to enter into a settlement agreement. Usually this involves victims being told something along the lines of "As we all know, litigation is uncertain in the best of times, and so the victim may ultimately not be able to prevail on her claims and may get nothing. Litigation is not only highly uncertain, it is also a long and arduous process which can take years to complete."<sup>28</sup> Therefore, NDAs are also plagued by an 'illusion of consent' as women are coerced into entering them.

Moreover, in cases of sexual misconduct, NDAs give oppressors a tool to uphold the theoretical 'law of male sex-right' even when it contradicts the actual law. In the U.S., NDAs are used by corporations to fend off investigations by the Equal Employment Opportunity Commission (EEOC). The EEOC has the right to investigate workplace sexual harassment to protect the public interest. However, "In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation."<sup>29</sup> Employees can be bound from speaking out before the sexual harassment even occurs by the terms of their original employment

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<sup>26</sup> Gibbs, Evan. "Non-Disclosure Agreements in the #MeToo Era," *Above the Law*. 20 Feb 2018. Web. <https://abovethelaw.com/2018/02/non-disclosure-agreements-in-the-metoo-era/>

<sup>27</sup> Hafiz, Hiba. "How Legal Agreements Can Silence Victims of Workplace Sexual Harassment," *The Atlantic*. 18 Oct 2017. Web. <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/>

<sup>28</sup> *Ibid*, 25.

<sup>29</sup> *EEOC v. Astra USA*, 94 F.3d 738 (1st Cir. 1996)

contract ‘confidentiality clauses’<sup>30</sup>. “Most employment contracts contain arbitration provisions that move lawsuits from a public forum to a private, usually confidential, proceeding.”<sup>31</sup>

The #MeToo movement revealed that NDAs are often used to silence sexual harassment and assault claims even when their use may violate the law. There is reason to believe the movement will lead to greater enforcement of sexual harassment law as the rights of victims are clarified, for it has been said that “The influence of the #MeToo movement has accelerated to the top of public discourse and has shifted how employers approach sexual harassment in the workplace.”<sup>32</sup> This is crucial, because victims of sexual harassment often fail to seek justice, because they—rightly—fear what will come from attempting to take on their oppressors.

“While NDAs are unenforceable when used to silence workers’ discussion of sexual harassment at work and in legal claims, they can and are enforced to silence employees’ public speech... Without the benefit of legal counsel, and when...sexual harassment does not rise to the level of criminal sexual assault, workers are right to be uncertain about what NDAs prohibit. That, along with the accompanying risk of getting fired, can discourage employees from speaking up.”<sup>33</sup>

Several particularly unsettling cases came to light during the #MeToo movement in 2017. Although the powerful Hollywood mogul Harvey Weinstein was sexually harassing and assaulting women for decades, his actions were protected from public scrutiny through structures of intimidation. The Weinstein scandal called attention to the system of underlying structures that often exists to protect bad actions of powerful men in society. “Mr. Weinstein enforced a code of silence; employees of the Weinstein Company have contracts saying they will not criticize it or its leaders in a way that could harm its ‘business reputation’ or ‘any employee’s personal reputation,’ a recent document shows. And most of the women accepting payouts agreed to confidentiality clauses prohibiting them from speaking about the deals or the events that led to them.”<sup>34</sup>

Through the force of the #MeToo campaign, women began calling attention to similar institutional protections across society. Larry Nassar, a USA gymnastics national team doctor, was accused of molesting at least 250 young girls. In a clear violation of the law, even some of Nassar’s victims of molestation were allegedly “forced to agree to a nondisparagement clause and confidentiality provision” during settlement agreements.<sup>35</sup> The #MeToo movement has revealed how powerful men come down on women to enter into Nondisclosure Agreements, robbing women

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<sup>30</sup> Hemel, Daniel. “How nondisclosure agreements protect sexual predators,” *Vox*. 13 Oct 2017. Web; “That kind of confidentiality clause — which prevents an employee or ex-employee from speaking about sexual harassment and other workplace misconduct — is generally considered to violate federal labor law, though lots of employers use them anyway. The National Labor Relations Board has ruled that “a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves” constitutes an unfair labor practice in violation of the Wagner Act. The Board has also held that an employer violates the Wagner Act when it requires employees to sign agreements promising not to “publicly criticize” the firm or its leaders. The Wagner Act does not apply to domestic workers, independent contractors, or individuals employed as supervisors. Thus, an executive in Weinstein’s organization might lack protection under the act because she supervises lower-rung employees.”

<sup>31</sup> *Ibid*, 26.

<sup>32</sup> Wright, Jamie. “Employer Takeaways From Calif.’s Response To #MeToo,” *Law360 Expert Analysis*. LexisNexis. 15 March 2018.

<sup>33</sup> *Ibid*, 26.

<sup>34</sup> Kantor, Jodi, et al. “Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades,” *New York Times*. 5 Oct. 2017. Web. <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>

<sup>35</sup> Mather, Victor. “McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlements,” *New York Times*. 20 Dec. 2017. Web. <https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html>

of a portion of their right to free speech. NDAs have even been used by government officials to shield the public from knowledge of bad actors. Regulations guiding the U.S. Congress made it extraordinarily difficult for victims to levy complaints of sexual misconduct against lawmakers.<sup>36</sup> Moreover, President Donald Trump's personal attorney, Michael Cohen, coerced Stormy Daniels into entering in an NDA by offering her \$130,000. Daniels has since filed suit accusing "Cohen of intimidating and coercing [her] into signing a false statement."<sup>37</sup> Cohen gave a sense of how the law serves to protect men in power when he described his role as the 'personal' attorney of the President: "I use my legal skills to protect Mr. Trump to the best of my ability."<sup>38</sup> NDAs have become a contractual tool of powerful men in society to exercise the male sex-right to access the female body as they please.

Despite the progress that the #MeToo movement has bought, in reflection of a conversation with Carole Pateman in 2017, it was cautioned that in the #MeToo movement, "an apparent focus on celebrity women has foreshadowed the day-to-day sexual harassment encountered by women unable to speak out for fear of losing their jobs and homes or jeopardising their intimate relationships. In this disparity of voice lies proof that the un-silencing of women in contemporary society is only partial." Pateman wonders, "Despite #metoo, how many men still think in exactly the same way? How many men have been influenced by the Harvey Weinstein scandal?"<sup>39</sup>

### **'Basic Income' and 'Participatory Governance' of Institutions as Solutions**

"A right to a basic income is analogous to the right to vote—a democratic right of all citizens"—Carole Pateman, *Illusion of Consent*

Carole Pateman offers universal 'basic income' and more participatory governance of institutions as possible solutions to the consequences of the sexual contract. She views both as mechanisms for democratizing institutions. Pateman says, "A basic income is crucial to establishing and maintaining individual autonomy because it provides the material basis necessary for social participation and for secure standing as a citizen, and it is the symbolic affirmation of that standing." (2008, 241). In Pateman's view, Individuals require both the right to consent and a basic income to participate in modern government.

Pateman's conception of more 'participative' governance<sup>40</sup> is an ideal that can be applied to institutions across society. A more participatory structure could certainly work to resolve inequities in the workplace that result from the widespread subordination of women to the conditions of structural 'gender segregation.' Pateman says, "democratic theorists seldom criticize the institution

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<sup>36</sup> Ye Hee Lee, Michelle, et al. "How Congress Plays by Different Rules on Sexual Harassment and Misconduct," *Washington Post*. 27 Oct. 2017. Web. [https://www.washingtonpost.com/politics/how-congress-plays-by-different-rules-on-sexual-harassment-and-misconduct/2017/10/26/2b9a8412-b80c-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.3dda01b1ec65](https://www.washingtonpost.com/politics/how-congress-plays-by-different-rules-on-sexual-harassment-and-misconduct/2017/10/26/2b9a8412-b80c-11e7-9e58-e6288544af98_story.html?utm_term=.3dda01b1ec65)

<sup>37</sup> Mark, Michelle. "Stormy Daniels says in bombshell new lawsuit that Trump didn't sign their NDA — and there could be photos from their alleged affair," *Business Insider*. 7 Mar. 2018. Web. <http://www.businessinsider.com/stormy-daniels-lawsuit-reveals-trump-affair-details-2018-3>

<sup>38</sup>Rokus, Brian, et al. "Michael Cohen – Trump's Loyal Fixer," *CNN*. 28 Mar 2018. Web. <https://www.cnn.com/2018/03/27/politics/michael-cohen-trump-lawyer/index.html>

<sup>39</sup> Ibid, 12.

<sup>40</sup> Refer to section in part one of this paper on "consent and participative democracy."

of employment despite its undemocratic character. Indeed, participation in paid employment is now widely seen to be necessary for democratic citizenship” (2008, 239). Thus, “By failing to take into account the feminist conception of ‘private’ life, by ignoring the family, participatory democratic arguments for the democratization of economic life have neglected a crucial dimension of democratic social reform” (1989, 220).

Moreover, basic income is defined by Michael Goodhart as “an unconditional social transfer set at a level that assures every citizen subsistence” (2008, 139). Goodhart applies basic income to his framework for ‘Democracy as Human Rights’ which “represents a political commitment to universal emancipation through securing the equal enjoyment of fundamental human rights for everyone” (2008, 144). Pateman says “for a basic income to be relevant for democratization, it should be adequate to provide what I call a modest but decent standard of life. This is a level sufficient to allow individuals to have some control over the course of their lives, and to participate to the extent that they wish in the cultural, economic, social, and political life of their polity.”<sup>41</sup>She argues, “universal basic income is not just another scheme to ameliorate poverty but (potentially) part of a democratic transformation to create citizenship of equal worth for everyone.”<sup>42</sup>

‘Universal Basic Income’ remains a viable proposal for structural reform. A basic income would offer an effective deterrent to NDAs. In the status quo, women often feel compelled to enter into these agreements, because they fear that otherwise, they will risk their livelihood. A basic income would give female victims of sexual assault and sexual harassment more leverage to refuse to sell their silence; however, this is just one of example of the potential benefits a basic income would offer for women in civil society, for “basic income...is a way to counter the subordination that stems from capitalist organization of production and the differential access to political power generated by economic inequality.” In Pateman’s view, basic income creates opportunities “for people to exercise their autonomy, give meaningful consent, and engage in participatory democratic activities” (2008, 5-6).

## Summary

Carole Pateman was an outstanding political thinker. ‘Sexual contract theory’ provides a sound framework for understanding the patriarchal structure of modern institutions. As Pateman says, “Contract is conventionally believed to have defeated the old patriarchal order, but, in eliminating the final remnants of the old-world status, contract may yet usher in a new form of paternal right” (1988, 218). “In the new world, the act of emancipation creates civil subordination and patriarchal right” (229). Contracts involving the exchange of ‘property in the person’ are interconnected and uphold the contemporary ‘law of male sex-right’.

Pateman concludes that classic contract theory which offered society a means of legitimizing relationships of domination and subordination. Consequently, contract theory has served to perpetuate the power of the modern fraternal order. As such, “In the victory of contract, the patriarchal construction of sexual difference as mastery and subjection remains intact but

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<sup>41</sup> Pateman, Carole. “Democratizing Citizenship,” *Politics & Society* Vol 32, Issue 1, pp. 89 – 105. 2004 Mar 1.

<sup>42</sup> *Ibid*, 41.

repressed” (1988, 187). Although Pateman argues that we need to rethink contract as a means of creating social relationships, she does not negate the potential use for contracts in a free and equal civil society.<sup>43</sup>

Pateman explores how “it becomes possible to see something of the way in which the sexual contract—the view that men have justified right of government over women in the modern state—has been, so to speak, built into major social institutions” (2007, 202). “Individuals enter into contracts about property in the person and the consequence is that they become ‘wives,’ or ‘workers,’ ‘husbands’ or ‘employers,’ superiors and subordinates, precisely because they then interact with an institution. The institution is maintained through these contracts, which create relationships that “reproduce ‘wives,’ etc.” (2007, 206). Thus, an order of civil subordination organizes ‘individuals’ who contract out the property in their persons.

The story of the sexual contract can provide us with a better understanding of modern institutions so that, as a society, we can contemplate how constructs of sexual difference have been manifested into real political differences between the sexes. In the 21<sup>st</sup> century era of #MeToo, conditions of female wage laborers, the state of modern social fraternities, an illusion of consent in sexual encounters, and man’s exploitation of Nondisclosure Agreements all serve as examples of the lingering social consequences of the sexual contract. We must overcome these conditions which compromise the ‘autonomy of freedom’ and juridical equality of individuals, so that democracy can become “more than a men’s club” (1989, 219). Pateman’s ideals of ‘universal basic income’ and more ‘participative governance’ of institutions are excellent models for overcoming some of the challenges woman faces as a result of her historical oppression.

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<sup>43</sup> Pateman says, “To argue for freedom of contract in the sense that wives should be able to enter into commercial transactions in their own right is by no means the same as arguing that members of both sexes (‘individuals’) should be conceived of as owners of property in the person” (1988, 210).

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