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National Interest

Assimilation or Liberation: Post-Modern American Women – Speech and Property Law

Barbara L. Bernier*

WOMEN'S TALK¹

what men dub tattle gossip women's talk
is really revolutionary activity
and would be taken seriously by men
(and many women too)
if men were doing the talking
women's talk is women together
probing the privatized
pain isolation exclusion trivialization
if situations were reversed
men would react with identical symptoms
to what women feel in their gut
worthlessness self depreciation depression
what men call prattle babble chatter jabber blather

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1. DALE SPENDER, *MAN MADE LANGUAGE* (1980).

gabbing hot air small talk rubbish gibberish verbosity
 clearly shows how language reflects
 the deep misogyny that's penetrated our lives
 and become common sport
 but from this day forward
 spare me
 I'm sick of being bait
 men denigrate our talk at their peril
 but that's because they're in ignorance
 of its power
 our power
 those precious few of us who see ourselves
 as powerful
 serious and deadly

INTRODUCTION

Women face the same issues regarding power and property acquisition in America today as they did before the civil rights and women's movement of the 1960s and 70s. The denial of equal rights to women has historically resulted in second class status which translates to the legal inability to acquire property and thus, power. Since property is essential to the concept of personhood and full citizenship in American society, it appears that it has been in the interest of the status quo to maintain archaic laws to place women in positions of powerlessness. For instance, even today, the concept of the life estate in inheritance law can relegate the widow to the status of a child by depriving her of the right to sell or mortgage the inherited property because it ultimately will be inherited by her children.² Women who question the status quo

2. MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 143 (1986).

The dower right of a widow represented a life interest only. It did not give women power to sell or devise dower property When a widow died, her dower estate descended to her husband's children in the same manner as the rest of the estate. If no children survived her, the property descended to her husband's heirs rather than her own. The provision for automatic descent demonstrates the primary purpose of dower, immediate support for a widow without independence. Women could use family property to maintain themselves, but they could not own it in their own names.

have always had their problems in society, whether it be in employment discrimination, marital rights or inheritance. The response of the power structure in society has been to quash women's dissent through ostracization, expulsion from the community, and loss of child custody, among other measures.

While the women's movement presented an opportunity for women to integrate corporate board rooms, the nation's educational institutions, and the workforce in general, it has failed abysmally in moving women from merely occupying the "gender" seat to really effectuating change in the workplace, concomitantly resulting in restructuring the family. In fact, since the women's movement, women are working harder and earning less in the workforce while working the "second shift" at home.³ Thus, the

Id. According to the Massachusetts Supreme Court in the early nineteenth century, it was not uncommon for a widow's children to sell their reversionary interests in their mother's dower lands before her death, thereby undoubtedly increasing her sense that the property was hers in no sense. *Hunt v. Hapgood*, 4 Mass. 117, 120 (1808); see also Carolyn Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940's*, 6 L & HIST. REV. 259 (1988) (examining the origination of the joint tax return as a reflection of 1940's gender roles and perceptions about the value of women's work); Mary M. Wenig, *Taxing Marriage*, 6 S. CAL. REV. L & WOMEN'S STUD. 561 (1997) (discussing "qualified terminable interest property" (QTIP) trusts as the new federal law of dower); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995) (critiquing QTIP trusts and their effects on women); Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So*, 76 N.C. L. REV. 1597 (1998) (arguing that QTIP trusts are not only illogical, but overtly sexist).

3. ARLIE HOCHSCHILD AND ANN MACHUNG, *THE SECOND SHIFT* 43-44 (1989).

Not long after this crisis in the Holts' marriage, there was a dramatic lessening of tension over the issue of the second shift. It was as if the issue was closed. Evan had won. Nancy would do the second shift. Evan expressed vague guilt but beyond that he had nothing to say. Nancy had wearied of continually raising the topic, wearied of the lack of resolution. Now in the exhaustion of defeat, she wanted the struggle to be over too. Evan was "so good" in *other* ways, why debilitate their marriage by continual quarreling. Besides, she told me, "Women always adjust more, don't they?"

Id. Women continue to perform more than seventy percent of household tasks in the family setting. See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 391 (1994) ("Moreover, once children are born, women typically do seventy-nine percent of the housework and a highly disproportionate share of the child care. One study estimated that fathers spend an average of only twelve minutes a day on solo child care."); see also

“reward” for admission into the workforce has translated to a paycheck for work outside of the home, without alleviating the responsibilities for the home. So while headlines seem to suggest that significant gains have been made in housing, education and employment, why do women continue to lag behind men financially and experience discrimination which seriously impacts their economic plight? The promise of the women’s movement was gender equity in all areas of American life.⁴ The effect of the women’s movement has been facial equality while negative financial undercurrents remain. Though the law claims to protect women and children after divorce through neutrality agreements, it continues to ignore the fact that women and their children are economically disadvantaged after divorce.⁵ The underlying message is that women should be thankful for the “emotional paycheck” they receive from being a wife and mother, but it is foolhardy to expect

Marjorie E. Starrels, *Husband Involvement in Female-Gender Typed Household Chores*, 31 SEX ROLES 473 (1994).

4. Title VII and the Equal Pay Act were intended to be the panacea to resolve the wage gap between men and women. However, women continue to earn 77 cents of every dollar a man earns. See National Committee on Pay Equity, *The Wage Gap Over Time* at <http://www.pay-equity.org/infotime.html> (source: Census Bureau, 2000 Current Population Reports, Median Earning of Workers 15 Years Old and Over by Work Experience and Sex – updated Sept. 2003); see also U.S. Dept. of Labor, Women’s Bureau, *20 Leading Occupations of Employed Women 2001 Annual Averages* available at http://www.dol.gov/wb/factsheets/20lead2001_txt.htm (stating that women continue to enter the workforce in sex segregated employment positions and thus generally earn less than men).

5. For instance, recent changes to divorce laws often result in financial detriment rather than freedom from a bad marriage. See, e.g., *The Uniform Marriage and Divorce Act*, 9A ULA 1973 (rejecting title-based property allocation and specifying that the homemakers’ contribution be taken into account). For example, in *Mattox v. Mattox*, the court awarded a lump sum alimony payment of \$8,000 and periodic one-year payment of \$6,000 for a 52-year-old wife who was beginning a \$13,000 a year job. 734 P.2d 259, 260 (N.M. App. 1987). Husband’s annual salary was \$68,500. *Id.* Both received \$187,459 in community property. *Id.* at 261. Thus the husband was better off because of his yearly income. See also Karen C. Holden and Pamela Smock, *The Economic Cost of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?* 17 ANN. REV. SOC. 51 (1991) (examining the economic status of women after divorce and widowhood).

that that type of “paycheck” will accommodate the financial realities of life in America when the marriage fails.⁶

This cultural message continues to support the notion that marriage and motherhood are the goals of womanhood. Good marriages reward women through dependent care in exchange for their non-paid work in the home and avoidance of detrimental financial consequences upon divorce. This attitude reinforces the idea that young women should continue to desire marriage as their central goal, rather than as a part of their lives.

The right-wing conservative stance in today’s society, with slogans of “family values” and attempts to repeal no-fault divorce laws, has resulted in two states passing “covenant marriage laws.”⁷ These laws attempt to reposition marriage as a lifelong selfless legal relation, and revert women back to their nineteenth century status of dependence and subservience. It is interesting to note that the “covenant marriage law” is written with the expectation that the religious community will actively participate in this endeavor.⁸ The legislative intent to intimately involve the church in this endeavor attempts to reposition marriage, not for the benefit of the individual parties, but for the alleged higher calling of self sacrifice in both the religious and legal sense. This is clearly a step backward for women because the basis of the covenant is

6. MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* 5 (1996) (citing that half of all marriages in the United States fail and most of those will involve young children).

7. See Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225-27 (1998) (“The Louisiana statute grows out of a widespread dissatisfaction with the current social and legal landscape of marriage and divorce, and a sense that marriage itself is threatened under no-fault divorce law.”); see also LA. REV. STAT. ANN. § 9:273A, (2)(a) (West 2000); ARIZ. REV. STAT. ANN. tit. 25 §§ 901-906 (West 2000).

8. LA. REV. STAT. ANN. § 9:237C (West Supp. 2004). The legislation counsels couples and solicits the assistance of other “communities” such as churches because they hold moral authority and are uniquely qualified to aid in preserving marriage. See Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 75 (1998) (stating that covenant marriage laws invited religion into the public sphere “for the purpose of performing a function for which religion is uniquely qualified – preserving marriages”); see also Susan Reimer, *Marriage Plan Misses Point for the Poor*, ORLANDO SENTINEL, Feb. 3, 2004, at E1 (critiquing expenditure of \$1.5 billion to promote marriage).

steeped in religious fundamentalism, which has traditionally been hostile to women.⁹

Wouldn't it be more equitable to incorporate a written agreement as a part of the marriage paperwork, where the parties fully agree on the nature of the relationship, including behavior that will be tolerated, and explicitly stating an expectation of a partnership in all aspects of the relationship, including finances and work in the home? Expecting that the parties will remain in the marriage for life presupposes sacrifice whatever the costs; costs which will undoubtedly fall more heavily on women. Perhaps, in the twenty-first century, instead of reestablishing an idealized vision of patriarchal marriage as a societal goal, the emphasis should be on extensive studies to establish why so many people divorce.

When women go through divorce, society and the law place a greater burden on women and their children. Society speaks through the law and punishes divorced mothers and their children by financial deprivation, such as ineffective child support enforcement measures.¹⁰ These ineffective measures, along with the loss of an income stream, forces divorced women to reenter the workplace, often while children are very young. There, women suffer discrimination because they must now manage additional

9. See generally ROBERTA S. SIGEL, *AMBITION & ACCOMMODATION: HOW WOMEN VIEW GENDER RELATIONS* (1996) (discussing a study of over 650 people and their perceptions of the past and present status of gender relations). Men and women operate under two different marriage contracts. "It would seem that in many families even today the husband's contract ('the husband's marriage' as [Jessie Bernard] called it) requires little change in his lifestyle and work responsibilities, whereas 'the wife's marriage' requires taking on the additional obligation of functioning as a housewife." *Id.* at 168. See JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 5 (1972).

10. It is disingenuous to make women the scapegoat for the lack of interest divorced men express towards their children. Many men use absence as a way of coping with divorce while failing to recognize their difficulty in maintaining relationships with their children without the support of the former wife. DAVID BLANKENHORN, *FATHERLESS AMERICA* 223 (1995); see also, Terry Arendell, *After Divorce: Investigations into Father Absence*, 6 *GENDER & SOC'Y* 562, 582 (1992) ("Rather than being 'locked out' of post divorce relationships with their children by others, as has been suggested by various explanations for father absence, these fathers were more typically 'locked into' [relationship patterns] and systems of meanings held by them and shaped by gendered ideology, practices and social arrangements."); TERRY ARENDELL, *FATHERS AND DIVORCE* 141-67 (1995) (discussing the disconnection men have with their children after divorce).

child-rearing obligations. At the end of this long day, the message is clear – good women who remain married are rewarded financially and have healthier, better-adjusted children, solely because fathers are in the home. Studies have shown that the standard of living for men rises after divorce while the standard of living for divorced women significantly decreases.¹¹

Due to societal attitudes and the laws that have been promulgated by those in power, women are the fastest growing group living in poverty in America, especially after divorce and upon retirement. Women filed more than a million bankruptcies in 2001, more than forty percent of all filings.¹² It is even more

11. LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA*, ix-xiv, 184-94 (1982).

The net effect of the present rules of property, alimony and child support is severe financial hardships for most divorced women and their children. They invariably experience a dramatic decline in income and a drastic decline in their standard of living. Even women who enjoyed comfortable middle- and upper-middle-class standards of living during marriage experience sharp downward mobility after divorce.

Id. at xiv; see also MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 48-52 (1991).

Simplistic, rule-equality changes in divorce laws premised on an unrealized egalitarian marriage ideal will tend to further impoverish women and their children. Under such laws, divorced women are to assume sole economic responsibility for their children. Theoretically, this requirement is fair because divorced women will assume this responsibility under the same terms and conditions as their ex-spouses. Equal treatment in divorce, however, can only be fair if spouses have access to equal resources and have equivalent needs. Realistically, many women do not have such economic advantages. In addition they continue to care for children.

Id. at 52.

12. Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L. J. 19, 25-29 (2002). Professor Warren discusses the need for women to place economic issues in the forefront of women's issues.

[A]s a group that has some highly visible issues, women face the problem of politicians who flaunt their support of one or two issues that prominently bear the label "women's issue," believing they have assured themselves of women's support regardless of what they do on a range of dull, economic issues. As women set their agenda for the next twenty-five years, the question of how to define a women's issue should be a matter of first concern.

Id. at 24.

alarming that fifty-six percent of those filing had some level of higher education, including advanced post-graduate degrees.¹³ How can it be that women today are more educated and seemingly have had more opportunities than our foremothers, yet fail abysmally in the area of wealth creation and protection?

The women's movement did great things to move the agenda and to get women on the radar screen. However, it has failed to help women understand that mere attendance in the workforce is not enough. Though women have picketed and marched for better laws to protect them in the event of divorce and spouse abuse, age-old laws especially in the area of property prevail. When women attempt to define their economic futures, the status quo, through the vehicles of the law, the church and the state, undermines any small gains women make, citing the name of the Lord or the State or simply the common good. Historically, the concept of partnership in marriage was only available to women who lived in community property states, and though many states have attempted to level the economic playing field through equitable distribution, women continue to be disadvantaged all too often. Though this is slowly changing, women must continue to overcome discrimination in the area of property and financial benefits before and during marriage, after divorce, and/or upon widowhood.¹⁴

Though education has placed many more women in academia and professional institutions, they are denied tenure and promotion opportunities because institutions remain in the mind-set that males are the dominant group because they place work above all else.¹⁵ Women are characterized as not serious about their careers if they ask for time off to tend to their children or elder parents. Lower wage employees are often discriminated against in at-will states where employers can fire them without cause – just or otherwise. Women in poverty are no longer afforded a safety net

13. *Id.*

14. See SOCIAL SECURITY ADMINISTRATION, POVERTY STATUS OF AGED PERSONS BASED ON INCOME, (2000), Table 8.1 available at http://www.ssa.gov/policy/docs/statcomps/income_pop55/2000/sect8.html (29.7% of widowed women aged 55-61, 27.8% of widowed women aged 62-64, and 28.5% of widowed women over age 65 live below 125% of the poverty line. The total number of all widows aged 55 and over living below 125% of the poverty level totals 9,944,000.).

15. See, e.g., Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 313, 317 (2003).

with the passage of the *Personal Responsibility and Work Opportunity Act of 1996*, which requires women with children to work outside the home as a condition to receive welfare benefits.¹⁶

In the area of marriage, the wedding day for many middle class women often comes with the large price tag of debt.¹⁷ It is even more insidious in today's world when young women are seduced by the advertising industry to care more for the dress they will wear on their wedding day than what will happen in the event of divorce.¹⁸ The wedding industry is a multibillion dollar business that creates and reinforces the wedding fantasy.

Concomitantly, highly educated women (married and unmarried) are filing for bankruptcy in record numbers, adversely affecting their credit and their ability to provide for themselves and their children. The more than one million women who filed for bankruptcy in 2001 brought more than two million children with

16. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 42 USC §§ 601-607 (1996). The effect of this Act was to place a five-year cumulative limit upon the benefit recipient family and all recipients had to work regardless of the age of their children. This philosophy squarely contradicts the family rhetoric of the right wing which emphasizes the care of young children by a stay-at-home mother. There is also a class bias built into this law that presupposes the only worthwhile children are those born to middle and upper class women.

17. CHRYS INGRAHAM, *WHITE WEDDINGS* 28 (1999).

[T]he average wedding in the United States costs \$19,104, with some regional variations. For instance, in the New York metro area, the average wedding increases to \$29,454. In the Midwest, the cost drops to \$16,195 and on the West Coast \$18,918. Considered in relation to what Americans earn, the cost of the average wedding represents 51 percent of the mean earnings of a white family of four and 89 percent of the median earnings for black families.

Id.

18. See Jacqueline Savaiano, *Insuring Weddings in Uncertain Times*, N.Y. TIMES, Apr. 13, 2003, at I13. ("Relatively rare a decade ago, sales of wedding insurance policies have been rising in tandem with the extraordinary expenses of weddings and with couples' concerns about the collapse of their plans in the face of disasters – natural and otherwise."). Though couples may spend money for wedding insurance, they are reluctant to assure their financial futures in the event of divorce in spite of the fact that the statistics for divorce are so high. "Only 1.5% of the marriage license applicants [surveyed] expressed any interest in entering into a prenuptial agreement concerning postdivorce finances[.]" Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 448 (1993).

them.¹⁹ Statistics from the latest census indicate that single-mother families increased from three million in 1970 to ten million in 2000. The proportion of single mother families grew to 26 percent in 2000 up from 12 percent in 1970.²⁰ As women headed households have increased, the income disparities have also widened. In the latest census data, women-headed households had a median income of \$28,142 versus the median male-headed household of \$40,715.²¹ How can this be the case when more women than ever are in the workforce, have attained more degrees than ever before in history and otherwise generally appear to be better off? Perhaps the problem lies with the media coverage of a few as representing many. When the media applauds the superstar, or the woman who has survived the odds, it doesn't take into account the millions who continue to live in poverty.²²

A generation later, the idea of women's full participation in American life brought subtle advances, though it is generally no more than mere tokenism which has assuaged the consciences of the powerful. Full participation incorporates notions of critical

19. Elizabeth Warren, *A Quiet Attack on Women*, N.Y. TIMES, May 20, 2002, at <http://www.commondreams.org/views02/0520.htm> (Apr. 2, 2004).

20. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, *AMERICA'S FAMILIES & LIVING ARRANGEMENTS* 7 (2000).

21. Money Income of Households (2001), Table No. 685, U.S. CENSUS BUREAU, at <http://www.census.gov/prod/2004pubs/03statab/income.pdf> (last visited Apr. 30, 2004).

22. In the mid-nineteenth century John Stuart Mill stated:

I believe that [women's] disabilities elsewhere are only clung to in order to maintain their subordination in domestic life; because the generality of the male sex cannot yet tolerate the idea of living with an equal. Were it not for that, I think that almost everyone, in the existing state of opinion in politics and political economy, would admit the injustice of excluding half the human race from the greater number of lucrative occupations, and from almost all high social functions; ordaining from their birth either that they are not, and cannot by any possibility become, fit for employments which are legally open to the stupidest and basest of the other [male] sex, or else that however fit they [women] may be, those employments shall be interdicted to them, in order to be preserved for the exclusive benefit of males.

JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 50 (The M.I.T. Press 1970) (1869). The discourse regarding equal images for men and women continues in the twenty-first century. While being married and having children depressed women's earnings, these life events had exactly the opposite effect on men's earnings. See Solomon William Polachek, *Potential Biases in Measuring Male-Female Discrimination*, 10 J. HUM. RESOURCES 205 (1975).

mass which continue to remain illusionary. Patriarchal power remains the foundation; fragile advances are represented as laudatory. The tokens are raised up as examples of fairness and acceptance while, behind the scenes, efforts are made to reverse the gains women have made. The concept of voice is important in any civil or human rights struggle and is surely the case for women. As more women speak out, more are silenced. In order to understand the impact of silence regarding women's rights, this Article will highlight and explain the construct and significance of legal voice in American history.

I maintain that the next step in the liberation of women is just that – liberation through the need to understand and acquire property ownership and the role women must play in their lives to have financial security and real power.²³ The women's movement suffers from the same problem of the civil right's movement – that is, expecting that assimilation is equivalent to liberation as the answer to full citizenship status in America.

In order to fully comprehend the issue of property in women's lives it is imperative to analyze the concepts of legal personhood, voice and the legal foundation associated with property.²⁴ The next sections will address the concept of property ownership and the connections to personhood and the depersonalization of women in this country through notions of speech and visibility. The following discussion is an excerpt from my forthcoming book *Bush Skirmishes: American Republicans and the New Political Reality*.

23. See Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L. J. 2213 (1994). "Equality without values ignores the special contributions a person or gender might contribute to family life. Valuing different contributions to family life without equality of reward risks disaffection and economic deprivation." *Id.* at 2225.

24. Renée Hirschon, *Power, Property and Gender* in WOMEN AND PROPERTY - WOMEN AS PROPERTY 6 (1979).

[T]he nature of 'property' as a category is essentially dynamic. Its form depends on a combination of interacting forces, political, legal as well as economic and cultural and these change through time . . . women's rights can only be protected when they are able to enter and participate fully in the procedures of the courts.

Id. See also, SALMON, *supra* note 2, at xv ("[T]he property rights of American women revealed above all else a picture of their enforced dependence, both before and after the Revolution Under property law, the male head of household held the power to manage his own property as well as his wife's.").

I. PROPERTY, STATUS AND THE CONSTITUTION

In order to understand the nuances presented in a discussion regarding property rights, one must begin with the constitutional definition of citizen at the inception of this country. Social and legal relations among citizens were and are dictated by the concept of personhood. There are three components of this personhood discussion: first, the use of speech to define who is a legal person; second, the ability of the legal person in private social relationships to have legal voice in family relationships; third legal empowerment to participate in society. The Constitution framed the discussion of women, slaves and non-propertied men by defining them as legal non-persons. By further silencing them and treating them as silent creatures rather than human beings, the concept of citizenship strengthened male control in all aspects of American life. Once that was established, the propertied white man became the overseer of both the private domain which included his property (personal, real and chattel) and absolute speech in the public arena because his speech was absolute in both the legal and social voice. The privileges of citizenship bestowed upon the propertied male complete control over his world in all aspects of his life. Property ownership defined and described the parameters of citizenship and this voice. Thus there is no reason to carve out legal protections related to human rights of white men because all rights, privileges and denial of privilege are entitlements of his personhood. Is it any wonder why there are virtually no discussions regarding human rights of white propertied men in early American society?

Women's inability to freely contract and to own property further established his position as the American political, economic and legal power and lessened female involvement and interaction. Women could not own property, enter into contracts or have any legal existence outside of their husbands.²⁵ "Others" such as Black slaves and Native Americans could not access legal rights except by the death of the master if they had been released from slavery

25. See NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK* 42-68 (1982).

through the concept of manumission or *coartacion*.²⁶ Thus, human rights are always couched as some ethereal, illusive disconnected gift offered by those who have the position and power to do so: propertied white men.

The rules of property law were also supported by American religion. Long before women and slaves were non-persons in the eyes of the law, they were non-persons in the eyes of religion. The concept of speech was controlled not only in the home²⁷ but also within the confines of the Church.²⁸ A woman was deprived of autonomy in early American society because privacy in the mari-

26. KIMBERLEY S. HANGER, *BOUNDED LIVES, BOUNDED PLACES: FREE BLACK SOCIETY IN COLONIAL NEW ORLEANS, 1769-1803*, 42-44 (1997) (describing methods slaves used to free themselves from bondage).

27. TAPPING REEVE, *THE LAW OF BARON AND FEMME* 141 (3rd ed., The Lawbook Exchange 1998) (1862) ("[T]he husband seems to have had the same right over the person of his wife that he had over the person of his apprentice: to chastise her moderately or confine her."). It appears that acceptable women's speech continues to be defined as ladylike and passive. "Dr. Ruth Moulton - a New York expert who conducted a study on the ability of women to speak in public says that many women are taken advantage of because their speech reveals they're passive - they don't want to be disagreeable or unladylike." Tom Smith, *How Women Should Talk So Others Take Them Seriously*, NATIONAL ENQUIRER, Oct. 6, 1981 at 28; see also Alette Olin Hill, *MOTHER TONGUE, FATHER TIME: A DECADE OF LINGUISTIC REVOLT* (1989).

Is "Women's Language" part of sexist language? . . . If "women's language" is on the way out, "sexist language" has become a growth industry by comparison. It is no longer chic, and it is subtler than it was in 1975, but to assume that language will change as our social condition improves is to accept a view of progress in history that has been halted since 1980 and given official cause for concern since June 30, 1982, with the death of the Equal Rights Amendment.

Id. at 19.

28. There are many references in Biblical texts relating to the appropriate place for women. See The Letter of Paul to the Ephesians. "Wives be subject to your husbands, as to the Lord. For the husband is the head of the wife as Christ is the head of the church . . . As the Church is subject to Christ, so let wives also be subject in everything to their husbands." 5 Ephesians 22:24; see also JANE KAMENSKY, *GOVERNING THE TONGUE* (1997) (stating that in New England, the concept of trespass against God was viewed as a breach of law).

The authors of *Malleus Maleficarum*, a fifteenth century treatise whose authority was felt in New England as well as in Europe argued that women's "slippery tongues" made them the likelier servants of the devil. [W]itch-hunters [need] look no further than the "wicked woman's . . . hot words," "evil blandishments and violent importunations" for evidence of diabolic goings-on.

Id. at 151.

tal relationship was reinforced by the Church in securing the acceptable notions of "good womanhood," and women were even known as "good wife" in early New England.²⁹ Societal power was vested in the white, propertied male who had control and power over all who were owned or connected to him.³⁰ Since the citizen had control over all human components, Church and state became one.³¹ White men who owned property crafted the legal and religious rules to control society, ultimately controlling women.

The creation of property rights enables citizen participation in the development of the republic. The essence of the American journey is founded on notions of property protection and privilege, isolating those human segments of the country who are not granted legal status, specifically those who were denied the right to vote or to contract and thus were unable to own property in their own right. A good marriage enabled white women to participate on the margins of society so long as they did so quietly and in unassuming fashion. Men controlled and maintained order in their homes without the intervention of the state.³²

Slavery further complicated the issue because, as human property, slaves were reduced to mere chattel without any legal or religious voice to speak of.³³ In fact the state reinforced the private

29. The concept of "Good Wife" describes the history of women in the traditional colonial setting. See LAUREL THATCHER ULRICH, *GOOD WIVES* 5 (1991).

30. The most obvious emblem of a woman's coverture was her loss of a name, a custom made more vivid by the seventeenth-century practice of referring to a married woman not as "Mary Brown" or as "Mrs. John Brown" but as "John Brown his wife."

....

Upon her husband's death, a wife became a *relict*. This now archaic synonym for *widow* evokes that state well: in etymology and in usage the term was identical to the modern *relic*. The death of a mother did not mean the dissolution of a family; the death of the father did.

Id. at 7.

31. *Id.* (stating "Obedience was not only a religious duty but a legal requirement" and citing Blackstone's Commentaries).

32. Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 127 (Julie Peters and Andrea Wolper eds. 1995) (arguing that international cultural norms regarding a state's duty to protect the family and family privacy have prevented governmental intervention in family life, where most gender-specific abuses occur).

33. Barbara Bernier, *The Praxis of Church and State in the (Under) Development of Women's Religion from France to the New World*, 7 WM. & MARY

property aspect of slavery by refusing to interfere with property rights over slaves, whether it was physical, emotional and psychological abuse or splitting up slave families for individual sale.³⁴ Furthermore, slave women had the additional burden of pregnancy and childbirth as a means to increase the property holdings of the master.³⁵ The law was reinforced by the religious community's refusal to recognize that slaves were human beings.³⁶ Be-

J. OF WOMEN & LAW 659 (2001) (connecting women and slaves in the new world). "The patriarchal system derived its power from subjugating women and slaves. Men, in their continuing quest for identification, cast as evil certain groups of society in an effort to determine and maintain their place within society." *Id.* at 699.

34. See, e.g., GWENDOLYN MIDLO HALL, *AFRICANS IN COLONIAL LOUISIANA: THE DEVELOPMENT OF AFRO-CREOLE CULTURE IN THE EIGHTEENTH CENTURY* 304-05 (1992). The separate sale of mother, father and children under fourteen years old was prohibited under the French Code Noir. When the Spanish took control of Louisiana, observance of the Code Noir was officially continued, but the rights given to slaves under the Code Noir disintegrated rapidly. *Id.* The English system throughout the United States established separate sales of slaves.

35. Barbara Omolade, *Hearts of Darkness*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 350, 353-54 (Ann Barr Snitow et al. eds., 1983) (discussing the commodification of slave women in property law. Some women had as many as twenty children during their lifetimes to satisfy the master's desires); see also CATHERINE CLINTON, *THE PLANTATION MISTRESS* 202-05 (1982) (depicting the relationship between white women and their slaves). The patriarchal structure debased both the wife and the slave. By taking sex to a level of breeding it created a hostile environment where white women could only lash out against slave women for the sexual promiscuity of their husbands. *Id.*; CAROLE PATEMAN, *THE SEXUAL CONTRACT* 119 (1988) (discussing white women's legal rights).

Until late into the nineteenth century the legal and civil position of a wife resembled that of a slave. Under the common law doctrine of coverture, a wife, like a slave, was civilly dead. A slave had no independent legal existence apart from his master, and husband wife became 'one person', the person of the husband. Middle- and upper-class women of property were able to avoid the full stringency of the legal fiction of marital unity through the law of equity, using devices such as trusts and pre-nuptial contracts.

Id. at 119; see also Janet Rifkin, *Towards Theory of Law and Patriarchy*, in *THE NATURE AND PROCESS OF LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY*, 265-66 (Patricia Smith, ed., 1993) (arguing that law acts as a "form of hegemonic ideology"). Ideology becomes hegemonic when it is widely accepted as describing 'the way things are,' inducing people to consent to their society and its way of life as natural, good and just. *Id.* at 265-66 (citing Kellner, *Ideology, Marxism and Advanced Capitalism*, 42 *SOCIALIST REV.* 38 (1978)).

36. CLIFTON E. OLMSTEAD, *HISTORY OF RELIGION IN THE UNITED STATES* 388 (1960).

cause they lacked souls, they were inhuman. This solidified the legal and social definition of humans as chattel. The narrow definition of who is and is not a legally empowered citizen becomes the bedrock of the republic. That the republic was founded for religious freedom or the myriad of other noble causes is immaterial when the issue of legal personhood comes into play. If the law was founded upon equitable principles, there would be no need to appoint special privileges to those who are not within the definition of the norm.³⁷ However, the American legal system has always differentiated rights through secondary human characteristics such as race and sex. The Constitution, with its proclaimed goal of protecting individuality, compartmentalizes humanity while espousing freedom and liberty for all. The definition of who is and who is not a legal person based on gender and race has had and continues to have economic, social and legal ramifications in this country.

The legal and religious status of humans became the touchstone for the rise of capitalism in this country. Thus, if one is to fully participate in the democratic process, property acquisition was supported by both the political and economic themes of capitalism. Capitalism is founded and grows because the wealth of few is predicated on the labor of many (slaves) or the disenfranchisement of family members, especially women, from inheriting or fully participating in the capitalistic endeavor. Many Americans

At this meeting the Assembly adopted a statement by James H. Thornwell, which attempted to defend the southern position on Christian grounds. Once having affirmed that slavery was an institution whose propagation or abolition was in the hands of the state and not the Church, it went on to characterize slavery as "kindly and benevolent," a gift of God without which "we are profoundly persuaded that the African race in the midst of us can never be elevated in the scale of being."

Id.

37. See generally BLANCHE GLASSMAN HERSH, *THE SLAVERY OF SEX: FEMINIST ABOLITIONISTS IN AMERICA* (1978) (examining the abolitionist movement and the beginnings of feminism and profiling a number of early feminist leaders). "[D]ebate on [the issue of citizen's rights] led to significant gains for white men. This situation contributed to an atmosphere of rising expectations, while at the same time, calling attention to the widening gap between the rights of women and men." *Id.*; Wendy McElroy, *The Roots of Individual Feminism in 19th Century America*, in *FREEDOM, FEMINISM AND THE STATE* (Wendy McElroy, ed., 1991) (discussing the abolitionist movement and the rise of feminism).

cannot imagine the daily lives of the bulk of the population living in the seventeenth century. We would be hard pressed to understand a world where citizenship was not the only acceptable human status available. But to fully comprehend and accept this concept helps to further entertain the myriad possibilities offered through property ownership for those whose biology was not the predicate of privilege.

Imagine a life where speech was unavailable unless it was spoken through a male family member, or a life where bodily integrity was nonexistent. By denying women the ability to take control of property, and forcing slaves to work for free, the capitalistic system grew and flourished. If property rights designated power and privilege in this country; they also designated human rights. Since only propertied white men could fully participate in the new republic, others were left in positions of servitude, be it indentured servant, slave or woman, though white women might attain associate membership in the republic by marrying well and participating on the margins of American society.

Property and its relational rights has always played a fundamental role in the discussion of the rights of the individual and the role of the government in relation to those rights. The concept of property, be it the wife or the slave, was an internal determinative of the property owner, always to be weighed against the possibility of governmental interference.³⁸ Thus, as time has gone on and the stable, solid nature of property rights and governmental interference has seemingly changed in this country, the fact remains that those who have less access to property are those who have less economic and social voice.³⁹ To say that the Madisonian

38. Stanley N. Katz, *Thomas Jefferson and The Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1967) (stating that Jefferson initially believed that each person owned the products of his labor, and a stake in ownership was central to the development of a moral, civically responsible, citizenry); see also JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF THE AMERICAN CONSTITUTIONALISM, THE MADISONIAN FRAMEWORK AND ITS LEGACY 91 (1990) (discussing Constitution Convention delegate Gouverneur Morris' view that rights should be treated as inviolable and free from governmental interference).

39. See Nedelsky, *supra* note 38.

Although . . . it is important that Madison did not actually posit property as an end in itself, he did not in fact treat it as a means. For Madison, property is an end of government, and it is that status that

theory of property is alive and well today can be assessed from deplorable statistics of the lack of property ownership by minorities and a corresponding lack of social and economic power.⁴⁰ The power of property as a symbol of stability and security remains in the hands of few, though significant gains have been made in recent years.⁴¹

Now, some would say that things are far better in twenty-first century America, and they are to a certain extent. However, we still speak the language of race and gender and it is no less powerful when it is couched in the language of tokenism. Property tokenism allows a few, but just a few, to rise in the ranks and become the symbols of what others who look like them should aspire to. Tokenism serves two purposes: it is there to assuage the guilt of the majority while providing hope for others.

Women, especially white women, continue to make gains in the area of employment and business ownership, because if there is anyone who can break through the economic line it is those who look most like white men: their daughters, wives and sisters. But white women must also admit that they have benefited from affirmative action programs more than any other minority group. Nevertheless, they remain reluctant to align with other groups for fear of losing their newly found power positions.

The financial issues surrounding citizenship are once again couched as out of the purview of "female" when in fact there are

mattered, not some underlying relation between property and liberty The tacit message is that the true ends of government are best served if property is treated as a sacred value that requires protection, not evaluation.

Id. at 185-86.

40. See Annie Nakao, *How Race in America Still Makes A Difference*, S. F. CHRON., Apr. 17, 2003, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/17/DD172869.DTL> ("Consider this: Between 1934 and 1962, the federal government backed \$120 billion in home loans. More than 98 percent went to whites. Closer to home, of the 350,000 new homes built with federal support in Northern California between 1946 and 1960, fewer than 100 went to African Americans.").

41. See Brenda W. Casserly, *Expert Perspective: Sensitivity to Diversity Spells Success*, at http://www.cendant.com/media/trendsinformation/trends_information.cgi/Real+Estate+Services/127 (Jan. 9, 2003) ("A Harvard study noted that 53 percent of female-headed households own a home. Similarly, Fannie Mae estimates that women will own 31 million households by 2010 – nearly 28 percent of all homes in the U.S.").

gross inequities in the economic system regarding women.⁴² Women can no longer isolate the economic issues from their daily realities. While the public debate regarding affirmative action continues, there is reluctance to understand the true impact of American capitalism enshrined in the power and construct of property. While the media continues to talk about women's progress and certainly minority progress (so much so that we should simply become a "color-blind"⁴³ country, as though we ever could), women in general, and white women in particular, think that they are insulated from the vestiges of sexism.

Professor Warren sounds a warning that women will continue to be discriminated against in financial affairs through the legal escape called bankruptcy.⁴⁴ Thus the gendered bankruptcy issue, coupled with the continued lack of financial participation in this country by minorities, makes one wonder how much real economic progress has occurred in the past three decades. Tokens are the exceptions the media bolsters while paying no attention to the realities of so many in this society. The vast number of American families rarely discuss money with their children during their formative years. There must be a revised definition of civil rights in this country where economic civil rights are paramount. Mandatory financial education will undoubtedly protect those who are informed.

White women and minorities in this country fail to understand that the issue isn't only about landing the best job; the underlying issue is about who controls the security and stability afforded by property ownership in this country. The civil rights and women's movements have been remiss in not focusing on the bedrock issue in this country, which is the lack of access to property.

Property has always been the price of admission to active political participation in the early development of this country and continues to be indispensable for full integration into the economic and political life. The traditional concepts of property seemingly evolved in the early twentieth century and real property was replaced by the middle class's incursion into the stock market. How-

42. See Warren, *supra* note 12.

43. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

44. See Warren, *supra* note 12.

ever, in the twentieth century, with retirement portfolios shrinking and many people on the brink of retirement in untenable positions, real estate has regained its prominence as a stable and secure investment. The recent increase in the price of real estate certainly has brought this point home to millions of Americans.⁴⁵

Rights afforded to the "property less" members of society are connected to treatment of personhood. Thus, children, women and others who are not active participants are adjudicated rights vis-à-vis treatment. This allows a shift in the focus of acceptable behavior towards "the other." Human rights are expected by those who owned property, and tangential to everyone else. Since the propertied members of society make the rules, the concept of human rights is often viewed as a conditional gift which can be taken away when the donor decides there has been a violation. Human rights are not absolute, as we're still debating whether women have rights over their bodies or whether minorities are taking valuable educational opportunities from whites via affirmative action. The powerful propertied elite continue to set the framework for the majority of society. In the twenty-first century the necessity to move large segments of society is grounded in financial education.

If property is viewed as essential to individual participation in the political and economic process, then it's logical to classify property as a basic human right. Human rights should be expanded to incorporate property rights because those who have property control the destiny of the republic. Though the idealized American democracy creates a semblance of participation by voting for representation, the truth is that voting is not the powerful tool it once was for effecting change. In fact, Gouverneur Morris, an ardent defender of the Constitution and a participant at the Constitutional Convention, took the position that "[p]roperty not only gave one independence, it gave one a stake in the community. It was, therefore, critical that the men of property have the influence in politics."⁴⁶

It is imperative to understand the far reaching tenets of the true meaning of property in a constitutional context. Conserva-

45. See generally MONEY MAG., June 2003 (devoted entirely to the current trends in the real estate market).

46. NEDELSKY, *supra* note 38, at 83.

tives often speak of the "intent of the framers" when speaking of property rights and the need to respect the autonomy of property owners associated with the "good old days."⁴⁷ Reversion to the old ways of constitutional safeguards for property owners becomes key in understanding the conservative push farther to the right. The return to the old days is paramount in reestablishing and securing the original intent of the framers to permit propertied white men to be the only viable voice in the political system.

Property has the ability to remain the central core in American life while appearing mutable. Is the Constitution the paradox in determining the role and assessing the power of property, or is it the nature of property itself that takes on an amoeba-like appearance while remaining essential at the core? In other words, does property change over time or does property have a mythic quality that transcends space and time? If we construe the concept of property as being inextricably connected to human rights, then the definition of property becomes mutable over time because more and more people have access to property and thus, access to more freedom. Property becomes the icon for freedom. If however, property is viewed as the prerequisite for freedom, then the old ways are maintained and the acquisition of property becomes a limited vehicle by which select people gain access to power and privilege. Those who would want to return to the old ways would argue that the Constitution would not permit substantial change and thus greater access because "the intent of the Framers" was a limiting intent. Whereas, if property is couched in terms of a human rights discussion, the "intent of the Framers" becomes a discussion of literal meaning to be applied as it would have been during that period.⁴⁸ The concept of property becomes a discussion of myth more than reality and yet it becomes a discussion of the new reality in the twenty-first century where volatile world

47. See *id.* at 208 ("The problem of protecting the rights of the propertied few against the demands of the many is not the same as protecting individuals from the ever-present possibility of collective oppression.").

48. See *id.* at 262 (arguing that "[e]galitarianism defines the inequality of property itself as the source of the problems to be remedied. Redistribution is not incidental, it is the objective"); see also JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 329 (1988) (explaining that "people need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and that is why it is wrong that some individuals should have had no private property at all").

events, stock markets and economic indices appear fluid, unstable and unreliable to most Americans. The pendulum swings back to the concept of real estate as being the secure, stable model for most Americans. Therefore, those groups who do not share in the reality of the property myth are again disenfranchised and voiceless.⁴⁹ Is this myth of property central to the continuation of this

49. JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 157-58 (2000).

Until 1948 racially restrictive covenants were common in the United States.

....

In 1948 the Supreme Court ruled in the case of *Shelley v. Kraemer* that court enforcement of racially restrictive covenants violated the equal protection clause of the Constitution It was not until the Fair Housing Act of 1968, however, the federal law prohibited individual property owners from refusing to sell or rent property because of the race of the buyer or renter.

....

The segregation laws in the Southern United States and the apartheid laws in South Africa did not merely limit individual rights; they created social and economic as well as political regimes. . . . But the notion of a regime may also apply to social and economic systems supported or structured by law.

Id. at 152-53.

On the issue of gender, the labor theory comes into play when addressing property rights. Some labor theories focus on the moral claims of the producer; others focus on the utility of rewarding productive labor. Both approaches assume that those who labor create property and that their rights over the resources they create are respected by the legal system. This line of argument creates the impression that most property is deserved because it derives from productive labor.

....

If we think about gender . . . why is it that women are more likely than men to be poor? . . . Men as a group are heavily dependent on this uncompensated labor, as is the economy in general.

Id. at 157-58. The failure of minorities to fully participate in the property market until the late 1960's coupled with continued racism explains why so many minorities continue to be economically excluded. So too, women's labor is not recognized by the market, thus further forcing them to remain tethered to a man to have any economic life. See also CBS, *Going Home to the South* (June 16, 2003) at <http://www.cbsnews.com/stories/2003/00/12/60minutes/main558375.shtml>.

Black buying power nationwide has doubled in the last decade. Half of all black households are now middle and upper income.

....

three hundred year old system that somehow has survived, or is it time for a new paradigm?

The events of 9/11 certainly have shaken the core of American values by creating an understanding that terrorists can have an impact on the markets and create uncertainty and volatility in a very fragile economic system. Does that mean that the Supreme Court, which has heretofore defined the terms and conditions of property and has been instrumental in continuing the myth, is now powerless to effectively control the myth when terrorism is actively affecting the economic and political debate in this country? Perhaps outside influences have reinvented the definition and terms of property and given the myth of property new parameters. Further outside influences, especially in the discussion involving religion and the reluctance to label the events of 9/11 as religious, spin the discussion as to whether there is a change again in the concept of property as we have known it. Perhaps the definition has to change because "the Framers" could never have foreseen today's world. Does the Constitution matter to people who have no vested property interest in it? Does the Constitution matter when outside concepts of liberty and autonomy are so closely tied to property ownership? Do we alter the myth of property or maintain it to serve its historical purpose of preserving non-interference of the government and effective exclusion of those who cannot show the "property pass" to gain admission into the political, economic, legal and, ultimately, social process of this country?

A discussion of property cannot exist without the exploration of religion's historical impact on the social construct of exclusion of property.⁵⁰ The law of slavery, for example, was supported and encouraged through religion. Since Protestantism regarded slaves as human property bereft of souls, there was no need to attach social or legal rights to humans who didn't exist as such. The capitalistic

[However, n]ationwide one in five blacks still lives in poverty . . . [b]ut that's a dramatic improvement from 10 years ago when the poverty rate was one in three.

Id. Though programs such as this would suggest that minorities are doing better than ever before, it doesn't negate the sad statistic that women as a group are poor due to lack of education, divorce and bankruptcy.

50. 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland, et al. eds., 1983) (suggesting that "man" has a property in his religious beliefs, his reputation, and in a whole array of other matters, making Property a metaphor for other rights).

system thrived on the ability of the slaveholder, through the auspices of the law and underscored by religion, to increase his wealth under this capitalistic concept of surplus and investment.⁵¹ This meant that the slaveholder could increase his fortunes and satisfy his curiosity for slave women by having sex with them. Though this, of course, was without their permission, slaves had no legal voice with which to object. This was further solidified through the use of religion to encourage the slave to accept the lot God had given them with the assurance that the next life would be better. Religion, in conjunction with the law, maintained the status quo with Africans assigned no rights either visible or spiritual that society needed to accept. The reduction of humans to a soulless, voiceless, legal status rendered slaves property. The underlying impact of this status constructed the Madisonian notion of property as an establishment of power protected by all components of society. The distinction between large and small property holders was the focus of law and religion – not the deprivation of a segment of humanity laboring in the new world.

White women, similarly, were considered property by the Constitution, law, religion and society in general, though they may have had limited spiritual rights.⁵² They could only hope to aspire to “personhood” if they could somehow manage to marry and thus have a semblance of legal rights through their husbands. The concept of coverture reinforced the idea that white women were tangentially legal persons if they married. Though there is ample evidence to prove that women who remained single had legal rights to contract, own property and pay taxes, they had no rights in the political process to fully participate because of the denial of the right to vote.⁵³ Thus, the rights of white women were

51. See Omolade, *supra* note 35 and accompanying text; see also MARILYN YALOM, *A HISTORY OF THE WIFE* 193 (2001) (discussing the status of the slave woman and the fact that one of her principal roles was to breed in order to increase the wealth of the master).

52. See YALOM, *supra* note 51, at 97 (“It should not surprise us that the history of the wife has been so intricately linked to the history of religion. Even today, in many parts of the world, married women’s destinies are determined by religious systems.”).

53. See Claudia Zaher, *When A Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002) (cataloguing legal resources on the rights of married and single women in American history).

also constrained to the interpretations of the Constitutional "God-given" rights afforded to white propertied men who held the ultimate power in the country and, who for the most part, still do.⁵⁴

The ability of white propertied men to exploit black slave women for sex, both for carnal enjoyment and to increase the number of slaves, while purporting to place white women on the pedestal of virtue and chastity, created the paradox that continues to fuel the debate over acceptable sexual behavior of both white and black women. White men continue to define and control women, whatever color they are, by defining sexual behavior. Whether it is a discussion of domestic violence or female reproductive choice,⁵⁵ the ability of men to control law and religion continues the tradition of treating women, at least on some level, as property. Others (men) are the final arbiters of what is good for women because they (women) are unable to make decisions for themselves. Since women continue to own less property, they have little to say in the outcome of their lives, especially in the area of divorce. The argument of "the Framer's intent" continues to loom in our discussions of women and their "human rights."

II. LEGAL SPEECH IN THE DEVELOPMENT OF THE IDEAL WOMAN IN AMERICAN SOCIETY

The concept of speech in early America set the stage for the role of women in society and is the backdrop against which the present day power situation of women developed. Society was charged with the duty of knowing when there was true liberty to speak. The tongue, though it is a small instrument, was crucial in the establishment of societal rights in early American society. It was important to know when to "open the door of speech and silence."⁵⁶ Though Anne Hutchinson signaled the beginning of dis-

54. See generally MARGARET B. SCHULMAN, MONEY, PROPERTY AND WEALTH (1992) (discussing ownership of assets and the choices afforded modern day women).

55. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY (1995) (asserting the need to reform the concept of family and preconception of intimacy, and arguing that it is the intimate bond between mother and child, and not the former relationship between the mother and father, that should be central in the adjudication of family issues in this country).

56. KAMENSKY, *supra* note 28, at 126.

sent in New England, it was the significance of female dissent that traversed the clerical and civil authority of the time. A good neighbor was "one of few words." This translated to the bad neighbor being reminded to "cary a good tounge in your head, [and] . . . know to whom you speake."⁵⁷ There were acceptable subjects for which the tongue could be utilized – for instance for religious purposes. One paleographer stated "I will praise the Lord with the best instrument I have," which of course was his tongue. The very purpose of the tongue was to praise the Lord.⁵⁸ However this philosophy of the use of the tongue for spiritual purposes was not available to women. As was spoken by Paul the Apostle, a woman was to hold her tongue in church and remain in a state of silence.⁵⁹ Thus the tongue was symbolic of one's role in society. Men could use their tongues to verbalize their inner thoughts in the furtherance of intellectual pursuits such as law and politics. Women, on the other hand, were only to speak in the confines of the home and, in public, through a male family member. Thus, women always needed a male conduit to articulate their thoughts. The norm of non-speech for women was, and to some extent continues to be, the definition of what is acceptable behavior and speech. Women who are loquacious, or who speak against the pre-

How did lay silence, and especially female silence, become a cornerstone of social order in Massachusetts? John Wilson placed the blame squarely upon Hutchinson herself – more particularly, upon her speech Until Hutchinson's oratory began to captivate scores of listeners, the issue of female speech had attracted scant notice from the leaders of New England Those few mentions of women's words that do survive from New England's first years suggests the "apostle's rule . . . for women's modesty" remained unchallenged in the public arena, while godly men conversed freely with their wives at home.

. . . .

The challenge was philosophical as well as practical, for it required outspoken dissenters to find a voice with which to quash spoken dissent.

Id. at 72-73.

57. *Id.* at 7.

58. JOSEPH ANGUS, *THE WORKS OF THOMAS ADAMS: BEING THE SUM OF HIS SERMONS, MEDIATIONS AND OTHER DIVINE AND MORAL DISCOURSES* 11 (1862).

59. See Lyle Koehler, *The Case of the American Jezebels: Anne Hutchinson and Female Agitation During the Years of the Antimonium Turmoil, 1636-1640*, 31 WM. & MARY Q. 55, 57 (1974).

vailing authority on some issue, are seen as generally verbally aggressive, uppity and unacceptable.⁶⁰

The tongue sets up barriers to particular classes and the respective sexes. In the French language,

there is a distinction between a closed pinched mouth (*la bouche*) and a large, open mouth (*la gueule*). Individuals from working-class backgrounds tend to draw a socially and sexually overdetermined opposition between these terms: *la bouche* is associated with the bourgeois and the feminine (e.g. 'tight-lipped'), whereas *la gueule* is associated with the popular and masculine (e.g. 'Big mouth' or 'loud mouth').⁶¹

It was also an unstated policy that every tongue had its office and was to perform the duties assigned to it, according to the class structure.⁶² The prevailing social structure cast women, and to a lesser extent the lower classes, in roles of silence. Cotton Mather, the famous Cambridge, Massachusetts preacher instructed a group of matrons on proper behavior when he stated "I will take heed unto my ways that I sin not with my Tongue; I will keep my Mouth with a Bridle."⁶³

Women's tongues, throughout history, were not their own. There was no good justification for women's use of their tongues to speak, and therefore, they served no real purpose. Men sought to keep women's tongues in check by regarding them as foolish and having the "glibbest tongue" or having "tongue enough to speak evil."⁶⁴ The concept of women's speech being interconnected to wickedness and witch craft was announced in 1619 by the Anglican minister George Webbe who proclaimed "the tongue is a witch."⁶⁵

60. See *id.* at 61-70. A Massachusetts statesman named John Winthrop wrote that Anne Hutchinson was a woman "of nimble and active spirit, and a very valuable tongue, more bold than a man, though in understanding and judgement, inferiour to many women." *Id.* at 58.

61. PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 17-18 (Gino Raymond et al. trans., John B. Thompson, ed., 1991).

62. ANGUS, *supra* note 58, at 11.

63. KAMENSKY, *supra* note 28, at 150.

64. ANGUS, *supra* note 58, at 16, 20.

65. KAMENSKY, *supra* note 28, at 151. Alexander Roberts also remarked that a woman was most often to be a witch because they "are of slippery tongue, and full of words." *Id.* at 264 n.9. This concept of women as witch was

The use of language as power has and continues to be pervasive in American society. Katharine MacKinnon eloquently stated "speech is not what you say but what your abusers do to you."⁶⁶ Speech is a construct of gender and class. Ascribing the use of "good" language differentiates the classes. Silencing women differentiates the concept of what acceptable women are, those who maintain their looks to please the dominant, yet do not speak in a way that is unacceptable or offensive to the dominant culture. Therefore, the construct of women stems from the early years of this republic and, through the definition of appropriate female speech, in effect translates to speechless beings born to serve men.

Some would argue that those days are over – that in this society women are not silenced. We should only remember the words of Reverend Jerry Falwell shortly after the 9/11 tragedy describing the cause for the tragedy:

I really believe that the pagans, and the abortionists, and the feminists and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People for the American Way – all of them have tried to secularize America – I point the finger in their face and say 'You helped this happen.'⁶⁷

The twenty-first century backlash against women's voice continues to serve as a foundation for what is acceptable behavior for women. One who is beautiful yet remains quiet and poses no threat to the status quo is the ideal. Words and images are stan-

prevalent in early New England. See MARIANNE HESTER, *LEWD WOMEN AND WICKED WITCHES* (1992); ELIZABETH REIS, *DAMNED WOMEN: SINNERS AND WITCHES IN PURITAN NEW ENGLAND* (1997); ELIZABETH REIS, *SPELLBOUND: WOMEN AND WITCHCRAFT IN AMERICA* (1998).

66. KATHARINE A. MACKINNON, *ONLY WORDS* 6 (1993). She goes on to talk about the control of words by the power elite in this country. In light of 9/11 there is an atmosphere in this country where those who speak out against the government and the President are ostracized. The threat of terrorists has curtailed the protections of the First Amendment and thus dissent in this country. Though there are constitutional protections, the tenor of the current state dictates that some speech be construed suspicious and those who speak be silenced. "In the context of social inequality, so-called speech can be an exercise of power which constructs the social reality in which people live, from objectification to genocide." *Id.* at 30-31.

67. See http://abcnews.go.com/sections/GMA/GoodMorningAmerica/GMA010920Falwell_sorry.html (last visited June 16, 2003).

dards upon which women are stereotyped and controlled in social relations.⁶⁸

The influence of religion into the concept of gender definition and association is also compelling. The idea of women's subordination in speech has its origins in biblical commentary and discourse. St. Peter related the Devil's pliancy of Eve in the beginning; it was she that he overcame in argument, with only a slight skirmish.⁶⁹ Other authors have also reflected on women's delicate nature of the mind. Chrysostoma, in the second part of his Homilies on Matthew, for instance, states, "The female sex is heedless and pliant: Heedless because it does not consider with wisdom and reason all that it sees or hears, pliant because it is easily bent from evil to good or from good to evil."⁷⁰

The inferiority of women is discussed in many disciplines including law and philosophy. Cynthia Freeland emphasizes the dichotomy of male/female, superior/inferior in Aristotle's work, which posited "that a female is an incomplete male or 'as it were, a deformity': which contributes only matter and not form to the generation of offspring; that in general 'a woman is perhaps an inferior being.'"⁷¹ Legal philosophers have also perpetuated this generalization of women's debilitated state. Jeremy Bentham, a revered founder of the school of legal positivism, brought justification to women's inferiority. He stated:

But why is the man to be the governor? Because he is the stronger. In his hands power sustains itself. Place the authority in the hands of the wife, every moment will be

68. See BOURDIEU, *supra* note 61. Often those of the lower classes, the petit bourgeois, were relegated to the improper forms of language – the broken forms of a borrowed and clumsy language. Though the ruling elite barricaded access to education, the hope was to leave them as a class, devoid of self-confidence, and in turn, eventual abstention and silence. *Id.* at 83.

69. BENJAMIN G. KOHL AND H.C. ERIK MIDELFORT, ON WITCHCRAFT: AN ABRIDGED TRANSLATION OF JOHANN WEYER'S *DE PRAESTIGIS DAEMNUM* 96 (1998) (stating that St. Peter relates the ability of the devil to seduce Eve in the garden as due to her weakness and thus pliancy).

70. *Id.* Other theologians have expressed similar comments. St. Jerome commented on their weak nature in the *Letter to Estochius on the Rule for Religious Women*, when he wrote: "The sex that you possess is surely weak and frail and fickle if it be left to its own judgment." *Id.*

71. ROBIN MAY SCHOTT, DISCOVERING FEMINIST PHILOSOPHY: KNOWLEDGE, ETHICS, POLITICS 33 (2003) (quoting Aristotle and discussing Cynthia Freeland's analysis of Aristotle's statements).

marked by revolt on the part of the husband. This is not the only reason: it is also probable that the husband, by the course of his life, possesses more experience, greater aptitude for business, greater powers of application.⁷²

This description of a weak nature was an effort to reinforce and maintain them in subordinate roles in society. Intellectual pursuits and thus the access to power could only be available to men, and women who attempted to enter this realm were shunned.

There is also an interesting correlation of women who spoke out during the Puritan era in New England and women accused of witchcraft. It seems that women who were about to inherit property or were economically autonomous would be subjected to accusations of witchcraft by speaking out.⁷³ The tragedy in these situations resulted in forfeiture of "witches" property to the authorities.⁷⁴ The devil was always lurking in the shadows. Women who were deemed intellectual were controlled by the devil and neglected their necessary obligations of motherhood.⁷⁵ It appears that this viewpoint continues today when courts decide whether a woman is a good mother if she works outside the home or at-

72. JEREMY BENTHAM, *PRINCIPLES OF THE CIVIL CODE*, in 1 *WORKS OF JEREMY BENTHAM* 355-56 (J. Browning ed. 1838).

73. CAROL F. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN: WITCHCRAFT IN COLONIAL NEW ENGLAND* 79-84 (1987).

74. *Id.* at 106. During the first witchcraft craze during the medieval period, women accused of witchcraft paid for the various aspects of their trials including judges', lawyers' and jailers' fees. In the end, if they were convicted, the remainder of their property was forfeited to the state. ALAN MACFARLAND, *WITCHCRAFT IN TUDOR AND STUART ENGLAND: A REGIONAL AND COMPARATIVE STUDY* (1970). It is interesting that similar events also occurred in New England. See MARION L. STARKEY, *THE DEVIL IN MASSACHUSETTS* 230 (1989) (discussing jail payments by the accused).

Mere pardon, [] did not guarantee jail delivery; the prison fees must first be paid. Criminals were not coddled in these days, nor were those on whom the merest shadow of suspicion had ever rested. You did not in prison become a guest of the state; you paid your way. Even if you were wholly innocent, if it were proved that you had been wrongfully deprived of your liberty, you still could not leave until you had reimbursed the jailer for his expenditures on your behalf, the food he had fed you, the shackles he had placed on your wrists and ankles.

Id.

75. Koehler, *supra* note 59, at 73.

tempts to manage family while she attends school. Thus women who strive to enter into the male realm have been characterized as rebels focusing on sociopolitical recognition not as women but as women attempting to become men.

The gendered nature of American life was established by society's strict expectations as to one's gender and/or race. The accident of birth dictated and solidified women's fate until death. Hence, men created and reinforced the proper traits of women (weak, submissive, charitable, virtuous and modest) and their proper roles (wife, caretaker, housekeeper, cook, nurse and midwife) to keep her in her compliant state.⁷⁶

Though women were silenced, they did have a place in society. Since the powerful were the only ones whose voices could be heard, when a woman spoke she was docile, in essence requesting permission from the powerful to speak. Thus, politeness was the vehicle that permitted women's speech, yet the power to decide whether this speech had value rested with the man. This also facilitated the sexual division of labor where woman could speak within the confines of the home, yet when speaking to her husband, father or brother, she had to do so in a differential fashion.

Women who decided to speak up were accused of being witches. In the late seventeenth century, the concept of speech that was reverent and religiously based was the order of the day. When women spoke out it was because the devil had found a vehicle to debase God. Women served that function well because of the historical connections between women, words and witchcraft.⁷⁷ And so the witch's tongue became a vessel through which "words broke free of their moorings in a system of [power and gained] actual, palpable power."⁷⁸ When one examines the content of this

76. *Id.* at 57-59.

77. See KAMENSKY, *supra* note 28, at 151-52. In the late 1630s, Anne Hutchinson lured converts to her side. In New England witches had unquiet voices which posed a problem for the status quo. These *unquiet* women were punished oftentimes by banishment and sometimes death. See ANNE L. BARSTOW, *WITCHCRAZE* 28 (1994) (discussing the impact of women's speech on men). Is it any wonder in modern day society that these concepts remain deeply rooted to what an acceptable woman is see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (female plaintiff was denied partnership in an accounting firm and one partner told her to "walk more femininely, talk more femininely, where makeup, have her hair styled, and wear jewelry").

78. KAMENSKY, *supra* note 28, at 154.

witch speech, it is essentially women speaking as men would speak but because the speech emanated from a woman it was characterized as witch speech – speech that went against the prevailing winds of what was acceptable speech for women. Additionally, when women spoke without permission from men they would surely be labeled a witch. Indeed, a witch was the inverse of the pious New England matron who was characterized as the soft-spoken infrequent speaker in everyday life.⁷⁹ Since women were to be seen and not heard, this concept of outspoken women had to be created as the opposite of the acceptable type. Thus, by denigrating this type of behavior and crunching in terms of the negative, women who spoke out were branded and identified as being against society, in fact they were speaking against the very God that they were supposed to revere because in the world of that male deity, women had no public voice. Speech perpetrated by these women, therefore, went against the conventional norms and the women themselves became the new “other” in civilized society. The witch was in a precarious position because her position in society was judged by her speech, thus those who stood up and also spoke could expect to similarly be considered outcasts of society.

Speech was a powerful tool to control behavior. The concept of marriage legitimized women and provided status and protection while relegating women to the core of silence and absolute servitude to their husbands. Women such as Anne Hutchinson, who started the Antimonium Society in the Bay Colony, were viewed as contrary to the established norms and threatened to sabotage the familial and societal norms of the time. We consider the ability to speak to be a fundamental right in today’s society, imagine the inability to express oneself without the fear of being labeled as an outcast. The deprivation of speech internalized intelligence, potential and ability. Anne Hutchinson was feared for not only what she said but also for her ability to incite others to revolt against their birth caste of womanhood and speechlessness.

There were norms of what constituted acceptable and unacceptable female speech in religion. Acceptable female speech included gathering in small meetings for prayer and edification and asking questions regarding sermons through husbands, fathers or brothers. John Cotton, a prominent Boston teacher proclaimed “it

79. *Id.* at 152.

is not permitted to a woman to speak in the Church by way of propounding questions though under pretence of desire to learn for her own satisfaction; but rather it is required she should ask her husband at home."⁸⁰ Women were also forbidden to interpret scripture or to engage in preaching. Koehler also states, through the doctrinal of St. Paul, that a woman was to hold her tongue in church and be careful "not to teach, nor to usurp authority over the man, but be in silence."⁸¹ For women in early New England, witchcraft gave power, provided a ground for religious experience and tested the limits of political constraint.⁸² Though women who spoke out were labeled as witch – it also provided a sense of power to women. Witchcraft was viewed as a crime of rebellion and disobedience to authority. Marriage dictated not only societal position but also placed men in charge of their wives and children. Thus a married woman's behavior became the legal responsibility of her husband.⁸³

Women accused of witchcraft in the early 1600s in New England were exempted by magistrates from executions if the women confessed in a certain way. Oftentimes the magistrates would provide the script and the accused would simply recite what would be acceptable to avoid death.⁸⁴ Once the authorities felt they had the accuser on the path to confession, and thus redemption, in their eyes they encouraged the accused witch to speak freely. The mag-

80. Koehler, *supra* note 59, at 72.

81. *Id.* at 57.

82. See STEVEN OZMENT, REFORMATION EUROPE: A GUIDE TO RESEARCH 197 (1982); see also SPENDER, *supra* note 1, at 186 ("Slowly their outlet of expression, witchcraft, eroded as men utilized witchcraft charges as a means to keep women inferior and in fear.")

83. ULRICH, *supra* note 29, at 6-7.

84. See Elizabeth Reis, *Gender and the Meanings of Confession in Early New England*, in SPELLBOUND: WOMEN AND WITCHCRAFT IN AMERICA (Elizabeth Reis ed., 1998). It is quite likely that instead of learning just what to say to save her own life, the court supplied an actual script. *Id.* at 59. Court records of Salem make it difficult to distinguish whether the words of the accused are verbatim transcripts or are reconstructed accounts. Within these court documents, sentences are written in fragments or are lost altogether, and while accounts generally are recorded in the third-person, indicating the writings reflect a "voice" other than the defendant. *Id.* at 57.

In a further push to get women to say what the court wanted to hear, women were often badgered and pressured to confess through severe cross-examination. Wendel D. Craker, *Spectral Evidence, Non-Spectral Acts of Witchcraft and Confession in Salem in 1692*, 40 THE HIST. J. 331, 343 (1997).

istrate's ploy was that the woman would implicate herself and in essence be "condemned out of her own mouth."⁸⁵ A woman could be damned regardless of her response.

The introduction of Anne Hutchinson and her Antimonium Society wrecked havoc in the Boston community because she represented the transgression of woman not only within the home but also upset the gender-family relationship that had been the foundation of not only the family, but society as a whole. After 1636, women had an ideological rationale to vent their concepts in the powerful religious community that had total control over their daily lives. The Antimonium philosophy believed that salvation could be achieved on an individual basis. God, not mortal men, had power over the individual. Thus, women could actively participate in religious activities because there was a higher order. Anne Hutchinson was a charismatic figure who defied authority by holding meetings in her home, interpreting and questioning the very content of the sermons. She basically instilled in women the idea that they had a direct link to God and had no reason to fear any man.⁸⁶ Her activities were denounced and churchmen associated her activities to be delusions inspired by the devil. She was eventually accused of witchcraft. In essence, she posed a direct threat to the order of the state. She used her power to castigate the authority of the magistrates as guardians of the state, the ministers as guardians of the church, and husbands as guardians of the home. Her theology permeated across gender lines. Her intellectual and aggressive spirit moved many women to join her. She was feared, because as Cotton Mather noted, she had a capacity to "seduce women into [her] notions, and by these women . . . the husband also."⁸⁷ Hutchinson threatened to imperil the self-image of the intellectual leaders of the community and the spokesmen for the male-dominated society, something that this body politic was not about to let occur.

Part of what really distressed the authorities was Anne Hutchinson's intellectual ability to critique the truth of their theology. Embodying this natural inclination, she challenged their every move, which was not to be tolerated. Throughout her own exami-

85. KAMENSKY, *supra* note 28, at 164.

86. Koehler, *supra* note 59, at 64-66.

87. KAMENSKY, *supra* note 28, at 77.

nation and her excommunication trial in 1638, she parlayed the ministers' and magistrates' accusations with verbal threats of her own, forcing them to justify their positions with biblical passages, pointing out their logical inconsistencies, and using innuendoes to cast doubt on their authoritarian ways.⁸⁸ Then-Governor, John Winthrop, at the conclusion of her trial simply stated "We do not mean to discourse with those of your sex."⁸⁹

In order to silence Hutchinson's relentless tongue and to prevent further social unrest, the authorities ensured she would no longer speak or take part in society. She was excommunicated from the colony for her rebellion against family, church, and the Commonwealth. In particular, she was excommunicated for violation of the fifth commandment, the sacred text ordaining submission of all members of the civil and religious polity to their rightful "parents."⁹⁰ After 1638, rebellious speech, especially that made by women, could be interpreted in light of Anne Hutchinson.⁹¹ The effort in 1640 to stamp out the Antimonium sentiment was very successful in the Bay Colony. Hence, for all the efforts of the Antimonians, women's position within the religious, and subsequently political hierarchy essentially remained unchanged.

American women strove for emancipation in the religious sphere long before women could conceive of solutions for their political situations. The spheres of religion and law were virtually intertwined and mutually dependent and served societal aims to subject women to second class status. It was, and to some extent continues to be, a vicious cycle. The power of speech provided the forum to acquire language and thus power. Without speech, one was forever cast in silence and invisible in society. Speech is the cornerstone in the quest to acquire the first step to personhood, liberty and freedom. Since women had no speech, they in turn were merely vessels to transfer wealth from one generation to another without themselves having any participatory right in society. As a consequence, they were dependent beings. The power of language was not meant for women or for the weak in society – it

88. *Id.* at 80.

89. *Id.*

90. *Id.* at 81.

91. Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717, 725 (1999) (discussing Anne Hutchinson's role in questioning religious doctrine in light of women's speech).

was valuable in the dominion of men and the patriarchal structure.⁹² The legal code was imbued with the extreme manifestations of men's power to define.⁹³ In order to assure male power, the creation of the patriarchy had to be established at the most basic of social relations – the family, and was supported by the legal power of the state. Women like Anne Hutchinson, who challenged the religious and thus the legal structure, had to be punished swiftly and severely to send the message to others who may have such inclinations.

Speech was a potent weapon not because the most powerful controlled it, but because it “had fundamentally public, if not overtly political or legal consequences.”⁹⁴ Thus, the concept of public apology was the most sought after cure against virulent words. In Essex County civil suits filed with the courts during the period of 1636 to 1686, victims of slander demanded a misspeaker's apology more than any other kind of retribution.⁹⁵ Apology seems the least severe of punishment meted out during that time. Possible punishments at that time also included fines, stocks, bodily mutilation or execution.⁹⁶ The impact of public apology during this time underscores the importance of speech. A public apology restored respectable men to their former positions. The unsayer (the speech violator) would apologize publicly, giving negative voice to the earlier comments that caused injury to the victim. The effects were twofold: it was a forum to provide solace to the victim but also served as a healing ritual for the person who used the speech

92. See PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 43 (1991).

“As you say, my good knight! There ought to be laws to protect the body of acquired knowledge.

Take one of our good pupils, for example: modest and diligent, from his earliest grammar classes he's kept a little notebook full of phrases.

After hanging on the lips of his teachers for twenty years, he's managed to build up an intellectual stock in trade: doesn't it belong to him as if it were a house or money?” *P. Claudel, Le Loulier de Satin*

Id.

93. GERDA LERNER, *THE CREATION OF FEMINIST CONSCIOUSNESS: FROM THE MIDDLE AGES TO EIGHTEEN- SEVENTY 3* (1993).

94. KAMENSKY, *supra* note 28, at 128.

95. *Id.*

96. *Id.* at 132.

to inflict pain.⁹⁷ Since the discourse of apology was gendered, women were banned from the public ritual that restored status to the wrongdoer. When church discipline was at stake, women could apologize privately. The tension between women's submission and their presumption for unfitness in public speech expresses the social power of speech. Women's speech was an encroachment on the privilege of male speech. By denigrating women's words, their commentary and thus their possible intellectual manifestations were rendered moot. Men were socially responsible and mandated to keep female speech within the home. When women kin spoke, male family members would serve as surrogates, even if only to apologize for them.

The first step on the path to restitution was a person recognizing his or her transgressions and making an effort to bring them to the forefront in public. While a public forum was essential, not just any public forum would do. Preferably, the proper setting was "in a full meeting" in front of as many believers as possible. It was also highly desirable for the apology to take place as soon as possible.⁹⁸ Like the women who were dubbed witches, a recitation was part their own narrative and part habitual incantation. New England speech offenders, men as well as women when permitted, knew the power of the formula of their words. When speaking, it was often highly effective for the misspeaker to show tears, and speak earnestly and humbly.⁹⁹ In short, such offenders, in the eyes of the authorities, were to proclaim that the court was right to convict them, the church was righteous in disciplining them, and that their neighbors had every reason to sue them.

For women denounced as witches, coercion was also a part of the plan. Much of the evidence collected from supposed voluntary confessions were dependent on rules of evidence extracted largely from torture and forced testimony.¹⁰⁰ Both badgering and pres-

97. *Id.* at 142 ("Addressing the future as much as restating the past, the ceremony was a model of what today's criminologists call reintegrative shaming: a punishment designed to turn dangerous wrongdoers into solid citizens."). For additional sources on the "reintegration of deviants" as a goal of justice in early New England see *id.* at 261 n.81.

98. *Id.* at 136.

99. *Id.* at 136-37.

100. STEVEN OZMENT, *THE AGE OF REFORM 1250-1550: AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE* 191 (1986).

tures to confess were applied at the preliminary hearings and later at subsequent trials. Through severe cross-examination at hearings, these tactics were utilized to create confusion or self-contradiction on the part of the accused "revealing" complicity with the devil. It is evident that there was no such thing as a pure voluntary confession.

In the modern context, women's position in the religious realm is really no different than during historical times. Women have continually been repressed in the hierarchy of religion, in part, because women have not been successful in reconceptualizing religion to allot for women's equal and central role in the Christian drama of the Fall and Redemption.¹⁰¹ Even within the Bible, language is utilized to construct a sexist reality.¹⁰² Then and now, our society has allowed religious and ethnic harassment.¹⁰³ The biblical story incessantly unfolds in a one-sided patriarchal fashion, with gross distortions pervading the reality. Thus, religion is and continues to be a systematic process of the manipulation of language for male ends. Men have cleverly developed ingenious practices for making women feel inferior and hence, invisible.¹⁰⁴

One feminist theologian, Mary Daly, has extensively studied the politics of naming within religion, and has concluded that within the Bible, males have named themselves as superior to the detriment of women.¹⁰⁵ Men have cast women, as negative players – from non-spiritual people to evil beings to deviant individuals. For example, while the Bible reads that Adam was created first and Eve taken from his rib, this was just one of a number of creation stories available when the editors of the Bible were at work.¹⁰⁶ Nevertheless, even the edited version of the Bible contains at least two stories of creation, but only the Adam and Eve story was emphasized among early theologians. No further explanation of why this particular version was chosen is needed other than that males played the superior role. If other versions of crea-

101. LERNER, *supra* note 93, at 11.

102. SPENDER, *supra* note 1, at 165.

103. MACKINNON, *supra* note 66, at 61.

104. See SPENDER, *supra* note 1, at 168, 170.

105. *Id.* at 165-66.

106. *Id.* at 166.

tion had been focused on, containing images of equality, religion might have developed along very different lines.¹⁰⁷

Within daily worship and prayer, then and now, there exists the distinct impression that God is thought of only in masculine terms. Thus, women feel exempted and isolated from a religion where they are supposed to feel encircled in the image of God. Women are further relegated to a negative position where they can be further exploited. Naming God the Father became very advantageous to man; for man made God in his own image.¹⁰⁸ Naming has been stolen from women – the power to name God, the world, even themselves.

The “men’s Bible” also eliminates any positive symbolism and imagery towards women. The incident of the apple highlights this statement. Rather than casting the man as weak for yielding to temptation, Adam’s eating of the apple [was viewed] as a sign of strength and superiority.¹⁰⁹ Instead the woman, Eve, was “branded as a dangerous, irresistible temptress.”¹¹⁰ Women are generally devoid of any positive role models in the religious sphere. Eve (and the female) in the story of the Fall, is denigrated as evil, while Adam (and the male) is elevated to godly status. Similarly, whenever female goddesses are mentioned within the Hebrew language, they are always referred to as male.¹¹¹

It comes as no surprise that in a religion infiltrated with male domination, women would seek relief in other venues. As women develop their own religions, it is interesting to note that religious males continue their naming: naming women’s religion “cults.” Male activities still connote “religion”, but comparable female activities are *negatively* named pagan cults.¹¹² Pagan cults, in theory and in practice, have nothing negative at all about them. These cults describe a “female Deity with all her magnificence and splendor, her creation of the world and her wisdom.”¹¹³ It is evident that traditional religious myths live on concerning women, in

107. *Id.*

108. *Id.* at 167.

109. *Id.* at 168.

110. SPENDER, *supra* note 1, at 168.

111. *Id.* at 170.

112. *Id.* at 169.

113. *Id.*

which women still represent what is not male, not divine, and not normal.

Our country is currently witnessing an example of twentieth-century heresy. This antifeminist backlash is instigated by male superiors who fear that women are gaining too much power, which causes increased concern that they might win the gender war. As more and more women decide they will not stand for infiltrated superiority in institutions, men strike back. In the religious context, they threatened the women's attempts to make life improvements, as men and some women revert to conservative notions of female roles within society. They are, in effect, reverting to the ploy of persecution – similar to women's persecution three hundred years ago – by naming, shaming and taming women; damning them the same today as they have done before.

If understanding the meaning of speech taught us something about early New England life, it should also teach us something about ourselves in today's society. Today, no less than yesterday, we are engaged in a war over words, struggling to understand the implicit relationships between language and experience, amid speech and power. Questions still remain. Where lies the proper balance between individual expressive liberty and the collective societal need for order? How do we keep the powerful voices from silencing the others? While our social agendas are markedly different from those in New England's seventeenth century, modern American society is connected to the past, and the connection between speech and power remains an entangled one at best.¹¹⁴

Law is intrinsically linked with power. Since there is still patriarchal hegemony over culture in modern society, law facilitates the power of man. Women do not have power over institutions, over the state, over the law. What women do possess is increased power to shatter the "patriarchal paradigm."¹¹⁵ During the past century, a wife's position in society had progressed from that of a servant to that of a joint, co-equal head of the family. Women have sought changes in the law since 1857 in their quest for the "equality of the sexes." During Anne Hutchinson's time, women were primarily concerned with having a word in the male dominated theology and in having a word in the intellectual sphere. Specific

114. KAMENSKY, *supra* note 28, at 9.

115. LERNER, *supra* note 93, at 283.

feminist campaigns in which women's focus was directed to female property ownership after marriage, divorce reform, voting rights, and the like, were for a later era.¹¹⁶

To appreciate women's struggle for equality under the law, it is necessary to see the progression of battles fought and won throughout the years. The marital relationship in Aristotle's time was akin to slavery.¹¹⁷ Within the Old Testament, women were excluded from the covenant community, exempted from misogynist teachings of the Church, and depreciated with moral guilt for the Fall of humankind.¹¹⁸ Historically, women were also not members of the polity. Women were not even mentioned in the law created by political members. The Founders, in the American Constitution, defined the status of indentured servants and Indians, but felt no need to mention, much less explain or justify, that while women were to be counted among "the whole number of free persons"¹¹⁹ in each state for representation, they were not free to vote or to be elected to public office. The issue of the civil and political status of women never even entered the debate, just as it had not done so in Aristotle's time.

In a further effort to subjugate women, they were relegated to the home – the domestic sphere. The traditional judicial attitude was that women were not legal subjects, but creatures whose "natural and proper timidity and delicacy . . . unfits (them) . . . for many of the occupations of civil life."¹²⁰ This attitude defined and deprived women of a social, political and legal life in early America. Men were harshly critical of female intellect because they could lose their ability to control the female masses and therefore sought to prevent their education. This was quite a hindrance because intellectual liberation was essential so that women could think themselves out of patriarchy. When the time came for the thought of women engaging in educational pursuits to be entertained, they were forced to not only argue for their right to equal education, but to prove their right to be educated at all! Women authors are also excised from literature and literary canons, which

116. Koehler, *supra* note 59, at 78.

117. See LERNER, *supra* note 93, at 5-6.

118. *Id.* at 7.

119. U.S. CONST. art. I, § II, cl. 3.

120. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

has contributed to restricting women's access to resources and self-support – the existence of a Women's History if you will. This has skewed women's collective intellectual development into thinking that there were not women like them who had made intellectual contributions to knowledge. Women were left with realizing their self-development through the development of a man.

While it is true that law has changed over the last several hundred years and women have succeeded in becoming independent legal subjects, there still exists subordination of women in law. Confined to the domestic sphere, women have remained remote from legal discussion. Law regulates only the public domain and confers legal rights on those who work, who are economically productive in the public sphere. Thus, since men occupy a majority of the public domain in politics, commerce, property and/or work, it is they who have the benefit of the laws. Therefore, the women who still occupy the private domain – the home – are unregulated by law, are not full legal subjects, and are not conferred the same legal rights as those in the public domain. The legal rhetoric to challenge this notion is that the separate spheres are “separate but equal.” But are they?¹²¹

Women's current battle for equal rights is centered in the law and politics and in economics and family life. The concept of status, with women occupying the lower rung, has served to justify the separate classification of women from men and their subsequent differentiation in the law. Additionally, the legal discourse must be reformed to eliminate the masculine character of language within the law. The conundrum is that a very small portion of women occupy positions within the political realm, and thus are not capable of assuring that legislation that is enacted is fair to their sex. In order to achieve equality of the sexes in the law, it is crucial that no one be forced into an already predetermined role on account of sex.

121. Under George W. Bush, the United States government has made a policy decision to exclude information that is vital to women's lives in the following areas: Women's Health, Women's Economic Status, Scientific Objectivity and Expertise, and Information to Help Protect and Advance Women and Girls. See THE NATIONAL COUNCIL OF RESEARCH ON WOMEN, *MISSING: INFORMATION ABOUT WOMEN'S LIVES*, available at <http://www.ncrw.org/misinfo/index.htm> (last visited May 6, 2004) (reporting additional information on the plight of American women under the Bush administration).

Another hurdle that women face is in trying to redo the present laws that assign certain roles and obligations to each spouse, and in doing so, place unfair burdens on women; something women have been trying to undo forever. It is evident that the law reinforces societal roles. The state's justification of the law is usually associated with either the biological functions of maternity or a social role within the family. The state views the protection of social roles within the law as a matter of public policy, and the state vouches for marriage as being a natural or social necessity. The state has lost sight of the fact that for many women it is also an *economic* necessity. Legal and other institutional arrangements coerce women into occupying the positions of housewives and mothers. This is done through women not being paid for domestic labor, not earning money comparable to men in the marketplace, and giving more economic benefits if tied in the state of matrimony. It is ironic that judicial biases against women in the nineteenth century continue to this day, even in the midst of alleged advances.

It is always important to reflect on the problems of yesteryear to see if we, as a society, have really learned the equality lesson. We fear as a nation, and certainly as women, that we will hark back to an era where there was a fear of the consequences of speaking publicly. But was there some significance to women's speech then that we have not quite been able to achieve ever since? If women's speech is less dangerous now, it is also less powerful as well. As one legal historian accurately phrased it, women in early New England had "good reason to believe that their voices would not be ignored."¹²² Never again would women's voices be as literally credible as they had been before 1692. Whether their speech was deemed useful (when they testified as witnesses, medical experts, or in cases of heresy), New England's wives, mothers, and daughters, made themselves heard. But as men's and women's daily lives began to diverge, and as legal discourse itself became more formal, complex, and distinct from everyday dialogue, women were less often called upon to speak directly to those in power. Female speech in the public sphere continued to be viewed as a disruption well into the nineteenth century, no different than today.

122. KAMENSKY, *supra* note 29, at 183.

