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Kevin C. Paul

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This essay examines the nature of gender inequality as it is manifest in American law. It focuses on the historical notion that women exist as legal possessions of men and argues that contemporary legal discourse both embodies and perpetuates this notion by creating a distinction between public and private reality.[1]

Part One constructs an historical framework exploring the ancient conceptualization of women as possessible objects and the manifestations of that conceptualization in early American law. The discussion narrows to consider the received doctrine of coverture as illustrative of the overtly patriarchal roots of the American legal structure. The depth of those roots is then demonstrated through brief consideration of Married Women's Property Acts. Allegedly the downfall of coverture, the acts are shown to have ratified pre-existing, socially accepted property rights while leaving the basic patriarchal structure unaltered. That structure is further examined as manifest in modern social convention, historically, and to some degree still, recognized as part of the legal relationship between women and men. Part One concludes with the caveat that although contemporary law apparently has divested itself of most, if not all, *overt* reference to women as chattel, the conclusion that women have entirely transcended legal "thinghood" ought not be hastily drawn.

Part Two attempts to illuminate one of those dark corners of contemporary law in which women, given the proper context, remain very much the personal property of men. The discussion first looks to early rape laws, demonstrating the historical legal protection provided a man's exclusive claim to "his woman," and

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1. This essay follows the lead of Tom Stoppard in his play *Rosencrantz & Guildenstern Are Dead*, casting a spotlight on characters presumed minor and obscure in order to attain an alternative vision of familiar events.

then to the phenomenon of marital rape exceptions. Discounting contract-oriented rationalizations, the conclusion is drawn that these provisions, medieval holdovers still in force in roughly half the states, are rooted in the status-based doctrine of property law.

Part Three carries the discussion to more theoretical ground, probing one of the justifications proffered for marital rape exceptions and, furthermore, for many sex-differentiating laws: the existence of "naturally-defined" sex roles. A few western political thinkers of old are canvassed to provide a base for investigating American law's reception of this rationale. Two important and familiar cases, *Bradwell v. State of Illinois*[2] and *Muller v. Oregon*,[3] illustrate the ease with which American law satisfied itself that women are essentially "out of place" in the extra-domestic sphere of social production. While the labor demands of capitalist society might require some infusion of women into limited sectors outside the home, *Bradwell* and *Muller* suggest, *nature* demands women function primarily, if not exclusively, as wives and mothers. Together, these cases provide the springboard from which to launch a broadened discourse as to the distinction they draw between "public" and "private" life.

After sketching the outlines of the public-private distinction, the essay attempts to paint that distinction in contemporary hues provided by the United States Supreme Court's decision in *Wimberly v. Labor & Industrial Relations Commission*.[4] Justice O'Connor's opinion for a unanimous Court is observed through "private eyes," revealing its guarantee of "equal treatment" as, at best, an ideological diversion and, at worst, a promise of continued material inequity. The discussion broadens yet again to encompass American jurisprudence in general and forges a link between the public-private distinction and the material reality of legal objectivity to demonstrate the ideological nature of "equal treatment" discourse within the confines of American liberalism.

The essay concludes in an encounter with a very different perspective on law and its societal function—that created by examining law through a feminist lens. Feminism, the essay argues, is uniquely capable of demystifying the link between the public-private distinction reified in American law and the subordinate status imposed upon women in contemporary society. By revealing woman's private reality as entirely political, feminist critique provides the framework for legal argument transcending the notion of

2. 83 U.S. (16 Wall.) 130 (1873).
3. 208 U.S. 412 (1908).
4. 479 U.S. 511 (1987).

male-defined, public equal treatment with a demand for universal treatment as an equal.[5] The essay closes with the observation that legal discourse must be reshaped to accommodate the whole of women's reality, confronting the inferior and objectified status necessarily perpetuated by the public-private distinction, if it is to provide a viable mechanism for effecting material equality.

I. The Historical Framework: Woman as Chattel[6]

Throughout most of Western history, women have been regarded as property[7]—men's property.[8] Our culture is replete with

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5. The distinction I draw between "equal treatment" and "treatment as an equal" is not intended to suggest complete agreement with the similar distinction drawn by Ronald Dworkin. *See* Ronald Dworkin, Taking Rights Seriously 227 (1978):

> There are two different sorts of rights . . . . The first is the right to *equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden . . . . The second is the right to *treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else. If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug. This example shows that the right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.

Id.

6. "Men (sic) make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past." Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* in The Marx-Engels Reader 594, 595 (Richard Tucker ed. 1978).

7. "That is property to which the following label can be attached. To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The State." Felix Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

> Broadly speaking, [western] attitudes to property are associated with the development of capitalism and with the notion of the commodity. Property for us is based on the idea of 'private ownership' which confers on the individual the right to use and to disposal. Property is thus seen as valued goods/objects which can be transferred between legally-constructed individuals.

Renee Hirschon, *Introduction: Property, Power and Gender Relations* in Women and Property—Women as Property 2 (Renee Hirschon ed. 1984).

8. As noted by Andrea Dworkin, women have been the chattel property of men within a patriarchal society that has existed from five to twelve thousand years. Andrea Dworkin, Pornography: Men Possessing Women 101 (1981). The genesis of male supremacy in human society has been the subject of much debate. *See, e.g.*, Toward an Anthropology of Women, (Rayma Reiter ed. 1975); Susan Brownmiller, Against Our Will: Men, Women and Rape (1975); Simone deBeauvoir, The Second Sex (1974); Shulamith Firestone, The Dialectic of Sex (1970); Friedrich Engels, *The Origin of the Family, Private Property and the State* in The Marx-Engels Reader 734 (Richard Tucker ed. 1978). I will not join the debate over origins,

the image of women as mere personal effects of the men who lay claim to them.[9] All that, however, is ancient history. "It is fashionable [and comfortable] to think that women, who have come a long way baby, are entirely removed from chattel[10] status. It is fashionable to think that the chattel status of women is ancient, buried with the old cities of defunct civilizations."[11] While fashionable and comfortable, the supposition that women's chattel status exists as a dusty artifact of the distant past is also wrong. A pass through the pages of American legal history reveals that American law from the outset endorsed male dominance through the legal fiction that women are objects in which men may assert and enforce claims of ownership.

A. The Legal Status of Women in Colonial America

The early colonial period arguably was characterized by a general leniency toward women.[12] British colonists, faced with the difficulties of subduing a new and vastly different environment,

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instead accepting patriarchy as "a system of interrelated social structures through which men exploit women" that remains, regardless of its origin, the bedrock of western society. Sylvia Walby, Patriarchy At Work: Patriarchal and Capitalist Relations in Employment 51 (1986). I also found Janet Rifkin's definition of patriarchy useful in trying to understand better how male supremacy manifests itself in American legal culture:

> By patriarchy, I mean any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the mystical and aesthetic and excluded from the practicial and political realms, these realms being regarded as separate and mutually exclusive.

Janet Rifkin, *Toward a Theory of Law and Patriarchy* in Marxism and Law 295 (Piers Bierns & Richard Quinney eds. 1982).

9. "She is my goods, my chattels, she is my house, My household stuff, my field, my bard, my horse, my ox, my ass, my anything." William Shakespeare, The Taming of the Shrew 175 (H.J. Oliver ed. 1982) (Act II, scene 2). Although this essay concentrates on the subjugation of women in Western culture—specifically, Western legal culture—it is important to note that Eastern civilization has also fostered and perpetuated a belief in women's inferiority. *See* Vern Bullough, The Subordinate Sex: A History of Attitudes Toward Women 230-62 (1973).

10. "[Personal property] is also called a *chattel*, derived from cattle, the most frequent form of personal wealth in the early days. John Cribbet, Principles of the Law of Property 10 (1975) (emphasis added).

11. Andrea Dworkin, *supra* note 8, at 102. Careful reading of Dworkin's works clarifies how deeply male domination is entrenched in every facet of American culture, most certainly including American law. In addition to *Men Possessing Women*, see Andrea Dworkin, Right Wing Women (1982).

12. *See* Albie Sachs & Joan Wilson, Sexism and the Law 69-75 (1978). Sachs and Wilson suggest that during the seventeenth and eighteenth centuries, women in the New World benefitted from generally loose adherence to English common law, including its restrictions on women's activities. This is not to suggest that colonial society was any less patriarchal than our own; women found themselves in extra-familial roles only as substitutes for dead or absent men. *Id.* at 71; *cf.* Marylynn

were not particularly strict in their adherence to English common law, preferring instead to develop local customs that more directly addressed New World conditions.[13] The result was a general acceptance of women in at least some extra-familial roles.

> In Philadelphia, for example, women engaged in roughly thirty different trades ranging from essential to luxury services. They included female silversmiths, tin-workers, barbers, bakers, fish picklers, brewers, tanners, ropemakers, lumberjacks, gunsmiths, butchers, milliners, harnessmakers, potash manufacturers, upholsterers, printers, morticians, chandlers, coachmakers, embroiderers, dry cleaners and dyers, woodworkers, staymakers, tailors, flour processors, seamstresses, netmakers, braziers, and founders.[14]

B. The Legal Status of Women in Post-Revolutionary America

Whatever de facto freedom colonial women may have enjoyed to participate in society as "quasi-males" the Revolution and independence brought to a grinding halt.[15] As the newly independent states turned from local ecclesiastical custom to more secular doctrine,[16] conservative aspects of English common law be-

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Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 Law & Hist. Rev. 129 (1983).

13. Illustrative of these common law modifications was the practice of declaring married women "feme-sole traders", a title that brought with it the right to sue, engage in some business activity, transfer real property, and maintain power of attorney in their husbands' absence. It should be noted that this practice was mainly one of economic necessity, spurred on by the need to continue "business as usual"; it was definitely not rooted in a pre-Revolutionary desire to enhance the legal position of women. *See* Sachs & Wilson, *supra* note 12, at 69-70; *see also* Harry Stumpf, American Judicial Politics 71 (1988) ("[T]hrough at least the early decades of colonial history, law consisted of a rough-and-ready frontier justice based on the political and social philosophies of the settlement leaders, frequently founded upon a biblical ethic." *Id.*).

14. Sachs & Wilson, *supra* note 12, at 70.

15. Whatever Independence and the new Constitution might have done to strengthen the rights of women as against the British Crown, they did nothing to strengthen their rights vis-a-vis their own menfolk. On the contrary, the post-Revolutionary period was one of declining legal status for women, brought about either by the increase of citizenship rights for men without an equivalent grant to women, or by the actual cutting down on or eliminating of rights which colonial women had exercised.

Id. at 69.

16. In nineteenth-century England, marriage and divorce were the province of ecclesiastical courts, allowing the church an important role in the creation and maintenance of family law. This tradition influenced the American colonies in their early years. However, the absence of both ecclesiastical courts and a state-sponsored church fostered the rise of a far more secular legal system as the colonies moved toward, and eventually gained, independence. *See* Lawrence Friedman, A History of American Law 202 (2d ed. 1985).

gan working their way into the evolving American legal system. Indeed, the new state constitutions either expressly denied or impliedly discouraged most of the political rights women were allowed prior to 1776.[17] For example, unmarried colonial women who held enough property to qualify at least technically held the right to vote on local issues. None of the state constitutions, however, with the exception of New Jersey, granted women the right to vote. New Jersey "mended its ways" and rescinded women's suffrage by amendment in 1807.[18]

Simply put, women, particularly married women, lost the American Revolution. Prior to Independence, the *legal* reality of colonial women had been as oppressive as ever—but the *lived* reality of life in the colonies allowed some "feathering" around the margins. In the two centuries that followed independence, however, women became the clearly established legal property of their fathers and husbands. A married woman could not own property, for she *was* property. Her personal "belongings," her children,[19] even her own body were legal possessions of the man she wed.[20] In the eyes of early post-Revolutionary law, a woman, as a freely-determined individual, simply did not exist.

C. *And the Two Shall Become One: The Doctrine of Coverture*

The notion that a woman's existence was completely sub-

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17. Sachs & Wilson, *supra* note 12, at 74.

18. New York was the first state to disenfranchise women expressly, inserting the word "male" into its constitution in 1777. Eleven other states soon followed suit. Even express disenfranchisement did not, however, greatly decrease the legal status or political power of women since very few had either voted or held colonial office. *See Id.* at 74.

19. The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union . . . . The general rule is that the husband becomes entitled, upon the marriage, to all the goods and chattels of the wife, and to the rents and profits of her lands . . . .

2 James Kent, Commentaries on American Law *129-30 (Oliver W. Holmes ed. 1896).

20. *See* Andrea Dworkin & Catharine MacKinnon, Pornography and Civil Rights: A New Day for Women's Equality, 12 (1988).

> Put in the simplest terms: women were the chattel property of men under law until the early part of the twentieth century. Married women could not own property because they were property. A woman's body, her children, and the clothes on her back belonged to her husband. When the husband died, another male, not the mother, became the legal guardian of the children. . . . Married women were what nineteenth-century feminists called "civilly dead."

Id.

sumed in that of her husband underlay the doctrine of coverture. As explained by Blackstone:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything . . . and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage . . . . For this reason, a man cannot grant anything to his wife, . . . for the grant would be to suppose her separate existence; . . .[21]

Receiving this medieval doctrine into American law, the men who fashioned the early legal system effectively relegated women to legal nonexistence and, at the same time, secured legal assurance that the reigns of power would remain in male hands.[22]

D. Much Ado About Nothing: The Married Women's Property Acts

The Married Women's Property Acts, passed in various forms by every state during the nineteenth century, arguably lightened the burden of coverture.[23] Although these statutes expanded the rights of women in some areas, they did not fundamentally alter the legal relationship between women and men. In material terms, the acts did little more than create room in the law for precedent social conditions that already permitted women to maintain control of the property they brought with them into marriage. "[M]ost of the acts were designed to establish simpler statutory procedures [to protect] women's separate property, while changing as little as possible the underlying institution of marriage."[24]

Not only were Married Women's Acts conservatively drafted

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21. 1 William Blackstone, Commentaries *430 (1765) (emphasis in original). More recently, Justice Hugo Black described coverture as "the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean. . . the one is the husband." United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

22. A graphic example of coverture in operation is provided by *In re Lockwood*. In deciding whether women could be constitutionally prohibited from practicing law in the state of Virginia, the United States Supreme Court left it to the state supreme court to determine whether the word "person", which appeared in the governing statute, included women. *In re* Lockwood, 154 U.S. 116 (1896); *see also* Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931) ("No intention to include women can be deduced from the omission of the word male" *Id.* at 408, 177 N.E. at 661).

23. *See* Leo Kanowitz, Women and the Law: The Unfinished Revolution 40 (1970).

24. Barbara Allen Babcock, Ann Freedman, Eleanor Holmes Norton & Susan

by male legislators, they were also narrowly interpreted by male judges.[25] For example, the United States Supreme Court concluded that the District of Columbia statute, guaranteeing married women the right to property they held before or acquired during marriage, did not extend to a woman's earnings. In *Seitz v. Mitchell*,[26] Mary Seitz challenged the seizure of two tracts of land, she purchased with her own money, in satisfaction of a judgment against her husband, George. The Court stated that, "nowhere, so far as we are informed, has it been adjudged that [a woman's] earnings or the product of them, made while she is living with her husband and engaged in no separate business, are not the property of the husband. . . ."[27] Leaving no doubt as to the reach of the District's statute, the opinion concludes, "[h]er earnings while cohabiting with her husband are not made her property. She can have them only by the gift of her husband, and such a gift is not protected against his creditors."[28]

The narrow construction imposed on the District of Columbia act in *Seitz* illustrates the modest impact these statutes had on the material existence of American women. In short, while Married Women's Property Acts marked a step toward recognition of women as legal persons, they did little to overcome the general understanding that a woman, once married, became the personal property of her husband, to be moved about and used to suit his pleasure.[29]

Ross, Sex Discrimination and the Law: Causes and Remedies 593 (1975) [hereinafter *Sex Discrimination and the Law*].

> Most state legislators, however, voted for Married Women's Property Acts on the basis of conservative economic reasoning designed to protect, not to liberate women. Unlike the equity procedures which they replaced, these acts did not explicitly classify women with lunatics and infants; but neither did they do anything to alter or reform prevailing gender-based custom and stereotypic attitudes.

Albie Sachs & Joan Wilson, *supra* note 12, at 78.

25. "At no time in the course of the nineteenth century were Married Women's Property Acts liberally interpreted by the lower courts." Sachs & Wilson, *supra* note 12, at 78; *see also, e.g.*, Joseph Warren, *Husband's Rights to Wife's Services*, 38 Harv. L. Rev. 421, 423 (1925) ("[I]nterpretation of [Married Women's Property Acts] fell into the hands of judges who as young lawyers had been educated in the legal supremacy of the husband."); Leo Kanowitz, *supra* note 23, at 40.

26. 94 U.S. 580 (1876).

27. *Id.* at 584.

28. *Id.* at 584-85.

29. [Married Women's Property Acts] were meant to rationalize more cold-blooded matters, such as the rights of a creditor to collect debts out of land owned by husbands, wives, or both. Most litigation over married women's property was not litigation between spouses, or within the family at all. In almost no case did a husband sue his wife or vice versa. The typical cases, both before and after the married women's property acts, . . . were about the family's external relations, not

E. What's In A Name?

Among the symbols of women's chattel status left untouched by the Married Women's Acts was the legal requirement that a woman replace her own last name with that of the man she married. As stated by the Superior Court of the State of New York in an 1881 opinion: "For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. . . . her maiden surname is absolutely lost, and she ceases to be known thereby."[30] Upon marriage, then, a woman was legally labeled with her husband's identity, making clear to the world to whom she "belonged."

This rule proved particularly resilient, maintaining its place in American legal doctrine well into the twentieth century. In a 1945 opinion, for example, the Illinois Court of Appeals echoed numerous previous decisions by declaring, "it is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and takes the husband's surname. . . ."[31] And in 1971, the United States Supreme Court affirmed, without opinion, an Alabama requirement that a woman adopt her husband's surname when applying for and receiving a driver's license.[32] Although the Court issued only a summary affirmance, the Sixth Circuit was persuaded, in 1976, that precedent

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its internal life. Passage of these laws did not signal a revolution in the status of women. . . .

Lawrence Friedman, *supra* note 16, at 211; *see also* Porter v. Dunn, 131 N.Y. 314, 30 N.E. 122 (1892) (Despite the New York Married Women's Act, Mrs. Porter was prohibited from recovering compensation for nursing an ailing boarder because she did so with her husband's knowledge and was "engaged in no occupation separate from that devolving upon her as a wife. . . ." *Id.* at 317, 30 N.E. at 125).

30. Chapman v. Phoenix Nat'l Bank of the City of New York, 85 N.Y. 437, 449 (1881); *see also*, Bacon v. Boston Elev. R. Co., 256 Mass. 30, 152 N.E. 35 (1926), in which a woman who registered her car in her own name was not allowed to recover for the injuries she suffered in an automobile accident caused by the Railway Company's negligence because the car was registered "in a name that was not hers." *Id.* at 32, 152 N.E. at 36. Although many judicial decisions about the right of married women to retain their own surnames invoke the long-settled principles of common law, "it was apparently not until Victorian times that [a woman's] loss of identity generally included the loss of both her first and last names. And even then, it was a matter of widespread custom, *not* law, in England." *Sex Discrimination and the Law*, *supra* note 24, at 579 (footnote omitted) (emphasis in original).

31. People v. Lipsky, 327 Ill. App. 63, 67, 63 N.E.2d 642, 644 (1945).

32. *See* Forbush v. Wallace, 341 F. Supp. 217 (M.D. Al. 1971), *aff'd*, 405 U.S. 970 (1971); The trial court in *Forbush* stated:

> Certainly the custom of the husband's surname denominating the wedded couple is one of long standing. While its origin is obscure, it suffices for our purposes to recognize that it is a tradition extending back into the heritage of most western civilizations. It is a custom common

required it to uphold a similar requirement, imposed by the state of Kentucky, against a constitutional challenge.[33]

The judiciary has not been alone in supporting the notion that a woman ought be required to adopt the name of the man she marries. Until very recently, many state name change statutes expressly excluded married women. For example, Iowa courts were forbidden from granting a formal name change to married females until 1972.[34] Prior to 1981, the Iowa provision required: "If the petitioner is married, the spouse must join in the petition or file written consent with the petition."[35] Similarly, Missouri still permits name changes only where a court "is satisfied that the desired change would be proper and not detrimental to the interests of any other person."[36] Missouri courts have interpreted this statute to require that the interests of a married woman's husband be considered before granting her name change petition.[37]

F. A Man's Home Is His Castle: The Domicile Requirement

Beyond replacing her name[38] with that of her husband, a wo-

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> to all 50 states in this union. Uniformity among the several states in this area is important.

Id. at 222; *see also*, Herma Kay, *Sex-Based Discrimination* 172 (1981); *Sex Discrimination and the Law*, *supra* note 24, at 579-83.

33. Whitlow v. Hodges, 539 F.2d 582 (6th Cir. 1976). "This court deems itself bound by the Supreme Court affirmance in *Forbush*." *Id.* at 584; *see also* Herma Kay, *supra* note 32, at 172-73. Worth noting is the California Court of Appeals' opinion in Allyn v. Allison, 34 Cal. App. 3d 448, 110 Cal. Rptr. 77 (1973). The court held women could constitutionally be required to use either "Miss" or "Mrs." on voter registration materials. As suggested by Kenneth Karst, the opinion completely fails to recognize the harm involved in requiring a woman to officially declare her relationship to men before she is allowed to exercise the most basic right of citizenship. Kenneth Karst, *A Discrimination So Trivial: A Note On Law and the Symbolism of Women's Dependence*, 35 Ohio St. L. J. 546 (1974); *see also* Leo Kanowitz, *supra* note 23, at 43-44.

34. Iowa Code Ann. § 674.1 (1947), *quoted in* Leo Kanowitz, *supra* note 23, at 43.

35. Iowa Code Ann. § 674.6 (West Supp. 1988).

36. Mo. Ann. Stat. § 527.270 (Vernon 1988).

37. Matter of Natale, 527 S.W.2d 402 (Mo. Ct. App. 1975).

38. *See* William Matthews, *Married Women and the Name Game*, 11 U. Rich. L. Rev. 121 (1976) regarding the intrinsic and social importance of names; *cf.* Karen DeCrow, Sexist Justice 250 (1974):

> When I got divorced for the second time, I thought I should get back "my own name."
>
> What was that? My first husband's last name wasn't my name. My late father's last name wasn't my name. I thought of taking my mother's maiden name, but realized that wasn't her name, but her late father's.
>
> I came to the conclusion that a woman has no name.

Id.

man traditionally has also been expected to take up his residence as her own. This social convention was, until very recently, widely imposed by law. As noted by a New Jersey court in 1913, "[i]t is familiar law that upon marriage the domicile of the wife merges with that of the husband. It is a legal consequence of the nuptial contract, and the unity of domicile exists during coverture, unless the wife acquires one elsewhere by the husband's consent."[39]

In the early nineteenth century, courts and commentators often recognized this requirement as the natural product of coverture.[40] Yet, even when reference to coverture itself fell into disfavor, there was no shortage of "policy reasons" for continuing adherence to the domicile rule. Take, for example, the opinion of the California Supreme Court in *In re Wickes' Estate:*

> The subjection of the wife to the husband was not the only reason for the [domicile] rule. Parties marrying contract to live together. The husband obligates himself to furnish a proper home for his wife, and to maintain her there in a degree of comfort authorized by his circumstances, and they mutually agreed to live there together. It is a matter of great public concern that this should be so. In this association there can be no majority vote, and the law leaves the ultimate decision to the husband. For the protection of the wife, she is allowed a different forum, when necessary in legal proceedings against her husband. In reality, this is not giving her a new domicile, but she is allowed to bring these suits where she actually resides, though that be not her legal domicile. . . .There are dependent persons other than married women who may not select their own domicile—minors, for instance, and all under guardianship.[41]

And in a 1940 Tennessee case holding that a married woman may acquire a domicile separate from her husband's, so long as he con-

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39. *In re* Geiser's Will, 82 N.J.Eq. 311, 313, 87 A. 628, 629 (1913); *see also In re* Paullin's Will, 92 N.J.Eq. 419, 113 A. 240 (1921) (legal presumption that wife's domicile is that of her husband); Restatement, Conflict of Laws § 27 (1934) (a wife takes her husband's domicile). The second Restatement generously modified this rule, allowing a woman to acquire a separate domicile where "an actual rupture of marital relations" has occurred. Restatement (Second) Conflict of Laws § 21 comment d (1971). Not until the 1986 revision of the second Restatement was the common law rule that a woman necessarily adopts her husband's domicile at marriage abandoned. See Restatement (Second) Conflict of Laws § 21 comment a (1986) ("The common law rule . . . is clearly inconsistent with contemporary views relating to the legal position of married women."). Note, however, that comment (*a*) proceeds to assert that nothing has *really* changed, since the vast majority of women will live in their husbands' homes. *Id.*

40. *See* Joseph Story, Commentaries on the Conflict of Laws § 46 (1834) (the rule that a woman's domicile is that of her husband "results from the general principle that a person who is under the power and authority of another possesses no right to choose a domicile."). *Id.*

41. *In re* Wickes' Estate, 128 Cal. 270, 278, 60 P. 867, 870 (1900).

sents, one finds this explanation: "The rule of the common law that the domicile of the wife follows that of the husband was based on (1) the doctrine of marital unity [coverture], and (2) that public policy demanded that the family unit be protected by allowing the family to have only one domicile."[42]

Even as recently as 1987, the Minnesota Court of Appeals seemed reluctant to discard the domicile rule completely. In *Jones v. Jones*,[43] the court concluded that, while it is *usually applied* in determining a married couples' homestead, the rule "does not apply *in all contexts*."[44] The point here is not that women remain the property of their fathers or husbands because they are still "given away" in traditional wedding ceremonies,[45] and are afterward expected to trade the last name and legal residence of the one for that of the other.[46] Although these archaic customs remain part of social convention, they, as well as many other overtly sexist practices, are no longer enforced by law. Yet, that American law throughout *most* of its history affirmatively assigned women the status of "objects" in their relationships to and with men ought not be entirely overlooked in contemplating the contemporary legal landscape. It is easy to assume that women have transcended property status because the law no longer expressly refers to them as such. Grounding that assumption in the lived reality of women is, however, a great deal more difficult.

II. In Dimly Lit Corners: Marital Rape

Despite the allegedly "progressive" state of contemporary American society, open and candid discussion of sex and sexuality remains largely taboo. It is, therefore, not surprising that legal regulation of sexual conduct constitutes one of the more dimly lit corners of American law. Nevertheless, the way sexual relationships between women and men are legally perceived has much to say about the underpinnings of female-male relations in general.[47] Specifically, the legal distinction between "sex" and "rape" reveals the principles of domination and subordination that yet permeate American law as it relates to women.

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42. Younger v. Gianotti, 176 Tenn. 139, 140, 138 S.W.2d 448, 449 (1940).

43. 402 N.W.2d 146 (Minn. Ct. App. 1987).

44. *Id.* at 149 (emphasis added).

45. *See* Judith Martin, Miss Manners' Guide to Excruciatingly Correct Behavior 343-44 (1982); *see also* Lewis Hyde, The Gift: Imagination and the Erotic Life of Property 93 (1983): "We still preserve the custom in the Protestant wedding ceremony, the minister asking the gathered families, 'Who giveth this woman to be married?' and the father of the bride replying, 'I do.' " *Id.*

46. *See* Judith Martin, *supra* note 45, at 387.

47. *See generally* Susan Estrich, Real Rape (1987).

A. *Historical Underpinnings of Rape Law: Protecting Men's Property*

Laws prohibiting rape were created in early Western societies to protect the property interests men held in their wives and daughters. The crime a man committed in raping a woman was that of stealing another man's property, or of diminishing its value through "unlawful" sexual intercourse.[48] As society advanced, however, so did its collective attitude toward rape—sort of. True, rape today is generally accepted as an offense perpetrated against the victim herself, rather than as a violation of the property rights her father or husband holds in her.[49] Yet, in a great many jurisdictions today a man cannot be convicted for raping his wife.[50]

B. *To Have, To Hold. . . and To Own: Marital Rape Exceptions*

A person commits the crime of forcible rape if he has sexual intercourse with another person *to whom he is not married*, without that person's consent by the use of forcible compulsion.

Missouri Rape Statute[51]

Legal recognition of the "marital rape exception" apparently stems from a statement made by the British jurist Sir Matthew Hale in the early eighteenth century: "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot

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48. To our Biblical forefathers, any carnal knowledge outside the marriage contract was "unlawful." And any carnal knowledge within the marriage contract was, by definition, "lawful." Thus, as the law evolved, the idea that a husband could be prosecuted for raping his wife was unthinkable, for the law was conceived to protect *his* interests, not those of his wife.

Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 380 (1975); "The earliest pronouncement of English institutional writers makes it clear that the law against rape was intended to prevent the abduction of propertied virgins." Michael Freeman, *"But If You Can't Rape Your Wife, Who[m] Can You Rape?": the Marital Rape Exemption Re-Examined*, 15 Fam. L. Q. 1, 8 (1981).

49. This is not to overlook the generally acknowledged and socially accepted dispensation of a father or husband to kill the man who rapes his daughter or his wife. *See* Randall Collins, *A Conflict Theory of Sexual Stratification*, 19 Soc. Probs. 3, 8 (1971).

50. *See, e.g.*, Del. Code Ann., tit. 11, §§ 763, 764 (1988); Mo. Ann. Stat. §§ 566.010, 566.030 (Vernon 1988); N.M. Stat. Ann. §§ 30-9-10E, 30-9-11 (1988); Tex. Penal Code Ann. § 22.011 (c) (2) (Vernon 1987); Va. Code Ann. § 18.2-61 B. (1988); *see also* Lisa Kivett, *Sexual Assault: The Case for Removing the Spousal Exemption from Texas Law*, 38 Baylor L. Rev. 1041, 1041 & n.1 (1986).

51. Mo. Ann. Stat. § 566.030(1) (Vernon 1989) (emphasis added).

retract."[52] Although Lord Hale cited no underlying common law authority for this notion, it nevertheless became accepted legal doctrine in both England and the United States.[53]

Several states have recently amended their penal codes to allow prosecution for marital rape.[54] Alaska, for example, affirmatively abolished its statuory exemption for marital rape by adding a section entitled "Spousal Relationship No Defense" to its criminal code.[55] Likewise, the Ohio legislature passed an amendment in 1986 allowing prosecution for first-degree rape regardless of the relationship between perpetrator and victim.[56] Men in Ohio remain protected, however, from prosecution for any sexual assault short of first degree rape they inflict on their wives.[57]

Like Ohio, Virginia has increased the complexity of its rape statute instead of flatly discarding its marital rape exception.[58] As of 1986, a man who forces intercourse on his wife may be prosecuted for rape only if he does not reside with her at the time, or if in raping her, he causes "serious physical injury."[59] Allegedly to "fill in the gap," the Virginia legislature created an offense called "marital sexual assault,"[60] which allows prosecution even where

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52. 1 Matthew Hale, History of the Pleas of the Crown 629 (1736). Hale had quite an impact on the development of rape law. In addition to penning the marital rape exception, he is well remembered and often cited for the statement, "it must be remembered [that rape] is an accusation easily to be made and hard to be proved. . . ." Barbara Toner, Facts of Rape 96 (1977). Toner describes Hale as "the most quoted authority on the British law of rape." *Id.* at 95; *see also* Gilbert Geis, *Lord Hale, Witches and Rape*, 5 Brit. J.L. and Soc. 26 (1978).

53. *See* Commonwealth v. Fogarty, 74 Mass. 487 (8 Gray) (1857), apparently the first recognition of the marital rape exception in American caselaw, and Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905), a particularly graphic illustration of the credit given Hale for "discovering" the exception; *see also* Annotation, *Criminal Responsibility of Husband for Rape, Assault to Commit Rape, on Wife*, 84 A.L.R.2d 1017, 1019 (1962).

54. *See* Lisa Kivett, *supra* note 50, at 1044 n.25; *State v. Smith*, 85 N.J. 193, 426 A.2d 38 (1981).

55. *See* Alaska Stat. §§ 11.41.443, .445(2) (1985).

56. *See* Ohio Rev. Code Ann. § 2907.02, .12 (Baldwin 1988).

57. *See* Ohio Rev. Code. Ann. § 2907.02 (Baldwin 1988).

58. *See* Va. Code Ann. §§ 18.2-61, 67.2:1 (1988).

59. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense... (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

Va. Code Ann. § 18.2-61 (1988).

60. "An accused shall be guilty of marital sexual assault if (i) he or she engages in sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with his or her spouse. . ., and (ii) such act is accomplished against the spouse's will by force or a present threat of force. . . ." Va. Code Ann. § 18.2-67.2:1 (1986).

the husband and wife live with one another. Although this addition might seem, at first blush, a step forward, it actually adheres closely to the notion that there is somehow a difference between a man who sexually assaults a stranger and one who inflicts the very same violence on his wife. It should come as no surprise that the penalty for "marital sexual assault" is substantially less severe than that for "rape." While the man who forces intercourse on a stranger is put away for no less than five years, the man who rapes his wife may, at the judge's discretion, receive a sentence of twelve months or less, a fine of up to one thousand dollars or both.[61]

"Marital Sexual Assault" is further distinguished from rape by a special provision in the Virginia code allowing a perpetrator to avoid criminal conviction altogether. With the wife/victim's consent, a judge may order a man convicted of the offense to undergo counselling and therapy. After completion of the regimen ordered, the court may dismiss the proceedings upon determining that doing so will "promote maintenance of the family unit."[62]

Where marital rape exceptions exist, they almost always extend to "cohabiting" couples—that is, heterosexual couples who are not legally married. For example, West Virginia's marital rape exception defines "married" to include "persons living together as husband and wife regardless of the legal status of their relationship."[63]

Perhaps the most disturbing contemporary permutation of the marital rape exception is its extension in a few states to men who rape their "voluntary social companions." For instance, in the state of Delaware "unlawful sexual intercourse in the second degree" cannot be charged when the victim was the "voluntary social companion" of the defendant.[64] The Delaware statute further states that "voluntary social companion means a victim who is in

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61. Va. Code Ann. § 18.2-67.2:1C (1988).

62. Upon a finding of guilt . . ., the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy. . . . If such counseling is completed. . ., the court may discharge the defendant and dismiss the proceedings against him if. . . the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

Va. Code Ann. § 18.2-67.2:1D (1986).

63. " 'Married,' . . . includes persons living together as *man* and *wife* regardless of the legal status of their relationship." West Va. Code § 61-8B-1(2) (1986) (emphasis added).

64. "(a) A person is guilty of unlawful sexual intercourse in the first degree when he intentionally engages in sexual intercourse with another person and. . . (2) . . . the defendant was not the victim's voluntary social companion on the occa-

the defendant's company on the occasion of the offense as a result of the victim's exercise of rational intellect and free will, without trick, coercion or duress."[65]

Although the state of Maine recently removed an explicit marital rape exception from its criminal code, it continues to recognize a "voluntary social companion" defense:

> Rape is a Class A crime. It is a defense to a prosecution under subsection 1, paragraph B [defining rape], which reduces the crime to a Class B crime that the victim was a voluntary social companion of the defendant at the time of the crime and had, on that occasion, permitted the defendant sexual contact or voluntarily engaged in sexual contact with the defendant.[66]

Interpreting this provision, the Maine Supreme Court concluded, "[t]he essence of the voluntary social companion defense is that the victim voluntarily induced the performance of the ultimate sexual act by (1) being voluntarily present as a social companion, and (2) permitting sexual contact, short of the sexual act, itself, to occur."[67]

That Ohio, Virginia, Maine and several other states maintain a legal distinction between sexual violence perpetrated against a stranger and that inflicted upon one's wife has several important implications. First, accepting the premise that the threat of criminal prosecution does indeed carry some deterrence value, women in those jurisdictions are denied a measure of legal protection from sexual assault at the hands of their state-recognized marital partners.[68] Simply put, marital rape exceptions make it "more expen-

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sion of the crime and had not permitted the defendant sexual intercourse within the previous twelve months;. . ." Del. Code Ann. tit. 11, § 775 (1988).

65. Del. Code Ann. tit. 11, § 761(h); *see also* State v. Hamilton, 501 A.2d 778 (Del. 1985) *aff'd* 515 A.2d 397 (1986); Scott v. State, 521 A.2d 235 (Del. 1987).

66. Me. Rev. Stat. Ann. tit. 17-A, § 252(3) (1964 and 1988 Supp.); *see also* State v. Robinson, 496 A.2d 1067 (Me. 1985).

67. State v. Reed, 459 A.2d 178, 180 n.1 (Me. 1983) (emphasis added). In *Reed*, the Maine court also extended the definition of voluntary social companion, and hence the marital rape exception, to a man whose victim "voluntarily touches [his] genitals." *Id.* at 180.

68. It is important to remember that many states have swept away the distinction between those who choose to participate in the formalities of church/state marriage and those who do not, recognizing "cohabiting" heterosexual couples as "married" for many legal purposes. As with much of the change American law has undergone in the past century, this appears to be a progressive and desirable move away from archaic, fundamentally religious notions toward a more equitable practice that reflects reality. However, as illustrated by quasi-exemptions for marital rape like that adopted in Virginia, superficial alteration in legal status unaccompanied by real change in social relations merely exposes more women to less costly (from the perpetrator's perspective) sexual assault. This is not to argue for a return to strict legal recognition of Victorian notions of marriage. Rather, it is to suggest that all legal change must be understood and reflected upon in the context of the male-oriented society from which it springs.

sive" for a man to rape a stranger (another man's woman) than to rape his wife (his own woman).

Second, the existence of marital rape exceptions reveals that women are still considered, on some level, the possessions of their husbands/male lovers/"dates." Lord Hale's judicial disciples have long attempted to justify exempting men from prosecution for raping their wives with the argument that a woman bargains away her bodily integrity to her husband as part of their marriage "contract."[69] Given the contract paradigm, one would expect a woman's standing consent to forced intercourse with her husband to exist as a material term in the marital agreement, either expressly or impliedly accepted by both parties. Yet, nowhere in the vows common to both civil and religious marriage ceremonies is there any mention of the woman's consent to sexual intercourse whenever her husband desires. Nor can it be reasonably implied that in becoming married to a man, a woman intends to negotiate away the right to refuse him sexual access.

Even assuming a woman agrees to submit to her husband's every sexual advance, the notion that her consent is irrevocable for the duration of their relationship runs counter to the principles of contract law. Where a material term of a contract goes unfulfilled, a remediable breach occurs. Thus, to play out the contract paradigm to its logical, though completely unrealistic conclusion, a man who could prove that his wife refused to have sex with him could recover damages from her for breaching their marital contract. But a marital rape exception operates to allow him to extract "specific performance"—the extraordinary contract remedy in any setting—and to do so through violence.

Hale's contract-based rationalization for the marital rape exception is entirely at odds with existing contract doctrine. It simply cannot be demonstrated, through reference to the marital relationship alone, that a woman either expresses or implies her completely irrevocable consent to sexual intercourse with her husband for so long as she is married to him. The fallacy of the contract-consent justification is even more clearly demonstrated where marital rape exceptions have been extended to "unmarried cohabitants." If the institution of state-recognized marriage indeed involves a contractual relationship, then rejection of the institution

69. *See* State v. Smith, 148 N.J. Super. 219, 226-27, 372 A.2d 386, 390 (1977); State v. Bell, 90 N.M. 134, 140, 560 P.2d 925, 931 (1977) ("[A] wife is irrebuttably presumed to consent to sexual relations with her husband, even if forcible and without consent. A husband is legally incapable of raping his wife."

itself seems to clearly express a desire not to be bound by the terms of that contract.

Despite the efforts of Lord Hale and two centuries of male judges, marital rape exceptions cannot be written off as mere terms in the marriage "contract." Rather, they far more clearly reflect the underlying principles of property law, creating enforceable obligations by virtue of legally-defined status.

> "Property," by one old definition, is a "right of action." To possess, to enjoy, to use, to destroy, to sell, to rent, to give or bequeath, to improve, to pollute—all of these are actions, and a thing (or a person) becomes a "property" whenever someone has "in it" the right of any such action.[70]

When society exempts a man from prosecution for raping his wife, it effectively grants him a "right of action" against her body—a legally enforceable claim to use, enjoy, indeed, possess her sexuality. Whether that right derives from the transaction recognized in law as marriage, through informal sexual use over a sufficient period of time to amount to "cohabitation," or through expectation of a "return" for serving as "social companion," the result is the same. Once a man can demonstrate some sexual tie to a woman, the law steps in to protect his "rights" as possessor, without regard for the woman/object he possesses.[71] Hence, disposing of the contrivance necessary to package marital rape exceptions in a contract-based rationale, those exceptions appear to fit quite squarely within the confines of property law, protecting the right of a man to the exclusive use of "his" woman. Indeed, viewed through the property lens, marital rape exceptions appear as "sexual easements," bestowing upon the holder certain legally recognized use rights. As such, they are illustrative of the regulatory nature of rape law in general, *regulating* who gets raped and when, rather than *prohibiting* rape from happening.[72]

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70. Lewis Hyde, *supra* note 45, at 94.

71. Wrongful power is often protected by law because law is the ordering of power. Law organizes power. In a society where women and Blacks have been legal chattel, the law is not premised on a sensitivity to *their human worth*. Law protects "rights" — but mostly it protects the "rights" *of those who have power*. The United States is a particularly self-congratulatory nation. We say that we invented democracy and that our Constitution represents the highest principles of civilized governing. Yet our Constitution was designed to protect slavery and to keep women chattel.

Andrea Dworkin & Catharine MacKinnon, *supra* note 20, at 17-18 (emphasis added).

72. It has been the business of the state to regulate male use of sexual force against women, not to prohibit it. The state may allow a man to force his wife but not his daughter, or his wife but not his neighbor's wife. Rather than prohibiting the use of force against women per se, a male-supremacist state establishes a relationship between sexual force

Marital rape exceptions reveal how deeply American law remains mired in male domination. Although women are no longer bought and sold as personal property, rape law in general, and its treatment of marital rape specifically, suggest that women remain objects in legal culture, their sexuality available for appropriation by the man, or men, who can demonstrate a legally cognizable claim to it.[73] This claim is itself rationalized in both law and social custom as the product of a "natural" ordering of things. Rather than candidly recognizing the legal distinction between "rape" and "sex" as the product of a patriarchal society that embodies its own values in the laws it generates, that distinction is rationalized as a means of protecting the naturally, even divinely, ordained roles of women and men in heterosexual relationships. This rationalization is not unique to American law. For centuries, Western political theorists have relied on "nature" to justify male control of social power and resources.

> and normalcy: in marriage, a woman has no right to refuse her husband intercourse. . . . The society's opposition to rape is fake because the society's commitment to forced sex is real: marriage defines the normal uses to which women should be put, and marriage institutionalizes forced intercourse.

Andrea Dworkin, RIGHT-WING WOMEN, *supra* note 11, at 85.

73. Virtually everything in Western culture related to relationships between women and men reinforces the notion that a woman's sexuality is a possessible object. "The rules for women in courtship delineate an image of woman as commodity. Her power to attract is her 'capital,' which she should invest frugally to assure an adequate future income." Judith Laws, The Second X: Sex Role and Social Rule 179 (1979). Commenting on Laws' interpretation, Edwin Schur states:

> The common reference to a woman's physical appearance as her "assets" supports this interpretation. So too does the frequent branding of women who overtly display their sexualtiy as "cheap." What seems to be implied by the use of that term is that such women are *not placing a high enough price* on their sexuality.

Edwin Schur, Labeling Women Deviant 165-66 (1984) (emphasis in original). Any complete discussion of the commodity status of women must at least recognize the blatant manifestation of that status in the institution of female prostitution.

> [The] demand which fosters prostitution occurs because of the way in which men and women have been taught to view themselves and members of the opposite sex. Men have been socialized to view sex as a commodity that can be purchased for a twenty-dollar bill. . . . [Women] have been conditioned to view themselves as sexual objects long before junior high school and encouraged to exchange attractiveness (or sexuality) for things like engagement rings or popularity.

Jennifer James, The Politics of Prostitution 39 (1975); *see also* Kathleen Barry, Female Sexual Slavery (1979). The obvious link between the institutions of prostitution and marriage was recognized by Engels in his essay on the bourgeois family: "[marriage] often enough turns into the crasest prostitution. . .on the part of the wife, who differs from the ordinary courtesan only in that she does not hire out her body, like a wage-worker, on piecework, but sells it into slavery once and for all." Friedrich Engels, *supra* note 8, at 742.

III. Of The "Natural" Order

Writing in the third century B.C.E.,[74] Aristotle concluded that all things, including people, act in accord with what nature intends. The essence of a thing is revealed by its function, Aristotle explained, because that thing naturally functions in accord with its essence.[75] Thus, women function primarily as passive receptacles in the reproductive process not because *men* impose such an arrangement, but because passivity and subordination accord with women's collective essence.[76] This notion of a naturally-mandated female social role appealed to Thomas Aquinas as well. Translating much of Aristotle's thought into the context of medieval Christianity, Aquinas, as Aristotle before, argued that woman's social role is inextricably linked to her necessary role in reproduction: "It was necessary for woman to be made, as the Scripture says, as *a helper* to man; not, indeed, as a helpmate in other works, as some say, since man can be more efficiently helped by another man in other works; but as a helper in the work of generation."[77]

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74. The abbreviation for "Before the Common Era," B.C.E. is an alternative to the theistic and entirely Christian "B.C."

75. "All things derive their essential character from their function and their capacity." Aristotle, Politics I § 1253 a., *quoted in* Susan Moeller Okin, Women in Western Political Thought 74 (1979).

> It is Aritstotle's view that the final cause of everything can be determined by noting the actualization of those capacities inherent within it from the start. . . .
>
> For Aristotle each separate thing's end is predetermined: it is destined to fulfill its essence. . . . Aristotle assumes, with latter-day functionalists who have borrowed from his method, that one can determine what a thing (person, institution) is in terms of its function or "end."

Jean Elshtain, Public Man, Private Woman: Women in Social and Political Thought 41-42 (1981) (citing Aristotle, Politics 5 (Ernest Barker ed. 1962)).

76. "A woman is, as it were an infertile male. . . ." Susan Moeller Okin, *supra* note 75, at 82-83 (quoting 1 Aristotle, Generation of Animals 728a); "[A] male is male in virtue of a particular ability, and a female in virtue of a particular inability." *Id.* at 82-83, (quoting 4 Aristotle, Generation of Animals 766a); "In spite of her widespread inabilities, then, woman is necessary for the reproduction of man, and this is therefore seen by Aristotle as her natural function. After all, if it were not for the requirements of sexual reproduction, this particular 'deformity in nature' would never have existed." *Id.* at 83.

77. Thomas Aquinas, *On the First Man* in Philosophy of Woman: Classical to Current Concepts 80 (Mary Mahowald ed. 1978). Like Artistotle before him, Aquinas described women as not only *inferior* to men, but as a *defective* product of the natural regenerative process:

> As regards the individual nature, woman is defective and misbegotten, for the active power in the male seed tends to the production of a perfect likeness according to the masculine sex; while the production of a woman comes from defect in the active power, or from some material indisposition, or even from some external influence, such as that of a south wind,. . .

Id. at 80-81.

Later thinkers, Bodin[78] and Filmer[79] among them, advanced the paradigm of male domination a step further, likening man's superior social role to the divinely-ordained authority vested in a king—just as absolute authority over the realm rests with the monarch, man retains absolute authority over his woman and his offspring (the two being virtually identical in their relationships to the governing male). Even Rousseau, famous for conceiving of civilization itself as a contractual relationship,[80] could not resist assigning to women the status of social inferiors, rationalizing that assignment with an appeal to nature. In *Emile*,[81] for instance, Rousseau described the "perfect" woman as the passive antithesis of the strong, active male who guards and protects her.[82] The "natural" life, Rousseau explained, is that lived in male-dominated monogamy, man enjoying the perfect servitude and subordination of the woman he marries.[83]

These few examples suggest the general tendency of Western political thought to leave the theoretical foundation of male domination virtually unquestioned. They also reflect the general tendency of male theorists to ground acceptance of the patriarchal

78. Jean Bodin, c. 1530-96, argued for a well-ordered state characterized by a fully sovereign monarch. Like his predecessors, Bodin found little use for women beyond their biologically necessary role in reproduction, setting the domestic world to which they were confined apart from the public, male world of the state. *See generally* Julian Franklin, Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History (1963).

79. Sir Robert Filmer, c. 1588-1653, was an early proponent of patriarchal social order. His work is particularly interesting in the context of political thought about women's social roles because he quite clearly did *not* distinguish between public and private spheres of existence. For Filmer, reality was lumped into a single, indivisible whole, characterized by absolute male control. "Within Filmer's patriarchalism, there are only subjects, never citizens. Each father in his little domain 'lords' it over wives, children, and servants." Elshtain, *supra* note 75, at 103-04. Elshtain takes a provocative, though substantively unfounded, stab at linking contemporary feminism's demand that "public" and "private" be collapsed with Filmer's attempt to do so. *See Id.* at 104-05. *See generally* James Daly, Sir Robert Filmer and English Political Thought (1979); *Patriarcha & Other Political Works of Sir Robert Filmer* (Peter Laslett ed. 1949).

80. *See* Jean Jacques Rousseau, *The Social Contract* (Willmore Kendall ed. 1954).

81. Jean Jacques Rousseau, *Emile* (Allan Bloom trans. 1979).

82. A perfect man and a perfect woman ought not to resemble each other in mind any more than in looks. . . . One ought to be active and strong, the other passive and weak. . . . [I]t follows that woman is made specially to please man. If man ought to please her in turn, it is due to a less direct necessity. His merit is in his power; he pleases by the sole fact of his strength.

Id. at 358.

83. "[T]he patriarchal rural life," Rousseau instructs in *Emile*, is "man's original life, the most peaceful, the most natural and the most pleasant for those whose hearts are not corrupted." Jean Jacques Rousseau, Emile, *quoted in* Okin, *supra* note 75, at 114.

status quo on the "natural" relationship alleged to exist between women and men. The two cases considered below, *Bradwell v. Illinois*[84] and *Muller v. Oregon*,[85] demonstrate that American law is itself no stranger to these theoretical trends. Together, *Bradwell* and *Muller* exemplify the historical attempt to mold American jurisprudence, and its practical, legal manifestations, in conformity with contemporary socio-economic demands without disturbing the basic parameters of male domination.[86]

A. No Women Need Apply: Bradwell v. Illinois[87]

In 1869, Myra Bradwell applied for admission to the Illinois state bar. She had been tutored in law by her husband, Judge James B. Bradwell,[88] and started a legal newspaper, the *Chicago Legal News*, that quickly gained wide circulation.[89] Despite passing the state bar exam, Bradwell was denied admission by the Illi-

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84. 83 U.S. (16 Wall.) 130 (1873).

85. 208 U.S. 412 (1908).

86. It is not surprising that this rationale came to the fore of American jurisprudence during the late nineteenth and early twentieth centuries, as modes of production moved out of the home and into the factory. American law's reception of the notion that women are somehow "naturally" intended to function in the domestic realm is arguably reflective of the separation between "home" and "workplace" necessarily brought about by capitalist industrialization.

> It is only under capitalism that material production as wage labor and the forms of production taking place within the family, have been separated so that the "economic" function of the family is obscured. . . . Only with the emergence of capitalism has "economic" production come to be understood as a "human" realm outside of nature.

Eli Zaretsky, Capitalism, the Family, & Personal Life 26-27 (1976); "With the rise of industry, capitalism 'split' material production between its socialized forms (the sphere of commodity production) and the private labour performed predominantly by women within the home. In this form male supremacy, which long antedated capitalism, became an institutional part of the capitalist system of production." *Id.* at 29. In part, this article is an attempt to answer some of the questions raised about Zaretsky's analysis: "Zaretsky's approach also has a number of fundamental weaknesses. First, Zaretsky offers no compelling reason why it must be women who are relegated to the household sphere.' Why isn't it men? Or why not men and women equally?" Michael Albert & Robin Hahnel, *Marxism & Socialist Theory* 211 (1981). A legal system that reinforces male-domination, enforcing (sometimes overtly, often subtly) the notion that women "belong" in the role of wife and mother is at least part of the answer.

87. 83 U.S. (16 Wall.) 130 (1873). The following portion of this essay draws on the work of Nadine Taub and Elizabeth Schneider, particularly *Women's Subordination and the Role of Law* in The Politics of Law: A Progressive Critique 117 (David Kairys ed. 1982).

88. Sachs & Wilson, *supra* note 12, at 97.

89. *Id.* at 98; *see also* Leslie Goldstein, The Constitutional Rights of Women 67 (1988).

nois Supreme Court specifically because of her sex.[90] She appealed to the United States Supreme Court armed with the argument that the fourteenth amendment's privileges and immunities clause opened every profession and vocation to all people, Black and white, women and men. In a brief majority opinion, authored by Justice Miller, the Court relied on its decision announced only the day before in *The Slaughterhouse Cases*[91] to reject Bradwell's claim:

> The opinion just delivered in the *Slaughter House Cases*. . . renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principle on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.[92]

Although the majority was satisfied with simply relying on the narrow *Slaughterhouse* interpretation of federally-protected privileges and immunities, Justice Bradley added a concurring opinion, joined by Justices Field and Swayne, that suggests the real concerns Myra Bradwell's claim raised for the almost exclusively male legal profession. Justice Bradley wrote:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of woman- hood. The harmony, not to say the identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common

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90. [W]hen the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women.
* * *
Whatever, then, may be our individual opinions as to the admission of women to the bar, we do not deem ourselves at liberty to exercise our power in a mode never contemplated by the legislature, and inconsistent with the usages of courts of the common law, from the origin of the system to the present day.

In re Bradwell, 55 Ill. 535, 539-40 (1869).

91. 83 U.S. (16 Wall.) 36, 77-82 (1873).

92. *Bradwell*, 83 U.S. at 130.

> law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state. . . .
>
> * * *
>
> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[93]

Justice Bradley's opinion provides insight into two perceptions that grounded women's legal status at the turn of the century. First, the opinion articulates the belief that men are both different from and superior to women. Second, a clear line is drawn between the "public" sphere of labor and production, naturally controlled and inhabited by men, and the "private" sphere of "housework" and motherhood, assigned by divine ordinance exclusively to women. Veiled in talk of "noble and benign offices," the clear implication of Bradley's concurrence is that a woman's place is in the home.

B. There's No Place Like Home: Muller v. Oregon[94]

Even as women took on employment outside the home, the public-private ideology that kept Myra Bradwell from being admitted to the Illinois bar continued as a strong undercurrent in American jurisprudence. In 1908, for example, the Supreme Court relied on woman's allegedly "natural" role as domestic servant and reproductive mechanism to uphold sex-specific labor regulations. *Muller v. Oregon*[95] is remembered as the case in which the Court turned away from its *Lochner*[96]-era prohibition against labor-protecting legislation, apparently persuaded by the renowned 113-page brief filed by Louis Brandeis for the state of Oregon. While the "Brandeis brief"[97] helped pave the way for legal discourse informed by social science, it also relied heavily on the argument that the sex-specific nature of the regulations at issue justified diverging from *Lochner*. "The brief portrayed as common knowledge pseudo-scientific data regarding physical differences between

93. *Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring).

94. 208 U.S. 412 (1908).

95. *Id.*

96. Lochner v. New York, 198 U.S. 45 (1905).

97. Although Louis Brandeis actually filed the *Muller* brief, he received a great deal of assistance in assembling the data that comprised it from Josephine Goldmark and Florence Kelly. Taub & Schneider, *supra* note 87, at 137 n.41; *see also Sex Discrimination and the Law*, *supra* note 24, at 29.

men and women, emphasizing the 'bad effects' of long hours on women workers' health, 'female functions,' childbearing capacity, and job safety, and on the health and welfare of future generations."[98]

> For example, this statement, made by Jules Simon in the French Senate in 1891, was included under the heading "The State's Need of Protecting Women": '[W]hen we ask... for a lessening of the daily toil of women, it is not only of the women that we think; it is not principally of the women, it is of the whole human race. It is of the father, it is of the child, it is of society, which we wish to re-establish on its foundation, from which we believe it has perhaps swerved a little.'[99]

Justice Brewer's opinion for the Court suggests that although Brandeis included data on the harmfulness of extended labor to *any* worker, it was the argument based on woman's "natural" inferiority that carried the day:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. . . . [A]nd as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[100]

In language only slightly more subtle than that of the *Bradwell* concurrence, Justice Brewer asserts that women are, by nature, relegated to a subordinate role in society, the primary purpose of which is producing "vigorous offspring." Indeed, the concern for providing society with healthy *mothers* is what makes women "objects of public interest" in the first place. This creates the inescapable impression that women *as women* really aren't worth legal protection.[101] It is only when their function in the production of men's children is threatened that "public," legal recognition is required.

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98. Taub & Schneider, *supra* note 87, at 128-129.

99. 16 Philip Kurland & Gerhard Casper, Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 48 (1975).

100. *Muller*, 208 U.S. at 421.

101. [B]eyond its direct, instrumental impact, the insulation of women's world from the legal order conveys an important ideological message to the rest of society. Although this need not be the case in all societies, in our society the law's absence devalues women and their functions: women simply are not sufficiently important to merit legal regulation. . . . In our society, law is for business and other important things. The fact that the law in general has so little bearing on women's day-to-day concerns reflects and underscores their insignificance. Thus, the legal order's overall contribution to the devaluation of women is greater than the sum of the negative messages conveyed by individual legal doctrines.

Taub & Schneider, *supra* note 87, at 122.

Criticizing the theoretical underpinnings of Justice Brewer's opinion is not to overlook the positive effect it made possible. Without question, the Court's movement away from stalwart opposition to labor-protective regulation was a victory for the working class. All workers, women and men, suffer to some degree in a capitalist structure, more so under capitalism untempered with even minimal physical health safeguards. However, the potential benefits the decision appeared to create for the *working* class cannot be isolated from the negative implications it held for the *female* class. Justice Brewer unabashedly declared that nature itself places women in a separate and inferior social role—a role their legal status ought to reflect. Further, his opinion reinforced the notion that law appropriately operates in assuring that woman's limited role in the public sphere does not impair her capacity to perform in her primary, private role as wife and mother.

By adopting the public-private distinction articulated in both *Bradwell* and *Muller*, American law makes itself an instrument of male-domination. It defines women as "naturally" suited to domestic and, particularly, reproductive tasks and then cordons off the context in which those tasks are accomplished—namely the traditional, heterosexual family—as a "private" world, exempt from legal intervention.

The public-private distinction fosters the perception that law is intended for "important" things, "public" things, the things men do and control. Women, in their naturally-ordained, domestic existence, neither need nor warrant legal protection and recognition. As actors in the public realm, they may function on a superficially equal legal footing with their male counterparts. But behind the wall established by legal privacy, women's interests in being treated as equals cannot overcome men's right to dominate and control. When judges and legislators refuse to discard marital rape exceptions, or police choose not to answer the call of a battered woman ("we can't interfere in domestic affairs"), or civil courts fail to evict abusive husbands or enforce child support obligations, they simply reify the myth that "a man's home is his castle," the boundaries of which ought, in most cases, be respected by other men. Further, sealing-off a realm defined by a male-oriented legal system as beyond the reach of legal regulation perpetuates the notion that women, like other *things* in a man's house, belong to him and are, hence, his to do with as he pleases. "By declining to punish a man for inflicting injuries on his wife. . ., the law implies [that] she is his property and he is free to control her

as he sees fit."[102]

Isolating women in a realm that law will not enter also serves the purpose of veiling real gender inequality in the smoke-and-mirrors of legal "non-discrimination." While the public world of capitalist production has occasionally been amended to appear somewhat gender neutral, thereby deflecting overt social unrest, the private realm continues to function according to the largely unamended rules of male domination. In this way, men create a social reality in which they have almost complete control. Human existence is divided into two separate and independent realms, the one governed by a system of laws built upon a foundation of collective male-dominance, the other protected from public intervention, allowing the individual (male) to draw up the rules of the game, to be the lord of his manor. This distinction is then rationalized as the dictate of nature itself, mandating that it be embodied in and reflected by law and, at the same time, assuring that "legal equality" remains, for the most part, male-created false consciousness.[103]

Recognizing and criticizing the public-private distinction that exists in American law is not an argument for the unreasoned application of patriarchically generated regulation to all facets of human existence. Legal recognition of, accommodation of, even absence from intimate relationships might well be justifiable in a non-patriarchal context. The existing public-private split, as applied to legal relationships between women and men—arbitrarily creating a lesser sphere founded on the notion of impermeability to public sanction, and assigning women to that sphere by natural ordinance, there to fare as they will within a male-dominated social structure—is, however, entirely beyond the pale. The misperception that life is indeed separable along that male-created demarcation submerges oppression, abuse, and violence in female-male relationships, allowing legal reality to deny lived reality. The illusion is created that "a woman's relationship with her man is a matter of interplay between two unique personalities, and can be

102. Taub & Schneider, *supra* note 87, at 122.

103. By placing the operation of law squarely in the public realm and, at least rhetorically, removing itself from the "private realm" of personal life and the family, the legal system created a distinction between a public realm of life, which is a proper arena for legal or social regulation, and another, fundamentally different sphere, which is somehow outside the law's or society's authority to regulate. Thus, the legal system has functioned to legitimate that very distinction by asserting it as a natural, rather than socially imposed ground for different treatment.

Diane Polan, *Toward a Theory of Law and Patriarchy* in The Politics of Law 298 (David Kairys ed. 1982).

worked out individually."[104] Legal intervention is declared to be neither desired nor desirable; absence of the law from the private sphere is rationalized as a means of encouraging people to "work things out for themselves," and to do so in the "privacy of their own home." By approaching home and family with presumed self-restraint, the state virtually assures *public* policy will be created without notice of *private* reality, substantially limiting the role of legal discourse in attacking and undermining gender inequality.

C. *Smoke and Mirrors and Preferential Treatment:* Wimberly v. Labor & Industrial Relations Commission[105]

In late August 1980, Linda Wimberly was seven months pregnant.[106] She requested a leave of absence from the J.C. Penney Department Store where she had clerked for three years.[107] Adhering to its established policy, the store granted Wimberly a "leave without guarantee of reinstatement."[108] Linda gave birth in November and was ready to return to work the first of December. She was told, however, that her position had been filled and that Penney's had nothing available to offer her.[109]

Shortly thereafter, Wimberly filed a claim for unemployment compensation with the Missouri Division of Employment Security.[110] She was informed that she was not eligible for compensation under the Missouri Employment Security Act,[111] which disqualifies an individual who "has left his work voluntarily without good cause attributable to his work or to his employer."[112]

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104. Arthur Brittan & Mary Maynard, Sexism, Racism and Oppression 125 (1984).

105. 479 U.S. 511 (1987).

106. Wimberly v. Labor & Indus. Rel. Comm'n, 688 S.W.2d 344, 345 (Mo. 1985), *aff'd* 479 U.S. 511 (1987).

107. *Id.*

108. "Pursuant to its established policy, the J.C. Penney Company granted [Wimberly] a 'leave without guarantee of reinstatement,' meaning that [Wimberly] would be rehired only if a position was available when [she] was ready to return to work." Wimberly v. Labor & Indus. Rel. Comm'n, 479 U.S. 511, 513 (1987).

109. *Id.*

110. *Id.*

111. Mo. Ann. Stat. § 288.050.1(1) (Vernon 1965 & Supp. 1989).

112. The Missouri statute reads in pertinent part: "a claimant shall be disqualified for waiting week credit or benefits. . . if the deputy finds (1) [t]hat he has left his work voluntarily without good cause attributable to his work or to his employer." Mo. Ann. Stat. § 288.050.1(1) (Vernon 1965 and Supp. 1989). It must be noted that as of 1989, a claimant who presents competent medical evidence that she must leave work due to pregnancy, and then returns to work as soon as she is deemed medically capable of doing so, *is* eligible for unemployment compensation. Mo. Ann. Stat. § 228.050.1 (1)(c) (Supp. 1989). That the state of Missouri has chosen to make this amendment to its policy does *not* alter the Court's interpretation of

Wimberly was told by the Division deputy who dealt with her claim that women who left their jobs due to pregnancy were considered to be leaving "voluntarily" and, thus, were ineligible to receive unemployment compensation.[113]

Wimberly appealed the decision to the division's appeals tribunal to no avail. The tribunal concluded that:

> Although the claimant did have a good reason for leaving her employment, it is found that that reason was in no way attributable to her work or to her employer. Accordingly, it is found that the claimant quit her job voluntarily on August 23, 1980, without good cause attributable to her work or to her employer.[114]

When the Missouri Labor and Industrial Relations Commission denied her petition for review, Wimberly filed a petition in the Circuit Court of Jackson County.[115] The court reversed the Commission's decision, concluding that the Missouri employment security statute's compensation provision ran afoul of federal standards imposed upon states receiving federal assistance for their unemployment insurance programs. The circuit court held that section 3304(a)(12) of the Internal Revenue Code,[116] which mandates that "no person shall be denied compensation under [a state unemployment compensation] law solely on the basis of pregnancy or termination of pregnancy," prohibited recognizing pregnancy or its termination as a justification for denying compensation to otherwise eligible women.[117]

On appeal to the Missouri Court of Appeals, Western District, the circuit court's decision was affirmed.[118] The appellate court joined the circuit court in relying upon the Fourth Circuit's interpretation of section 3304 in *Brown v. Porcher*.[119] In *Brown*, South Carolina's policy of denying unemployment compensation to women who left their jobs due to pregnancy was challenged as incongruous with the requirements of section 3304. Both the United

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the Internal Revenue Code's requirements regarding unemployment insurance programs.

113. "The deputy [for the Division] determined that [Wimberly] had 'quit because of pregnancy' and, therefore, had left work voluntarily and without good cause attributable to [her] work or to [her] employer." *Wimberly*, 688 S.W.2d at 345.

114. *Id.*

115. *Wimberly*, 479 U.S. at 513.

116. 26 U.S.C. § 3304(a)(12) (1982) reads: "The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that. . . . (12) no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy." *Id.*

117. 479 U.S. at 513.

118. *Id.*; *Wimberly*, 688 S.W.2d at 346.

119. 660 F.2d 1001 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983).

States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit agreed that section 3304 "unambiguous[ly]" prohibited such law.[120] The United States Supreme Court refused to grant certiorari, although Justice White, joined by Justices Powell and Rehnquist, dissented, concluding that, "[i]t is by no means clear. . . that section 3304(a)(12) does not simply provide that pregnancy must be treated like all other disabilities—that pregnancy simply cannot be singled out for unfavorable treatment."[121]

On April 2, 1985, the Supreme Court of Missouri reversed the court of appeals decision regarding Linda Wimberly's claim to unemployment compensation.[122] While concluding that the lower courts were correct in considering the Fourth Circuit decision in *Brown v. Porcher*, the only reported case construing section 3304(a)(12),[123] the court rejected the notion that it was bound by statutory constructions of federal courts other than the United States Supreme Court.[124] Instead, persuaded by Justice White's dissent, the court concluded that Congress did *not* intend section 3304 to create the "sweeping ban" the Fourth Circuit found the provision embodies.[125] What Congress *did* intend to proscribe through section 3304 was a state policy that denied unemployment compensation solely because of pregnancy; because the Missouri provision made no specific reference to pregnancy as a disqualifying factor, it was not in conflict with section 3304.[126]

The United States Supreme Court granted certiorari[127] and, in a unanimous opinion authored by Justice O'Connor, affirmed the Missouri Supreme Court's decision.[128] The Court framed the dispute as whether section 3304 "mandates preferential treatment for women who leave work because of pregnancy."[129] Contrary to Wimberly's assertions and to the Fourth Circuit's decision in *Brown v. Porcher*, Justice O'Connor found that:

> The plain import of the language of § 3304(a)(12) is that Congress intended only to prohibit States from singling out pregnancy for unfavorable treatment. . . . Thus, a State could not decide to deny benefits to pregnant women while at the same

120. *Wimberly*, 688 S.W.2d at 348.
121. Porcher v. Brown, 459 U.S. 1150 (1983) (White, J., dissenting).
122. *Wimberly*, 688 S.W.2d 344 (Mo. 1985).
123. *Id.* at 347.
124. *Id.*
125. *Id.* at 349.
126. *Id.*
127. 475 U.S. 1118 (1986).
128. Wimberly v. Labor & Indus. Rel. Comm'n, 479 U.S. 511 (1987). (Justice Blackmun did not participate in the decision).
129. *Id.* at 516.

> time allowing benefits to persons who are in other respects similarly situated: the 'sole basis' for such a decision would be on account of pregnancy.[130]

But the challenged Missouri provision was facially neutral, only "incidentally" disqualifying pregnant or formerly pregnant women from receiving unemployment compensation as part of a larger group of justifiably ineligible claimants.[131]

> [U]nder Missouri law, *all* persons who leave work for reasons not causally connected to the work or the employer are disqualified from receiving benefits. To apply [the Missouri compensation policy], it is not necessary to know that petitioner left because of pregnancy; all that is relevant is that she stopped work for a reason bearing no causal connection to her work or her employer. Because the State's decision could have been made without ever knowing that petitioner had been pregnant, pregnancy was not the 'sole basis' for the decision under a natural reading of § 3304(a)(12)'s language.[132]

Justice O'Connor pointed to the Vietnam Era Veterans' Readjustment Assistance Act of 1974[133] and to the Rehabilitation Act of 1973[134] as examples of similarly worded statutes construed by the Court to prohibit discrimination "against otherwise qualified individuals," rather than to require that employers provide "special treatment" for disadvantaged individuals.[135] Further, beyond the "plain language" of section 3304, the Court was persuaded that nothing in the legislative history of the statute suggested an intention to create something more than a prohibition against singling out pregnant women for disadvantageous treatment.[136] Neither the House nor the Senate Committee Reports hinted "that Congress disapproved of, much less intended to prohibit, a neutral rule such as Missouri's."[137]

Finally, Justice O'Connor found the Missouri Supreme Court's decision entirely consistent with the Department of Labor's interpretation of section 3304. In two communications to state governments, the Department emphasized that the provision " 'does not speak to treating pregnant claimants more favorably. It only requires that they not be disqualified solely on the basis of pregnancy or its termination.' "[138] Because section 3304 does not

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130. *Id.*
131. *Id.* at 517.
132. *Id.*
133. 38 U.S.C. § 2021(b)(3) (1982).
134. 29 U.S.C. § 794 (1982).
135. *Wimberly*, 479 U.S. at 517-18 (quoting Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979)).
136. *Id.* at 518-19.
137. *Id.* at 521.
138. *Id.* at 522 (quoting United States Dept. of Labor, Employment and Training

require "preferential treatment" for women, the Court concluded, it also does not prohibit Missouri from denying pregnant women unemployment compensation when they leave their jobs in order to give birth and are subsequently denied the opportunity to return to work.[139]

D. Looking at Wimberly *Through Private Eyes*[140]

Justice O'Connor's *Wimberly* opinion may be understood to rest on either of two antithetical foundations. From one perspective, the decision seems firmly rooted in the notion of "equal treatment." Rather than imagining, and then focusing almost exclusively upon, woman's disadvantageous physical structure and "maternal functions" as did Justice Brewer in *Muller*,[141] the *Wimberly* Court recognizes *all* workers, regardless of sex, as similarly situated individuals in the labor marketplace. Gone are the references to woman's duty to provide "vigorous offspring"[142] and the veiled assertions that a woman really belongs at home and must, therefore, be protected on the job from anything that might impede the fulfillment of her "natural" role there. Indeed, *Wimberly* may be taken as simply a manifestation of the principle of equal protection—"that people who are similarly situated in fact must be similarly treated by the law."[143] From this perspective, *Wimberly* illustrates the positive change that has taken hold, both in law and in society at large, since Myra Bradwell fought for a place at the Illinois bar.[144]

A second, very different perspective reveals an equally different vision of *Wimberly*. By shifting focus from *Wimberly's* bare mandate of identical treatment with regard to unemployment compensation, a wider, more comprehensive frame of reference is attainable—a frame that encompasses not only the notion of "equal treatment," but the underlying material reality of that notion as well. From this alternative perspective, one is able to see past the Court's persistent "antidiscrimination" language to the presump-

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Administration, Unemployment Insurance Service, Supplement No. 1 — Questions and Answers Supplementing Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 — P.L. 94-566, at 26 (1976)).

139. *Id.*

140. Much of the following section was greatly aided by Martha Minow's exploration of the "dilemma of difference" in *The Supreme Court, 1986 Term, Forward: Justice Engendered*, 101 Harv. L. Rev. 10 (1987).

141. 208 U.S. 412, 421 (1908).

142. *Muller*, 208 U.S. at 421.

143. *See* Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949); Taub & Schneider, *supra* note 87, at 130.

144. *See supra* notes 87-93 and accompanying text.

tions the Court necessarily adopts in its implicit definition of "discrimination."

In order to frame the *Wimberly* issue as one of "equal" versus "special" treatment,[145] the Court must establish male workers as the backdrop against which to view discrimination. Although this presumption remains unstated, it is necessary to the conclusion that accommodating pregnancy requires "discriminatory" action. Only by establishing men as the status quo, and the treatment they are accorded in the workplace as the measure of "equal" treatment, can O'Connor and the Court logically conclude that pregnancy, a circumstance that can only physically affect women, cannot be taken into consideration without granting pregnant workers "special" treatment. The bottom line must be that the template for *equal* treatment is *male* treatment.

This conclusion, in turn, implies a workplace and employment conditions designed exclusively for men. Any reform of the sort necessary to accommodate the biological reality of pregnancy can only come at the legally-established expense of male workers. Women may enter the work environment only so long as they assimilate; that is, only through "being men." Circumstances departing from the male norm can only be accommodated through the provision of "special," "preferential" treatment, violating the "objective" legal tenets of "equal" treatment. The public, extra-domestic realm hence remains primarily male-defined and male-oriented, even as increasing numbers of women are grudgingly allowed to enter it.

E. Unlinking Private Reality From Public Policy Through Legal Objectivity

Contemplating *Wimberly* from the perspective that reveals it as a mandate for assimilation to male public norms exposes how closely the Court's reasoning is linked to public/private ideology. Not only does the equal treatment-special treatment distinction adopted by the Court presume that women will function as men on the job, it further presumes that women and men come to the workplace on a level legal footing. These presumptions require the Court to take a *tabula rasa* approach, ignoring the substantially different legal status women and men are assigned outside the workplace. By adopting such an approach, *Wimberly* reasons a wall into place between the public life and private reality of wo-

145. *See Wimberly*, 479 U.S. 511 (1987); *supra* notes 128-32, 135-139 and accompanying text.

men, creating policy for the former with no hint that the latter even exists.

Perhaps appearing merely a quibble as to theory, this criticism of *Wimberly* takes on concrete implications when placed in the factual context surrounding Linda Wimberly's claim. Among the private realities "objectified" out of the Court's consideration is the long-standing existence of a marital rape exception in Missouri. Four times since 1980, Missouri courts have reaffirmed that exception.[146] Taking this into account undercuts the Court's assertion that pregnancy is no different than any other reason one might have for voluntarily leaving a job. Furthermore, the existence of a marital rape exception suggests the larger fallacy inherent in the assumption that pregnancy itself is necessarily voluntary and thereby reasonably categorized with other reasons a worker might have for deciding to depart her or his place of employment. The *Wimberly* analysis completely disregards that a woman in Linda Wimberly's position might be leaving her job due to a pregnancy forcibly inflicted on her by the man she married—a man whose sexual violence the state chooses to ignore so long as it is directed toward her. And even if that same woman was forcibly impregnated by a stranger (i.e. "raped") whom she resisted sufficiently to escape the broad sweep of male-defined "consent," she may yet be forced to carry the pregnancy to term by a legal system that recognizes only her ability to *choose* to terminate an unwanted pregnancy.[147] Whether or not she actually has the opportunity to exercise that choice may be limited by her financial capability—itself potentially dependent on a wage that is only sixty percent of what a similarly situated male could expect.[148] By ignoring the private reality of subordination and inequality that is experienced by women, the *Wimberly* Court implicitly reifies the public/private distinction, giving legal life to an unfounded ideological construct. In doing so, the Court furthers the notion that "discrimination" and "inequality" can only be ascertained through reference to male-defined and male-oriented norms.[149]

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146. *See* State v. Taylor, 726 S.W.2d 335 (Mo. 1987); State v. Badakhsan, 721 S.W.2d 18 (Mo. App. 1986); State v. Maynard, 714 S.W.2d 552 (Mo. App. 1986); State v. Thurber, 625 S.W.2d 931 (Mo. App. 1981).

147. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Roe v. Wade, 410 U.S. 113 (1973).

148. *See* U.S. Bureau of the Census, *Male Female Differences in Work Experience, Occupation, and Earnings: 1984*, Series P-70, No. 10 Current Population Reports 4-5 (1987).

149. *See* Minow, *supra* note 140, at 43 ("By allowing employers to ignore the difference of pregnancy, the Court keeps in place the assumption that equal treatment is measured by a male norm.")

In order to comprehend *Wimberly* in the context of continuing gender inequality, one must recognize that the Court attended only to the public, and therefore male, world, ignoring the less visible reality of women's bifurcated legal existence. Equally important, however, is recognizing *how* legal discourse makes such sleight of hand possible.

"The separation of public from private is as crucial to the liberal state's claim to objectivity as its inseparability is to women's claim to subordination."[150] Fundamental to American jurisprudence is the notion of legal objectivity—that courts ought to act dispassionately, with neither predisposition between parties nor interests of their own.[151] The *Wimberly* Court effected such a stance by "objectively" squaring the Missouri unemployment compensation policy with the "purely nondiscriminatory" federal requirements manifest in section 3304. This could not have been accomplished without disregarding the private legal reality that follows women into the public sphere. In essence, the public-private ideology adopted in *Wimberly* embodies the largely mythical distinctions drawn between "moral," "political," and "legal" decision-making. "In Anglo-American jurisprudence, moral [value judgments] are deemed separable and separated from politics (power contests), and both from adjudication (interpretation)."[152] Legal objectivity filters out the moral and the political, casting its dispassionate adjudicative sights only toward properly framed "legal" issues. Hence, in *Wimberly* the challenged Missouri statute could be viewed in a context devoid of marital rape exceptions, abortion prohibitions and other real facts of women's lives. Yet, this demarcation between law and "everything else," between subjective, private reality and objective, judicial decision-making allows the mere *form* of equality to supersede equality of *substance*—ideological construct to overtake material reality. *Wimberly* demonstrates how judicial aperspectivity, within the confines of a legal system that established treatment of males as

150. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 656 (1983) [hereinafter *Signs II*]. My analysis in these final sections is in large part the product of Professor MacKinnon's two *Signs* articles, *see id.* and Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs 515 (1982) [hereinafter *Signs I*], and her 1987 book, *Feminism Unmodified*.

151. "Neutrality, including judicial decision making that is dispassionate, impersonal, disinterested, and precedential, is considered desirable and descriptive. Courts, forums without predisposition among parties and with no interest of their own, reflect society back to itself resolved." *Signs II*, *supra* note 150, at 655.

152. *Id.* at 655.

the status quo, operates as a tool of male hegemony.[153] The Court's guarantee of "equal treatment" thus becomes the guarantee that every pregnant woman will be treated just as is every pregnant man.

Looking at *Wimberly* through "private eyes," one observes how "objectivity" as a jurisprudential doctrine functions to assure woman's objectification. Paring away the "extraneous," subjective details of private existence and dispassionately surveying only that which law defines for itself as relevant, legal discourse effectively ignores that moment within which inequality is generated. "The very place (home, body), relations (sexual), activities (intercourse and reproduction), and feelings (intimacy and selfhood) that feminism finds central to women's subjection"[154] are precisely what law "objectifies" out of existence. In this way, law itself assures that the private sphere remains inviolate and, by refusing to inform *public* equality discourse with the *private* reality of male domination, necessarily adopts the private definition of womanhood.[155]

F. American Liberalism: Managing Inequality Through "Equal Treatment" Ideology

Looking at the *Wimberly* decision from a perspective informed by women's private reality reveals comfortable American

153. Closely related to the law's role as an exponent of particular ideologies that support male supremacy, such as the public/private ideology, is its hegemonic function in support of patriarchy. While the concept of hegemony has thus far been articulated and applied in the context of understanding and explaining the *class* domination of advanced industrial society, it may also be useful to apply this concept in trying to understand how male supremacy is maintained. In respect to patriarchy, a set of ideas could be said to operate hegemonically to the extent it succeeds in convincing women that their inferior political, economic, and social status, as well as their subordination to husbands and fathers within the family unit, is a result of a *natural* division of the world into separate spheres and *natural* differences between male and female personalities that suit women and men for different roles, rather than the result of exploitation and domination.

Diane Polan, *supra* note 103, at 298-99.

154. *Id.* at 657.

155. To fail to recognize the meaning of the private in the ideology and reality of women's subordination by seeking protection behind a right *to* that privacy is to cut women off from collective verification and state support in the same act. . . . This right to privacy is a right of men "to be let alone" to oppress women one at a time. It embodies and reflects the private sphere's existing definition of womanhood. . . . It is at once an ideological division that lies about women's shared experience and that mystifies the unity among the spheres of women's violation. It is a very material division that keeps the private beyond public redress and depoliticizes women's subjection within it.

Catharine MacKinnon, *Feminism Unmodified* 101-02 (1987).

liberalism as a guarantor of continued inequality. Retaining the Millian[156] notion that inequality can be managed by replacing the ideology of "status" with that of "contract," liberal jurisprudence simply asserts that all are now equal—free to bargain in a vast marketplace governed only by the dispassionate forces of individual wants and needs. Hence, marriage can be spoken of as a contractual arrangement, and irrevocable consent to sexual imposition perceived as merely a part of the bargain. Guaranteeing that women will be treated just as men in the limited areas of the public sphere open to both, however, fails to even address the roots of gender inequality, leaving them hidden away in the dimly lit corners of women's private reality. The concept of "equal treatment" in traditional American jurisprudence thus operates in large part as an ideological, rather than material, construct, distorting what is real by filtering it through a system of male-oriented presuppositions and defining what remains as "objective reality." The impermeability of the private realm to legal intervention and alteration is thereby assured, as is the status quo of male domination in both public and private spheres.[157]

G. An Alternative Perspective: Feminist Jurisprudence

In order to collapse the public/private distinction into a single conceptualization of reality, one must comprehend the exclusively sex-based nature of gender inequality. Indeed, one must grasp that women are inflicted with inferior status by and in law precisely because they are women. Feminist critique is uniquely capable of revealing and articulating this conceptualization. Beginning with the proposition that "the molding, direction, and expression of sexuality organizes society into two sexes—women and men—which divi-

156. *See generally* John Stuart Mill & Harriet Taylor Mill, Essays on Sex Equality (1970).

157. Unfortunately, leftist critiques, for the most part rooted in Marxist analysis, also fail to comprehend fully the exclusively sex-based component of gender inequality. As Professor Catharine MacKinnon points out, Marxism and feminism proffer specific theories, independent of one another, about the underpinnings of power distribution — an independence that is not unintended. "[Marxism and feminism] exist to argue, respectively, that the relations in which many work and few gain, in which some fuck and others get fucked, are the prime moment of politics." *Signs I*, *supra* note 150, at 517 (footnote omitted). Since Engels noted that the first class antagonism and oppression was *like* (rather than simply *was*) man's oppression of woman, Friedrich Engels, *supra* note 8, at 739, Marxist analysis has attempted to explain gender inequality in terms of economic class inequality. However, by interpreting all social phenomena exclusively in class terms, Marxism stops short of comprehending the purely sexual aspect of gender inequality. No less than liberalism, Marxism does not, indeed cannot, recognize that women are subjected to inequality *because* they are women. Woman as *worker* may well be liberated, but woman as *woman* remains bound.

sion underlies the totality of social relations," feminism observes American law from a perspective that reveals the ideological nature of "equal treatment" discourse.[158]

Without acknowledging that the very concept "woman" carries with it the social status of "inferior," "subordinate," and "object," it is possible to assume that merely lowering the overt, traditional barriers to women's participation in the public sphere will eradicate gender-based inequality. Feminism confronts this component of legal "objectivity"—denial of the relevance of women's lived reality in a complete sense to the legal reality imposed on them—as a root cause of male hegemony. This confrontation is accomplished by recognizing that social power is, indeed, gendered. "Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other. This is the social meaning of sex and the distinctively feminist account of gender inequality."[159] Feminist critique alone, because it is cognizant of woman *as woman*, reveals the necessary link between legal "objectivity" and female "objectification." Unlike male-oriented legal discourse of the sort illustrated by *Bradwell*,[160] *Muller*,[161] and *Wimberly*,[162] feminist jurisprudence does not choose to imagine, indeed is incapable of imagining, a public world separate from and independent of private reality.

> The private sphere, which confines and separates [women], is therefore a political sphere, a common ground of [female/male] inequality. In feminist translation, the private sphere is a sphere of battery, marital rape, and women's exploited labor; of the central social institutions whereby women are deprived of (as men are granted) identity, autonomy, control, and self-determination; and of the primary activity through which male supremacy is expressed and enforced. Rather than transcending the private as a predicate to politics, feminism politicizes it. For women, the private necessarily transcends the private. If the most private also most "affects society as a whole," the separation between public and private collapses as anything other than potent ideology.[163]

Of course, the bare fact that feminist critique is capable of addressing a fundamental cause of gender inequality that is consciously bypassed by other perspectives—that is, the objectification inherent in the public-private distinction—is no guarantee that

158. *Signs I*, *supra* note 150, at 516.
159. *Signs II*, *supra* note 150, at 635.
160. 83 U.S. (16 Wall.) 130 (1873); *supra* notes 87-93 and accompanying text.
161. 208 U.S. 412 (1908); *supra* notes 94-103 and accompanying text.
162. 479 U.S. 511 (1987); *supra* notes 106-133 and accompanying text.
163. *Signs II*, *supra* note 150, at 657.

legal discourse can or will inform itself with what feminism reveals. As demonstrated throughout this essay, American law has a long history of male-identification and male-orientation. It has operated and continues to operate as a vehicle of male authority through its acceptance, both explicit and implicit, of male domination as the desired status quo. Although the continued identification of American law with expressions of male authority is a significant hurdle that must be cleared in attempting to effect legal change in the patriarchal social order, it is not the only such hurdle. Law itself functions as hegemonic ideology, asserting itself, and receiving social acceptance, as *the* rational and legitimate mechanism for resolving disputes.[164] The material result for women is a two-headed beast: law embodies male authority through its absence in that context that gives rise to gender inequality and, at the same time, displaces other mechanisms of effecting social change, thereby assuring that inequality remains immune to socially-accepted eradication.[165]

Recognizing the link between law and male authority as hegemonic powers raises the question of whether legal discourse *can* function as a mechanism for eradicating existing inequality, or instead should be perceived as merely an ideological diversion that actually guarantees maintenance of the status quo.

> The reliance on litigation reflects the belief in law as a source of social change, while ignoring the ideological power of law to mask social reality and block social change. Court battles

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164. The law acts hegemonically to assure people that their particular consciences can be subordinated—indeed, morally must be subordinated—to the collective judgment of society. It may compel conformity by granting each individual his right of private judgment, but it must deny him the right to take action based on that judgment when in conflict with the general will. Those who would act on their own judgment as against the collective judgment embodied in the law find themselves pressed from the moral question implicit in any particular law to the moral question of obedience to constituted authority. It appears mere egotism and antisocial behavior to attempt to go outside the law unless one is prepared to attack the entire legal system and therefore the consensual framework of the body politic.

Eugene Genovese, *Roll, Jordan, Roll* 27-28 (1976).

165. A good example of this phenomenon is found in the suffragist movement of the early twentieth century. "Operating within the male-dominant paradigm, the form, language, and mode of Suffragist protest was set not so much by the objective conditions of female oppression as by their response to the idealizations and mystifications and legalities which rationalized continuance of the status quo." Thus, the suffragist, in not challenging the ideology of law which supported an ideology of women, perpetuated the mystifications which supported the status quo.

Janet Rifkin, *supra* note 8, at 296 (quoting Jean Elshtain, *Moral Woman and Immoral Man: A Consideration of the Public-Private Split and Its Political Ramifications*, 4 Pol. & Soc'y 453, 469 (1974)).

> about "women's issues" are waged and sometimes won with the result that a new body of rights is created and deployed in battle, but the basic sexual hierarchy is not changed.[166]

By framing disputes like that in *Wimberly* in terms of *individual* access to social resources—hence, as disputes between women and men—legal discourse obscures the fundamental questions of power distribution that underlie such disputes.

> The crucial point is that these battles reflect anger and dissatisfaction which, in reality, potentially threaten the patriarchal hierarchy. The power of law is that by framing the issues as questions of law, claims of right, precedents and problems of constitutional interpretation, the effect is to divert potential public consciousness from an awareness of the deeper roots of the expressed dissatisfaction and anger. The ideology of law serves to mask the real social and political questions underlying these problems of law. At the same time, the paradigm of law which has historically been and continues to be the symbol of male authority is not only unchallenged but reinforced as a legitimate mechanism for resolving social conflict.[167]

The problem thus becomes whether litigation, as the modus operandi of legal discourse, is itself a desirable means of attacking patriarchy, or whether, stripped of its imposed legitimacy, it exists more realistically as a mechanism of cooptation.[168] Perhaps law should be understood to divert attention from the existence of, and hence, from the need to address, gender-based inequality and oppression wherever it exists. Legal discourse would then appear to confine attacks on inequality to narrowly-defined, legally-articulable claims, resulting in both the channeling of energy away from the material oppression that pervades women's "private" lives and reinforcement for the belief that *legal* change, constrained within its own patriarchal context, is *legitimate* change.

In the end, patriarchy as a form of power and social order will

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166. Janet Rifkin, *supra* note 8, at 296.

167. Janet Rifkin, *supra* note 8, at 297.

168. [W]e cannot underestimate the practical limitations we face with any law-oriented strategy. The experience of going to court on a regular basis underscores the pervasive maleness of the legal system: it is a system infused with sexist values. Regardless of the language of a statute, it is individual judges who decide cases. The judiciary remains overwhelmingly male. Judges have grown up in a patriarchal culture; their attitudes are inevitably shaped by their life experiences and by their position as the beneficiaries of male supremacy. Similarly, the juries who weigh women's claims of sex discrimination and pass judgment on the guilt of rape defendants are made up of people who have lived their entire lives in a male supremacist culture. . . . The whole structure of law—its hierarchical organization; its combative, adversarial format; and its undeviating bias in favor of rationality over all other values—defines it as a fundamentally patriarchal institution.

Diane Polan, *supra* note 103, at 301.

> not be eliminated unless the male power paradigm of law is challenged and transformed. In order to challenge the male paradigm of law, the origin of law as a form of male authority and power must be discovered and examined more thoroughly.[169]

The lone conclusion that law is a wholly ineffective mechanism for altering patriarchal social relations is likely neither particularly satisfying nor much of an incentive to continue pursuing legal avenues in the struggle for social change. And indeed, the point here is *not* to suggest that Mao was entirely correct in asserting that all political power grows out of the barrel of a gun and that, therefore, legal discourse is a complete waste of time. Many women in contemporary American society *do* experience a different, less oppressive reality than their mothers and grandmothers did; and much of what appears to be lasting change in gender relations was either the product of litigation or has at least been recognized in modern law. However, identifying the unquestionably patriarchal roots of American jurisprudence, and linking those roots with somewhat more subtle, but nonetheless observable, manifestations of inequality in contemporary American law signals the care with which legal discourse should be approached as a means of addressing and eventually eradicating social wrongs. The legal battle against sexism must be expanded to include arguments that confront not only what the law *says*, but also what exactly law *is*. Real, lasting social change cannot be effected through wiping marital rape exceptions off the books without at the same time confronting *how* American jurisprudence has made room for those medieval constructs well into the twentieth century.[170] Indeed, only through recognizing the hegemonic functions of male authority and of law itself, and confronting the symbiotic relationship between the two, can legal discourse broaden sufficiently to incorporate a single conception of women's reality. The struggle against gender inequality in the legal context cannot otherwise succeed.

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169. Janet Rifkin, *supra* note 8, at 297.

170. Catharine MacKinnon, *supra* note 20, at 100-01.